

Contents

Articles

- 222 MALCOLM LANGFORD AND SAKIKO FUKUDA-PARR
The Turn to Metrics
- 239 POLLY VIZARD
Evaluating Compliance Using Quantitative Methods and Indicators: Lessons from the Human Rights Measurement Framework
- 279 JODY HEYMAN, MAGDA BARRERA, NICOLAS DE GUZMAN, AMY RAUB AND ILONA VINCENT
From Human Rights Agreements to National Change: Illustrating a More Transparent Approach to Accountability
- 297 SUSAN RANDOLPH AND PATRICK GUYER
Tracking the Historical Evolution of States' Compliance with their Economic and Social Rights Obligations of Result: Insights from the Historical SERF Index
- 324 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
- 350 ALICIA ELY YAMIN AND KATHRYN L FALB
Counting What We Know; Knowing What to Count: Sexual and Reproductive Rights, Maternal Health, and the Millennium Development Goals
- 372 COURTNEY JUNG AND EVAN ROSEVEAR
Economic and Social Rights Across Time, Regions, and Legal Traditions: A Preliminary Analysis of the TIESR Dataset

Book Review

- 395 REVIEWED BY SEVDA CLARK
Arzoo Osanloo
The Politics of Women's Rights in Iran

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Malcolm Langford and Sakiko Fukuda-Parr
Guest Editors

The Turn to Metrics

Malcolm Langford and Sakiko Fukuda-Parr

Malcolm Langford, Research Fellow, Norwegian Centre for Human Rights, Faculty of Law, University of Oslo and Co-Coordinator, Metrics for Human Rights, email: malcolm.langford@nchr.uio.no.

Sakiko Fukuda-Parr, Professor of International Affairs, New School, New York and Co-Coordinator, Metrics for Human Rights, email: fukudaps@newschool.edu.

I. Introduction

Quantitative methods have played a limited role in human rights practice. Beyond the generation of events-based figures (e.g., numbers of persons tortured or evicted), some high profile but controversial measures such as the Freedom House index,¹ or the monitoring of a few treaties containing quantitative commitments,² the use of numerical data has been infrequent. Instead, qualitative methods have been dominant. Information is primarily sourced and reproduced from interviews with victims and alleged perpetrators, witness accounts, audio and video footage, official documents and media reports. With a focus on human rights violations affecting specific persons, places or events, these qualitative methods seem apposite in establishing the relevant facts and narratives that can be tested against human rights standards.

Nonetheless, the field of human rights has not been immune from a global shift towards quantitative measurement in all fields of human activity. The community of activists, professionals, officials and scholars concerned with human rights has begun to explore ways in which different metrics can establish the denial of rights, reveal breaches of obligations and justify new laws or policies. This has been complemented by the use of quantitative methods in social science research and programme evaluation.³

1 Since 1972, Freedom House has issued *Freedom in the World*, which provides a comparative assessment of political rights and civil liberties, currently across 195 countries and 14 related and disputed territories. Freedom-House, *Freedom in the World 2012* (Freedom House, New York 2012).

2 E.g., the ILO Convention 102 on Social Security which requires states to meet different quantitative benchmarks in terms of coverage for a minimum number of pillars of social security.

3 See discussion in Section 2.

The motivations for using quantitative methods in, at least, human rights practice are many. Qualitative methods often elicit the complaint that the evidence is too *ad hoc*. It is inadequate in establishing systematic patterns of violations, identifying clear failures by duty-bearers to fulfil their positive obligations, or motivating systemic reform. At the heart of quantification is aggregation and replication. A broader swathe of events and experiences can be captured, represented and compared across time and space (e.g., localities, countries, regions etc); which can provide information on the magnitude and source of problems. Establishing seemingly neutral, scale-able and externally verifiable methods seems ideal for human rights. In an environment characterised by accountability relations, distance between actors, and mutual distrust, “audit”-like tools such as indicators can provide a mutually acceptable means for actors to assess compliance.⁴

Strategically, quantified data is a powerful tool of communication. It offers clear, comprehensible and simple snapshots of complex situations. Porter claims that the global rise of ‘numbers, graphs, and formulas’ can be traced primarily to this function.⁵ Quantification is a ‘technology of distance’ which is ‘well suited for communication that goes beyond the boundaries of locality and community’.⁶ However, his ambiguity toward another common explanation – proof of causal relations between social phenomena – is not justified. Quantification is driven by attempts to substantiate certain causative arguments and overcome resistance to them. Human rights is no exception and quantitative methods have been employed to challenge scepticism towards rights or disputes over causes of non-implementation. For instance, different actors have sought demonstrate that human rights do not generate negative externalities but instead provide verifiable benefits, whether it is peace, economic growth, improved health, democratic deliberation etc.⁷

The turn to quantitative methods has been encouraged by various UN bodies. Although, it had a very rocky start. The creation of a Human Freedom Index by the UNDP in 1992, which ranked countries across a representative range of

4 A Rosga and M Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’ (2009) 27 *Berkeley Journal of International Law* 253, 280.

5 T Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton University Press Princeton 1995) viii.

6 *Ibid* ix.

7 For an earlier historiography of this stream of quantitative methods in human rights, see RL Barsh, ‘Measuring Human Rights: Problems of Methodology and Purpose’ (1993) 15 *Human Rights Quarterly* 87.

rights in the Universal Declaration of Human Rights, met strong opposition from many states.⁸ The upshot was that international agencies proceeded in a diffuse and modest manner with human rights indicators, often under the cover of more innocuous terms such as governance or development rather than democracy or human rights. However, the human rights branch of the UN system has begun to re-champion the international measurement of rights, although with less emphasis on ranking.⁹ Moreover, it is not only international bodies that are driving these demands: human rights practitioners note the increasing demands by courts, media and bureaucrats amongst others for quantitative evidence. In addition, various donor programmes like the Millennium Challenge Account provide extra financial assistance for reaching the Millennium Development Goals if countries attain certain thresholds on civil and political rights and good governance.

The purpose of this *Special Issue on Quantifying Human Rights* is threefold. It is to showcase different methods for quantitatively measuring human rights compliance, provide critical perspectives on the use of such methods, and raise opportunities and challenges for future theory and practice. It emerged from the second annual meeting of Metrics for Human Rights in New York in May 2011, which is a loose international network of scholars and practitioners working on quantitative methods and coordinated by the New School and University of Oslo. The remainder of this Introduction discusses all three aspects with reference to the broader scholarship and the six articles in this special issue.

II. Uses of Quantitative Methods in Human Rights

The rich and emerging literature and practice on quantitative methods includes a diversity of approaches with respect to: the motivation and the purposes to which data would be used (the “why”); the identification of relevant aspects of “human rights” for measurement (the “what”); and finally, the quantification method itself (the “how”). The papers in this collection contribute in all of these dimensions.

8 See discussion in *ibid* 87–90.

9 For instance, the UN High Commissioner has stated in the context of economic, social and cultural rights that, OHCHR, ‘Monitoring realization requires tools that are capable of measuring results and progress over time’ UN doc. E2009/90, para. 34.

Why

There are three broad uses for which human rights measurement tools are being developed: *monitoring* and determination of compliance; *advocacy* for improved policies and practices; and *explanation* of broader casual relationships that include human rights.

As to the first, a particular driver of recent measurement attempts has been compliance-based monitoring. For instance, in 2002 the UN Committee on Economic, Social and Cultural Rights (CESCR) called on states to cooperate with them in setting performance benchmarks for progressive realisation of various rights in the intervals between five yearly periodic reporting.¹⁰ Quantitative indicators could overcome one of the major weaknesses in monitoring processes that depends on self-reporting: They provide a consistent measurement tool that can be applied across countries and/or time and that relate to agreed standards. This interest spread and in 2006, all UN human rights treaty bodies sent a joint request to the Office of the UN High Commissioner for Human Rights to provide recommendations on how statistics and indicators could be used and developed in their monitoring function.¹¹ In response, the Office has developed a framework of indicators across all human rights.¹²

The aim to monitor compliance with human rights standards is prominent in this issue. Many authors take a point of departure in international human rights treaties although some of them give greater attention to regional or national legislative standards. Moreover, the intended users of the results are more diverse than UN bodies and include national governments, media, civil society etc. Vizard showcases the Human Rights Measurement Framework (HRMF), through which indicators are used to assist in determining compliance by British authorities, and demonstrates its application in the areas of violence, treatment of older people and child poverty. Haymann, Berrera, de Guzman, Raub and Vincent introduce the World Policy Centre Analysis (WPCA) which seeks to make available “readily-accessible comparative data on hundreds of laws and policies” and sets out their results on the right to social security. Randolph and Guyer use their Social

10 UN Committee on Economic, Social and Cultural Rights, ‘General Comment 14, The right to the highest attainable standard of health’ (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para. 58.

11 OHCHR, ‘Report on Indicators for Monitoring Compliance with International Human Rights Instruments – Summary’, UN Doc. HRI/MC/2006/7 (2006).

12 OHCHR, ‘Report on Indicators for Promoting and Monitoring the Implementation of Human Rights’, UN Doc. HRI/MC/2008/3 (2008).

and Economic Rights Fulfilment Index (SERF Index) data to establish historical trends in compliance by states with duties to progressively fulfil economic and social rights.

Not all quantitative monitoring though is focused on the obligations of states: other actors also carry duties. Elsewhere, quantitative methods have been applied to the performance of local governments and transnational corporations amongst others.¹³ In addition, compliance-based approaches are also not always backwards-looking. Human rights impact assessments which seek to prevent future denials of human rights are increasingly turning to indicators as a way of standardising and streamlining measurement.¹⁴

Advocacy for change for policy and practice is a second purpose. It can build on the results of monitoring work; Corkery and Way present the OPERA framework as a process using a variety of analytical tools to monitor compliance, and on this basis advocate for policy change. But the effective use of metrics for policy advocacy demands specific considerations. There is a preference for indicators that are actionable or provide a better case for spurring reforms.¹⁵ For instance, Yamin and Falb argue in this issue that greater efforts should be given to measuring Emergency Obstetric Care (EmOC) indicators rather than improving measures of maternal mortality: the former reflect policies and practices that have a proven effect in reducing maternal mortality. In other cases, data generated for monitoring purposes may be ambiguous in establishing a violation but reveal priorities for action. Vizard's regression results demonstrate that young persons, females and persons with disabilities have a higher risk of being victims of violence which 'does not provide direct evidence of the failure of duty-holders to fulfil the negative and positive duties' but highlights the 'need for more effective public policy interventions'.¹⁶

A third purpose is what could be broadly described as explanatory and is evident in academic scholarship, public policy research and human rights practice.

13 See for example J Dugard, M Langford and E Anderson, 'Determining Progress on Access to Water and Sanitation: Law and Political Economy in South Africa' in M Langford and A Russell (eds), *The Right to Water: Theory, Practice and Prospects* (Cambridge University Press, Cambridge 2013); Danish Centre for Human Rights, *Human Rights Compliance Assessment*, Human Rights and Business Department, available at <http://www.humanrightsbusiness.org/compliance+assessment>.

14 See *Human Rights Impact Assessments for Trade and Investment Agreements*, Report of the Expert Seminar, 23–24 June 2010, Geneva, Switzerland.

15 For a discussion, see: M Orkin, C Naval, JR Suesser and RS de Miguel, 'Towards the Democratic Monitoring of Governance: the Metagora Experience' in UNDP (ed) *Making the State Responsive: Experience with Democratic Governance Assessments* (UNDP, New York 2011).

16 Corkery and Way, this Special Issue, 255.

Quantitative data can permit us to better understand the relationship between human rights and other social and political processes. Currently, there is a major interest in understanding the impact or effects of human rights approaches. Do they work? The rise of the paradigm of rights has seen a broad array of treaties, laws, policies, development programmes, civil society strategies which all seek to advance various human rights objectives. In analysing the extent to which these “interventions” have reached their goals, quantification has become an important tool, particularly when research is carried out by social scientists or consultants.¹⁷ Promoters and critics are interested to learn whether the intervention has worked, how it could be improved and whether alternatives are available. This use of quantitative methods is not the focus of this issue but Heymman and her fellow authors demonstrate for example that infant mortality is negatively correlated with maternity leave laws.

More traditionally, the focus has been on understanding and explaining the nature and causes of behaviour by different actors.¹⁸ In this issue, Jung and Rosevear outline the Toronto Initiative for Economic and Social Rights (TIESR), which creates a dataset that measures the presence, absence, and justiciability of seventeen separate economic and social rights in 136 constitutions. It is motivated by a desire to understand how and where constitutionalisation of these rights is spreading but also establish the basis for determining their effects and influence. Randolph and Guyer also use the Social and Economic Rights Fulfilment Index (SERF Index) to explore the relationship between rights fulfilment and economic growth.

What

Each quantitative tool draws on a particular conceptual model of human rights and focus on specific concerns with human rights. An important advance in

17 See, e.g. E Hafner Burton and J Ron, 'Human Rights Institutions: Rhetoric and Efficacy' (2007) 4 *Journal of Peace Research* 379; V Gauri, 'Public interest litigation in India: overreaching or underachieving?' (2011) 1 *Indian Journal of Law and Economics*; D Pope and C Bambra, 'Has the Disability Discrimination Act closed the Employment Gap?' (2005) 27 *Disability and Rehabilitation* 1261; JJ Donohue, M Stein, C Griffin and S Becker, 'Assessing Post-ADA Employment: Some Econometric Evidence and Policy Considerations' (2011) 8 *Journal of Empirical Legal Studies* 477.

18 See, e.g., B Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge University Press, New York 2009) (in relation to treaty ratification); J Foweraker and T Landman, *Citizenship Rights and Social Movements: A Comparative and Statistical Analysis* (Oxford University Press, Oxford 1997); PA Goff, J Eberhardt, M Williams and MC Jackson, 'Not yet human: Implicit knowledge, historical dehumanization, and contemporary consequences' (2008) 94 *Journal of Personality and Social Psychology* 292.

recent thinking about human rights measurement has been to move beyond the mere achievement of certain outcomes or results. Human rights standards often contain obligations of conduct or a mixture of conduct and result and not just results. They also contain various exceptions, defences and conditions which need to be taken into account for any finding of violation. The result is that a measurement of outcomes focuses on the perspective of the rights holder and may only tell us that human rights have been denied; not whether any duty bearer has breached an obligation or could have taken remedial or corrective action.

The problem in determining compliance with civil rights by merely using general outcome indicators is well known. When is violence committed by private actors attributable to a state: i.e., how far do positive obligations to protect extend in this situation? When is state-sponsored killing an “extrajudicial killing”: i.e., does the killing fall into a particular exception? Yet another aspect of the ill-fitting indicator is the neglect of the obligations of progressive realisation for economic, social and cultural rights¹⁹ but also equality rights and some civil and political rights.²⁰ Implementation to develop the necessary institutions and systems requires time, administrative capacity and resources.²¹ Inherent in this idea of “progressive realization”, therefore, is the principle that countries with greater economic resources have a correspondingly greater duty to ensure equitable and widespread enjoyment of these rights. In the case of economic, social and cultural rights this was made very explicit in international standards: states have obligations to fulfil these rights subject to maximum available resources. Incorporating such state capacity into the measurement of how well a country is doing in meeting its obligations under international law is essential: Countries cannot be simply compared on the same scale as they are in the Millennium Development Goals.²²

There have been various attempts at overcoming this problem. The first is to typologise: to disaggregate obligations and connect them with relevant indicators.

19 See UN CESCR, ‘General Comment 3, The Nature of States Parties Obligations (Art. 2, para. 1)’, UN Doc. E/1991/23 (1990), Annex III; Charter of the United Nations (San Francisco, 26 June 1945), 3 Bevans 1153, 59 Stat. 1031, T.S. No. 993, *entered into force* 24 Oct. 1945, Art. 1, para. 3.

20 UN CCPR, ‘General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Art. 2)’, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004).

21 According to the principle of progressive realisation, states must strive to fulfil economic and social rights obligations to the maximum extent possible in the face of economic resource constraints *Id.*

22 See discussion in S Fukuda-Parr and J Greenstein, ‘How Should MDG Implementation Be Measured: Faster Progress or Meeting Targets?’, *World Development* (forthcoming); M Langford, ‘A Poverty of Rights: Six Ways to Fix the MDGs’ (2010) 41 IDS Bulletin 83.

This alerts us to the multitude of duties that require measurement. This can be done by categorising obligations according to the trichotomy of respect, protect and fulfil and populating the categories with relevant indicators.²³ Similarly, but from a more statistical perspective, human rights are increasingly being divided up according to whether they refer to the enjoyment of rights (outcome); institutional arrangements made by governments such as constitutional provisions (structure); and the taking of steps and implementation of policy measures (conduct).²⁴ For instance, the TISER (Jung and Rosevear) and WPCA (Heymann and others) focus on measuring “structural” indicators.

The disadvantage of this approach is that it may overlook the relationship between these categories (the progressive realisation obligations is properly characterised as conduct-result) and the indicators may not always incorporate exceptions, defences and conditions. An alternative approach is to use different indicators in a structured fashion. In this issue, Corkery and Way present the OPERA framework which provides an overarching analytical framework within which multiple tools and techniques, including both conduct indicators and result indicators can be eclectically integrated to determine compliance. An alternative is to seek to bridge the gaps through various quantitative techniques. A focus on the duty bearer and differentiated resource constraints is the chief motivation for the creation of the SERF Index.²⁵ By using the achievement possibilities frontier, state performance is judged not by the level of outcome achieved but by the shortfall to what could have been achieved with the resources available. Other approaches focus though on the relationship of a country’s performance to the average performance at the same resource capacity (and sometimes with a broader range of resource indicators) – the country whose performance is worse than average then warrants further examination.²⁶ Randolph and Guyer in this issue

23 V Roaf, A Khalfan and M Langford, *Indicators for the Right to Water* (Heinrich Boell Foundation, Concept Paper No. 13, Berlin 2005).

24 See, e.g., OHCHR, ‘Report on Indicators for Promoting and Monitoring the Implementation of Human Rights’, UN Doc. HRI/MC/2008/3 (2008).

25 The SERF index used by these authors reflects the highest feasible performance at any per capita income level. See generally S Randolph, S Fukuda-Parr and T Lawson-Remer, ‘Economic and Social Rights Fulfillment Index: Country Scores and Rankings’ (2010) 9 *Journal of Human Rights* 230.

26 See E Anderson and M Langford, ‘A Distorted Metric: The MDGs, Human Rights and Maximum Available Resources’, Working Paper, 2012. In this paper, Anderson and Langford find that the country rankings with the SERF and outlier approaches disagree, with the latter more favourable to lower-resourced countries. They also note that the maximalist approach of SERF may be closer to the normative benchmark but may equally provide an unrealistic benchmark.

use the SERF index to develop empirical evidence of how compliance has improved or regressed over time, showing that in some cases there has been regress even if the actual achievement level has increased.

How

Numerous initiatives in the last decade have introduced innovations in methods for quantitative analysis with distinctive approaches to data source, indicator selection, level of aggregation and data use.

With respect to data source, several organisations and researchers have attempted to *create data* that is relevant to human rights priorities, ranging from empirical “situation testing” such as ILO studies of discrimination in employment²⁷ to field surveys such as individual/victim perception in Haiti,²⁸ and the coding of qualitative data. Coding has been widely used in better known international civil and political rights indices such as the Freedom House freedom scores, Political Terror Scale, Cingranelli and Richards Indices (CIRI) and others.²⁹ These approaches code qualitative reports that evaluate human rights situations. The coding is often done according to rigorous standards but relies on subjective rather than objective information. Some approaches avoid this dilemma and have focused on coding objective information, such as constitutions. TIESR (Jung and Rosevar) presented in this issue is an example of such an effort.

In contrast, another strand of work has attempted to make better use of existing survey and sometimes events-based data, notably economic and social data that are in the public domain, in most cases published by official statistical bodies and harmonised in international statistical processes. The indicator sets of the OHCHR are largely comprised of these data. In this issue, OPERA (Corkery and Way), HRMF (Vizard), and SERF (Randolph and Guyer) rely on these sources.

With respect to indicator selection, an important innovation in recent years has been to employ participatory and dialogical processes. Stakeholders, sometimes including rights holders, reach a consensus on a relevant indicator as well as

27 E.g., P Arriijn, S Feld and A Nayer, 'Discrimination in access to employment on grounds of foreign origin: the case of Belgium' (ILO, Geneva 1998).

28 E.g., M Satterthwaite, N Reisch, F Brody and J Simeone, *Yon Je Louvri: Reducing Vulnerability to Sexual Violence in Haiti's IDP Camps* (CHRGJ, New York 2012).

29 See an overview in T Landman, 'Measuring Human Rights: Principles, Practice and Policy ' (2004) 26 Human Rights Quarterly 906 and D Cingranelli and D Richards, 'The Cingranelli and Richards (CIRI) Human Rights Data Project' (2010) 32 Human Rights Quarterly 395.

the relevant normative benchmark for that indicator. Examples include the IBSA approach of the UN CESC, HRMF (Vizard in this issue), treaties such as ILO Convention 102 and court orders/settlements.

Another methodological divide concerns the level of aggregation. This concerns the units of analysis, covering both the scope of cases (from a single case or individual to all individuals affected) and the categorical unit—expanding to include subnational entities, countries or the world. The motivation behind much of the quantitative work of recent years has been to move beyond the individual case and situation that has been the cornerstone of human rights investigative methodology. The papers in this issue include those that aggregate to the country level (OPERA, HRMF) and others that provide global data sets (SERF, TISER, WPCA) where country data can be compared. Note that some of these national (HRMF, OPERA) and global (SERF) data sets can be disaggregated to sub-national levels, which is a high priority requirement of human rights analysis.

Another type of aggregation is across different rights. Much of the recent quantitative work has focused on the use of specific indicators and has eschewed the earlier emphasis on aggregation across rights and attempts to develop composite indices.³⁰ This is reflected in all the papers in this issue with the exception of the SERF Index (Randolph and others). Composite approaches may however play a role, particularly in communication: different types of data serve different analytical purposes. The lower the level of aggregation, the richer the detail but less the information on overall magnitude and trends. Instead, the thrust of many in the human rights community has been to focus on disaggregation of existing indicators, particularly to see whether human rights are being enjoyed by women and groups that face discrimination or social exclusion.

Finally, there are several approaches to the ways that data are put to use. In some instances, *descriptive* methods are used e.g. counting, disaggregation, simple probabilities, ratios, allocations, benefits or cost incidence. Others use more *comparative* approaches that build in common denominators to establish trends, rankings, indexes and outliers. Yet others seek to identify *causal* relationships, such as by use of bivariate and multivariate regression, which may also inform comparative approaches. Very early examples includes Becker's method for

30 For an overview of different global indices developed on human rights and governance in the 1990s, see A Wilde, 'The Democratization of Governance Assessments' in UNDP (ed) *Making the State Responsive: Experience with Democratic Governance Assessments* (UNDP, New York 2011), 29-48.

decomposing labour market gaps (e.g., for ethnic minorities, women and recently persons with disabilities) to determine whether employers were engaged in discriminatory practices.³¹ Vizard and Randolph and Guyer use regression analysis to respectively establish probabilities and rankings. However, Corkery and Way also show how simple methods can be deployed to raise a *prima facie* case for non-compliance or feasibility of a measure.³²

III. Limitations

The customary concerns over the use of quantitative approaches are not foreign to the field of human rights. However, there is a danger that each new wave of metrics in human rights takes insufficient heed of its inherent limitations and dangers. Whereas there is much to be gained by the turn to numbers, it is our view that the human rights community must develop the practice with a spirit of self-criticism and modesty, an openness to peer review, and an awareness of the political environment in which data is constructed and received.

We will not discuss exhaustively all of the challenges but name four that we consider significant. The first is the definition and choice of indicators – construct validity. The very strengths of quantification – simplification and abstraction in applying a single measurable definition across different contexts – are its Achilles heel. The criteria for creating an indicator may not match the relevant human rights standard. To take an example: The commonly-used measure of “improved water” by the WHO and UNICEF is often used as a stand-alone proxy for the basic minimum for the right to water. It represents approximately 20 litres of water per person per day.³³ However, the indicator is questionable as a human rights standard. It does not really tell us whether this minimum has been realised: it is arguably too permissive in its criteria³⁴ and allows water supply to being ticked as “improved” even if it is irregular or not

31 G Becker, *The Economics of Discrimination* (Chicago University Press, Chicago 1971).

32 See also CESR and ICEFI, *Rights or Privileges? Fiscal commitment to the rights to health, education and food in Guatemala* (CESR, Madrid 2009). See also E Felner, 'Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights' (2009) 1 *Journal of Human Rights Practice* 402.

33 In the practice of the UN CESCR it is the dominant indicator.

34 J Bartram, 'Improving on haves and have-nots' (2008) 452 *Nature* 283. Interestingly, he notes that the standard for sanitation may, to the contrary, be too strict.

portable,³⁵ unaffordable³⁶ or culturally unacceptable³⁷ - all constituent elements of the right to water in international law and jurisprudence.³⁸ Indeed, some of these elements, such as cultural acceptability, raise the intractable problem of whether some human rights are quantifiable at all: the inclusion of local contextual factors makes them inherently difficult to accommodate in a universally applicable quantitative definition.

In this issue Vizard shows how some of these dangers might be minimised. In building up a quantitative evidence database in England, Scotland and Wales on human rights, the HRMF project began with OHCHR's international framework and "illustrative indicators". However, they engaged in an extensive consultation with national human rights, policy and statistical actors that mapped in more detail the legal requirements and available data sources and thus sought to identify better-fitting indicators. This demonstrates the possibility of developing indicators with higher construct validity within a community or a country, but its limitation is that it cannot be extended to develop cross-country comparable data.

The problem of ill-fitting proxies does not, however, stop at the phase of constructing, processing and interpreting data. It is also a reflexive process whereby an indicator reshapes its parent norm. As Davis, Kingsbury and Merry put it, indicators embody a 'theoretical claim about the appropriate standards for evaluating actors' conduct'.³⁹ If an indicator is loosely matched with a standard or simply achieves prominence, it can quickly take on a normative life of its own. One pertinent example is income poverty. In 2000, the Millennium Declaration elevated the \$1 US dollar a day indicator from being one marker of extreme income poverty to being *the* standard of income poverty itself.⁴⁰ Disturbingly, it is far

35 G Mboup, 'Existing Indicators in the Water and Sanitation Sector: Indicators for Accessibility, Affordability and Non-Discrimination' (Indicators for the Right to Water, Concept Paper No. 13, 2005).

36 OECD, *Social Issues in the Provision and Pricing of Water Services* (OECD, Paris 2003); H Smets, *De l'eau potable à un prix abordable* (Johanet, Paris 2009).

37 N Singh, 'Socio-Cultural Norms, Human Rights and Access to Water and Sanitation' in M Langford and A Russell (eds), *The Right to Water: Theory, Practice and Prospects* (Cambridge University Press, Cambridge 2013).

38 See, e.g., Committee on Economic, Social and Cultural Rights, 'General Comment 15, The right to water', U.N. Doc. E/C.12/2002/11 (2003); Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21st Century, UN Doc. A/CONF.151/PC/112 (1992), Principle 4.

39 K Davis, B Kingsbury and SE Merry (eds), *Governance by Indicators: Global Power through Classification and Rankings* (Oxford University Press, Oxford 2012) 9.

40 In the Millennium Declaration and the subsequent Millennium Development Goals, the targets are formulated in such a way as to provide space for different indicators.

from clear that this represents a minimum core of the right to an adequate standard of living given the prevailing prices of basic goods. Indeed, the indicator may conveniently blind us from the fact that the world's poorest would 'grow' in number from approximately a billion to approximately 2.5 billion if we used two dollars a day as a yardstick, and even more if we included health and education costs in actual measurement.⁴¹ This risk can be even greater for process or conduct-oriented indicators – it can be assumed that they embody a one-size-fits-all policy prescription. In moving the quantitative agenda forward, the human rights community needs to consider what are the normative implications of the use of a particular indicator.

The second challenge is the reliability and validity of data. Recorded observations may not be an accurate reflection of the reality that a measuring instrument is trying to capture. In the process of data creation, subjectivity enters: classifying an event as a violation, coding qualitative information according to a scale, or conducting surveys in different cultural or linguistic contexts may bias responses. Even data that is meant to capture subjectivity – such as perception/ barometer surveys – needs to be used cautiously: an individual's response may not correspond to their behaviour or even their attitudes.⁴² Moreover, there are the practical challenges of missing data and technical dilemmas, such as weightings given to respondent groups or indicators in composite indexes.

The full implications of using unreliable data are demonstrated by Yamin and Falb in this issue. The reduction of maternal mortality by two-thirds was established as a Millennium Development Goals but the prevailing maternal mortality ratios are 'notoriously unreliable due to a number of factors including the quality of the underlying source data regarding the number of maternal deaths, and varying specifications of statistical models including, but not limited to the selection of covariates and handling of HIV-related deaths'.⁴³ Statistical modelling exercises have sought to overcome the problems but the result is contradictory data sets and data that is largely meaningless. The authors give the example of Afghanistan where estimated maternal deaths in one study dropped slightly from 1640 to 1,575 deaths per 100,000 live births between 1980 and

41 See generally T Pogge, 'Millions Killed by Clever Dilution of Our Promise' (CROP Poverty Brief, August, 2010). See also A Fischer, 'The Political within the Depoliticised: Poverty Measurement, Implicit Agendas and the MDGs' in M Langford, A Sumner and AE Yamin (eds), *The MDGs and Human Rights: Past, Present and Future* (Cambridge University Press, Cambridge 2013).

42 The framing and phrasing of the questions, the nature of the survey instrument and the context in which the questions are being asked can be critical in shaping the responses.

43 Yamin and Falb, this Special Issue, 353.

2008. However, the (enormous) confidence interval was largely unchanged (632 – 3,527 deaths), which means that it is ‘simply impossible to say whether and to what extent levels of maternal mortality have declined in Afghanistan over the past few decades’.⁴⁴

Reducing systemic error can be achieved through various methods such as repetition, using complementary indicators and testing the measuring instruments under different conditions. For instance in her paper, Vizard describes how the HRMF project in the United Kingdom sought to overcome the unreliability of official sources on domestic abuse and sexual violence (which understates prevalence) by also drawing on a general population survey which includes questions on experiences in a self-completion module.

The third challenge is aggregation. Higher levels of aggregation are valuable because it provides an overall – summary – picture of the magnitude of achievement and deficits, progress and regress. This makes it possible to show broad trends and highlight major areas of concern. By the same token, they do not provide adequate detail and differentiation. For instance, data truncation is a particular problem with global data sets.⁴⁵ Highly diverse situations are grouped together in a single category, such as in the Freedom House Index, where a large number of countries are given a score of 1 for political rights yet this masks important differences between these countries which include all Western countries, most East European countries and Israel. Diverse countries can also be bunched together at the end of a continuous scale.

The SERF index presented by Randolph and Guyer in this issue has sought to avoid this problem by creating a separate index for high income countries and differentiates with greater detail with scores ranging from 1 to 100 incorporating decimal points. The index has been used to advocate poor performance of the US when the country was reviewed at the UN as they ranked at the bottom of the high income country scores. These poor scores reflect the exclusion of disadvantaged groups and inadequacy of social protection measures. Yet these global rankings could be misused to deflect criticism or encourage complacency if these higher scores at the upper end of the scale are contrasted with much lower levels. The same occurs when even the best-performing high-income countries are not called to account for unjustified denial of rights and exclusion of significant but smaller groups, e.g., prisoners, ethnic minorities,

44 Ibid 356.

45 For a discussion in the context of human rights, see Barsh (n 7), 102-3; Landman (n 29), 923.

homeless persons. These highly aggregated indices should be used in conjunction with more detailed studies.⁴⁶

The final challenge is interpretation and use of quantitative measurement: what indicators ‘actually communicate, and to whom, may not be what their producers and promulgators sought to communicate’.⁴⁷ Allusion has already been made to the misuse of data. One particular problem for human rights practice is that some countries may be judged too lightly or harshly because of problems in the data or method rather than reality. This risk is particularly prominent in rankings methods but exists in any approach that seeks to arrive at a normative conclusion. As in any other area, qualitative and cross-checking methods are needed for interpretation and awareness is needed as to how data will be used in the public sphere.

IV. Moving Forward with an Agenda

In developing the field of human rights measurement, data creation and testing needs to take a prominent place. It is obviously important to identify how existing data can be used. The papers by Vizard and Randolph and Guyer demonstrate how this can be done in a rigorous but also consultative manner. But this is not adequate: many of the most pressing human rights issues are simply not measured by official agencies. Whether it is forced evictions, political participation, freedom of speech, affordability of certain social rights or corruption, statistical agencies provide few meaningful, reliable or comparable measures.⁴⁸ The result is that academics and NGOs collect, analyse and report most of this data

46 For example, in another paper, Randolph has disaggregated the US score by racial groups and states to highlight disparities. Randolph, Susan, Michelle Prairie, John Stewart (2009) ‘Economic Rights in the Land of Plenty: Monitoring State Fulfillment of Economic and Social Rights Obligations in the United States’ <http://www.serfindex.org/wp-content/uploads/2010/12/Research-Economic-Rights-in-the-Land-of-Plenty_WithoutAnnexes.pdf>. They can be used in complementarity with other more detailed analysis that disaggregates by right, such as Corkery and Way in this issue that arrives at the same conclusion regarding the poor performance of the US in comparison with other OECD countries.

47 Davis, *Kingsbury and Merry* (n 39) 10.

48 For in-depth discussion of this problem, see C Naval, S Walter and R Suarez de Miguel (eds.), ‘Measuring Human Rights and Democratic Governance: Experiences and Lessons from Metagora – Special Issue’ (2008) 9 OECD Journal on Development. Note that the Metegora project has had success in motivating statistical agencies to work on data collection projects concerning what were traditionally considered sensitive human rights issues.

but this approach faces its own challenges of bias, reliability, validity, and the lack of repetition. Efforts such as WPCA and TIESR extend the frontiers of quantitative methods but face these ongoing challenges. Greater effort needs to be made in pushing agencies to include data that matters as well as support non-government actors to expand their capacity to create data given that this will be the only solution in the medium-term. But human rights groups need to consider carefully the limitations in collecting new data (given the demands on agencies) and whether compliance or a policy-actionable data should be prioritised.

A second area is to better coordinate collection, analysis and use of data. This will be helped by making data available, free of charge, online as far as possible, when it does not compromise the sources of data, and providing spaces for networking and peer review. This should minimise duplication of resources but also ensure comparable development of data sets and methods.

A third is cooperation with social scientists. Many academics and researchers use human rights data sets and methods but are asking different questions. A clear example is Jung and Rosevear in this special issue: their analysis of the constitutionalisation of social rights seeks to answer questions about patterns of state behaviour and the effects of constitutionalisation. However, their database also provides a tool for measuring a state's normative commitments to judicialise economic and social rights or incorporate the ICESCR.⁴⁹ Social science explanatory and operational methods can be used to justify recommendations that stem from compliance findings. The findings in this issue on the contribution of rights to economic growth and declines in infant mortality are examples. However, further engagement may also help build the skills of human rights practitioners and foster collaboration with scholars whose work may support compliance, advocacy or impact assessment efforts.

The collection of papers in this issue demonstrates the promise and perils of human rights measurement. The strength of some approaches are the flaws of others. Aggregation to the country as the unit of analysis and inter-country comparability can provide an overview of global trends in human rights and an evaluation of performance on a common standard taking account of both positive and

49 For instance, the Committee on Economic, Social and Cultural Rights in General Comment 9 asked states to justify the absence of judicial remedies and incorporation and its concluding observations regularly address the subject now. M Langford and JA King, 'Committee on Economic, Social and Cultural Rights: Past, Present and Future' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, Cambridge 2008). Moreover, the issue will be raised in cases taken under the Optional Protocol to ICESCR: i.e., whether a state has domestic remedies that must be exhausted.

negative obligations. But it faces the challenges of validity, reliability and equivalence over widely varying contexts. The development of country or locality-specific indicators provides measures that may reflect more accurately the contextual application of universal principles and be more actionable in practice. But they cannot be compared with other countries which help in establishing what would be reasonable performance and, to a certain extent, exploring broader causal relationships. In practice both approaches are needed.

A common theme that emerges in the issue is the need for a *broad* evidence base. Qualitative methods tend to be critical at all stages in the use of quantitative methods for human rights, providing (1) the basis for framing a hypothesis for metrics or motivating data creation; (2) the source of data creation in many cases (3) a constant check on data creation techniques, indicator matching or methods: (4) and complementary evidence for interpreting quantitative results. Both Vizard and Corkery and Way propose systematic methods for the integration of quantitative and qualitative methods. Indeed, quantitative methods will usually not do more than create a *prima facie* argument – the rest is often left to qualitative methods. One needs to avoid the danger of turning exercises of judgment into ones of measurement.

Evaluating Compliance Using Quantitative Methods and Indicators

Lessons from the Human Rights Measurement Framework¹

Polly Vizard

Research Fellow, Centre for Analysis of Social Exclusion, London School of Economics,
email: P.A.Vizard@lse.ac.uk.

Abstract: There is growing interest in the application of quantitative methods and indicators as a basis for evaluating compliance with human rights standards. This article contributes to the emerging body of literature in this area by examining how quantitative methods and indicators are being applied as a basis for evaluating human rights compliance in England, Scotland and Wales. Using

1 The Human Rights Measurement Framework was commissioned by the Equality and Human Rights Commission (EHRC) and the Scottish Human Rights Commission. The Framework was developed by a research team at the Centre for Analysis of Social Exclusion at London School of Economics (LSE) in partnership with LSE Human Rights and the British Institute for Human Rights. A research report arising from the project is available on the EHRC website: J Candler, and others, 'Human Rights Measurement Framework: Prototype Panels, Indicator Set and Evidence Base' (Report) (2011) Equality and Human Rights Commission Research Report 81 <<http://www.equalityhumanrights.com/human-rights/our-human-rights-work/human-rights-measurement-framework/>> accessed 6 June 2012. The author is grateful to the co-authors of the original research report (Jean Candler, Holly Holder, Sanchita Hosali, Anne Maree Payne and Tiffany Tsang) as well as to Francesca Klug and Helen Wildbore, who were unpaid advisors on the project; to members of the Project Management Group (including Gwen Oliver, Anna Henry, Mary Cunneneen and Duncan Wilson); an Advisory Group (including Nicolas Fasel, OHCHR); to participants in an event for inspectorates, regulators and ombudsmen convened by the Ministry of Justice; to participants in the HRMF specialist consultation on the selection of indicators; and to numerous other individuals and organizations who generously gave up time and provided input, feedback and guidance on the development of the Framework. Feedback on material in this article was received from participants at seminars organised by the Human Rights Quantitative Methods Network (held at New York University); the Centre for Human Rights and Social Justice at London Metropolitan University (hosted by the Joint Committee on Human Rights); the Arts and Humanities Research Council / Human Rights Consortium (held at the School of Advanced Study, University of London); and the Institute for Human Rights Pentland Symposia Series (held at University College London). Two anonymous referees provided helpful comments on an earlier draft. The author is also grateful to Peter Matejic (Department for Work and Pensions), and to Claudia Wells and Vanessa Fearn (Office for National Statistics) for suggestions on the presentation and interpretation of data. The Adult Inpatient Survey dataset was made available via the UK Data Archive at Essex University and the Care Quality Commission. Responsibility for the views expressed, and for errors of fact or interpretation, remains with the author.

the Human Rights Measurement Framework (HRMF) as an entry-point I illustrate how quantitative methods and indicators can be systematically combined with qualitative information and case law analysis in order to build up a comprehensive information base for evaluating human rights. The limitations of quantification are also discussed. I suggest that quantitative evidence should often be regarded as a partial rather than a complete information base for human rights evaluation and judgement.

Keywords: Human Rights; Quantitative Methods; Indicators; Violence; Older People; Health and Social Care; Child Poverty.

I. Introduction

The search for an expanded and enriched information base for human rights evaluation has driven a series of important conceptual and methodological innovations in recent years. Human rights analysis is increasingly viewed as a multidisciplinary field of inquiry drawing on a range of perspectives including ethics, political theory, sociology, economics and social sciences as well as law. Quantitative methods and measurement has emerged as a distinct field within the study of human rights with its own set of evidential thresholds, interpretative conventions and techniques. The terrain here is mapped out by Landman and Carvalho, who characterise human rights measurement as the methodological process whereby the concept of human rights is transformed into a set of valid, reliable and meaningful indicators.²

Conceptual and methodological innovations by international human rights monitoring bodies have also been important in moving the international human rights agenda forward. New schema developed and applied by the UN Committee on Economic, Social and Cultural Rights have highlighted the analytical distinctions between *de jure* and *de facto* human rights and *international obligations of conduct* and *international obligations of result* as well as the respect/protect/fulfil typology. The development and application of these schemas has resulted in the more widespread acceptance of a broader information base for human rights evaluation that includes outcome-orientated, statistical information on the position of individuals and groups in practice. As a result, the role of quantitative evidence in building up both direct evidence of human rights violations, and *prima facie* evidence of human rights concerns has become more firmly established.

2 T Landman and E Carvalho, *Measuring Human Rights* (Routledge 2010) 1-8.

International efforts to apply quantitative indicators and benchmarks as a basis for evaluating human rights compliance have also accelerated in recent years. Earlier work on indicators and benchmarking³ has been followed up by the development of a good practice model for using indicators to evaluate the compliance of duty-holders with the obligations that flow from international human rights standards by the Office of the High Commissioner for Human Rights.⁴ The importance of the OHCHR good practice model has been recognised by a number of international bodies.⁵ At the regional level, the Human Rights Commissioner for the Council of Europe has highlighted the importance of the OHCHR model and the role of indicators in addressing “implementation gaps” and evaluating progress towards the achievement of human rights in practice.⁶

In this article, I examine how the Human Rights Measurement Framework (HRMF) builds on and contributes to the broader search for an expanded and enriched information base for evaluating human rights. The HRMF is a new indicator-based tool that was commissioned by the Equality and Human Rights Commission (EHRC) in partnership with the Scottish Human Rights Commission (SHRC) as a basis for evaluating human rights in England, Scotland and Wales. The Framework is being used by the Commissions in order to take forward their broader remits and responsibilities. The HRMF points to a number of

3 UNHCHR, ‘Interim report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health, Mr. Paul Hunt’, (2003) UN Doc A/58/427; UNHCHR, ‘Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’, (2006) UN Doc E/CN.4/2006/48.

4 OHCHR, ‘Report on Indicators for Monitoring Compliance with International Human Rights Instruments,’ (2006) UN Doc HRI/MC/2006/7; OHCHR, ‘Report on Indicators for Promoting and Monitoring the Implementation of Human Rights’, (2008) UN Doc HRI/MC/2008/3; OHCHR, ‘Status Note on OHCHR’s Work on Indicators for Human Rights dated March 2010’ (Personal Communication from Nicolas Fasel to author, made available upon request) (2010).

5 UN Economic and Social Council. *Report of the United Nations High Commissioner for Human Rights* (2011) E/2011/90 dated 26 April 2011 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/427/16/PDF/G1142716.pdf?OpenElement>> accessed 30 October 2011; UN Committee on Economic, Social and Cultural Rights, ‘Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, (2009) UN Doc E/C.12/2008/2 3.

6 T Hammarberg, ‘Serious Implementation Of Human Rights Standards Requires That Benchmarking Indicators Are Defined’ Council of Europe, Commissioner for Human Rights Viewpoints 17 August 2009 <http://www.coe.int/t/commissioner/Viewpoints/090817_en.asp> accessed 5 December 2011.

specific roles and functions that quantitative methods and indicators can play in human rights analysis and evaluation, including:

- Providing direct information on human rights violations;
- Providing *prima facie* evidence of human rights concerns;
- Establishing trends in prevalence over time and highlighting inequalities in the position, risks and vulnerabilities of different population sub-groups;
- Identifying possible gaps and/or weaknesses in protection and the need for specific targeted public policy interventions;
- Specifying targets and benchmarks;
- Conveying the outcomes of relevant regulatory and inspection processes and investigations and reviews;
- Providing essential information on the nature and/or scope of a particular phenomenon;
- Meeting the data requests of international human rights treaty bodies.

Developing the HRMF and building-up the HRMF evidence base has also highlighted some of the possible limitations of quantification and the complexities of adopting an expanded and enriched information base for human rights evaluation that incorporates quantitative indicators and methods. Some elements of the HRMF evidence base may not be quantifiable; and quantitative indicators and findings require careful analysis and interpretation in the light of statistical methods and theory. In addition, as the discussion below will show, adopting an expanded and enriched information base for human rights evaluation can also have important implications for the types of inferential conclusions that can be drawn about human rights violations and the extent to which duty-holders have complied with the negative and positive legal duties that flow from human rights.

The remainder of this article is organised as follows. Section 2 examines how the HRMF conceptually and methodologically contributes to broader efforts to develop an expanded and enriched information base for human rights evaluation. The three subsequent sections then provide illustrations of how the HRMF results in a comprehensive information base for human rights evaluation that systematically combines legal and broader qualitative indicators with quantitative indicators and methods. The illustrations draw on three areas of established and emerging national human rights concerns in Britain. These are protection from homicide, violence and abuse within communities and families (section 3); the treatment of older people in health and social care (section 4); and child poverty (section 5). Section 6 concludes the article.

II. Expanding and Enriching the Information Base for Human Rights Evaluation

The Human Rights Measurement Framework (HRMF) provides a comprehensive information base for human rights evaluation that systematically combines case law analysis and broader qualitative evidence with quantitative indicators and methods. Conceptually and methodologically, there are four key innovations.

First, the Framework explicitly builds on the OHCHR good practice model and systematically monitors the implementation of human rights in England, Scotland and Wales using three types of indicators highlighted in OHCHR recommendations: namely, structural, process and outcome indicators. The following working definitions are used with the HRMF. “Structural indicators” are indicators of the formal commitment of a state to human rights in principle (for example, through domestic codification and signing and ratifying regional and international instruments). “Process indicators” are indicators of the steps taken by duty holders such as the UK Government and other-duty holders in order to discharge the duties that flow from human rights obligations. Relevant measures might include primary legislation, public policy interventions, benchmarks, targets and goals. “Outcome indicators” are indicators of the results achieved in practice (in terms of the actual position and experiences of individuals and groups on the ground). Systematically monitoring against a set of structural, process and outcome indicators results in a comprehensive information base for human rights evaluation incorporating outcome-orientated statistical information about the position of individuals and groups in practice as well as information about formal legal standards (and their breach). The development of the HRMF demonstrates how this approach can be successfully applied as a basis for national human rights reporting exercises.

Second, despite the proliferation of quantitative methods in the field of human rights, there often remains a divide between those using legal case outcome analysis as a basis for human rights evaluation, those using qualitative research methods and those using quantitative indicators and measures. The HRMF addresses this lacuna by providing a systematic methodology for combining qualitative information and case law analysis with quantitative indicators and methods. The Framework highlights the importance of developing an informationally and methodologically plural evidence-base for human rights evaluation, and views quantitative information as supplementing and complementing (rather than replacing or superseding) legal and qualitative analysis.

Third, in terms of its application of quantitative indicators and methods, the HRMF puts particular emphasis on monitoring and reporting at the highest possible level of disaggregation using a wide range of administrative and social survey sources. Here, the HRMF builds both on the recommendations of OHCHR and a broader work-stream that applies quantitative methods in order to build up a robust statistical evidence base on inequalities in the position of different population subgroups in Britain based on systematic disaggregation by eight characteristics (age, gender, disability, religion and belief, race/ethnicity, sexual orientation, transgender status and social class).⁷ The HRMF builds on and takes forward this work whilst extending the range of disaggregation characteristics (for example, to cover income poverty and area deprivation) and putting particular emphasis on building up robust statistical evidence on the position of specific at risk/vulnerable groups (for example, Gypsies and Travellers, refugee and asylum seekers, people resident or detained in public and private institutions, such as older people resident in care homes or individuals detained in prisons or secure units, “looked after children” and “children in need”).

Fourth, the HRMF is innovative in identifying and recording evidence from a very wide range of diverse and often fragmented sources, and bringing these together into a single comprehensive information base for human rights evaluation.

Like the OHCHR good practice model, the HRMF is made up of a series of panels, each of which focuses on a single human right. To date, eight HRMF panels have been developed. These cover both human rights that are directly enforceable in UK domestic law (through the Human Rights Act⁸ (HRA) 1998, which incorporates many of the human rights recognised in the European Convention on Human Rights⁹ (ECHR) and gives further effect to these in UK

7 The Equality Measurement Framework uses administrative and social survey data to monitor the position of individuals and groups across 10 critical domains of life with systematic disaggregation by a set of equality characteristics. For further details see S Alkire and others, ‘Developing the Equality Measurement Framework: Selecting the Indicators’ (2009) Equality and Human Rights Commission Research Report 31, <<http://www.equalityhumanrights.com/fairer-britain/equality-measurement-framework>> accessed 6 June 2012; T Burchardt, P Vizard, ‘Operationalizing the Capability Approach as a Basis for Equality and Human Rights Monitoring in Twenty-first-century Britain’ (2011) 12 *Journal of Human Development and Capabilities* 91; EHRC ‘How Fair is Britain? The First Triennial Review’ (2010) <http://www.equalityhumanrights.com/uploaded_files/triennial_review/how_fair_is_britain_ch6.pdf> accessed 24 November 2010.

8 Human Rights Act 1998 (UK) (‘HRA’).

9 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (‘ECHR’).

The Right to Life (HRA 1998, ECHR Article 2)**‘Structural indicators’**

Indicator 1: Legal and constitutional framework

Indicator 2: Legal precedents, gaps and standard-setting

‘Process indicators’

Indicator 3: Regulatory framework

Indicator 4: Public policy framework

‘Outcome indicators’

Indicator 5: Outcomes of key judicial, regulatory and investigative processes

Indicator 6: Spotlight statistics: Deaths in the police and criminal justice system context

Indicator 7: Spotlight statistics: Deaths within health and social care institutions/ community care

Indicator 8: Spotlight statistics: Protection from third party violations – homicide within society, community and families

Indicator 9: Spotlight statistics: Premature mortality within families, community and society

Indicator 10: Spotlight statistics: Public attitudes, understanding and experiences.

Figure 1: HRMF illustrative indicators

domestic law), as well as human rights that are recognised in other regional and international instruments and treaties that the UK has signed up to (Figure 1). For example, the first HRMF panel focuses on the right to life (which is recognised in Article 2 of the ECHR and given effect in UK law through the HRA) the second HRMF panel focuses on the prohibition on torture and inhuman or degrading treatment or punishment (which is recognised in ECHR Article 3 and incorporated into UK domestic law through the HRA) and so forth.

Each of the HRMF panels includes a set of indicators that are used to build up a picture of the human rights situation in England, Scotland and Wales. The Framework again builds on the OHCHR good practice model here, which includes illustrative indicators for each of the panels that it has produced. Each HRMF panel includes a balance of “structural”, “process” and “outcome” indicators in order to build-up a comprehensive evidence base on the human rights situation in Britain. A list of the indicators that have been developed and agreed upon for the first HRMF panel on the right to life is provided in Figure 2.

Critically though, rather than simply “adopting” the illustrative indicators set out by the OHCHR, the HRMF indicator set was developed and agreed upon through an extensive process of consultation with human rights NGOs, subject

experts, government departments, regulators, inspectorates and other relevant bodies and organisations. The aim was to reach maximum possible agreement on 10 indicators for each panel that put the spotlight on key human rights concerns in England, Scotland and Wales, as well as to identify relevant data sources. Participants in the specialist consultation provided input on the nature and scope of the HRMF indicators, as well as their legitimacy, validity and importance. Full details of the specialist consultation process and the project indicator selection criteria are provided in Candler et al.¹⁰

<p>Legal evidence</p> <ul style="list-style-type: none"> • Information about domestic human rights law and treaty ratifications; • Information about human rights case law precedents and outcomes (i.e. violations/breaches); <p>Broader qualitative evidence</p> <ul style="list-style-type: none"> • Information about primary law and public policy; • Concerns highlighted by domestic and international human rights monitoring bodies (for example, the Joint Committee on Human Rights and United Nations treaty monitoring committees); • Findings of investigations, inquiries and reviews and issues raised by regulators, inspectorates and ombudsmen; • Allegations and concerns raised by NGOs and other civil society mechanisms such as media reports; <p>Quantitative evidence</p> <ul style="list-style-type: none"> • Statistical information drawing on a wide range of data sources including administrative data generated by specific monitoring exercises, specialist surveys run by regulators and inspectorates, and nationally representative social surveys.
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Figure 2: The HRMF information base

Building up the HRMF evidence base has involved legal research (covering codification and ratification, case law precedents, violations etc), broader qualitative research (by identifying the key findings of human rights monitoring bodies and of relevant investigatory, regulatory and complaints-handling processes) and the application of quantitative indicators and methods (by bringing together and

10 Candler and others (n 1).

analysing data from a wide range of administrative and social survey sources and by building-up new statistical evidence by accessing micro-datasets where necessary). In instances where information gaps against the HRMF indicators are identified, the HRMF methodology envisages new primary research.

In the sections that follow, I provide three illustrations of how the application of the HRMF methodology results in a comprehensive information base on the human rights situation in Britain that systematically combines legal evidence, broader qualitative evidence and quantitative evidence drawing on a wide range of diverse and often fragmented sources (see Figure 2). For each illustration, I briefly review the different types of evidence that have been identified and recorded against the HRMF indicators and demonstrate how the HRMF methodology results in an expanded and enriched information base for evaluating human rights.

III. Protection from Homicide, Violence and Abuse within Families and Communities

The first illustration focuses on the issue of protection from homicide, violence and abuse within families and communities. Two HRMF panels are directly relevant to this issue. These are the panel on the right to life and the panel on the prohibition of torture and inhuman and degrading treatment or punishment.

Legal Precedents and Principles

The HRMF “structural indicators” focus on domestic, regional and international human rights instruments, alongside key case law precedents and principles. Examples for the HRMF right to life panel are listed in Figure 2 (Indicators 1 and 2). Similar indicators are specified under the HRMF panel on the prohibition of torture and inhuman or degrading treatment or punishment (Indicators 11 and 12).

The information gathered and recorded under these indicators highlights how human rights law creates positive duties on state parties to protect individuals from violations of human rights perpetrated by third parties including homicide, violence and abuse. A growing body of European human rights case law relates to the positive duty to protect in the context of life (and the prohibition of torture and inhuman or degrading treatment or punishment).¹¹ Key precedents and prin-

11 HRA; ECHR art 3.

ciples have been established in relation to the positive duty of the state to protect children from ill-treatment about which it had, or ought to have had, knowledge (e.g. *Z and others v UK* (2001));¹² and the positive duty to protect women from life-threatening domestic violence (e.g. *Opuz v Turkey* (2009)).¹³

Review of the Broader Qualitative Evidence

The HRMF methodology entails systematically supplementing information about legal standards with outcome-orientated information about results in practice. Consider Indicator 5 under the right to life panel listed in Figure 2 ('Outcomes of key judicial, regulatory and investigative processes'). The evidence base against this indicator identifies and records qualitative information on the 'failure to protect' life based on the findings of human rights bodies, independent inquiries and reviews, and through regulatory, inspection and complaints handling processes. This includes a qualitative evidence base on the extent to which public authorities are fulfilling their positive duties to protect individuals from homicide and life-threatening violence and abuse perpetrated by third parties. A similar indicator is specified under the panel on the prohibition on torture and on inhuman and degrading treatment or punishment (Indicator 15).

The HRMF evidence base under Indicator 5 includes the findings of a key regulatory body, the Independent Police Complaints Commission (IPCC), in its investigation into the death of Rabina Bibi. The IPCC found that the police force had not dispatched police officers when an initial call for assistance was made contrary to force policy on domestic abuse.¹⁴ Another IPCC investigation concerned the death of Fiona Pilkington, who had made 33 calls over a seven-year period asking police for help after suffering repeated and continuing abuse and torment from a gang of youths.¹⁵ The Commission concluded that the failure by police officers to identify Fiona Pilkington, her son and severely disabled daughter 'as a collective vulnerable family unit' was 'at the core of Leicestershire Constabulary's failure to implement a cohesive, structured and effective approach to the harassment/anti-social behaviour from which they were suffering'.¹⁶

12 *Z and others v UK* (App no 29392/95) ECtHR 10 May 2001.

13 *Opuz v Turkey* (App no 33401/02) ECtHR 9 June 2009.

14 Independent Police Complaints Commission, 'Annual Report and Statement of Accounts, 2009-10' (2010) 23.

15 Independent Police Complaints Commission, 'Report Into The Contact Between Fiona Pilkington And Leicestershire Constabulary, 2004-07, Independent Investigation Final Report 2009/016872' (2009).

The findings of other investigations and reviews highlighting instances of the ‘failure to protect’ in the context of child abuse are incorporated into the HRMF evidence base under Indicators 5 and 15. For example, the Victoria Climbié Inquiry documented the ‘gross failure’ of the UK’s child protection system and disparities in the standard of investigation into criminal offences against children compared to adults.¹⁷ The Laming Review of Child Protection (Baby P case) made wide-ranging recommendations to address gaps in child protection in practice.¹⁸

Building up a Quantitative Evidence Base

The “outcome indicators” under each HRMF panel also include quantitative indicators that provide outcome-orientated statistical information on the human rights position of individuals and groups in practice. Consider Indicator 8 of the right to life panel listed in Figure 2 (‘Spotlight statistics: Protection from third party violations – homicide within society, community and families’). The evidence base against this indicator provides quantitative information on the nature and scope of homicide, violence and abuse within families and communities and the vulnerabilities and risks of different population subgroups.

An illustration is provided in Figure 3, which provides statistical information on the homicide rate per million of the population by age and sex of the victim based on official statistics compiled using police and court records over the period 1999/2000 to 2009/10 for England and Wales. The data shows that, amongst the population subgroups identified in the analysis, the highest rate of homicide per million of the population involves victims under one year old, both for males and females, for most of the years reported. Table 1 extends the quantitative evidence base under Indicator 8 further. The data here provides information on the relationship of victims of homicide under 16 to the principal suspect, drawing again on official police and court records. Consistent with other studies, the figures highlight the relatively high proportion of victims of child homicide who are related to the principal suspect, with 63% of male victims of homicide who were under 16, and 67% of female victims of homicide who were under 16, being acquainted with the perpetrator as either son or daughter in 2010/2011.

16 Ibid; *Independent Police Complaints Commission*, ‘Annual Report’ (n 15).

17 Lord Laming, ‘The Victoria Climbié Inquiry’ (Report) (January 2003).

18 Lord Laming, ‘The Protection Of Children In England: A Progress Report’ (March 2009).

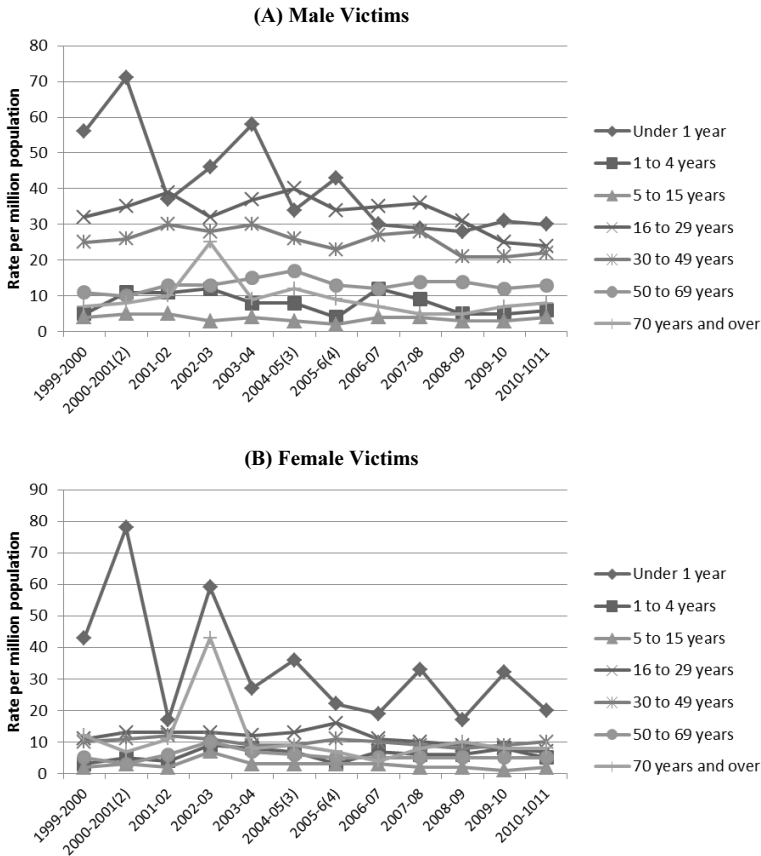


Figure 3: Offences currently recorded as homicide by age and sex of victim, 1999/00-2009/10 (England and Wales, Recorded Crime)

Source: Home Office.¹⁹ Notes: (1) Rates as of 28 September 2010 for 1999-2000, otherwise as of 18 October 2011; figures are subject to revision as cases are dealt with by the police and the courts, or as further information becomes available. (2) For 2000-01 there were 58 victims (54 male and 4 female) of unknown age. (3) For 2004-05 there were 6 victims of unknown age. (4) For 2005-06 there were 2 victims of unknown age.

19 Home Office, 'Homicides, Firearm Offences and Intimate Violence 2009/10 Supplementary Volume 2 to Crime in England and Wales 2009/10 Data Tables Excel File Second Edition' (Microsoft Excel File, Data Tables) Table 1.07 (2011) <<http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb0111/>> accessed 30 May 2011; Home Office, 'Homicides, Firearm Offences and Intimate Violence 2010/2011 Supplementary Volume 2 to Crime in England and Wales 2010/11' (Microsoft Excel File, Data Tables) Table 1.08 (2012) <<http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb0212/>> accessed 30 May 2012.

Table 1: Homicides currently recorded for victims under 16 by relationship of victim with principal suspect (England and Wales, 1999/2000-2010/2011 (recorded crime) (1)

Percentages(3)

	1999/ 2000	2000/ 2001	2001/ 2002	2002/ 2003	2003/ 2004	2004/ 2005	2005/ 2006	2006/ 2007	2007/ 2008	2008/ 2009	2009/ 2010	2010/ 2011
Male victims												
Acquainted	82	84	80	72	64	59	85	66	84	85	78	77
Son	74	75	67	67	41	38	56	51	66	65	70	63
Other family/ friend/acquaint- ance	8	9	13	5	23	22	30	15	18	19	7	14
Stranger ²	10	11	7	15	25	22	11	17	13	4	7	6
No suspect	8	5	13	13	11	19	4	17	3	12	15	17
Female victims												
Acquainted	77	92	76	65	70	83	60	76	84	80	88	76
Daughter	73	87	59	48	63	66	50	68	64	60	83	67
Other family/ friend/acquaint- ance	4	5	18	17	7	17	10	8	20	20	4	10
Stranger ²	19	8	18	21	15	7	30	8	4	-	-	19
No suspect	4	-	6	13	15	10	10	16	12	20	13	5

Source: Home Office.²⁰ **Notes:** (1) Homicides recorded as of 28 September 2010 for 1999-2000, otherwise as of 18 October 2011; figures are subject to revision as cases are dealt with by the police and by the courts, or as further information becomes available. (2) Includes cases where relationship not known. (3) Percentages are rounded up. Sub-categories of 'acquainted' victims may not sum to total 'acquainted victims' due to rounding up.

20 Home Office, 'Homicides, Firearm Offences and Intimate Violence 2009/10 Supplementary Volume 2 to Crime in England and Wales 2009/10 Data Tables Excel File Second Edition' (Microsoft Excel File, Data Tables) Table 1.04 (2011) <<http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb0111/>> accessed 30 May 2011; Home Office, 'Homicides, Firearm Offences and Intimate Violence 2010/2011 Supplementary Volume 2 to Crime in England and Wales 2010/11' (Microsoft Excel File, Data Tables) Table 1.04 (2012) <<http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb0212/>> accessed 30 May 2012.

Table 2: Percentage of adults aged 16-59 who were victims of domestic abuse and sexual assault in the last year by various personal and household characteristics (England and Wales 2009/10)

Percentages	Any domestic abuse		Partner abuse (non-sexual)		Family abuse (non-sexual)		Sexual assault		Unweighted base (1)	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
ALL ADULTS	4.2	7.5	2.6	4.6	1.4	2.3	0.5	2.3	9,892	11,728
Age group										
16-19	6.2	12.7	3.6	7.3	2.7	3.9	1.2	7.9	661	670
20-24	5.5	11.1	3.0	5.6	2.1	4.4	0.5	3.6	756	898
25-34	5.4	7.3	3.7	4.8	1.5	1.6	0.5	2.1	2,048	2,634
35-44	3.4	6.8	2.3	4.7	1.0	1.7	0.3	0.9	2,746	3,477
45-54	2.8	5.3	1.7	3.4	1.1	2.0	0.3	1.4	2,579	2,809
55-59	2.6	4.8	1.6	3.2	0.9	1.4	0.4	0.7	1,102	1,240
Ethnic group										
White	4.3	7.5	2.7	4.7	1.5	2.3	0.4	2.3	9,074	10,835
Non-White	3.4	7.4	1.7	4.5	1.4	2.2	0.5	1.9	815	887
Respondent's occupation										
Managerial and professional occupations	3.2	5.3	2.1	3.5	0.8	1.3	0.3	1.6	4,013	4,469
Intermediate occupations	3.6	5.6	2.0	4.2	1.3	1.5	0.6	1.5	1,742	2,511
Routine and manual occupations	5.4	10.3	3.6	6.0	2.0	3.6	0.5	2.0	3,278	3,590
Never worked and long-term unemployed	4.6	11.0	3.6	7.1	1.2	3.8	0.0	3.0	161	329
Full-time students	4.8	8.9	2.1	4.4	2.5	2.8	0.7	6.1	649	772
Not classified	-	17.7	-	14.9	-	6.4	-	2.5	49	57
Long-standing illness or disability										
Long-standing illness or disability	6.7	12.3	3.8	7.1	2.8	4.5	0.9	3.0	1,519	2,030
Limits activities	6.8	13.8	4.2	7.9	3.3	5.2	0.9	3.0	843	1,217
No long-standing illness or disability	3.8	6.6	2.4	4.2	1.2	1.9	0.4	2.1	8,369	9,691
Household income in the last year										
Less than £10,000	8.5	16.9	6.0	10.9	3.1	5.0	0.8	3.5	740	1,235
£10,000 less than £20,000	4.4	10.4	2.2	6.5	1.4	2.6	0.4	2.7	1,137	1,975
£20,000 less than £30,000	5.1	8.5	3.0	5.1	1.7	3.4	0.6	2.2	1,485	1,743
£30,000 less than £40,000	3.6	5.2	2.0	3.1	1.4	1.5	0.3	1.7	1,442	1,521
£40,000 less than £50,000	3.6	5.6	2.8	3.8	1.0	1.6	0.5	1.2	1,109	1,071
£50,000 or more	3.4	4.3	2.2	2.8	1.0	1.2	0.4	1.8	2,403	2,325
No income stated or not enough information provided	3.9	6.7	2.5	3.9	1.7	2.1	0.5	2.8	1,576	1,858

Percentages	Any domestic abuse		Partner abuse (non-sexual)		Family abuse (non-sexual)		Sexual assault		Unweighted base (1)	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
Employment deprivation index										
20% most deprived output areas	4.7	10.7	2.5	6.0	1.7	3.5	0.7	2.7	1,681	2,037
Other output areas	3.9	7.0	2.5	4.5	1.3	2.1	0.4	2.1	5,424	6,467
20% least deprived output areas	4.2	6.1	2.9	3.9	1.6	1.8	0.4	2.5	2,090	2,360

Source: Home Office.²¹ **Notes:** (1) The bases given are for any domestic abuse and bases for other measures are similar.

Outside of the homicide context, the HRMF panel on article 3 (the prohibition on torture and inhuman or degrading treatment or punishment) builds up quantitative evidence base on the prevalence of violent crime including domestic abuse and sexual assault. For example, HRMF Indicator 18 includes quantitative information on the prevalence of domestic abuse and sexual violence drawing both on police records (which are widely viewed as under-stating the prevalence of domestic abuse and sexual violence) and a general population survey source (the British Crime Survey, which includes questions on experiences of domestic abuse and sexual violence in a self-completion module).

Analysis of British Crime Survey data suggests that there are important variations in the prevalence of domestic abuse and sexual violence amongst certain subpopulation groups (see Table 2). The data show higher prevalence of domestic abuse and sexual assault amongst females compared with males; those with a longstanding limiting disability or illness compared with those without; women from routine and manual occupations, and women who have never worked or are long-term unemployed, compared with women from other occupational groups; individuals living in households with total household income of less than £10,000 in the last year compared with those living in households with total household income of above £10,000; and those living in the 20% most deprived areas compared with less deprived areas (measured by the employment deprivation index).

The analysis of the quantitative evidence here can be taken further by applying logistic regression techniques (which provide a framework for identifying sta-

21 Home Office, Kevin Smith (ed), Kathryn Coleman, Simon Eder and Philip Hall, 'Homicides, Firearm Offences and Intimate Violence 2009/10', Tables 3.06 and 3.07.

tistically significant explanatory variables underlying domestic abuse and sexual violence, controlling for other factors). Findings of a logistic regression research exercise of this type covering experiences of both domestic abuse and sexual assault in the last year using the British Crime Survey data are analysed in a recent Home Office report.²² The statistical significance of a wide range of independent variables has been tested under three alternative specifications of the underlying logistic regression model.²³ The overall effects of age, sex and longstanding limiting illness and disability on domestic abuse and sexual assault was found to be statistically significant for all three model specifications (controlling for other factors). Statistically significant variations in the risk of both domestic abuse and sexual assault are also apparent by population subgroup. The odds of being a victim of both domestic abuse and sexual assault are higher for females compared with males, older people compared with those aged 16–19, and for those with a longstanding limiting illness or disability compared to those without (again after controlling for other factors).²⁴

The findings here regarding longstanding limiting illness and disability are particularly striking. Whilst the increased likelihood of younger people (compared with older people) and females (compared with males) experiencing domestic abuse and sexual assault is relatively well known, there is perhaps less knowledge and understanding of disability as a risk factor underlying victimisation. Table 3 summarises the results of the logistic regression exercise for the longstanding limiting illness and disability variable. The increased odds ratios for respondents with a longstanding limiting illness and disability in both Sections A and B of Table 3 indicate that the odds of experiencing both domestic abuse and sexual assault are higher amongst this subgroup, relative to their counterparts

22 Ibid pages 73–79 and Tables 3.08 and 3.14.

23 The methodology for developing and interpreting the logistic regression model is set out in Home Office User Guide to Home Office Crime Statistics (Last updated August 2010) (2010), Section 8.4. This states that BCS logistic regression models are developed by adopting an iterative process which relies on a theoretical rationale of how the independent variables might affect the outcome. This process enables the evaluation of the impact of certain types of variables on the outcome. A forward stepwise logistic regression procedure is also applied as part of the model fitting process.

24 A number of other variables were also found to be statistically significant in their effect on the dependent variables under each of the three model specifications. In addition, statistically significant variations in the odds ratios between indicator-level categories and the reference category for a number of other variables were also identified. For further details and full results see *Home Office and others*, ‘Homicides, Firearm Offences and Intimate Violence 2009/10’ (n 21), Tables 3.08 and 3.14.

who do not have a longstanding limiting illness and disability. Under 'Iteration 3' (which provides the best 'model fit' as measured by the Nagelkerke R square statistic), the odds ratio for domestic abuse for respondents with a longstanding limiting illness or disability is 2.01, whilst for sexual assault the odds ratio for those with a longstanding illness or disability is 1.85. These findings are both statistically significant at the 95% confidence level ($p < 0.05$) and suggest that, controlling for other factors, the odds of experiencing domestic abuse or sexual assault for those with a longstanding limiting illness or disability are higher by a factor of approximately two.

The increased risk of homicide for under-1s (highlighted through the quantitative analysis of death rates per million of the population) and the increased risk of disabled people in the context of both domestic abuse and sexual assault (confirmed through logistic regression analysis, holding other factors constant) provide useful illustrations of how the application of quantitative methods can have "added value" in building-up a comprehensive evidence base on the implementation of human rights. Quantitative data of this type can be particularly useful in going beyond an individual case-based approach and in analysing both trends over time and the risks and vulnerabilities for different population sub-groups. It has a key role to play in identifying possible gaps in protection and in highlighting the need for more effective public policy interventions.

It is important to note, however, that this data does not itself provide direct evidence of the failure of duty-holders to fulfil the negative and positive duties that flow from human rights standards. It is not possible, from quantitative data of this type alone, to draw inferential conclusions about the adequacy of the steps taken by duty-holders or to attribute direct responsibility to the state in any particular case. For this reason, the increased risk of homicide for under-1s or the increased risk of disabled people in the context of domestic abuse and sexual assault may be most appropriately characterised as highlighting a *prima facie* human rights concern. That is, in undertaking human rights evaluation, the data can be said to raise important questions that require further analysis and investigation.

Table 3: Analysis of the risk of domestic abuse and sexual assault in the last 12 months by disability status using logistic regression analysis (England and Wales, 2008/09 and 2009/10) (1) (2) (3) (4)

	(A) Domestic abuse											
	Iteration 1 (6)			Iteration 2 (7)			Iteration 3 (8)					
	β -coefficient	p-value	Odds ratio	β -coefficient	p-value	Odds ratio	β -coefficient	Standard error	p-value	Odds ratio	Confidence interval	
Long-standing illness or disability – non-limiting	0.57	0.000**	1.77	0.56	0.000**	1.75	0.57	0.12	0.000**	1.77	1.39 -	2.26
<i>No long-standing illness or disability</i>			1.00			1.00				1.00		
Nagelkerke R square (5)			0.080			0.093						0.110
	(B) Sexual assault											
	Iteration 1 (6)			Iteration 2 (7)			Iteration 3 (8)					
	β -coefficient	p-value	Odds ratio	β -coefficient	p-value	Odds ratio	β -coefficient	Standard error	p-value	Odds ratio	Confidence interval	
Long-standing illness or disability	0.60	0.001**	1.83	0.61	0.001**	1.85	0.62	0.19	0.002**	1.85	1.27 -	2.72
<i>No long-standing illness or disability</i>			1.00			1.00				1.00		
Nagelkerke R square (5)			0.146			0.160						0.190

Source: Home Office, based on British Crime Survey.²⁵ **Notes:** (1) '**' denotes categories that are statistically significant at the 95% confidence level ($p < 0.05$). Reference groups are denoted in italics. (2) An odds ratios of greater than one indicate relatively higher odds for the category relative to the reference group and of less than one indicates relatively lower odds. (3) The overall effect of longstanding illness or disability on each of the dependent variables was also found to be statistically significant under all three of the iterations models. (4) The unweighted base for model A is 24,761 and for model B is 24,922. This figure includes adult respondents aged 16–59 who completed the self-completion module and gave valid responses to all questions included in the models. (5) The Nagelkerke R square indicates which model has the highest model fit. The higher the value the better the model predicts the outcome. (6) Iteration 1 explanatory variables: longstanding limiting illness or disability, respondent's marital status, age, sex, respondent's occupation, highest education qualification, ethnic group, respondent's employment status. (7) Iteration 2 explanatory variables are: iteration 1 variables plus household structure, total household income, tenure, output area classification, accommodation type, level of physical disorder and area type. (8) Iteration 3 explanatory variables are: iteration 2 variables plus use of drugs, frequency of alcohol consumption in the last year, number of visits to a nightclub in last month, number of evening visits to a bar in last month and hours out of home on an average weekday. (9) This table reports the main results by disability. A number of other variables were found to be statistically significant in their effect on the dependent variables under all three specifications of the models. Statistically significant variations in the odds ratios between indicator-level categories and the reference category for a number of other variables were also identified. For further details see original data tables.

²⁵ Home Office and others, 'Homicides, Firearm Offences and Intimate Violence 2009/10' (n 22) Tables 3.08 and 3.14.

IV. The Treatment of Older People in Health and Social Care

The second illustration highlights how the HRMF provides an analytical tool for gathering and recording qualitative and quantitative evidence on the treatment of older people in health and social care in Britain. Concerns regarding the poor treatment of older people in health and social care have been rapidly moving up the human rights agenda in Britain in recent years. The HRMF systematically gathers and records the qualitative and quantitative evidence in this area, building up a comprehensive national picture based on the methodology set out in section 2.

Relevant Legal Instruments

The issue of poor treatment of older people in health and social care is relevant to four of the HRMF panels. Although there is no specific instrument incorporating economic and social rights in Britain, the poor treatment of older people in health and social care potentially falls within the ambit of at least three articles that are given “further effect” in the UK Human Rights Act (which incorporates many of the rights set out in the European Convention on Human Rights and which is directly enforceable in UK domestic law). These are ECHR article 2 (the right to life), ECHR article 3 (the prohibition of torture and inhuman or degrading treatment or punishment) and ECHR article 8 (respect for individual and family life). In addition, the poor treatment of older people in health and social care is of direct relevance to a number of international human rights treaties that the UK has signed up to, including article 12 of the International Covenant on Economic, Social and Cultural Rights (the right to the highest attainable standard of physical and mental health).

Review of the Qualitative Evidence

The HRMF “outcome indicators” in the panels mentioned above provide a qualitative evidence base on the poor treatment of older people in health and social care, drawing on a wide-range of sources, including qualitative evidence identified by human rights bodies, through regulatory, inspection and complaints-handling processes, and in civil society and media reports. HRMF Indicators 5, 15, 45 and 55 are particularly relevant here.

Qualitative evidence identified by *human rights bodies* includes findings of the Joint Committee on Human Rights (JCHR) which published an agenda setting

report, *The Human Rights of Older People in Healthcare*,²⁶ raising concerns about poor treatment, neglect, abuse, discrimination, malnutrition and dehydration and ill-considered discharge. The report highlighted lack of support for older people who needed help with eating and drinking during hospital stays as a key human rights concern. The Equality and Human Rights Commission *Inquiry into Home Care of Older People* also identified major problems in the home care system including inadequate time to deliver care; lack of control over timing of care visits; failure to deliver adequate homecare; lack of staff awareness and training; high staff turnover; lack of complaints, and low expectations.²⁷

Qualitative evidence identified through *regulatory, inspection and complaints-handling processes* includes key findings of national health and social care regulators and ombudsmen. For example, in its report, *Rights, Risks and Restraints*, the Commission for Social Care Inspection (a predecessor of the Care Quality Commission, the new national health and social care regulator) found that the use of restraint in elderly care services was ‘unacceptable’ and denies the human right to ‘dignity and choice’.²⁸ The Care Quality Commission (CQC) published 12 reports from an inspection programme on dignity and nutrition which examined whether elderly people are receiving essential standards of care in 100 hospitals across England. The CQC identified recurring concerns in relation to both nutrition and dignity, including people not being given assistance to eat, not having their nutritional needs monitored and not being given enough to drink; and staff not treating patients in a respectful way or involving them in their own care.²⁹ The Health Service Ombudsman has responsibility for investigating complaints that the NHS in England has not acted properly or fairly or has provided a poor service. Ten recent investigations undertaken by the Ombudsman provide further evidence of failure to meet basic standards in the context of older people’s health-care.³⁰

26 Joint Committee on Human Rights, ‘The Human Rights of Older People in Healthcare’ (Eighteenth Report of Session 2006-07)(14 August 2007) HL Paper 156-I, HC 378-I.

27 Equality and Human Rights Commission, *Close To Home, An Inquiry Into Older People And Human Rights In Home Care* (Manchester 2011).

28 Commission for Social Care Inspection, ‘Rights, Risks and Restraints: An Exploration into the Use of Restraint in the Care of Older People’ (Report) (November 2007).

29 Care Quality Commission, ‘Dignity and Nutrition Inspection Reports’ (2011) <<http://www.cqc.org.uk/public/reports-surveys-and-reviews/themes-inspections/dignity-and-nutrition-older-people>> accessed 3 December 2011.

30 Parliamentary and Health Service Ombudsman, ‘Care and Compassion: Report of the Health Services Ombudsman on Ten Investigations Into NHS Care Of Older People – Fourth Report of the Health Service Commissioner for England’ (Report) (February 2011).

Civil society campaigns and media reports have also brought the issue of the poor treatment of older people in health and social care to public attention, and the issues raised through these processes are also gathered and recorded in the HRMF qualitative evidence base. For example, in its campaign *Malnutrition in Hospital: Hungry to be Heard*, Age UK highlighted lack of detection and treatment of malnutrition in hospital as a ‘national disgrace’ and called upon the Government to introduce compulsory monitoring of malnutrition.³¹ The Patients Association report, ‘We’ve been listening, have you been learning?’ details sixteen accounts of poor hospital care received by its Helpline, focusing on care-communication, access to pain relief, assistance with toileting and help with eating and drinking.³²

Building up a Quantitative Evidence Base

Based on the HRMF methodology, the legal indicators and broader qualitative evidence of the poor treatment of older people in health and social care in the HRMF evidence base are supplemented by quantitative evidence. For example, consider Indicator 7 of the HRMF Right to Life Panel listed in Figure 2 (‘Spotlight statistics: Deaths within health and social care institutions/community care’). The evidence base pertaining to this indicator includes quantitative statistics on deaths through dehydration and malnutrition within hospitals and care homes. This data is presented in Table 4 and is particularly innovative in that it supports and exemplifies one of the key priorities of the HRMF – namely, to ensure that the position of the non-private household population and particular at risk/vulnerable groups (such as older people resident in hospitals and care homes) is identified and tracked as part of the human rights monitoring and reporting process. Advocacy campaigns can be important in ensuring that national statistical offices respond to the need for robust quantitative evidence of this type. It is significant, therefore, that the publication of this new data on deaths by place by the Office for National Statistics (ONS) was a response to a specific request from a newspa-

31 Age UK, ‘Still Hungry to be Heard: The Scandal of People in Later Life Becoming Malnourished in Hospital’ (2010) <<http://www.ageuk.org.uk/Documents/EN-GB/ID9489%20HTBH%20Report%2028ppA4.pdf?dtrk=true>> accessed 5 July 2011.

32 Peter Wasson, ‘We’ve Been Listening, Have You Been Learning?’ (*The Patients Association*, 8 November 2011) <<http://patients-association.com/Default.aspx?tabid=80&Id=23>> accessed 11 November 2011.

per as part of a broader campaign on the treatment of older people in health care.³³

Although the data presented in Table 4 is based on all registered deaths (rather than a random sample of such deaths), it is based on small numbers of events and is therefore subject to annual fluctuations and random error. For this reason, ONS strongly advise interpreting this data using confidence intervals (which are also provided in Table 3).³⁴ The age-standardised death rate is a statistical measure that eliminates the effects of the age structure and the size of the population and provides a more precise method of estimating trends over time than a simple comparison of numbers of deaths. The trends are reported for the period 1999–2010 and, as a cross-check, for the period 2001–2010. The cross-check is necessary because of a change in the system for codifying deaths (on which, see Table 4, note 1).

The data in Section A of Table 4 provides information on the age-standardised death rate per 1 million of the population where dehydration or malnutrition was the underlying cause of death.

- For dehydration in the care home context, the rate was 0.17 deaths per million population in 1997, falling to 0.15 in 2001 and then rising to 0.21 in 2010. The increases between 1997 and 2010, and between 2001 and 2010, were not statistically significant.
- For dehydration in the hospital context, the rate was 1.10 deaths per million population in 1997, falling to 1.02 in 2001 and then rising to 1.37 in 2010. However, the increases between 1997 and 2010, and between 2001 and 2010, were not statistically significant.
- For malnutrition in the care home context, the figures are very small, making it difficult to draw conclusions about trends over time.
- For malnutrition in the hospital context, the rate increased from 0.43 deaths per million population in 1997, to 0.53 deaths per million population in 2001 and 0.61 deaths per million population in 2010. The increases

33 Lucy Vickers, 'Hospital Deaths: Daily Mail, January 2012: Letter for Publication in Response to an Article in the Daily Mail' (*Office for National Statistics*, 26 January 2012) <<http://www.ons.gov.uk/ons/search/index.html?newquery=malnutrition>> accessed 23 May 2012; Lucy Vickers, 'Hospital Deaths: Telegraph Website, 23 January 2012: Letter for Publication in Response to an Article on the Telegraph Website' (*Office for National Statistics*, 23 January 2012) <<http://www.ons.gov.uk/ons/search/index.html?newquery=malnutrition>> accessed 23 May 2012.

34 Claudia Wells, ONS (Personal communication February 2011); Office for National Statistics, 'Deaths By Place 1997–2010 Excel Sheet' (2012) <<http://www.ons.gov.uk/ons/search/index.html?newquery=malnutrition>> accessed 23 May 2012.

between 1997 and 2010, and between 2001 and 2010, were not statistically significant.

The data in Section B of Table 4 provides information on the age-standardised death rate per 1 million of the population in care homes and hospitals where dehydration or malnutrition was either the underlying cause of death or was mentioned on the death certificate as a contributory factor.

- For dehydration in the care home context, the rate was 0.67 deaths per million population in 1997, falling to 0.66 deaths per million population in 2001 before rising and peaking at 1.33 in 2006. After 2006 the rate declined each year to 1.04 deaths per million population in 2010. The increases between 1997 and 2010, and between 2001 and 2010, were statistically significant (since the confidence intervals do not ‘overlap’). The decline between 2006 and 2010 was not statistically significant.
- For dehydration in the hospital context, the rate was 7.15 deaths per million population in 1997, falling to 6.47 deaths per million population in 2001 before rising and peaking at 9.62 deaths per million population in 2006. The increases between 1997 and 2006, and between 2001 and 2006, were statistically significant. After 2006 the rate dropped to 7.75 deaths per million population in 2010. The decline between 2006 and 2010 was statistically significant.
- For malnutrition in the care home context, the rate increased from 0.33 deaths per million population in 1997/2001 to 0.34 deaths per million population in 2010. The increases between 1997 and 2010, and between 2001 and 2010, were not statistically significant.
- For malnutrition in the hospital context, the rate increased from 2.40 deaths per million population in 1997 to 2.48 deaths per million population in 2001 and 3.81 deaths per million population in 2010. The increases between 1997 and 2010, and between 2001 and 2010, were statistically significant.

This data represents an important extension of the information base for human rights evaluation, in light of the qualitative findings on the treatment of older people in health and social care discussed above. However, it is important to note that it is *not* possible to make direct inferences about causality from this data and/or to directly attribute this increase to poor care either in care homes or hospitals. As ONS note in their interpretative guidance, there are a number of explanations in addition to poor quality care as to why someone becomes malnourished or dehy-

drated. For example, an underlying medical condition such as cancer might mean that nutrients cannot be absorbed and some conditions that may have increased over the period (such as the healthcare associated infection *Clostridium difficile*) are associated with diarrhoea which can lead to dehydration. Recording methods can change over time, and conditions such as dehydration and malnutrition may have arisen prior to entry into care homes or hospitals. Information that is not provided in this table includes the duration of stay in care homes and hospitals.³⁵

As well as being of substantive interest, the data in Table 4 highlights a number of important issues that arise when using quantitative evidence in the field of human rights. These relate to the importance of standard statistical methods and evidential thresholds (such as “statistically significant differences” and “confidence intervals”) as well as the importance of interpretative guidelines provided by data providers (including data limitations and other caveats). The failure to give due weight to these considerations can result in misleading reporting and analysis – as highlighted by the ONS in relation to newspaper coverage of the death by place data.³⁶

The quantitative evidence base on the treatment of older people in health and social care is further developed under the HRMF panel on the prohibition of torture and inhuman or degrading treatment or punishment (which is recognised in article 3 of the ECHR and is given further effect in UK domestic law through the HRA); the HRMF panel on respect for individual and family life (which is recognised in article 8 of the ECHR and incorporated through the HRA) and on the right to the highest attainable standard of physical and mental health (which is recognised in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)). For example, in relation to the right to the highest attainable standard of physical and mental health, the HRMF panel includes a quantitative indicator on treatment within healthcare (Indicator 58). The evidence that we have built up for this Indicator includes statistical evidence on the experiences of lack of nutritional support for older people during hospital stays drawing on the NHS Adult Inpatient Survey. The latter is part of a regular programme of national surveys in England used by the health regulator (the Care Quality Commission) and the Department of Health in order to monitor standards and user experiences in NHS hospitals.

35 Claudia Wells, ONS (Personal communication February 2011), ONS ‘Deaths by Place’ (n 34); Vickers, ‘Hospital Deaths: Daily Mail’ (n 34); Vanessa Fearn, ONS (Personal Communication June 2012).

36 Vickers, ‘Hospital Deaths: Daily Mail’ (n 33); Vickers, ‘Hospital Deaths: Telegraph Website’ (n 33).

Table 4: Deaths involving malnutrition and dehydration by place of death. Number of deaths and age-standardised rate per 1 million population (England and Wales 1997-2010)

		A. Specified condition was the underlying cause of death (1) (2) (3) (4) (5) (6)								B. Cause specified was mentioned on the death certificate (1) (2) (3) (4) (5) (6)							
		Care home				Hospital				Care Home				Hospital			
		Deaths	Rate	LCL	UCL	Deaths	Rate	LCL	UCL	Deaths	Rate	LCL	UCL	Deaths	Rate	LCL	UCL
Dehydration	1997	16	0.17	0.08	0.25	99	1.10	0.89	1.32	63	0.67	0.51	0.84	611	7.15	6.58	7.72
	1998	18	0.18	0.10	0.27	79	0.84	0.66	1.03	72	0.72	0.56	0.89	552	6.41	5.88	6.94
	1999	22	0.22	0.13	0.32	99	1.06	0.85	1.26	57	0.60	0.45	0.76	565	6.47	5.93	7.00
	2000	10	0.10	0.04	0.16	106	1.12	0.91	1.33	53	0.52	0.38	0.66	546	6.10	5.59	6.62
	2001	15	0.15	0.07	0.22	97	1.02	0.81	1.22	65	0.66	0.50	0.82	587	6.47	5.95	7.00
	2002	23	0.22	0.13	0.31	129	1.35	1.12	1.58	98	0.97	0.78	1.17	775	8.50	7.90	9.10
	2003	21	0.22	0.12	0.31	125	1.27	1.05	1.49	94	0.93	0.74	1.12	778	8.52	7.93	9.12
	2004	22	0.21	0.12	0.30	139	1.41	1.17	1.64	89	0.89	0.71	1.08	803	8.56	7.97	9.16
	2005	29	0.28	0.18	0.38	147	1.45	1.22	1.69	105	1.01	0.82	1.20	843	8.81	8.22	9.41
	2006	35	0.35	0.23	0.47	123	1.16	0.96	1.37	141	1.33	1.11	1.55	945	9.62	9.01	10.24
	2007	31	0.28	0.18	0.38	131	1.26	1.05	1.48	128	1.18	0.97	1.38	911	9.04	8.45	9.63
	2008	41	0.35	0.24	0.46	162	1.46	1.24	1.68	137	1.22	1.02	1.42	941	9.11	8.53	9.70
Malnutrition	1997	11	0.12	0.05	0.20	34	0.43	0.29	0.58	30	0.33	0.21	0.45	175	2.40	2.04	2.75
	1998	19	0.20	0.11	0.29	25	0.31	0.19	0.44	32	0.35	0.23	0.47	164	2.27	1.92	2.62
	1999	8	-	-	-	28	0.38	0.24	0.51	26	0.33	0.20	0.45	192	2.58	2.22	2.95
	2000	9	-	-	-	26	0.31	0.19	0.43	33	0.37	0.24	0.50	184	2.56	2.19	2.93
	2001	6	-	-	-	45	0.53	0.38	0.69	28	0.33	0.20	0.45	195	2.48	2.14	2.83
	2002	6	-	-	-	56	0.70	0.51	0.88	21	0.23	0.13	0.32	254	3.33	2.92	3.74
	2003	8	-	-	-	51	0.64	0.46	0.81	23	0.25	0.15	0.35	225	3.11	2.70	3.52
	2004	7	-	-	-	45	0.57	0.41	0.74	25	0.26	0.16	0.36	222	2.91	2.53	3.30
	2005	4	-	-	-	45	0.51	0.36	0.66	23	0.26	0.16	0.37	222	2.81	2.44	3.18
	2006	3	-	-	-	62	0.72	0.54	0.89	24	0.28	0.17	0.39	270	3.47	3.05	3.88
	2007	7	-	-	-	53	0.65	0.48	0.83	28	0.28	0.18	0.39	269	3.48	3.07	3.90
	2008	8	-	-	-	42	0.50	0.35	0.65	36	0.36	0.25	0.48	290	3.84	3.40	4.28
	2009	11	0.11	0.04	0.17	57	0.63	0.47	0.79	38	0.36	0.25	0.48	284	3.70	3.27	4.13
	2010	4	-	-	-	48	0.61	0.43	0.78	34	0.34	0.22	0.45	301	3.81	3.38	4.24

Source: ONS.³⁷ **Notes:** (1) Cause of death was defined using the International Classification of Diseases, Ninth Revision (ICD-9) for the years 1997-2000, and the International Classification of Diseases, Tenth Revision (ICD-10) for 2001 onwards. The ICD codes used are defined in ONS 2012. Deaths were included in Section A where the specified cause was the underlying cause of death. Deaths were included in Section B where the specified cause was mentioned anywhere on the death certificate, either as the underlying cause or as a contributory factor. Where an individual had both dehydration and malnutrition, they will be

37 Claudia Wells, ONS (Personal communication February 2011) ONS, 'Deaths by Place' (n 34) Tables 1 and 2; Fearn (n 35).

included twice in section B. Figures in section A are included in section B, so these figures should not be added together. The introduction of ICD-10 in 2001 means that the numbers of deaths from these causes before 2001 are not completely comparable with later years. (2) 'Care home' includes a variety of NHS, local authority and private nursing/care/residential homes; 'Hospital' includes NHS hospitals (excluding psychiatric hospitals) or multifunction sites, and military and other non-NHS hospitals; 'Other' comprises any other place e.g. other types of communal establishment (such as psychiatric hospitals or hospices), at home (at a private residential address) and elsewhere. (3) Figures for England and Wales include deaths of non-residents. (4) Figures are for deaths registered in each calendar year. (5) Age-standardised mortality rates per 1 million population, standardised to the European Standard Population. Age-standardised rates are used to allow comparison between populations which may contain different proportions of people of different ages, and so also allow comparisons over time. (6) Ninety-five per cent lower and upper confidence limits have been provided. These form a confidence interval, which is a measure of the statistical precision of an estimate and show the range of uncertainty around the estimated figure. Calculations based on small numbers of events are often subject to random fluctuations. As a general rule, if the confidence interval around one figure overlaps with the interval around another, we cannot say with certainty that there is more than a chance difference between the two figures.

*

Table 5 presents quantitative evidence on the percentages of inpatients who did not receive enough help with eating from staff during their hospital stay. The data is disaggregated by age, gender and disability. Respondents who report a longstanding limiting illness or disability *and* are 81 years of age or over are also separately identified. Amongst inpatients who need help with eating, 51.7% of respondents aged 81 or over reported receiving insufficient help from staff, with 26.3% reporting that they only 'sometimes' received enough help, and 25.4% reporting that they 'did not' receive enough help. Of those with a limiting longstanding illness or disability who are also 81 years of age or over, 62% reported receiving insufficient help from staff, with 29.0% who reported only 'sometimes' receiving enough help, and 33% who reported that 'they did' not receive enough help.

The analysis of the inpatient data can be taken forward by identifying statistically significant differences in experiences of lack of help with eating during hospital stays by subgroup. The results in Table 6 test for statistical significance by undertaking a logistic regression test controlling for age, sex and disability. These controls have been introduced in order to improve the robustness of significance testing for subgroup differences because the Adult Inpatient Survey dataset does not provide statistical weights. However, it should be noted that the aim of the analysis here is the (descriptive) identification of subgroup differences and that a full logistic regression research exercise (which would involve identifying a complete set of statistically significant explanatory variables and specifying an underlying model) has not been undertaken.

Table 5: The percentage of inpatients who need help with eating, who do not receive enough help from staff with eating meals (1) (2) (3) (4)

	Always received enough help	Sometimes received enough help	Did not receive enough help
ALL	58.7	21.1	20.2
Age			
16-35	50.5	26.1	23.4
36-50	60.6	19.7	19.8
51-65	64.4	18.7	16.9
66-80	62.5	18.8	18.7
81+	48.2	26.3	25.4
Sex			
Male	63.1	19.5	17.4
Female	54.6	22.6	22.7
Disability (4)			
No limiting longstanding illness or disability	62.9	19.8	17.3
Limiting longstanding illness or disability	51.4	23.4	25.2
Disability (4) and older age			
Limiting longstanding illness or disability, aged 81+	38.0	29.0	33.0

Source: Author's calculations using the Adult Inpatient Survey, 2006, England only.³⁸

Notes: (1) Respondents were asked 'Did you get enough help from staff to eat your meals?' and could choose from the following responses, (1) 'Yes, always'; (2) 'Yes, sometimes'; (3) 'No'; (4) 'I did not need help to eat meals'. (2) The 2006 Adult Inpatient Survey includes 80,694 observations. The minimum weighted base for the three responses reported in this table is more than 3,500 observations. The minimum weighted base refers to the total number of respondents who gave a valid answer to the question. (3) Percentages are based on the subsample of respondents who need help with eating (identified through response (4) to the question on help with eating meals detailed under note (1)). The number of observations of respondents who needed help with eating in the sample was 19,041 (24.1% of the overall sample). (3)

38 National Patient Survey Programme (England) dataset deposited by the Care Quality Commission and made available via the UK Data Archive at Essex University (SN5167 group 33348).

Sampling weights were not available with the dataset. (4) Respondents were asked a two part question. They were first asked: ‘Do you have a long-standing physical or mental health problem or disability?’ They were then asked: ‘Does this problem or disability affect your day-to-day activities?’ To the second part of this two-part question, respondents can answer (a) ‘Yes, definitely’; (b) ‘Yes, to some extent’; (c) ‘No. The response’ (a) ‘Yes definitely’ has been used as an identifier of disability for the purposes of this analysis. (5) Rows may not add to 100% due to rounding.

*

Referring to Table 6, it is notable that, in relation to age, the odds ratio for each subgroup is less than one. The results suggest lower odds of not receiving help for the middle aged and older aged groups (36-50, 51-65, 66-80) compared with the reference group (16-35s). For over 81s compared with the reference group (16-35s), the odds ratio is also very slightly less than one, but this difference is not statistically significant. In contrast, the odds ratio for sex is greater than one, suggesting that women have higher odds of not receiving help than men. Likewise, the odds ratios for disability is also greater than one, suggesting that individuals reporting a longstanding limiting illness or disability have higher odds of not receiving help than their able bodied counterparts. Further research is being undertaken in order to analyse this data in more depth and to address the precise role of older age, gender and disability – as well as different combinations and interactions of these variables – as explanatory factors in pathways to neglect.

Table 6: Individuals who reported not receiving enough help from staff with eating meals by age, gender and disability (significant subgroup differences) (1) (2) (3) (4)

Respondents who did not receive enough help

	Odds ratio	p-value	Standard error
Age			
<i>16-35</i>			
36-50	0.750	0.000**	.0507
51-65	0.599	0.000**	.0394
66-80	0.682	0.000**	.0427
81+	0.968	0.626	.0648
Sex			
<i>Male</i>			
Female	1.373	0.000**	.0525
Disability (5)			
<i>No limiting longstanding illness or disability</i>			
Limiting longstanding illness or disability	1.654	0.000**	.0642

Source: Author's calculations using the Adult Inpatient Survey, 2006, England only.³⁹

Notes: (1) See previous table notes 1. (2) * indicates a statistically significant category at the 95% level ($p < 0.05$) in the odds ratio for the category compared with the reference group, based on logistic regression analysis controlling for age, gender and disability. The reference groups are denoted in italics. An odds ratio of greater than one suggests relatively higher odds for the category relative to the reference group. An odds ratio of less than one suggests relatively lower odds. (4) The unweighted base for the figures reported in this table is 17,892. This figure includes those respondents who indicated that they need help with eating and who gave a valid response to the help with eating, age, sex and longstanding limiting illness or disability questions. (5) See previous table note 4.

V. Child poverty

The third illustration of the application of the HRMF is in the area of child poverty. The issue of child poverty is another concern that has been moving up the human rights agenda in Britain in recent years. As noted above, the ICESCR is

³⁹ Ibid.

not incorporated into British domestic law. However, the Human Rights Act, which is legally enforceable, provides an element of protection in relation to the standard of living. For example, in *R v Secretary of State for Home Department ex parte Limbuela* (2005)⁴⁰ the domestic Courts found that the refusal to give financial support (including the practice of refusing accommodation or food) to asylum seekers may breach article 3 if they would otherwise be destitute. The case established that deprivation in basic needs can in principle fall within the scope of HRA 1998/ECHR article 3. However, the threshold for violations was set at an extremely high level, covering only the most extreme cases of deprivation. Child poverty is also relevant to a number of international human rights treaties that the UK has signed up to, and the HRMF panel on the Right to an Adequate Standard of Living (which is recognised in article 11 of the ICESCR and Article 27 of the CRC) is directly relevant.

The Child Poverty Act 2010

Under the HRMF panel on the right to an adequate standard of living, the evidence base against the “process indicators” includes the Child Poverty Act 2010.⁴¹ This is a new and innovative legal instrument that establishes a legal duty to eradicate child poverty by 2020 (the so-called “Child Poverty Duty”). The legislation specifies time-bound statistical targets for evaluating progress and mechanisms for ensuring both political and legal accountability with a possibility of judicial review. The four key time-bound targets relating to the eradication of child poverty by 2020 are a relative low income target, an absolute low income target, a combined low income and material deprivation target, and a persistent poverty target (relating to poverty that is experienced over a number of years).

All new legislation in Britain is scrutinised by the Joint Committee on Human Rights (JCHR) in order to evaluate its compatibility with the UK Human Rights Act. In its pre-legislative scrutiny of the Child Poverty Act, the JCHR characterised the legislation as a human rights enhancing measure that provides a means of implementing article 27 of the CRC and article 11 of the ICESCR.

By providing an unqualified duty to meet the four income targets ... and establishing a detailed framework both for driving and monitoring progress towards the achievement of those targets, the Bill ... [appears] to provide a

40 *R v Secretary of State for Home Department ex parte Limbuela* (2005) UKHL 66.

41 Child Poverty Act 2010 (UK).

mechanism for the progressive realisation of children's right to an adequate standard of living in Article 27 CRC and Article 11 ICESCR. It goes some way towards implementing the recent recommendation of the UN Committee on the Rights of the Child that the Government adopt legislation aimed at achieving the target of ending child poverty by 2020, including by establishing measurable indicators for its achievement. We therefore welcome the Bill as a human rights enhancing measure.⁴²

The Committee also suggested that the child poverty duty enshrined in the legislation provides an exemplar of the Committee's "mid-way model" for the implementation of economic, social and cultural rights in Britain. This model is intended to preserve the democratic legitimacy of the legislature whilst providing for limited judicial review. The JCHR reasoned that the Child Poverty Bill was compatible with its "mid-way" model for implementing economic and social rights in Britain because it provides an exemplar of a "target-setting legislative" model to bring about the realisation of an important human right. According to the Committee, it would not be constitutionally appropriate for the courts to decide whether a particular standard of living is "adequate". However, under the "target-setting" legislative model, the judiciary has a strictly circumscribed role in the enforcement of economic and social rights that is limited to reviewing the adequacy of the measures taken to reach the target.

[W]e consider that in a parliamentary democracy it is the democratic branches of the state (the Government and Parliament) which should have primary responsibility for economic and social policy, in which the courts lack expertise and have limited institutional competence or authority. In our view the scheme of the Bill ensures that primary responsibility for policy on child poverty remains with the democratic branches, by making detailed provision for the Secretary of State's accountability to Parliament for Government policy on how to meet the targets.⁴³

42 Joint Committee on Human Rights, 'Legislative Scrutiny: Child Poverty Bill' (Twenty-eighth Report Session 2008-09)(26 November 2009) [1.22].

43 Ibid [1.26]. For further details of the Committee's "mid-way" model, also see JCHR, 'A Bill of Rights for the UK?' (Twenty-Ninth Report of Session 2007-2008) (10 August 2008) HL Paper 165-I, HC 150-I.

The JCHR's pre-legislative scrutiny did however raise an important concern regarding monitoring arrangements under the CPA. This related to a possible failure to separately identify and/or the possible exclusion of some the most at risk and disadvantaged children from official data systems for tracking progress against the targets. The JCHR envisaged that the "qualifying households" referred to in the official target descriptions above would be defined in official regulations by the relevant social surveys that the Government uses to monitor low income – namely, the Households Below Average Income (HBAI) series. This is a subset of the annual Family Resources Survey and is the data source for Tables 7 and 8 below. The JCHR reasoned that limiting the coverage of monitoring to "qualifying households" in this way could potentially amount to indirect discrimination under article 14 of the European Convention on Human Rights.

[T]he use of targets which apply only to children in qualifying households is potentially indirectly discriminatory, because it necessarily excludes certain children who may well be living in poverty, including Gypsy, Roma and Traveller children, asylum-seeking children living in asylum centres or Bed and Breakfast accommodation, and looked after children living in children's homes. Such differential treatment of children not living in qualifying households raises the question whether the Bill is compatible with Article 14 ECHR, the right not to be discriminated against in the enjoyment of Convention rights.⁴⁴

Monitoring Implementation and Building up a Quantitative Evidence Base

The HRMF panel on the right to an adequate standard of living includes a specific quantitative indicator that monitors and reports progress against the Child Poverty Act targets and the fulfilment of the Child Poverty Duty (Indicator 77). The discussion here considers the evidence base that has been built up, to date, in relation to two of these targets: the absolute low income target, and the relative low income target.

- The *absolute low income target*, which specifies that less than 5% of children who live in "qualifying households" should live in absolute low income by 2020. Absolute low income threshold for the purposes of the target is 60% of

44 JCHR, 'Legislative Scrutiny' (n 42) [1.44].

median equivalised net household income held constant in real terms. The “base year” for the absolute income target is specified in the Child Poverty Act as 2010/2011.

- The *relative low income target*, which specifies that less than 10% of children who live in “qualifying households” should live in relative low income by 2020, with relative low income defined as income that is less than 60% of contemporary median equivalised net household income.

The data in Table 7 provides information on the historic trends that correspond to these targets (since the targets are essentially forward looking, this data is the most up to date available at the time of writing). The data shows that by 2009/10, 11% of children lived in households with total household equivalised income (before housing costs) that fell below 60% of 1998/99 median income held constant in real terms. Furthermore, 20% of children were living in households with total equivalised income (before housing costs) of less than 60% of the contemporary median income threshold.

The data suggests that despite the progress made over the period spanning 1998/99 to 2009/10, the persistence of both absolute and relative low income by the end of this period means that it will be challenging for both the absolute and low income targets to be met. This finding is supported by a recent microsimulation exercise which provides forecasts for child poverty based on an econometric model. The forecasts confirm that the Government is *not* on track to meet the relevant child poverty targets by 2020.⁴⁵ The need for the Government to set out a clear pathway for meeting the goal of ending child poverty in the UK by 2020 was recently highlighted in recommendations made at the UK’s Universal Periodic Review.⁴⁶

45 M Brewer, J Browne and R Joyce, ‘Child and Working Age Poverty and Inequality in UK: 2010’ (IFS Commentary) (October 2011) <<http://www.ifs.org.uk/publications/5711>> accessed 5 December 2011.

46 United Nations General Assembly, Human Rights Council Working Group on the Universal Periodic Review, ‘Draft report of the Working Group on the Universal Periodic Review. United Kingdom of Great Britain and Northern Ireland’ (2012) UN Doc. A/HRC/WG.6/13/L.7 Conclusions and Recommendation 10.4.1.

Table 7: Number and percentages of children living in households where total income (before housing costs) falls below the low income threshold

Equivalised household income

		Children falling below absolute low income threshold (<60% of 1998/99 median income held constant in real terms)		Children falling below relative low income threshold (<60% of contemporary median income)	
		No. (millions)	%	No. (millions)	%
Family Expenditure Survey (UK)	1979	5.2	38	1.8	13
	1981	5.8	43	2.6	19
	1987	4.2	34	2.8	23
	1992-1993	4.3	33	3.8	29
	1995/96-1996/7	4.0	30	3.8	29
Family Resources Survey (GB)	1997-1998	3.5	28	3.4	27
Family Resources Survey (UK)	1998/99	3.4	26	3.4	26
	1999/00	3.1	23	3.4	26
	2000/01	2.5	19	3.1	23
	2001/02	2.0	15	3.0	23
	2002/03	1.8	14	2.9	23
	2003/04	1.8	14	2.9	22
	2004/05	1.7	13	2.7	21
	2005/06	1.6	13	2.8	22
	2006/07	1.7	13	2.9	22
	2007/08	1.7	13	2.9	23
	2008/09	1.6	12	2.8	22
	2009/10	1.4	11	2.6	20
Change	1998/99-2009/10	-2.0	-15	-0.9	-6
	2008/09-2009/10	-0.2	-2	-0.2	-2

Source: Department for Work and Pensions.⁴⁷ **Notes:** (1) Family Resources Survey figures are for Great Britain up to 1997/98, and for the United Kingdom from 1998/99. Estimates for Northern Ireland are imputed for the years 1998/99 – 2001/02. The reference period for FRS figures is single financial years. (2) Small changes in estimates from year to year, particularly at the bottom of the income distribution, may not be significant in view of data uncertainties.

47 Department for Work and Pensions, 'Households Below Average Income (HBAI) 1994/95-2009/10, Tables 4.1tr-4.5tr (Trends)' (Excel Sheet) (2011), Tables 4.1tr-4.4tr <<http://research.dwp.gov.uk/asd/hbai/hbai2010/index.php?page=chapters>> accessed 6 June 2012.

(3) Due to rounding, the estimates of change in percentages of children below low-income thresholds may not equal the difference between the total percentage of children below thresholds for any pair of years shown. (4) Family Expenditure Survey figures are for the United Kingdom. These are single calendar years for 1979, 1981, and 1987; two combined calendar years for the 1992-1993 figure and two financial years combined for 1995/6-1996/7. (5) The data in this table are based on a social survey and are subject to random error. (6) Ninety-five percent confidence intervals for numbers and proportions of children below the relative and absolute low income thresholds for the United Kingdom are provided in DWP (2011: Appendix 2). (7) Details of the levels of change needed between two years for a significant movement based on 60 percent of contemporary median household income are also provided in DWP (2011: Appendix 2). Significant change can be inferred from difference of around 1.5 percentage points or 180-200,000 children.

*

In building-up the evidence base under HRMF Indicator 77, we have attempted to address the possible gaps in the official monitoring systems highlighted in the pre-legislative scrutiny of the Joint Committee on Human Rights (discussed above). For example, as well as providing a quantitative evidence base against the official child poverty targets, we have systematically reviewed administrative and social survey sources in order to identify supplementary evidence on the low income characteristics of specific groups of at risk/vulnerable children. Whilst the targets set out in the Child Poverty Act are specified in terms of population averages, the official data HBAI published in annual reports supports the evaluation of the risks of absolute and relative low income for children in different population subgroups. The data highlights the relatively high risks of relative low income for children living in families which include a disabled adult, and where the head of household is from the Pakistani or the Bangladeshi ethnic groups, or is a lone parent (see Table 8).

Table 8: Percentage of children living in households where household income falls below the relative low income threshold by disability, ethnicity and lone parent status, United Kingdom, 2009/10

Equivalised household income

	Percentage of children living in households where household income is below 60% of contemporary median income	
	Before housing costs	After housing costs
Disability and receipt of disability benefits (1)		
Those living in families where no-one is disabled	18	27
Those living in families where someone is disabled	25	35
No disabled adult, 1 or more disabled child	15	22
1 or more disabled adult, no disabled child	30	41
1 or more disabled adult, 1 or more disabled child	28	39
Ethnic group of head (2)		
White	19	27
Mixed	28	42
Asian or Asian British	42	52
Indian	27	35
Pakistani and Bangladeshi	54	63
Black or Black British	32	48
Black Caribbean	24	39
Black Non-Caribbean	36	54
Chinese or other ethnic group	33	48
Lone parent families	28	46
ALL CHILDREN (3)	20	29

Source: Department for Work and Pensions.⁴⁸ **Notes:** (1) Disability benefits are Disability Living Allowance; Armed Forces Compensation Scheme; Attendance Allowance (for those

⁴⁸ Department for Work and Pensions, 'Households Below Average Income (HBAI) 1994/95-2009/10, Tables 4.5db-4.6db (Risk)' (Excel Sheet) (2011), Table 4.5db <<http://research.dwp.gov.uk/asd/hbai/hbai2010/index.php?page=chapters>> accessed 6 June 2012.

over 65 years old); Industrial Injuries Disablement Benefit. Disability benefits may be received by or on behalf of the eligible person in the household. (2) Figures for ethnicity are calculated as a three-year moving average and cover the years 2007/8, 2008/9 and 2009/10. (3) The totals for all children are shown for the United Kingdom for the latest year and are not three-year averages.

*

The quantitative evidence base here could be potentially extended through further analysis of the Family Resources survey (for example, by identifying the absolute and low income risks of children who are carers). In addition, supplementary data sources on the low income characteristics of specific groups of at risk/vulnerable children have been identified through the review process and are included in the HRMF evidence base. For example, administrative data identifying “children in need” and “looked after children” by their primary need category at their initial assessment is a potentially important new source of evidence in this area. The primary need categories that are coded for this exercise include low income. The data suggests that 2,500 children officially recognised as “children in need” and 170 children who are “looked after” by the state were assessed as having low income as their primary need in England in 2010.⁴⁹

VI. Conclusion

Landman notes that ‘good human rights scholarship and good human rights arguments need strong methodological foundations that specify the ways in which human rights problems will be addressed, how human rights evidence will be collected and analysed, and how human rights conclusions will be drawn’.⁵⁰ This article hopefully has some of the elements of such an approach.

The discussion in Section 2 highlighted how the HRMF contributes to the broader search for an expanded and enriched information base for human rights

49 Department for Education, ‘Statistical Release: Preventable Child Deaths in England: Year Ending 31 March 2010’ (2010) Table 6 <<http://www.education.gov.uk/rsgateway/DB/STR/d000943/osr17-2010v6.pdf>> accessed 17 February 2011; Department for Education, ‘Statistical Release: Children in Need in England, including their Characteristics and Further Information on Children who were the Subject of a Child Protection Plan’ (Children in Need Census – Final Year Ending 31 March 2010, OSR28/2010, 30 November 2010) (2010) Table A1, <<http://www.education.gov.uk/rsgateway/DB/STR/d000970/index.shtml>> accessed 27 February 2011.

50 T Landman, *Studying Human Rights* (Routledge 2006) 77.

evaluation. The Framework has “value added” in providing a comprehensive information base that systematically combines case law analysis and broader qualitative evidence with quantitative indicators and methods. I argued that the HRMF is innovative in at least four key ways.

First, the HRMF demonstrates how the distinction between structural, process and outcome indicators can be successfully applied as a basis for national human rights monitoring and reporting. Adopting this approach results in a comprehensive information base for human rights evaluation, incorporating outcome-orientated statistical information about the position of individuals and groups in practice as well as information about formal legal entitlements (and their breach). Second, the Framework provides a systematic methodology for addressing the traditional divide between qualitative and quantitative approaches to human rights evaluation. Third, in terms of the application of quantitative indicators and methods, the HRMF moves forward by emphasising the principle of systematic disaggregation and by building up a robust statistical evidence base on inequalities in the position of different population subgroups. Fourth, the HRMF is innovative in identifying and recording evidence from a very wide range of diverse and often fragmented sources, and bringing these together to form a single comprehensive information base for human rights evaluation.

The application of the HRMF has been illustrated drawing on three areas of established and emerging human rights concern in Britain. The illustrations demonstrated how the HRMF methodology results in a comprehensive evidence base for human rights evaluation that systematically identifies and records legal, qualitative and quantitative evidence drawing on a wide range of diverse and often fragmented sources. The discussion showed how quantitative indicators and methods can play a variety of useful roles in human rights evaluation. Disaggregated statistical analysis was shown to be particularly useful in going beyond case-based analysis and pinpointing the risks and vulnerabilities of different population subgroups, indicating possible gaps in protection and highlighting the need for a more effective public policy response. These applications were illustrated in section 3 in relation to under-1 homicide and the risks of disabled people in the context of domestic abuse and sexual assault. The article has also drawn attention to some of the complexities of the approach to human rights evaluation being proposed, including the importance of acknowledging data limitations and of careful interpretation of quantitative evidence in the light of advice from data providers and statistical theory. The ONS data on deaths by place discussed in section 4 provides a useful example.

Finally, I have examined some of the implications of adopting an expanded and enriched information base for human rights evaluation for the types of inferential conclusions that can be drawn about human rights violations. Landman pinpoints this issue when he notes that ‘methods matter’ and that the methods adopted for evaluating human rights affects the type of inferences that can be drawn and the types of claims that can be safely advanced.⁵¹ I have argued here that administrative data and social survey/administrative data often provides information about socio-economic outcomes and has “value added” for human rights evaluation by providing critical information about trends, vulnerabilities and risks. However, outcome-orientated quantitative data of this type does not necessarily provide a sufficient evidence base for direct inferences to be drawn about whether the state has violated the duties that flow from human rights. As the discussion in section 5 suggested, even where statistical targets on child poverty are embedded into primary legislation, any future judicial review of the implementation of the child poverty duty is likely to entail an evaluation of the conduct of the state (by applying criteria such as the “reasonableness” of the steps taken) in the light of the results achieved. It is therefore critical not to “over-interpret” statistical information and to recognise that quantitative evidence often provides a partial rather than a complete information base for evaluating the compliance of duty-holders with the obligations that flow from human rights.

It is worth noting that the move towards quantification is not itself the key driver of these complexities. For example, incorporating a count of the number of violations of article 2 of the European Convention of Human Rights established in UK laws through the judicial process is unproblematic. The complexities are raised by the outcome-orientated nature of quantitative data, for example, the prevalence of domestic violence. Prevalence statistics of this type are directly relevant to the characterisation of results (or outcomes) on the ground and the evaluation of the “reasonableness” of state action (which often requires the evaluation of state conduct in the light of the results achieved). At the same time, outcome-orientated statistical information of this type only provides a partial information basis for human rights analysis. The types of inferential conclusions that can be drawn regarding the violation of a human right in a particular case – and the extent to which the state has discharged its negative and positive duties to protect human rights in any particular case – are limited.

51 Ibid 76.

Sceptics suggest that too much emphasis on outcome-orientated quantitative information can shift attention away from the evaluation of state conduct and compliance with legal (negative and positive) duties in an unhelpful way – resulting in a lack of focus on violations and a dilution of accountability. Readers will, I hope, be persuaded of the merits of a truly multidisciplinary approach and an expanded and enriched information base for human rights evaluation that incorporates quantitative indicators and methods with a view to supplementing and informing (rather than superseding or displacing) legal reasoning.

From Human Rights Agreements to National Change

Illustrating a More Transparent Approach to Accountability

Jody Heymann, Magda Barrera, Nicolas de Guzman Chorny,
Amy Raub and Ilona Vincent

Jody Heymann, McGill Institute for Health and Social Policy, email: jody.heyman@mcgill.ca

Magda Barrera, McGill Institute for Health and Social Policy, email: Magdalena.barrera@mcgill.ca

Nicolas de Guzman Chorny, McGill Institute for Health and Social Policy,
email: Nicolas.deguzmanchorny@mcgill.ca

Amy Raub, McGill Institute for Health and Social Policy, email: Amy.raub@mcgill.ca

Ilona Vincent, McGill Institute for Health and Social Policy, email: Ilona.vincent@mcgill.ca

Abstract: Over the past 60 years, the global community has developed an increasingly comprehensive framework of international agreements to protect human rights around the world. Every UN member state is a signatory to at least one of the major human rights treaties,¹ and has therefore agreed to report on their compliance with the obligations the treaty contains. However, much remains to be done when it comes to ensuring national compliance and accountability with international human rights instruments. If the first decades after the Universal Declaration of Human Rights (UDHR) were characterised by an emphasis on constructing a legal and normative framework for human rights, more recently the focus has shifted to implementation of this framework and the question of how to ensure government compliance with ratified human rights conventions.²

Keywords: Human Rights; Accountability; International Agreements; Human Rights Monitoring; Global Data; Economic and Social Rights; Civil and Political Rights; Transparency; Quantitative Indicators.

1 AF Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Report) (Transnational publishers 2001).

2 P Alston, 'Towards a Human Rights Accountability Index' (2000) 1 *Journal of Human Development* 249.

I. Human Rights Accountability Mechanisms: Progress and Limitations

The international human rights framework includes a structured and complex system of treaty bodies and committees tasked with monitoring countries' compliance with their treaty obligations. The UN's human rights monitoring system includes UN Charter-based bodies such as the Human Rights Council,³ as well as treaty bodies made up of committees of experts, set up to monitor compliance with each of the core human rights conventions, such as the Committee on Economic, Social and Cultural Rights.⁴ Other international monitoring bodies include the International Labour Organization's (ILO's) Committee of Experts on the Application of Conventions and Recommendations, as well as regional bodies such as the European Committee of Social Rights.

Through these bodies, states are expected to report on their compliance with treaty obligations and detail the measures taken to implement these commitments. State parties to each convention must periodically submit a report to the relevant committee detailing their progress in implementing the Convention's requirements. Non-governmental organisations (NGOs) and civil society organisations are invited to contribute reports to treaty bodies, during their review of countries' human rights compliance. The purpose of these reports is to provide additional information about, and different perspectives on, the human rights record of each country, thus compensating for the potential inaccuracies or deficiencies of national reports. Input from NGOs is incorporated into discussions of

3 The Human Rights Council, which works with the support of the Office of the High Commissioner for Human Rights, was created in 2006 to replace the UN Commission on Human Rights, which had drawn strong criticism when states with poor human rights records were elected for seats, and its review procedures and recommendations lost credibility as a result. The human rights records of all 193 UN Member states are reviewed once every four years in a process called the Universal Periodic Review (UPR). The reviews are undertaken by the UPR working group, which consists of the 47 members of the Human Rights Council. Each review is assisted by a group of three states who act as rapporteurs and the review occurs through an interactive discussion between the states under review and other member States.

4 For example, the Committee on Economic, Social and Cultural Rights (CESCR) monitors the International Covenant on Economic, Social and Cultural Rights (ICESCR). Composed of eighteen independent experts in relevant fields, the Committee was established by the Economic and Social Council (ECOSOC) in 1985, nine years after the Covenant entered into force. States must submit a report to the committee within two years of accepting the covenant and every five years subsequently. These reports must detail what actions they have taken to fulfil their human rights obligations according to the convention.

national reports and the oral questioning that takes place during the review process. Unfortunately, the heterogeneity of procedural requirements across numerous committees has presented practical difficulties for civil society groups operating at the national level; as a result, their contributions to these bodies are often quite limited.⁵

As valuable as this monitoring system and the extensive information it produces are, scholars and human rights advocates have pointed out that the current system has important limitations. A major source of these limitations is the system's focus on country self-reports, which may be biased and which do not lend themselves well to cross-country comparisons of action and outcomes. The reporting procedure has been criticised as being characterised by limited compliance, which reduces the effectiveness of reporting as an accountability mechanism;⁶ according to reports from the human rights committees, between 2004 and 2005 only 39 % of reports submitted were in compliance with reporting guidelines.⁷ Moreover, late submission of reports to the monitoring bodies, and in some cases outright failure to submit them, has been a persistent problem.⁸ Since states must submit reports to each treaty body, there may well be "reporting fatigue" in national administrations. Technical and human resource limitations, as well as political factors, may contribute to the failure of states to comply with their reporting obligations. Additionally, the information contained in country self-reports is not easily comparable and does not facilitate the analysis of possible relationships between policies and outcomes across countries.

Following the submission of national reports, treaty bodies analyse them and issue concluding observations, which are meant to provide states with specific recommendations to improve their human rights records. Although there have clearly been cases where focused concluding observations have made valuable contributions, the difficulty of synthesising a large quantity of information and the wide variety of individual perspectives of treaty body members has meant that

5 AR Chapman, "A Violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 Human Rights Quarterly 23; M O'Flaherty and C O'Brien 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7 Human Rights Law Review 141.

6 WM Cole, 'Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999' (2005) 70 American Sociological Review 472.

7 United Nations Secretariat, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty*. Fifth Inter-Committee Meeting of the human rights bodies. UN Doc. HRI/MC/2006/2. 22 March 2006.

8 Bayefsky (n 1).

concluding observations have often been found to lack ‘clarity, degree of detail, level of accuracy and specificity’.⁹ Moreover, concluding observations do not always reflect the exchanges between treaty bodies and individual states, often failing to reference observations adopted following the previous consideration of a report. This lack of continuity leads to inconsistencies that, along with their non-binding nature, limit the impact of the concluding observations.¹⁰ Furthermore, even when concluding observations produce valuable information and recommendations, they are seldom widely disseminated nationally or internationally, and the committees and their reports regarding human rights compliance are largely unknown in many areas of the world.¹¹

A more straightforward and readily accessible source of information on countries’ human rights performance could therefore prove a valuable complement to the existing reporting mechanisms. This article will suggest an approach to human rights monitoring that would increase accountability and transparency by making comparable data on national compliance with human rights conventions readily available. This system would complement and strengthen the current monitoring system by providing easily accessible and analysable data to policy-makers, civil society organisations and citizens, on the performance of their own and other countries.

II. The Power of Information in the Hands of Society

A question often posed when it comes to human rights instruments is whether treaty ratification and legal commitments to uphold rights lead to implementation in practice. The findings of some studies have raised important concerns. A study analysing the relationship between ratification of the International Covenant on Civil and Political Rights (ICCPR) and human rights practices as measured by Freedom House found no significant effect.¹² Another study focused on a

9 Commission of Human Rights, ‘Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the long-Term Effectiveness of the United Nations Human Rights Treaty System’, Report of the Secretary General Phillip Alston (Fifty third session) UN Doc. E/CN. 4/1997/74 (1997) [109].

10 M O’Flaherty, ‘The Concluding Observations of United Nations Human Rights Treaty Bodies’ (2006) 6 Human Rights Law Review 27.

11 O’Flaherty, ‘Reform of the UN Treaty Monitoring Bodies’ (n 5).

12 LC Keith, ‘The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?’ (1999) 36 Journal of Peace Research 95.

wider range of human rights treaties and outcomes in areas such as torture, fair trials, civil liberties and women's political equality, and also found no relationship.¹³

However, civil society and accessibility and transparency of information may be important pieces in the puzzle of whether ratification translates into effective implementation of rights. There is evidence that treaty ratification can make a difference in countries with a strong civil society. Hafner-Burton and Tsutsui find that ratification does lead to better outcomes in countries whose citizens have strong linkages with international civil society. They posit that this may be the case because ratification of human rights treaties provides greater leverage for civil society to pressure governments toward compliance.¹⁴ Similarly, Neumayer examines the relationship between ratification of international and regional treaties and civil and personal integrity rights. He finds that, while ratification does not necessarily improve human rights performance, the stronger a country's civil society (as measured by the number of international NGOs with domestic participation) and the more democratic its political system, the greater the effects of treaty ratification on the improvement of human rights performance.¹⁵

These findings are consistent with other studies on the effectiveness of public information regarding human rights practices in the hands of civil society. Murdie and Davis analyse data on the "naming and shaming" activities conducted by international NGOs working on human rights issues in 130 countries. They find that targeted states do improve their human rights practices, in terms of guaranteeing physical integrity rights, and that these improvements are more significant in settings where international human rights NGOs, intergovernmental organisations, and third-party states or individuals have a strong domestic presence and exert pressure on the regime.¹⁶ At the same time, there are limitations to "naming and shaming" strategies, which highlight a small number of violations while failing to report on other human rights areas. In a global longitudinal analysis of the relationship between these strategies and human rights practices, Hafner-Burton finds that while countries may improve their performance

13 OA Hathaway, 'Do Human Rights Treaties Make a Difference' (2001) 111 *Yale Law Journal* 1935.

14 EM Hafner-Burton and K Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 *American Journal of Sociology* 1373.

15 E Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 *Journal of Conflict Resolution* 925.

16 AM Murdie and DR Davies, 'Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs' (2012) 56 *International Studies Quarterly* 1.

in some areas, these improvements are often offset by worse violations of other rights, which may be the product of governments' strategic calculations to relieve international pressure on areas of attention, at the same time as increasing violations in areas that are not subject to public scrutiny.¹⁷ While various techniques with different advantages and limitations can be used by civil society to increase the likelihood that governments respect rights, comprehensive and comparative information about the status of basic rights domestically and internationally can clearly be a powerful tool.

Getting critical information about human rights compliance and violations into the hands of civil society is central to the effectiveness of their actions. Public dissemination of information on human rights would be greatly facilitated by a system that could provide information that is straightforward and easily accessible, and contains information on various rights simultaneously so as to give a comprehensive picture of compliance. Increased transparency and availability of comprehensive information would facilitate the activities of civil society organisations and, at the same time, make government attempts to placate international and domestic pressure by improving some rights at the expense of others more difficult — since such an attempt would be immediately evident to observers.

III. Strengthening Conventions and Improving Impact

The current lengthy national reports — divided over many conventions and based largely on government self-reports — exist in a form that is not readily actionable. Moreover, the information is not in a format that can be readily transmitted to a large audience. While making findings on national human rights compliance widely available was difficult when many of the current monitoring methods were developed, huge advances in telecommunications technology have transformed our ability to engage citizens when it comes to holding countries accountable for their commitments.

The extent to which citizens in all countries around the world have access to information via mobile devices and the internet has dramatically changed the ability of the international community to provide information on country performance, the capacity of civil society groups to organise and act within and

17 EM Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62 *International Organization* 689.

across countries, and the feasibility of making information readily comprehensible and accessible. Maps and short texts could provide clear, concise information on whether countries have passed laws to guarantee their citizens the human rights that they have been promised in international agreements. Likewise, maps, numbers, and short texts could rapidly convey whether these laws are being effectively implemented, and what their outcomes are.

Far more people than ever before will be able to access this information online. The number of internet users worldwide has doubled from 2005 to 2010, and has reached two billion. According to the International Telecommunications Union, the UN's specialised agency for information and telecommunications technology, 30 % of the world's population was online by the end of 2010, compared to 12 % in 2003 and 6 % in 2000.¹⁸ These figures are even higher in high-income countries.¹⁹ Middle-income countries, in particular, have experienced rapid increases in internet usage rates. In Colombia, the percentage of people using the internet increased from 2.2 % in 2000 to 36.5 % in 2010; in Egypt, it increased from 0.64 % in 2000 to 26.7 % in 2010.²⁰ In other middle-income countries such as Morocco, Serbia, and Uruguay, over 40 % of the population had been online over the previous 12 months in 2009.²¹ Internet use is generally higher among younger people, particularly students. In Brazil, around 90 % of students in tertiary and post-secondary programs were online in 2008, compared to an overall internet use rate of 35 %.²² While numbers remain significantly lower in low-income countries, they have been growing steadily. In Bangladesh, the percentage of people using the internet increased from 0.7 % in 2000 to 3.7 % in 2010; in Eritrea, it increased from 0.14 % in 2000 to 5 % in 2010.²³

While the UN cannot change the requirements of treaties that have already been signed without the consent of the signatory states, the power of each treaty could nevertheless be markedly enhanced by taking a step that is well within its current authority: producing a publicly available and easily comprehensible score

18 Figures from *Measuring the Information Society 2011*. International Telecommunications Union.

19 International Telecommunications Union. ICT Data and Statistics. Core indicators on access to and use of ICTs by households and individuals, latest available data. December 2011.

20 Figures from *Measuring the Information Society 2011*. International Telecommunications Union.

21 International Telecommunications Union. ICT Data and Statistics. Percentage of individuals using the Internet. 2011.

22 Numbers from *Measuring the Information Society 2011*. International Telecommunication Union.

23 Ibid.

card of how countries are doing with respect to their obligations. This would make it easier for citizens to hold their own countries accountable for commitments made under international agreements. We have already seen the dramatic changes in the ability of citizen groups to organise collectively and demand government accountability that have resulted from greater availability and use of mobile communications and the web.

IV. A Proposal: Transforming Transparency and Access to Information

In order to provide the kind of information that could effectively inform citizens' and policymakers' actions, the UN or a separate body with recognised impartiality would need to put in place a system to generate clear, comparable, and easily accessible information on countries' human rights performance through maps, score cards, or other means.

Ideally, information would be provided on three levels:

1. Whether governments have passed the laws and enacted the policies necessary for their citizens to enjoy the civil, political, social and economic rights that their governments agreed to in principle in international conventions. For example, is the right to education guaranteed in international conventions translated into laws and policies guaranteeing tuition-free and fee-free access to schools?
2. Whether countries are effectively implementing these laws and policies. For example, are children, in practice, able to attend schools without paying, or do some schools informally violate free education policies?
3. What outcomes characterise the lives of men and women in a given country, and how do these outcomes relate to the laws, policies and their implementation? For example, does the country have educational disparities based on gender or income level?

It will be important to measure and provide information on countries' experiences at each of these levels. Government leaders can be held directly accountable for passing the laws and enacting the policies needed to comply with international agreements, and for implementing these national laws and policies. In addition, given the wide range of policies and laws that might support human

rights goals, tracking outcomes is essential in order to analyse and determine the relative effectiveness of different approaches across countries.

When designing this new system, the use of objective benchmarks to analyse laws, policies and implementation and outcome indicators is essential. Data sources must be reliable and unbiased, to ensure objectivity and consistency of data across different countries and topics. The data will need to be regularly updated to reflect changes in policies and legislation.

Treaty body reform discussions between UN bodies, member states, and civil society have already resulted in a number of recommendations to make the current human rights monitoring system more effective.²⁴ This article's proposed new system could make a significant contribution to the reforms already under discussion by providing a number of benefits such as reducing the reporting burden on member states and streamlining an approach across treaty bodies. Far from requiring countries to produce lengthy descriptive reports, countries could be asked to answer a series of straightforward questions regarding the laws and policies they have in place that address particular areas of human rights; these could be verified if countries are asked to submit copies of the relevant legislation and policies. Implementation and outcomes could then be measured through existing national and global surveys; relevant questions could be added to the national and international surveys that are already conducted on a regular basis. Surveying those living in each country would allow us to gain a different, and deeper, understanding of the extent to which laws and policies are being implemented than is currently possible through national reports (in which countries are asked to assess themselves) and NGOs comments (for which participation is highly variable). Many UN agencies already gather data on relevant outcomes, and integrating their work into the human rights monitoring system would provide valuable additional information without significantly increasing monitoring-related funding requirements. Over time, this system would create a historical record of change that would allow countries to be monitored for the extent of

24 In 2009, the OHCHR launched consultations with academics, treaty body members, NGOs and national human rights institutions to gather recommendations for reform. Recommendations have included: aligning the reporting process and communication procedures among treaty bodies; introducing page limits to state reports; ensuring that the preparation of reports included consultations with relevant stakeholders including civil society; webcasting public meetings of treaty bodies; having shorter and more focused concluding observations; and prioritising the follow-up of concluding observations. Office of the UN High Commissioner for Human Rights (OHCHR), <<http://www2.ohchr.org/english/bodies/HRTD/docs/ProposalsTBStrengtheningProcess.doc>>, accessed on May 24, 2012.

improvements, as well as degree of compliance. These quantitative data would also make longitudinal analyses of impact possible. Setting in place this new system is clearly within the authority of the UN bodies that follow up on international conventions and agreements and would help fulfil their mandate to monitor compliance with international commitments. We understand that it would require political will at the UN to make this proposal a reality. While countries that value more effective measurements of compliance would appreciate the proposed system's contribution of objective, comparable data, nations who worry about their performance may not prove so receptive. However, in the long run, such a system would increase support for the UN from the general public, who want to see clearer accountability for international agreements and measurable improvements in their lives as a result.

V. Demonstrating Feasibility: The Proposal in Action

In the rest of this article we begin to demonstrate the feasibility of this new approach. In particular, we will attempt to show that it is possible to:

1. Concisely convey information on progress and gaps in the passage of legislation relevant to sample human rights commitments in countries around the world; and
2. Provide systematic information on policy approaches taken, and use this type of data to examine the impact of specific policy choices.

We build on a multi-year effort to develop a World Policy Analysis Centre. The World Policy Analysis Centre was created to provide readily-accessible comparative data on hundreds of laws and policies. This database was developed by a team of multilingual researchers, fluent in the official UN languages and several additional ones, who reviewed legislation and other source materials, either in the original language or a translation into an official UN language. The database is based on the analysis of a variety of sources, including labour codes, social security legislation, national constitutions and country reports to UN bodies; while the World Policy Analysis Centre uses a variety of sources to verify the accuracy of data, the primary source of information has been country legislation, and policy data and detailed information of social security systems. Legislation and policy details tend to be lengthy and qualitative in nature; these were systematically ana-

lysed to convert them into a format that permits rapid comparisons with human rights commitments for each nation, as well as comparisons of action across countries and evaluation of impact. To ensure accuracy, data for each country were coded independently by two researchers, and their results compared. Once the coding process was complete, the team ran data quality checks.

The World Policy Analysis Centre brings together data relevant to many UN conventions and agreements. A few examples follow. Major conventions such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the UDHR specify the right to social security and an adequate standard of living. The World Policy Analysis Centre examines countries' performance on these rights by gathering data on minimum wages, unemployment policies, and income support policies targeting families, the elderly and persons with disabilities. In order to examine compliance with rights guaranteed in key labour conventions such as the ILO's C183 on Maternity Protection, Convention 14 and 106 on Weekly Rest, Convention 132 on Holidays with Pay and Convention 138 on Minimum Age for Admission to Employment and Work, the World Policy Analysis Centre includes policies such as the provision of maternal leave, breast-feeding breaks, annual leave, and the minimum age to work. The UDHR and the ICCPR contain numerous provisions to guarantee equal rights and freedom from discrimination for different populations. The World Policy Analysis Centre accordingly examines legal instruments such as national constitutions to analyse the existence and nature of anti-discrimination provisions in education, work, political participation and other areas of life.

The completed World Policy Analysis Centre databases allow researchers to easily see where countries stand in terms of specific laws and policies, and compare them with other countries in the same region, with similar GDP, comparable population structure, and other analogous features. Being able to conduct these comparisons can open the door to the possibility of learning from the policies of countries that are similar in many respects yet are performing better on a specific issue. An important current limitation is that World Policy Analysis Centre databases do not yet measure implementation and enforcement because systematic global data are not available on these.

VI. Sample Findings

This section will undertake a proof of concept by presenting sample findings from our World Policy Analysis Centre project, to examine the extent to which we can begin to increase transparency on:

1. whether countries' laws are consistent with specific rights that they have committed to guarantee; and
2. how countries' decisions about the approach they take affect the impact.

These findings are a sample of the type of measures that can be coded and analysed using the World Policy Analysis Centre databases, and constitute only a first step in constructing a comprehensive picture of countries' compliance with their human rights commitments.

Are countries complying with their commitments to social and economic rights?

The right to social security is enshrined in the UDHR, article 25,²⁵ as well as in the ICESCR, article 9.²⁶ According to the Committee on Economic, Social and Cultural Rights, 'the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member ...'.²⁷ The vast majority of countries around the world (160 in total) have ratified the ICESCR. Our data allow us to begin to identify whether the countries that have ratified the convention have set legislation or policies in place to guarantee the protections covered by the ICESCR.

25 art 25. (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

26 art 9. The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.

27 Committee on Economic, Social and Cultural Rights, 'General Comment No. 19, The Right to Social Security' (2007) UN Doc E/C.12/GC/19 [2].

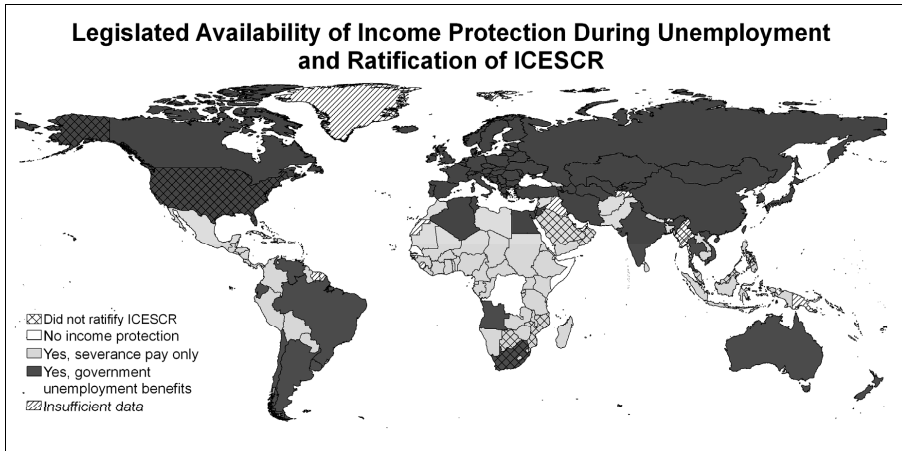


Figure 1: Income protection during unemployment

The right to social security enshrined in the ICESCR requires governments to set up systems to protect all people against the income losses associated with unemployment. Figure 1 shows how countries fare when it comes to providing income protection during unemployment. Of the 160 countries that have ratified the ICESCR, 8 fail to provide any income protection during unemployment. Moreover, 68 of the countries offering some form of unemployment coverage only offer employer-sponsored severance pay. Severance pay programs are less protective than unemployment insurance systems since they do not commonly cover as many reasons for job loss in the formal economy as are covered by unemployment insurance and do not cover the informal economy at all.

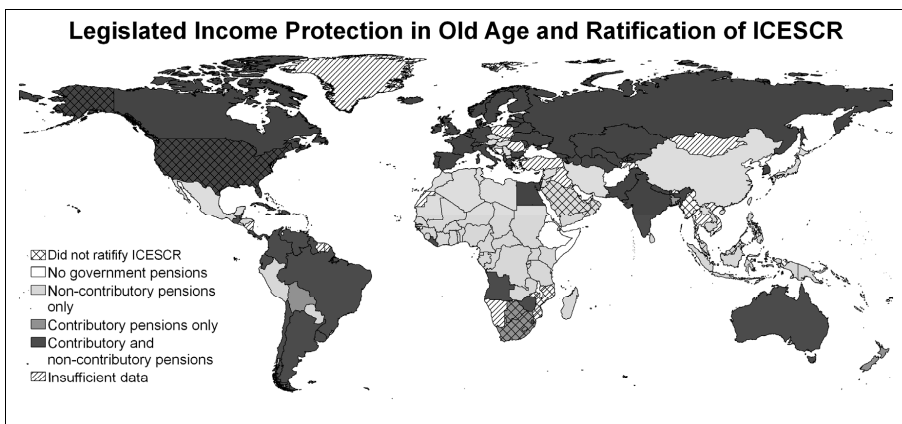


Figure 2: Income protection in old age

States that have ratified the ICESCR have an obligation to provide the elderly with social security, including some form of income protection. Yet, as Figure 2 illustrates, 7 countries that have ratified the ICESCR do not legislate any form of income protection in old age; 66 countries have only contributory pensions where the employee pays into his/her pension plan; and 66 countries have a mix of contributory and non-contributory pensions, where the government provides a retirement pension in addition to, or in the absence of contributory pensions.



Figure 3: Paid sick leave

Guaranteed under social security in the ICESCR, paid sick leave has important implications for the ability to lead a healthy life.

Not all of the nations that have ratified the ICESCR provide coverage for the sick. As shown in Figure 3, the majority of these countries (139) provide some form of paid sick leave to employees. Nonetheless, 15 countries that have ratified the ICESCR, as well as an additional 6 countries, do not offer any paid sick leave at all.

What approaches do countries take to meet their commitments?

Most articles in conventions provide a fair amount of latitude with respect to how they are implemented. A convention may specify a person's right to health care but not how it should be provided. An international agreement could call for a minimum length of paid leave but not specify the ideal length or whether it should be paid by employers or funded through social insurance. In addition to being able to measure whether policies are being enacted in accordance with international commitments, it is important to be able to compare the mecha-

nisms that countries choose for policy implementation. Having data available in comparative format on all countries makes it possible to examine the implications of choices countries make in how to implement human rights obligations. This data would also facilitate providing nations who seek to enact new policies with guidance on options and their implications.

Social security for the sick provides a good example. We found that countries selected different approaches, which had implications for the generosity of support. The majority of countries have set in place social insurance systems: 96 of the 154 countries that provide paid sick leave do so through a social insurance system. Social insurance is most commonly funded through a tripartite mechanism, with contributions from the employee, the employer and the government. 29 countries, mostly in Europe (55 %) have a two-stage model of employer coverage and social insurance for providing sick leave payments. 27 countries, mostly in Africa (63 %) and Asia (26 %) finance sick leave entirely through employer contributions.

When it comes to the duration of paid sick leave, two-stage models have slightly higher duration than social insurance systems and employer liability systems have the shortest duration. In 92 % of the countries with a social insurance system, paid sick leave benefits last 31 days or more, and in 78 % they last at least 26 weeks. Only 7 % of these countries offer benefits for 30 days or less.

While employer liability systems provide the shortest duration of benefits, they tend to have the highest wage replacement rates. 74 % of countries with this system offer the maximum wage replacement rate of 100 %, compared to only 40 % of countries with a social insurance system. Employer liability systems have a 9 % higher wage replacement rate than social insurance systems.

Looking at generosity of leave (combining the duration of benefits and the wage replacement rate to calculate the full time equivalent weeks of paid leave), we can see that employer liability systems tend to have the least generous benefits, offering an average of 18 full-time equivalent weeks. Social insurance systems are more generous, providing benefits for an average of 33 full-time equivalent weeks. The two-stage model, combining employer liability and social insurance, provides an even greater length of paid leave, with 44 full-time equivalent weeks.

This approach to quantifying compliance also facilitates examining the impact of choices countries make on population outcomes. Maternity leave provides an illustration. 64 countries have ratified at least one of the ILO Maternity Protection conventions, and 186 countries have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) with 2 additional countries signing it but not ratifying (the United States and Palau). CEDAW requires signatory states to guarantee job protection and paid maternity leave. Under article

11 part 2, states that have ratified CEDAW commit to ‘introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances’.²⁸ Yet, six countries that have ratified CEDAW fail to provide any paid maternity leave. The ILO adopted Maternity Protection Convention No.3 in 1919. The labour standards on maternity protection have been updated with conventions No. 103 and 183 in 1953 and 2000 respectively. The ILO’s Convention 183 requires that countries guarantee at least 14 weeks of paid maternal leave, but does not specify an ideal length of leave.²⁹ A reasonable question is whether longer leaves make a difference. Out of the countries that have ratified CEDAW, 150 countries offer 12 weeks or more of paid leave, the original duration targeted by the ILO; 96 countries offer 14 weeks or more of paid maternal leave, the current length in ILO agreements; 44 countries offer 26 weeks or more, enough to allow exclusive breastfeeding for the WHO-recommended 6 months.

There is reason to suspect lengthier leaves might be helpful. The majority of deaths of children younger than 5 years of age are from preventable causes. For example, malnutrition contributes to 35 % of all child deaths,³⁰ but can be reduced by ensuring that mothers have time to breastfeed and that families have adequate incomes. Without access to flexibility or paid leave from work, many parents may be unable to provide their children with the type of care and attention that could have a significant impact on their development and well-being.

In order to examine the impact of duration of leave from work on health outcomes of children, we used our database to perform a series of analyses, examining whether national paid maternity leave policies influence neonatal, infant, and under-5 mortality rates. Table 1 shows the OLS regression model for the effect of paid maternal leave on neonatal mortality rates. We were able to establish a significant, strong association showing that ten additional full-time weeks of maternal leave were associated with a 10 % lower neonatal and infant mortality rate as well as a 9 % lower under-5 mortality rate³¹ even after controlling for per capita health expenditure, overall resources available to meet basic needs and basic public health measures.

28 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

29 International Labour Organisation Maternity Protection Convention (2000) No 183 (adopted 15 June 2000, entered into force 7 February 2002).

30 World Health Organization, ‘The Global Burden of Disease: 2004 Update’ (Report) (WHO Press 2008).

31 SJ Heymann, A Raub and A Earle, ‘Creating and Using New Data Sources to Analyze the Relationship between Social Policy and Global Health: The Case of Maternal Leave’ (2011) 126 (Suppl3) Public Health Reports 127.

*Table 1: The effect of paid maternal leave on neonatal mortality*³²

	Model 1	Model 2
	β	β
Weeks of paid maternal leave	-0.008***	
Natural log of weeks of paid maternal leave		-0.116**
Per capita GDP	-0.567***	-0.560***
Total health expenditures	-0.083***	-0.084***
Government health expenditures	0.001	0.000
Female literacy rate	-0.005	-0.005
Constant	8.294***	8.514***
N	150	150
R-squared	0.804	0.796

Notes: *** = $p \leq 0.001$, ** = $p \leq 0.01$

VII. Next Steps

As seen in the examples above, a quantifiable and transparent approach can provide researchers, policymakers, and concerned citizens with readily available information on whether states have laws consistent with international human rights obligations. This approach can also make it possible to quantitatively analyse the impact of policy choices countries make regarding how to meet their obligations.

The work by our international team of researchers based at a research university supports the feasibility of mapping compliance and developing quantitatively comparable measures that can be analysed. While the work presented above demonstrates the feasibility of transforming information that had previously been available only in lengthy text format into data that can be readily communicated in a comparative format, it has important limitations: the current databases do not cover all human rights; the data centre provides information on the situation of rights at the present time but it does not yet provide longitudinal data; most importantly, the data centre does not currently provide information on implementation of policies and laws.

32 Ibid.

The UN is in a position to address the need for data on all rights. With regular updating, the data will become longitudinal over time. International bodies, through the household surveys they regularly conduct in collaboration with countries, have the capacity to monitor implementation. Through collaborations between the UN, international bodies and universities, this new comprehensive system could transform the current relatively inaccessible format of lengthy reports and legislative text into readily actionable information to be used by citizens and policymakers interested in greater accountability.

Tracking the Historical Evolution of States' Compliance with their Economic and Social Rights Obligations of Result

Insights from the Historical SERF Index¹

Susan Randolph and Patrick Guyer

Susan Randolph, Associate Professor, University of Connecticut, susan.randolph@uconn.edu.

Patrick Guyer, Chief Statistician, Measure of America, a Project of the Social Science Research Council, guyer@ssrc.org.

Abstract: Countries that ratify the International Covenant on Economic, Social and Cultural Rights, ICESCR, commit to utilise the 'maximum of [their] available resources with a view to achieving progressively the full realization' (art 2) of the economic and social rights enumerated in the Covenant. The Social and Economic Rights Fulfillment Index, SERF Index developed by Randolph, Fukuda-Parr and Lawson-Remer (Fukuda-Parr et al 2009, Randolph et al 2010) utilises a unique methodology that benchmarks a country's level of obligation by rigorously mapping what is feasible to achieve using best practice for countries with different resource capacities. This paper adapts the SERF Index to track countries' progress over the past several decades in meeting this commitment. The analysis shows there has been an overall improvement in the extent to which countries are fulfilling their economic and social rights commitments, albeit with setbacks for many countries. This paper then addresses the question of whether countries face a trade-off between fulfilling economic and social rights today and stimulating per capita income growth and accordingly, their capacity to fulfil economic and social rights in the future. Our results show that there is considerable compatibility between fulfilling economic and social rights and promoting economic growth.

Keywords: Human Rights; Economic and Social Rights; Progressive Realisation; Economic Growth; Economic Development; Human Capabilities.

I. Introduction

This paper introduces the Historical Social and Economic Rights Fulfillment (SERF) Index. The Historical SERF Index adapts the methodology developed by

¹ This article is based upon work supported in part by the US National Science Foundation Grant # 1061457.

Randolph, Fukuda-Parr, and Lawson-Remer² to examine trends according to the extent to which countries have met their obligations of result under the International Covenant on Economic, Social, and Cultural Rights (ICESCR).³ Other approaches used to monitor countries' compliance with their obligations of result consider only the level of rights enjoyment. However, the ICESCR's "principle of progressive realization" specifies that a country's level of obligation depends on its resource capacity and that countries must fulfil economic and social rights to the 'maximum of [their] available resources'.⁴ A country with a lower resource capacity has a lower level of obligation so that a given level of rights enjoyment may be consistent with fully meeting its obligations of result, while the same level of rights enjoyment in a richer country will imply it is seriously deficient in meeting its obligations.

The SERF Index methodology allows us to assess a country's compliance with its obligations of result while taking into account both the extent to which the substantive economic and social rights enumerated in the ICESCR are enjoyed and the extent of a country's level of obligation to ensure each substantive right. The key innovation of the SERF Index methodology is the specification of Achievement Possibility Frontiers (APFs), which rigorously map what is feasible to achieve using best practice for countries with different resource capacities. Thus, the Historical SERF Index allows us to address the twin aspects of the ICESCR's "principle of progressive realization":

1. The extent to which a country is ensuring the level of rights enjoyment that is reasonably feasible given its resource capacity at any given time,
2. Whether a country is improving its performance over time, relative to its expanding resource capacity.

The Historical SERF Index also identifies those countries that are likely to have violated the principle of non-retrogression. Finally, the Historical SERF Index

2 Susan Randolph, Sakiko Fukuda-Parr and Terra Lawson-Remer, 'Economic and Social Rights Fulfillment Index: Country Scores and Rankings' (2010) 9 *Journal of Human Rights*, 230; Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, 'SERF Index Methodology: Version 2011.1' (2011) (Technical Note) <http://www.serfindex.org/data/>; Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, 'An Index of Economic and Social Rights Fulfillment: Concept and Methodology' (2009) 8 *Journal of Human Rights*, 195.

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

4 ICESCR art 2.1.

allows us to learn whether countries face a trade-off between fulfilling economic and social rights today and stimulating per capita income growth and, accordingly, their capacity to fulfil economic and social rights in the future.

This paper is organised as follows. The following section (section II) summarises the basic SERF Index methodology and explains how the SERF Index is adapted in light of the limitations of available data covering the past forty years. Section III then examines trends in the average achievement of countries on the composite Historical SERF Index and its underlying component right indices. The fourth section probes deeper and considers the variation in performance across countries, identifying instances where the ICESCR's "principle of non-retrogression" has been violated as well cases of exceptional performance. A key question, that the fifth section then addresses, is whether countries that emphasise devoting current resources to meeting their economic and social rights (ESR) commitments do so at the expense of generating additional resources that could enable even greater ESR enjoyment in the future. The final section (section VI) provides some concluding observations.

II. The SERF Index Methodology and Construction of the Historical SERF Index

The principle of progressive realisation enunciated in article 2.1 of the ICESCR requires countries to commit the maximum of their available resources to fulfil their economic and social rights obligations. Thus, in assessing the extent to which countries meet their obligations of result one needs to assess the level of rights enjoyment *relative to the level of the country's obligation*. Socio-economic indicators are now readily available for the vast majority of countries, which can be used to specify the extent to which a country's people enjoy relevant aspects of the substantive rights enumerated in the ICESCR. Specifying a country's level of obligation has proven more problematic. It necessitates that a different level of obligation be specified for each country at any given time, in accordance with each country's resource capacity at that time.

In practice, the monitoring body of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR), evaluates a country's performance with regard to its obligations of result on the basis of the country's achievement in terms of relevant socio-economic indicators, reflecting rights enjoyment relative to benchmarks or targets. Although the CESCR does expect more of states with

greater resources, the countries themselves enjoy considerable discretion over precisely where their benchmarks are set. Evidence-based conceptual models have the potential to guide the setting of benchmarks, but, in the development field, debates remain concerning the appropriate models for realising different development objectives that match rights, and calculations of resource costs can differ dramatically.⁵ In the absence of an evidence-based conceptual model of what can reasonably be achieved by countries with different resource capacities, as Omani points out, countries are able to set low benchmarks that effectively allow them to avoid meeting their commitment to provide the highest level of rights enjoyment feasible within the constraints of their current resource capacity.⁶ A ‘scoping’ process, whereby the CESCER would have greater input on the specification of benchmarks to ensure they reflect what is reasonably feasible is one potential solution to countries availing themselves of this “escape hatch”. However, as Chapman laments, the CESCER has neither resources to pay for the necessary independent economic analyses required, nor the time and expertise to undertake the necessary analyses themselves, nor have states embraced any such scoping process.⁷ The SERF Index methodology provides a solution to this problem.

The key innovation of the SERF Index methodology⁸ is the construction of an Achievement Possibility Frontier (APF) for each relevant socio-economic indicator, which benchmark’s the level of achievement feasible for any level of resources. In so doing, it helps close the aforementioned “escape hatch”. Here we briefly summarise how the Achievement Possibility Frontiers are constructed and used to specify the extent to which a country is fulfilling its obligations of result with regard to any given aspect of a substantive economic or social right.

5 For example, Langford compares World Bank and ILO calculations of the cost of providing basic child benefits in Africa and Asia and finds the World Bank estimates are two to three times ILOs estimates. See Langford, Malcolm, ‘Social Security and Children: Testing the Boundaries of Human Rights and Economics’, in Stephen Marks, Bard Anders Andrasen, and Arjun Sengupta (eds), *Freedom from Poverty as a Human Right: Economic Perspectives* (UNESCO 2009).

6 Siddiqur Rahman Osmani, ‘Human Rights to Food, Health, and Education’ *Journal of Human Development* 273.

7 Audrey Chapman, ‘The Status of Efforts to Monitor Economic, Social and Cultural Rights’, in Shareen Hertel and Lanse Minkler (eds.) *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press 2007).

8 Fukuda-Parr, Lawson-Remer and Randolph ‘An Index of Economic and Social Rights Fulfillment’ (n 2); Fukuda-Parr, Lawson-Remer and Randolph ‘SERF Index Methodology’ (n 2); Randolph, Fukuda-Parr and Lawson-Remer ‘Economic and Social Rights Fulfillment Index’ (n 2).

Achievement Possibility Frontiers and Performance Indicator Scores

Achievement Possibility Frontiers (APFs) are specified for relevant socio-economic indicators by first constructing a scatter plot of achievement on the indicator against per capita GDP (measured in constant purchasing power parity dollars, PPP\$), our indicator of resource capacity, using data from all countries spanning the period 1990-2008 as in Figure 1. Frontier observations, the observations lying on the outer envelope of the scatter, are then identified, and econometric techniques are used to fit a curve to these boundary observations. For example, since children who do not have access to sufficient micro and macro-nutrients become stunted (short height for age), the percentage of children under five who are not stunted can be used as an indicator of the enjoyment of the right to food. Figure 1 shows the scatter of observations (black ovals) for all countries over the period in question on this indicator against the country's per capita GDP (2005 PPP\$) at the time of the observation. The fitted Achievement Possibility Frontier (depicted by the larger, lighter circles) shows the level of achievement on the indicator that is feasible using best practices consistent with country experience at any given level of resource capacity.

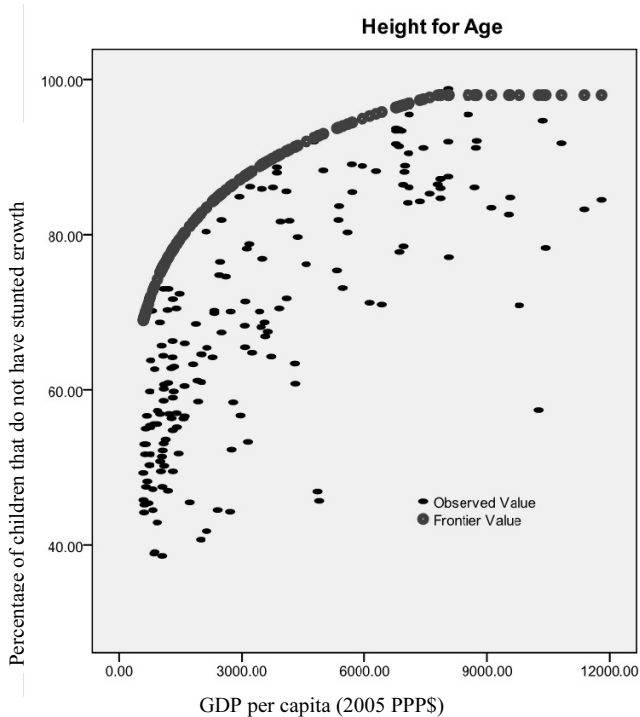


Figure 1: Achievement possibilities frontier—percentage of children that do not have stunted growth

Separate APFs are fitted to each indicator selected to measure a relevant aspect of rights enjoyment. The Achievement Possibility Frontiers for different indicators increase at different rates as per capita income rises, reflecting differences in the feasibility of transforming resources into the enjoyment of the different right aspects. They also peak at different per capita income levels, indicating that it is feasible to completely fulfil some aspects of some rights at lower per capita income levels than it is others. In essence, the frontiers map the rate at which it is feasible to transform resources into the enjoyment of the various right aspects. The APFs assume that the knowledge of the policies and practices for transforming resources into rights enjoyment is stable over the medium term for each selected indicator. The fact that the boundary observations defining the frontier span the data range used to construct the frontiers (1990 to 2008) provides assurance that this assumption is reasonable over the 1990 to 2008 period.⁹

A country's level of obligation at a given time, with regard to any given aspect of a right (in the above example, access to food with sufficient macro and micro-nutrients), is then measured as the frontier value of the relevant APF at the country's per capita GDP level at the time. The striking variation in rights enjoyment levels among countries with similar per capita GDP levels reveals the substantial difference in the extent to which countries fulfil the different aspects of the substantive rights "to the maximum of [their] available resources" as obligated under article 2.1 of the ICESCR. A 'performance indicator score,' *P*, for a given country and time period is calculated as the ratio of the country's score on the indicator at a given time (in the above example, the percentage of children in the country that are not stunted), call it *I*, to the value of the APF for the country's per capita GDP level in the year concerned, call it *F*. Thus,

$$P = I / F$$

So for example, if a country with a per capita income level of \$10,000 (2005 PPP\$) achieved a score of 72 % of children who are not stunted, and the APF value for \$10,000 were 90 % of children not stunted, its performance indicator score would be calculated as $(72/90) = 80 \%$. Adjustments to this score are made to normalise the observed range of scores across indicators and to penalise coun-

9 Table A.2 in *Fukuda-Parr, Lawson-Remer and Randolph* 'SERF Index Methodology' (n 2) shows the year of the boundary observations defining the frontier for each of the indicators used in the construction of the SERF Index. Over the longer term, the frontier is likely to shift upward with further improvement in best practice.

tries with more than sufficient income to reach the maximum feasible score on an indicator but which still fail to do so.¹⁰

Indicators of the Rights Enjoyment Level

The ICESCR, along with the CESCR's General Comments, enumerate seven substantive economic and social rights – the right to education, health, food, housing, work, water, and social security, with the right to water also featuring as an aspect of the rights to housing, food and health.¹¹ Within the constraints of available data, we select socio-economic indicators reflecting the most relevant attributes of each substantive right to measure the level of rights enjoyment. Beyond concept validity, a number of additional criteria governed our choice of indicators, including data reliability, public accessibility, comparability across countries and over time, and whether the indicator was based on objective information (as opposed to subjective judgment) and generated using a transparent methodology. We also sought to identify indicators that tend to reflect the performance of multiple aspects of a right, so called “bellwether indicators”.

Ultimately, indicator selection involved striking a balance between country coverage both within and across time periods, the most relevant challenges to fulfilling a given right, and whether the indicator captures variation in achievement across countries. Since high-income OECD countries collect different data and have faced different challenges with regard to fulfilling ESR over the past few decades, as is the case for the cross-sectional SERF Index, we specify two separate Historical SERF Indices: one for most countries (our Core Historical SERF Index), and a Supplemental SERF Index (for high-income OECD countries). Table 1 shows the indicators used to measure each right for both variants of the Historical SERF Index. Data limitations precluded our taking the right to social security into account, and, in the case of our Supplemental Index, the right to housing could not be taken into account either. Additionally, as mentioned earlier, the right to water is incorporated as a key aspect of the right to housing rather than a separate right. As Table 1 shows, in the case of some rights, multiple indicators are selected to track different aspects of the right concerned; while, for other rights, only a single indicator is selected. This reflects both the limitations

10 See *Randolph, Fukuda-Parr and Lawson-Remer* ‘Economic and Social Rights Fulfillment Index’ (n 2) and *Fukuda-Parr, Lawson-Remer and Randolph* ‘SERF Index Methodology’ (n 2) for details on these procedures.

11 The right to property is also identified in the Covenant but not considered here, since compliance with it is more appropriately addressed as a procedural right.

of available data series and the availability of “bellwether indicators” capturing multiple aspects of a right. A detailed discussion of the indicator selection is available in previously published work.¹² Here, we simply provide an overview.

Table 1: Historical SERF Index indicators of rights enjoyment level by right

Social or Economic Right	Core Historical SERF Index	Supplemental High-income OECD Country Historical SERF Index
Right to Food	Stunting rate (100 – % low height for age)	Normal birth weight rate (100 – % newborns < 2500 grams)
Right to Education	Primary school completion rate; Gross secondary school enrolment rate;	Gross secondary school enrolment rate
Right to Health	% Child (under 5) survival rate; Life expectancy at birth; Contraceptive Use Rate	% Child (under 5) survival rate; Life expectancy at birth
Right to Adequate Housing	% Population with access to improved water source % Population with access to improved sanitation	Data not available
Right to Decent Work	% Not absolutely poor (% with income ≥ \$2 per day, 2005 PPP\$)	% Not relatively poor (% with income > 50 % of median income); % Unemployed not long-term (>12 months) unemployed

Three indicators are used to reflect enjoyment of the right to health for core countries: the under-five child survival rate; life expectancy at birth; and the contraceptive use rate. The under-five child survival rate captures children’s access to preventative and curative healthcare as well as other aspects of child health. Life expectancy at birth expands the focus to include adult access to preventative and curative health, along with other factors influencing adult health. The contraceptive use rate specifically focuses on access to reproductive health inputs and care.

12 *Randolph, Fukuda-Parr and Lawson-Remer* ‘Economic and Social Rights Fulfillment Index’ (n 2) discuss the link between specific indicators and the right aspect they reflect in some detail.

In the case of high-income OECD countries, only the first two indicators are incorporated: the contraceptive use rate is not tracked. The specific focus on reproductive health care was considered less critical given the broad access to contraception and reproductive health inputs and care in high-income OECD countries. Two indicators are selected to reflect enjoyment of the right to education for core countries: the primary school completion rate (capturing the minimum core content of the right), and the gross secondary school enrolment rate (reflecting fulfilment of the right to education extending beyond the minimum core content).¹³ The fact that compulsory primary school education is specifically mentioned in the ICESCR was a central reason for selecting the primary school completion rate over the literacy rate. The primary school completion rate is not included in the index for high-income OECD countries since primary school completion is essentially universal among high-income OECD countries. Although we would have preferred to use the combined school enrolment rate rather than the gross secondary school enrolment rate for both the core and Supplementary Index, historical data on this indicator was far more spotty. General Comment 4 defines adequacy with regard to the right to housing to include the 'availability of services, materials, facilities and infrastructure'; water and sanitation are central among these.¹⁴ Our indicators of the right to housing for core countries are comprised of the percentage of the population with access to an improved water source and the percentage of the population with access to improved sanitation. Access to clean water is also a right in itself (as previously noted) and is therefore incorporated within the context of the right to housing.

The right to food entails access to both adequate macro-(calories) and micro-nutrients. Both macro and micro nutrient deficiencies result in children's growth being stunted. Households protect children's nutrition so that the rates of children with stunted growth are also a measure of severe insecurity of access to sufficient food among all household members. Accordingly, the percentage of children that are not stunted is selected as a "bellwether indicator" for the right to food for core countries. Data on the rate of children with stunted growth are not tracked for high-income OECD countries. Given the link between low birth rates and poor nutrition of mothers, the percentage of infants that do *not* have low birth weight is adopted as the indicator for the right to food for our Supple-

13 Limitations in country coverage precluded the selection of the net secondary school enrolment rate.

14 UN Committee for Economic, Social and Cultural Rights, 'General Comment 4: The Right to Adequate Housing' (1991) UN Doc E/1992/23 (General Comment 4).

mentary Index for OECD countries. Access to work; conditions of work; and remuneration from work are all aspects of the right to work. In developing countries, social security systems only reach a small percentage of the population at best. As a result absolute poverty primarily reflects a lack of access to productive and remunerative work, and, regrettably, the number of people living below the international two-dollars-a-day poverty line remains high. Accordingly, we adopt the two-dollars-a-day poverty line as our “bellwether indicator” of the right to work for the core SERF Index. For high-income OECD countries, lack of access to decent work is better reflected by long term unemployment and relative poverty; these indicators are accordingly selected for such countries.

As our Historical SERF Index looks back to the decade of the 1970s, we are unable to take advantage of several desirable series used in the cross-sectional SERF Index. In particular, we were unable to include our indicator of the quality of schooling for high-income OECD countries, achievement on tests administered by the Programme for International Student Assessment. When assessing enjoyment of the right to housing, we had to substitute the percentage of total population with access to an improved water source for the more discriminating percentage of the rural population with access to an improved water source. Finally, with regard to the right to health, life expectancy at birth was substituted for the percentage of the population expected to survive to sixty-five years of age. As is the case with the cross-sectional SERF Index, gaps remain in the right aspects incorporated in our historical SERF Index. No internationally comparable data series exists to cover relevant aspects of the right to housing, such as the security, tenure, affordability, or habitability of housing. Although internationally comparable data on the quality of schooling are increasingly available, coverage remains limited, with the exception of the last decade or so for high-income OECD countries. Furthermore, available indicators often lack the sensitivity and focus ideally desired. For example, as noted by Bartram, the access standard used for the internationally comparable data on access to an improved water source does not ensure that water is available at home, or that it is actually safe to drink.¹⁵

15 Jamie Bartram, ‘Improving on Haves and Have-Nots’ (2008) 452 *Nature* 283.

From Performance Indicator Scores to Right Indices and the Composite SERF Index

When only a single indicator is used to assess enjoyment of a substantive right, the adjusted performance indicator score is itself the right index. So, for example, in the case of our Core Historical SERF Index, the adjusted performance indicator score for the percentage of children that do not have stunted growth is at the same time the Core Historical Right to Food Index. When multiple indicators are used to reflect enjoyment of a substantive right, the average of the adjusted performance indicator scores concerned constitutes the Right Index. So for example, in the case of the Core Historical SERF Index, the Core Historical Right to Education Index is the average of the adjusted performance indicator scores for the primary school completion rate and the gross secondary school enrolment rate. The aggregate Historical SERF Index (both Core and Supplemental) is itself the weighted average of the component right indices.¹⁶ Figure 2 schematically demonstrates the construction of the Historical SERF Index. For our purposes here, we set the weights to all equal 1 so that the Historical SERF Index becomes the simple average of the component right indices.

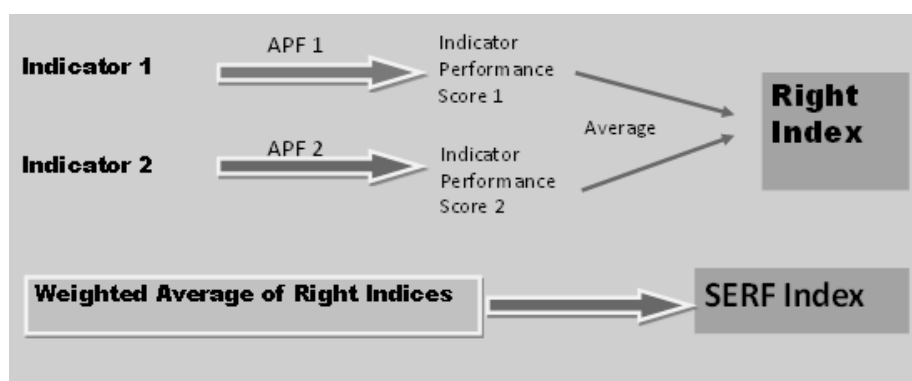


Figure 2: Construction of the SERF Index

¹⁶ Regressions were run one at a time of one component right index on all of the other component right indices (for example, the Core Historical Right to Education Index was regressed on the Core Historical Right to Health, Right to Housing, Right to Work, and Right to Food Indices). The partial correlation coefficients from these regressions were all positive, providing some assurance that countries defining the frontier for one right do not do so to the neglect of other rights, and suggesting there are indeed interdependencies between the rights.

We compute the Historical SERF Index for four separate decades, or waves as we call them. The decade of the 1970s covers the period 1971–1980, that for the 1980s covers the period 1981 to 1990, and so on. Country observations on the indicators used to construct the Historical SERF Index are generally not available for every year; also, the year for which data on a particular indicator is available differs by country. In constructing the Historical SERF Index, as far as possible, we select the observation on each indicator that falls as close as possible to around the middle of the decade, to the “5’s” — 1975, 1985, 1995, 2005 — thereby resulting in a single observation for each decade.

In the sections that follow, we consider the extent to which commitments to progressively realise economic and social rights have been met. The Historical SERF Index allows us to consider two important but distinct aspects of progressive realisation. Firstly, at any given time, is a country fulfilling its economic and social rights obligations of result to the maximum of its available resources? Secondly, are countries fulfilling their obligations of result to an increasing extent over time, to the same extent over time, or is the principle of non-retrogression being violated?

III. Global Performance and Trends

The overall picture is that on average countries are meeting their commitments to fulfil economic and social rights to an increasing extent. However, a great deal of progress still remains to be made. Figure 3 tracks the average score on the Core Historical SERF Index and the Core Historical Component Right Indices for all countries with data for the particular wave concerned.¹⁷ With regard to the aggregate Core Historical SERF Index and the Core Historical Right to Work Index, the average country score is shown only for the decades of the 1980s, 1990s and 2000s (Waves 2, 3, and 4), as not enough countries have sufficient data to compute the index for the decade of the 1970s. The average score on the aggregate

17 A parallel analysis was conducted using the average values for those countries for which it was feasible to compute the Core Historical Right to Health, Food, Housing, and Education indices for all four waves and the Core Historical Right to Work Index and the aggregate Core Historical SERF Index for the last three decades. The difference in averages for each given wave is quite small, with a small but noticeable increase in the rate of improvement over time on the Core Historical Right to Food and Health Indices, and a small decrease in the rate of improvement over time on the Core Historical Right to Education Index. See Annex A, Figure 1 for graphs comparing the variants.

Core Historical SERF Index rose from 63.1 to 72.8 between 1985 and 2005, with the pace of improvement accelerating somewhat over the last decade. On average, the core countries scored highest on the Right to Work Index. Nevertheless, this is the one index that failed to show consistent improvement across the decades: the average score fell three points between 1985 and 1995, this then recovered but still did not surpass its 1985 value in 2005. The standard for decent work implicit in the Right to Work Index is the bare minimum requirement for human dignity; yet, by 2005, countries on average only provided minimally decent work to three quarters of those that they feasibly could, given the resources available.

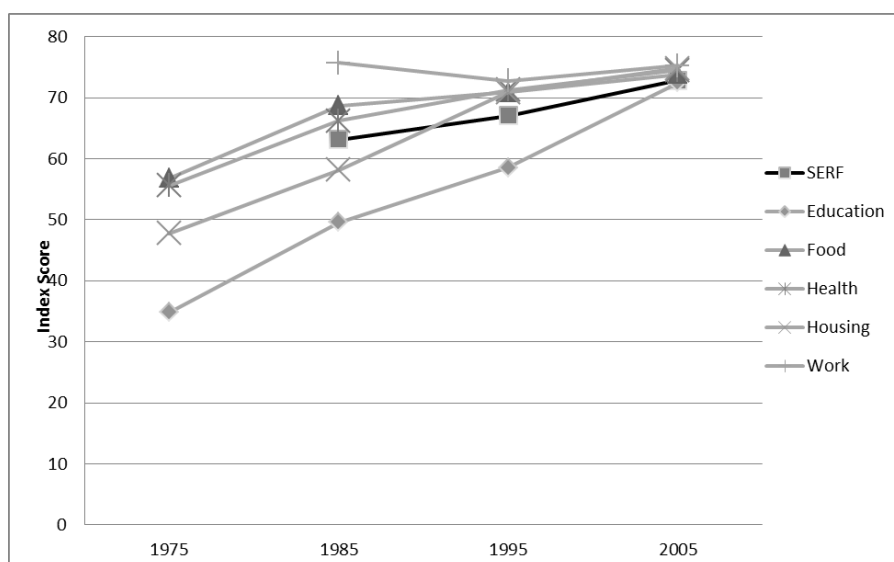


Figure 3: Average score on core historical SERF Index and component right indices: countries with data for any wave

Core countries dramatically improved the extent to which they met their commitments to fulfil their citizen's and resident's rights to education and housing; the same rights that, in 1975, they were most deficient in fulfilling. The average score on the Core Historical Right to Education Index increased from 35 to 72 between 1975 and 2005, while the average for the Core Historical Right to Housing Index rose from 48 to 75 over the same period. Progress in fulfilling the rights to health and food increased in tandem, rising quite rapidly between 1975 and 1985, but at a slower pace thereafter.¹⁸ The average score on the Core Histor-

ical Right to Health Index rose from 56 to 75 between 1975 and 2005, while the average score for the Core Historical Right to Food Index rose from 57 to 74 in the same period. Although consistent progress was made regarding the extent to which countries met their commitments to fulfil the rights to health, education, housing and food across the four waves, with the exception of the right to housing, progress slowed between 1985 and 1995. Overall there is convergence when it comes to the extent to which countries are fulfilling the different substantive economic and social rights. Nevertheless, countries continue to be doing substantially less than that which is reasonably feasible. On average, countries could feasibly increase their scores on each of the component right indices by a third.

High-income OECD countries had a considerably higher SERF Index score forty years ago than core countries: roughly 80 % versus 60 %. Yet although they too experienced progress over the subsequent forty years, they only increased their absolute score by half as much. That is, although high-income OECD countries witnessed increased enjoyment of economic and social rights, the gains (relative to what they feasibly could have been considering the extent to which their resource base expanded) were smaller than they were in the case of the core countries. To an important extent, this reflects high levels of achievement on some basic rights. High-income OECD countries are currently approaching 100 % achievement in meeting their obligations of result, with regard to the basic aspects of the rights to education, health and food, incorporated in the Supplemental Historical SERF Index. Figure 4 shows the trend in the Supplemental Historical SERF Index along with the trend in the component right index scores, for all high-income OECD countries with data.¹⁹

18 One should bear in mind that the data used to construct the frontiers spans 1990 to 2008. Technological advances may have led to an increase in the feasible level of achievement at a given per capita income level from the seventies to the eighties, with regard to the right to health in particular. To the extent that this is true, the observed progress on the right to health between the seventies and the eighties is inflated.

19 A parallel analysis was conducted using the average values for those countries for which it was feasible to compute the Supplemental Historical Right to Health, Food and Education indices for all four waves and the Supplemental Historical Right to Work Index and the aggregate Supplemental Historical SERF Index for the last three decades. The difference in averages for each given wave is fairly small, with a small but noticeable increase in the rate of improvement, since 1995, in the aggregate Supplemental Historical SERF index. There is also a noticeable decrease in the Supplemental Historical Right to Food Index and a slightly increased level in the Supplemental Right to Work Index. See Annex A, Figure 2 for graphs comparing the variants.

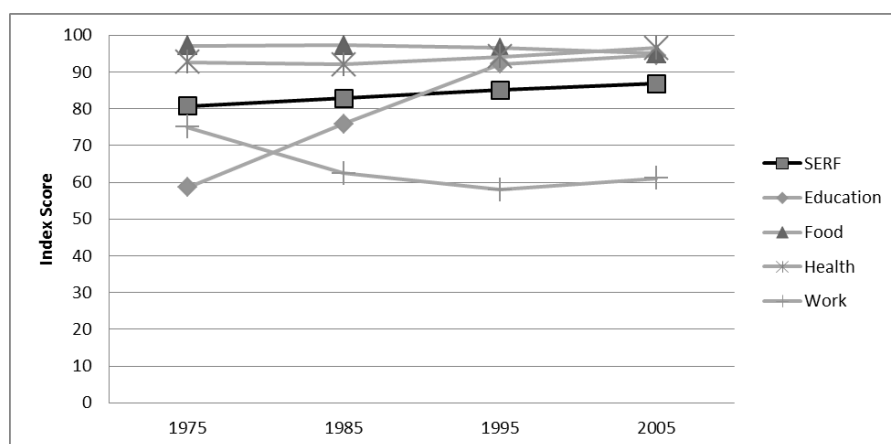


Figure 4: Average score on supplemental historical SERF index and component right indices: high income OECD countries with data for any wave

The variation in performance across rights was greater at the outset (forty years ago) for high-income OECD countries than for core countries. However, as was the case for core countries, the greatest gains are observed in the right to education. On average, the score on the Supplemental Historical Right to Education Index increased nearly 35 percentage points between 1975 and 1995; the pace then decelerated such that, from 1995 and 2005, the gain was a mere 2 percentage points. One could well argue that, given the high level of achievement on the Supplemental Right to Education Index by 1995 (which averaged 95 %), the fall in the rate of gain is to be expected. However, even if one enriches the index to include information on the quality of education, by incorporating country scores on an indicator of the quality of education, the Program for International Student Assessment (PISA), the average gain between 1995 and 2005 is still minimal.²⁰ Furthermore, upon doing so, the average score falls nearly 10 percentage

20 PISA scores are not available for 1970s or 1980s — the quality aspect cannot therefore be incorporated into the Supplemental Historical Right to Education Index for 1975 or 1985. If one incorporates the average of the math and science PISA score as a component of the Supplemental Historical Right to Education Index for 1995 and 2005, the average score on the Index falls from 92 % to 85 % in 1995 and from 95 % to 86 % in 2005. However, the average gain in this alternative Supplemental Right to Education Index across high-income OECD countries is less than one percentage point (85.0 % to 85.8 %) for countries that have the necessary data on either wave 3 or 4, and by an even smaller amount for countries that have data on both waves 3 and 4.

points indicating challenges remain when it comes to fully realising the right to education in high-income OECD countries.

The rise in the Supplemental Historical SERF Index over the forty years in question reflects the substantial gains in education to an important degree. Unarguably, progressive realisation is the norm for the right to health, but unsurprisingly given the fairly high initial score on the index, the gains were small: the Supplemental Right to Health Index rose from 93 % to 96 % over these forty years. However, high-income OECD countries regressed with regard to the right to food and the right to work: over the 40 years, the average score on the Supplemental Right to Food Index fell slightly (from 97 % to 95 %), while the Supplemental Right to Work Index fell markedly (from 75 % to 61 %). Although in 1975 high-income OECD countries were most deficient in terms of fulfilling their obligations of result with regard to the right to education, by 2005, the greatest deficiency was observed for the right to work. Fulfilling commitments to ensure the right to work emerged as the greatest challenge for high-income OECD countries.

IV. Variation in Performance Across Countries

On average and in the aggregate, both core and high-income OECD countries not only increased the level of economic and social rights enjoyment, they also expanded the level of rights enjoyment more rapidly than their capacity to fulfil rights increased. That is to say, they progressively realised their economic and social rights obligations of result in the full sense of the term. This achievement implies that the substantial rise in the global average per capita income level and (accordingly) countries' capacity to fulfil economic and social rights was increasingly directed towards fulfilling economic and social rights. The average trends, however, mask wide variation in performance across countries.

Countries in Europe and Central Asia tend to score highest on the Core Historical SERF Index and underlying component right indices, with those in Sub-Saharan Africa scoring lowest. The latter is of particular concern since it implies that, despite the lower level of obligation in the face of their lower resource capacity, the extent to which Sub-Saharan African countries fulfil their obligations of result has decreased — a double loss in the extent to which people living in this region enjoy basic economic and social rights. This is not to say that countries in Europe and Central Asia uniformly meet their commitment to fulfil basic eco-

conomic and social rights to a greater extent than those in Sub-Saharan Africa do. Nor is it to say that there has been less progress over time in all Sub-Saharan Africa countries. There is wide variation in the level and trend in performance within regions. Take the case of performance on the Core Historical Right to Education Index within Sub-Saharan Africa, for example (Figure 5). By 1985, Mozambique achieved over 90 % of the feasible value given its resource capacity, only to then dramatically regress to a level just half of that score. Yet Malawi, on the other hand, showed steady progress: raising its score from less than 30 % of the feasible value to over 80 % of the feasible value. Lesotho's score barely moved over the forty years and hovered around 55 % of the feasible value.

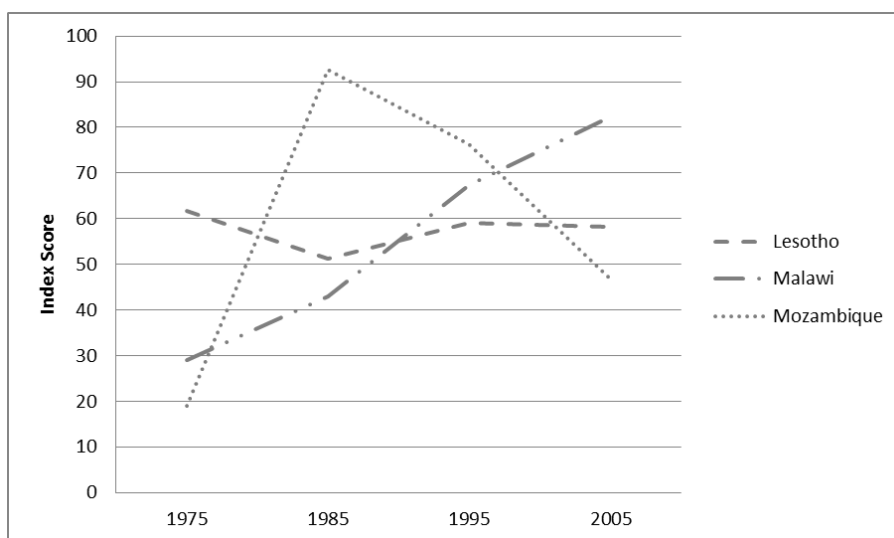


Figure 5: Variation in performance on core historical right to education index within region

The principle of non-retrogression as referenced in CESCR's General Comment 3 on the nature of state's obligations, prohibits states undertaking any deliberately retrogressive measure.²¹ Specifically, paragraph 10 states;

Any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the

21 UN Committee on Economic, Social and Cultural Rights, 'General Comment 3, The Nature of State Parties Obligations' (1990) UN Doc E/1991/23.

totality of the rights provided for in the covenant and in the context of the *full use of the maximum available resources* (emphasis added).

Clearly, if a state takes specific identifiable and deliberate actions that reduce rights enjoyment, their conduct is in violation of the principle of non-retrogression (unless they can defend such actions). However, declines in levels of rights enjoyment also offer evidence of a state's likely violation of the principle of non-retrogression. In discussing the principle of non-retrogression in the context of poverty reduction, the Office of the High Commissioner for Human Rights specifies that the principle implies that, 'no right can be deliberately allowed to suffer an absolute decline in its level of realization'.²² The Office of the High Commissioner for Human Rights, defines non-retrogression in terms of a country's obligations of result in other documents also. For example in its discussion of frequently asked questions about human rights principles it states:

Finally, according to the principle of *non-retrogression* of rights, *no* right can be permitted deliberately to suffer an absolute decline in its level of realization, *unless* the relevant duty-bearer(s) can justify this by referring to the *totality of the rights* in force in the given situation and *fully uses the maximum of available resource*.²³

At a minimum, this suggests that countries whose scores on the SERF Index decline over time have violated the principle of non-retrogression unless they can justify the decline.

Table 2 shows the number of countries that are likely to have violated the principle of non-retrogression (by decade for both core and high-income OECD countries relative to the number of countries with data). The results suggest that retrogression (regarding such a breach) was common. Despite the fact that on average progress was greatest on the Core Historical Right to Education Index, over a third of the countries showed retrogression on this index between 1985 and 1995. Many countries progressed in one decade, only to then regress in a subsequent decade (or vice versa). In general, for core countries, retrogression was more common from

22 Office of the High Commissioner for Human Rights, 'Human Rights and Poverty Reduction: A Conceptual Framework' (2004) United Nations, Acting Commissioner for Human Rights, Bertrand Ramcharan, UN Doc. HR/PUB/04/1, <<http://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf>> accessed 30 June 2012, 25.

23 Office of the High Commissioner for Human Rights, 'Frequently Asked Questions on a Human Rights-Based Approach to Development' (2006) United Nations, New York and Geneva, accessed June 30 2012, <<http://www.ohchr.org/documents/Publications/FAQen.pdf>>.

1985-1995, and also from 1995-2005, than it was from 1975-1985. For some countries, achievement relative to the feasible level was lower in 2005 than it was in 1975 (see the second column in Table 2), implying retrogression over the period as a whole. Many high-income OECD countries also are likely to have violated the principle of non-retrogression: the increase in the level of rights enjoyment did not increase at the same rate as their capacity to fulfil rights increased (in fact it even decreased sometimes). With regard to the rights to education and health, evidence of probable retrogression in the high-income OECD countries never extended over the whole forty-year period. However, with regard to the rights to food and work, retrogression in the respective rights indices proved to be the rule across each decade, and consequently over the forty-year period as a whole.

Table 2: Proportion of countries failing to uphold the principle of non-retrogression

Historical SERF Index and component right indices

Index	1975-2005	1975-1985	1985-1995	1995-2005
Core Historical Indices				
Core Historical SERF	0/1	0/1	3/24	10/54
Core Historical Right to Education	7/86	9/87	35/99	17/124
Core Historical Right to Food	3/16	0/13	20/52	34/96
Core Historical Right to Health	3/51	3/35	7/71	24/116
Core Historical Right to Housing	4/73	21/71	22/106	36/136
Core Historical Right to Work	3/4	0/2	27/50	29/81
Supplemental Historical Indices				
Supplemental Historical SERF	1/4	1/5	5/14	5/21
Supplemental Right to Education	0/25	0/25	1/28	7/31
Supplemental Right to Food	17/25	13/25	21/29	24/30
Supplemental Right to Health	0/28	18/28	1/31	0/31
Supplemental Right to Work	4/4	13/15	5/5	8/22

Note: The numerator shows the number of countries whose scores fell. The denominator shows the number of countries with data.

Table 3 shows the countries whose score on the Core Historical SERF Index and Core Component Right Indices increased the most over the whole period (see column 2), and in each decade (see columns 3, 4, and 5). Table 4 provides the same information with regard to the Supplemental Historical SERF Index and underly-

ing right indices. A fair number of countries showed a dramatic increase in their index scores, even in the face of rapidly increasing per capita income, and, accordingly, a rapidly rising level of obligation. For example, Qatar, Kuwait and Oman dramatically improved their score on the Core Historical Right to Education Index. Other countries also showed substantial gains in this respect, despite very limited gains in per capita income. That is to say, they raised the level of rights enjoyment relative to the feasible level given their limited resource capacity; although the absolute level of rights enjoyment remained low in those countries with low per capita income levels. The gains shown by the top performing high-income OECD countries were far more modest, except with regard to the right to education. Not surprisingly, since countries scoring near 100 % on the index cannot improve their scores much in future periods, for both core and high-income OECD countries, progress was greatest for those countries that were most deficient in meeting their economic and social rights obligations at the outset.

*Table 3: Top 5 Countries showing improvement
Core historical SERF Index and component right indices*

Index	Most Improvement				Wave 4 Top Scores
	1975-2005	1975-1985	1985-1995	1995-2005	
Core Historical SERF	Insufficient Data	Insufficient Data	Guatemala (22.7) Dominican Republic (14.2) Sri Lanka (11.5) Bangladesh (11.2) Thailand (11.1)	The Gambia (23.2) Vietnam (16.7) Indonesia (15.0) Nepal (14.4) Honduras (13.4)	Ukraine (95.3) Belarus (94.0) Uruguay (93.4) Jordan (92.8) Chile (92.6)
Core Historical Right to Education	Qatar (89.3) Liberia (83.4) Kuwait (83.3) Oman (69.7) Sierra Leone (68.2)	Guatemala (40.7) Rwanda (32.5) Mauritania (21.5) Thailand (19.6) Chile (16.7)	Afghanistan (54.9) Cyprus (52.2) United Arab Emirates (51.8) Brazil (47.1) Burundi (39.5)	Kuwait (55.5) Eritrea (52.4) Saudi Arabia (48.4) Qatar (46.9) Togo (41.0)	Score of 100: Brazil, Liberia, Tajikistan, Democratic Republic of Congo, Dominica, Grenada, Tonga, Seychelles
Core Historical Right to Food	Nepal (49.6) Pakistan (47.8) El Salvador (44.3) India (43.3) Philippines (41.0)	El Salvador (31.1) Tunisia (30.2) Philippines (25.7) Trinidad & Tobago (18.0) India (16.2)	Pakistan (33.1) India (30.3) Vietnam (19.9) Bhutan (18.4) Peru (17.6)	Bangladesh (38.2) Mauritania (34.9) Indonesia (29.6) Nepal (28.6) Uzbekistan (27.6)	Kyrgyz Republic (100) Ukraine (100) Moldova (100) Togo 99.8) Chile (99.4)

Index	Most Improvement				Wave 4 Top Scores
	1975-2005	1975-1985	1985-1995	1995-2005	
Core Historical Right to Health	Nicaragua (50.0) Malawi (45.8) Algeria (43.5) Honduras (39.9) Peru (39.2)	Algeria (24.4) El Salvador (19.3) Honduras (19.3) The Gambia (18.0) Nicaragua (17.9)	Liberia (34.8) Iraq (19.1) Nicaragua (18.7) Malawi (17.0) Bangladesh (16.9)	Rwanda (26.0) Mauritius (21.3) Nepal (17.8) Niger (17.6) Malawi (17.0)	Vietnam (99.1) Costa Rica (99.0) Cuba (97.9) China (96.9) Nicaragua (96.0)
Core Historical Right to Housing	Maldives (87.0) Saudi Arabia (74.8) Nepal (64.4) Paraguay (63.2) Thailand (57.2)	Saudi Arabia (56.3) United Arab Emirates (45.6) Paraguay (44.4) Chile (33.3) Iran (33.2)	Maldives (59.8) Oman (50.9) Bangladesh (47.7) Guatemala (46.9) Argentina (39.1)	Afghanistan (23.3) Paraguay (21.3) Malawi (21.2) Timor-Leste (19.1) Lao PDR (18.8)	Score of 100: Bulgaria, Malta, Cyprus, Oatar, Singapore, Barbados
Core Historical Right to Work	Insufficient Data	Insufficient Data	Guatemala (40.7) Rwanda (32.5) Mauritania (21.5) Thailand (19.6) Chile (16.7)	The Gambia (52.3) China (31.3) Vietnam (26.6) Romania (25.4) Pakistan (25.1)	Score of 100: Croatia, Ukraine, Bosnia & Herzegovina, Belarus, Kazakhstan, Serbia, Russian Federation, Latvia, Azerbaijan, Togo, Seychelles, Lithuania

Note: Excludes countries with an obligation of 0 in view of per capita income levels that are too low (below \$725) to bring anyone above the \$2 poverty line in the absence of inequality.

The last columns of Tables 3 and 4 show the countries with the top scores on the Historical SERF Indices and underlying right indices in 2005 for core, and high-income OECD countries, respectively. Although no country achieved 100 % on the Core Historical SERF Index, a considerable number of countries achieved a score of 100 % on the Core Historical Component Right Indices. Countries in Eastern Europe and Central Asia tend to score highest on the Core Historical SERF Index and several, but not all, of the underlying right indices. Latin American countries and countries in East Asia and the Pacific topped the list with respect to the Core Historical Right to Health Index. The Scandinavian countries achieved the highest scores on the Supplemental Historical SERF Index, although none achieved a score of 100 %. By 2005, the majority of high-income OECD countries achieved scores of 100 % on the Supplemental Historical Right to Education Index, implying that all people in these countries enjoy access to a basic education. Japan, Iceland and Italy hold the top scores on the Supplemental Historical Right to Health Index.

*Table 4: Top 3 Countries showing improvement and best performing countries
Supplemental historical SERF Index and component right indices*

Index	Most Improvement				Wave 4 Top Scores
	1975-2005	1975-1985	1985-1995	1995-2005	
Supplemental Historical SERF	Spain (11.9) Sweden (8.9) Canada (5.8)	Spain (6.8) Canada (5.1) United States (4.2)	United Kingdom (9.0) France (7.4) Sweden (6.8)	Italy (10.3) Hungary (4.8) Greece (4.4)	Sweden (95.2) Norway (95.0) Finland (92.9)
Supplemental Right to Education	Portugal (68.6) Spain (62.9) Italy (59.5)	Spain (40.8) Republic of Korea (40.3) Netherlands (38.5)	Portugal (74.4) United Kingdom (41.4) New Zealand (39.0)	Luxembourg (34.2) Italy (30.5) Greece (21.9)	Score of 100: Sweden, Norway, Finland, Denmark, Canada, Australia, Netherlands, United Kingdom, Spain, Ireland, Germany, Greece, Belgium, France, Iceland, Japan, New Zealand
Supplemental Right to Food	Hungary (5.2) Luxembourg (3.5) Poland (2.2)	Hungary (2.3) Canada (1.9) Italy (1.7)	Hungary (3.1) Poland (2.5) Luxembourg (2.3)	Luxembourg (3.2) Denmark (1.3) Poland (1.1)	Sweden (100) Finland (100) Iceland (100)
Supplemental Right to Health	Republic of Korea (10.1) Iceland (6.6) Portugal (5.4)	Republic of Korea (3.8) Iceland (1.1) Spain (0.76)	New Zealand (3.5) Austria (3.5) Greece (3.3)	Republic of Korea (3.8) Iceland (3.3) Estonia (3.2)	Japan (99.4) Iceland (99.0) Italy (98.4)
Supplemental Right to Work	No country with data progressed	No country with data progressed	Denmark (16.3) Luxembourg (15.3) All others with data regressed	United Kingdom (18.0) Norway (13.0) Spain (12.9)	Norway (95.0) Sweden (95.2) Korea (90.5)

The high scores achieved by some developing countries reflect low levels of obligation in the face of their limited resource capacity. This raises the question of whether rights enjoyment would have increased more over the four decades had efforts been focused on increasing per capita income rather than improving rights enjoyment, within the constraints of limited resources. More generally, a key question is whether countries that emphasise devoting current resources to meeting their economic and social rights commitments do so at the expense of generating additional resources that could have enabled even greater enjoyment of economic and social rights in the future. It is to this question that we now turn.

V. Do Countries Direct Resources to Meeting Economic and Social Rights Commitments at the Expense of Growth?

One way to examine the question of whether countries that prioritise meeting their economic and social rights commitments over growth then grow more slowly is to examine trends over time in countries' growth and rights performance. Here we divide countries along two dimensions:

1. Those with SERF Index scores above or below the median score;
2. Those with average annual per capita GDP growth rates during the decade above or below the median score.

We look at the transition pattern between the decades of the 1990s and 2000s.²⁴ Cycles can be variously classified as vicious or virtuous according to whether improvement or decline ensues. Countries that are in the bottom half of countries – with regard to both their SERF Index score in 1995 and their average annual per capita GDP growth rate during the decade – are classified as being caught in a “vicious cycle”: hypothesising that their low score on the SERF Index impedes per capita income growth thereby further limiting resources available with which to expand the enjoyment of economic rights over time. Along the same lines, countries that are in the top half of countries – with regard to both their SERF index score and their average annual per capita GDP growth rate during the decade – are classified as being in a “virtuous” cycle. Our hypothesis is that a high SERF Index score may foster faster per capita income growth increasing resources to further expand rights enjoyment. Countries that appear to have prioritised growth over meeting their commitments to fulfil economic and social rights are those that have above-median growth rates over the decade, but below-median SERF index scores, we call these “growth-lopsided” countries. Countries that appear to have prioritised meeting their commitments to fulfil economic and social rights over growth are those with above-median scores on the SERF Index, but below median growth rates, we call these countries “SERF-lopsided”.

24 The methodology used is an adaptation of that employed in Alejandro Ramirez, Gustav Ranis and Frances Stewart, ‘Economic Growth & Human Development’ (2000) 28 *World Development* 197.

To test our hypothesis that fulfilling economic and social rights commitments and economic growth may be mutually reinforcing, we examine where countries that start in either the “vicious” or the “virtuous” quadrant in the initial decade (1990s) end up in the subsequent decade (2000s). Eleven countries were in the vicious quadrant in the 1990s, of these, 63.6 % failed to escape the vicious quadrant in the 2000s; their SERF Index scores and per capita GDP growth rates were below the median levels during the 2000s. Of the remaining countries, 18.2% became “growth-lopsided”, 9.1 % “SERF-lopsided”, and 9.1 % succeeded in achieving the virtuous quadrant. On the other hand, of the eleven countries that started out in the virtuous quadrant, 63.6 % remained in the virtuous quadrant in the subsequent decade, with 18.2 % becoming “SERF-lopsided”, 9.1 % becoming “growth- lopsided” and 9.1 % falling into the vicious quadrant. These transition patterns indicate that meeting economic and social rights commitments reinforces growth.

To attain the virtuous cycle, is it better to focus on growth or to concentrate on meeting economic and social rights commitments first? To gain some insight into this question, we consider the transition paths of the “lopsided” countries. Of the 16 countries that were growth-lopsided in the 1990s, only one converted to the virtuous cycle in the subsequent decade; while 50 % (ie 8 countries) converted to the vicious quadrant. The other 44% remained growth-lopsided. In contrast, of the 16 countries that were “SERF-lopsided” in the 1990s, 56 % converted to the virtuous quadrant in the subsequent decade; with an additional 31 % remaining “SERF-lopsided”; and just 6 % falling into each of the growth-lopsided and vicious quadrants. Thus focusing available resources on meeting economic and social rights commitments offers better prospects for both future growth and enhanced economic and social rights enjoyment in the future. Directing available resources to foster growth at the expense of meeting economic and social rights obligations is likely to lead to both poor growth outcomes and lower levels of economic and social rights fulfilment in the future.

Several issues warrant further investigation in future work. Firstly, it is possible that fulfilling certain economic and social rights drives our findings that ensuring economic and social rights and economic growth are mutually reinforcing and that to attain the virtuous cycle, it is better to prioritise economic and social rights over growth. There exists a rich theoretical and empirical literature confirming a positive link between human capital and economic growth.²⁵ Expanding educational opportunities and improving health outcomes build human capital. It could be that while fulfilling the rights to education and health is critical to our results, fulfilling other economic and social rights is not. Secondly, a growing amount of literature demonstrates multiple channels through which poverty and inequality impede

growth; there is growing evidence that countries with extensive welfare systems tend to enjoy lower levels of inequality and poverty.²⁶ Together, these findings suggest a large state sector may offer better prospects for fulfilling economic and social rights while promoting growth. However, it is likely that there are multiple policy regimes that foster economic growth which are consistent with the fulfilment of economic and social rights commitments. Case studies of the policy regimes followed by those countries identified here as performing relatively better, with regard to both growth and economic and social rights fulfilment, are promising in terms of their potential to shed light on the range of options regarding the balance between the state and the market that can successfully meet both objectives.

VI. Concluding Remarks

The SERF Index methodology introduced by Randolph, Fukuda-Parr, and Lawson-Remer²⁷ specifies an evidence-based methodology that enables one to identify the level of rights enjoyment that is reasonably feasible for countries with different resource capacities to achieve. Here, we adapt this methodology to construct an Historical SERF Index that overcomes the challenge of gauging the extent to which countries are compliant with their obligations of result under the ICESCR, by benchmarking each country's level of obligation as it has evolved over the past forty years (with regard to the different substantive economic and social rights). This approach enables us to learn whether the expansion of the enjoyment of economic and social rights been extended in tandem with per cap-

25 See for example Alan B Krueger and Mikael Lindahl, 'Education for Growth: Why and for Whom' (2001) 39 *Journal of Economic Literature* 1101; Amar A Hamoudi and Jeffrey D Sachs 'Economic Consequences of Health Status: A Review of the Evidence' (1999) CID Working Paper No 30, Harvard Center for International Development.

26 Regarding how poverty and inequality impede growth, see for example, Philippe Aghion, Eve Caroli, and Cecilia Garcia-Penalosa, 'Inequality and Economic Growth: The Perspective of the New Growth Theories' (2006) 37 *Journal of Economic Literature* 1615; and Guillermo Perry and others, 'Poverty Reduction and Growth: Virtuous and Vicious Circles' (The World Bank 2006). Regarding the relative efficacy of growth versus welfare in mitigating poverty, see for example David Brady, 'Structural Theory and Relative Poverty in Rich Western Democracies, 1969-2000' (2005) Luxembourg Income Study Working Paper series No. 407 and Michael Cichon and others, 'Financing Social Protection' (ILO/ISSA 2004).

27 See Fukuda-Parr, Lawson-Remer and Randolph 'An Index of Economic and Social Rights Fulfilment' (n 2); Fukuda-Parr, Lawson-Remer and Randolph 'SERF Index Methodology' (n 2); Randolph, Fukuda-Parr and Lawson-Remer 'Economic and Social Rights Fulfilment Index' (n 2).

ita income growth, and whether countries are indeed doing as much as they can to ensure economic and social rights. It also spot-lights cases where it is likely that countries have violated the principle of non-retrogression.

Our findings are encouraging. The big picture is that, in general, countries are meeting their economic and social rights obligations of result to an increasing degree, and (generally) the gains have been pronounced. The average score on the Core Historical SERF Index (covering all but the high-income OECD countries) has increased by 10 percentage points since 1985, and that for the underlying right to education, housing, health and food indices by 37, 27, 19 and 17 percentage points, respectively, since 1975. The only substantive right where no progress has been made is in the right to work. Despite the gains shown, substantial progress remains to be achieved. On average, by 2005, the core countries had achieved just over 70 % of that which is reasonably feasible. Average achievement among high-income OECD countries as assessed by the Supplemental Historical SERF Index is somewhat higher — over 85 % of what is reasonably feasible in 2005. Nevertheless, progress over the forty years scrutinised has been more limited and primarily traces the progressive realisation of the right to education, and, more specifically, access to basic education. Regression has been the rule, with regard to the rights to food and the right to work, in the high-income OECD countries. This suggests that the principle of non-retrogression has been violated both in terms of the right to food and the right to work.

The big picture, regarding average progress, masks substantial variation across countries; retrogression — both overall and with regard to specific substantive rights — was common, especially over periods spanning a decade. This raises fundamental questions regarding the factors that account for the difference in outcomes. Among the many factors that are likely in play, we examined one key question here: whether countries face a trade-off between fulfilling economic and social rights obligations today, and expanding the resource capacity that can enable greater enjoyment of economic and social rights in the future.

The evidence here indicates that, far from retarding per capita income growth, fulfilling economic and social rights obligations today tends to promote per capita income growth and thereby the capacity to further expand the enjoyment of economic and social rights in the future. The variation in performance observed across countries at a given time, and within individual countries over time, raises many more questions concerning the policy regimes and circumstances that best facilitate the fulfilment of economic and social rights. Detailed case studies of those countries that performed relatively better in terms of meeting their economic and social rights com-

mitments while simultaneously promoting growth promise to shed light on the range of policy regimes that promote both of these goals, and in various circumstances.

Annex A

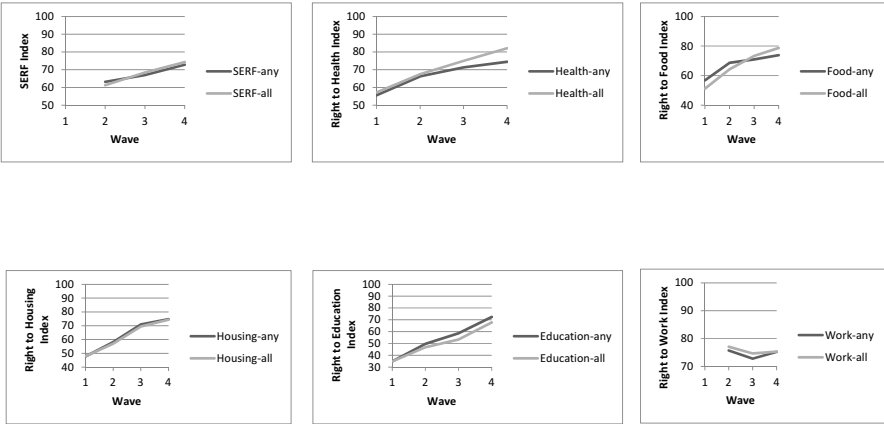


Figure 1: Average Core Historical SERF Index and component right indices trends: countries with data on any wave versus countries with data on all waves

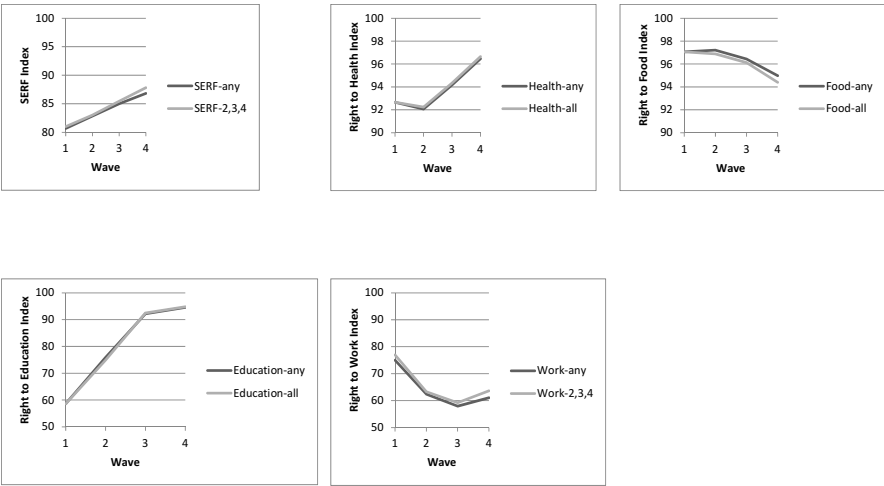


Figure 2: Average Supplemental Historical SERF Index and component right indices trends: countries with data on any wave versus countries with data on all waves

Integrating Quantitative and Qualitative Tools to Monitor the Obligation to Fulfil Economic, Social and Cultural Rights: the OPERA Framework

Allison Corkery and Sally-Anne Way

Allison Corkery, Researcher, Center for Economic and Social Rights, email: acorkery@cesr.org.

Sally-Anne Way, Lecturer, University of Essex; Researcher Associate Centre for Economic and Social Rights, email: s.way@lse.ac.uk.

Abstract: Significant progress has been made over the last two decades in clarifying the normative content of article 2(1) of the International Covenant on Economic, Social and Cultural Rights and this has been followed by the development of new methodologies seeking to monitor state compliance with economic, social and cultural rights (ESCR) obligations. New tools and techniques that adapt both quantitative and qualitative approaches have started to give operational meaning to complex concepts such as “progressive realisation” and “maximum available resources”, making it possible to translate these concepts into measurable standards against which to judge the adequacy of actions taken by states.

In this article, we briefly analyse the range of new methodologies which have been developed to monitor the positive obligation to fulfil ESCR. We argue that each methodology has strengths in measuring a distinct aspect of the obligation but, as yet, no single methodology provides an overall picture of compliance. We suggest then that a more holistic approach be adopted that combines a range of methodologies and tools—both quantitative and qualitative—to address the multidimensional factors affecting the fulfilment of ESCR and to help gather the evidence to demonstrate how poor human rights outcomes (a failure to meet an obligation of result) may be linked to deficiencies in social and economic policies and programs (a failure to meet an obligation to conduct). In order to combine these different methodologies in a systematic way, this article also discusses how one approach—the OPERA framework developed by the Center for Economic and Social Rights—provides an overarching analytical framework within which multiple tools and techniques can be eclectically integrated to allow for a more holistic assessment of states’ compliance with their obligation to fulfil ESCR. The ultimate aim of this approach is to hold states to account for their obligations to fulfil ESCR by combining the strengths of a broad range of new methodologies; quantitative and qualitative.

Keywords: Analytical Framework; Budget Analysis; Guatemala; Holistic Assessment; Indicators; Maximum Available Resources; Measurement; Monitoring Tools; Obligation to Fulfill; Progressive Realization; Quantitative Methodologies; Qualitative Analysis.

I. Introduction

In order to establish that hunger, illiteracy, or lack of access to adequate health-care amount to violations of the International Covenant on Economic, Social and Cultural Rights, (the Covenant), it is essential to demonstrate that they result from failures and deficiencies in a given state's policies—in other words, that the state is failing to meet its obligation to “fulfil” economic, social and cultural rights (ESCR).¹ In the past however, it has been difficult to translate the standards that underpin ESCR obligations such as “progressive realisation” and “maximum available resources” into measurable criteria, which has allowed states to escape responsibility and abdicate their duties towards realising ESCR. Yet over the last two decades, substantial progress had been made to address the challenge of monitoring and measuring compliance with ESCR obligations. First, the standards underpinning the obligation to fulfil ESCR have been increasingly clarified in what is now a significant body of jurisprudence from judicial and quasi-judicial bodies at the national and international levels. Second, there has been the development of many innovative new tools and techniques for monitoring ESCR: both qualitative and quantitative. There is growing literature and practice, for example, about applying indicators and benchmarks, budget analysis and statistical data in the human rights field, making compliance with the obligation to fulfil ESCR more measurable in practice.²

Based on insights from the application of some of these new monitoring tools in practice, this article argues that each have important strengths in measuring distinct aspects of the obligation to fulfil. As noted above, however, to make a holistic assessment of a state's compliance with this obligation, it is necessary to demonstrate the links between poor human rights outcomes (a failure to meet an obligation of result) with deficiencies in social and economic policies and programs (a failure to meet an obligation to conduct). To date, these different tools and techniques have tended to be developed in isolation from each other. We argue, however, that, when used in a complementary way, they can more mean-

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

2 See Center for Economic and Social Rights (CESR), ‘The OPERA Framework: Assessing compliance with the obligation to fulfil economic, social and cultural rights’ (Briefing Paper, 2012); E Felner, ‘Closing the “Escape Hatch”: A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights’ (2009) 1 JHRP 402; Office of the High Commissioner for Human Rights (OHCHR), ‘Report on the implementation of economic, social and cultural rights’, presented to the Economic and Social Council (8 June 2009) UN Doc E/2009/90.

ingfully demonstrate the linkages between states' obligations of conduct and obligations of result. To this end, we reflect on how the adoption a broader assessment framework might facilitate a more systematic convergence of distinct quantitative and qualitative methodologies, to ensure that the full range of relevant standards is captured when assessing compliance with the obligation to fulfil ESCR.

The article therefore first addresses why it has been difficult to assess compliance with the obligation to fulfil ESCR and how the greater clarification of legal standards underpinning the obligation has been an important first step in overcoming this challenge. It then briefly reviews progress made in the development and use of quantitative approaches to measure specific aspects of these standards, before outlining some of the challenges regarding the application of these methodologies in practice. Finally, the article explores how different quantitative and qualitative methods can be combined in order to more holistically assess compliance with the obligation to fulfil ESCR. It considers how one overarching analytical framework developed by the international non-government organisation, the Center for Economic and Social Rights—the OPERA framework—facilitates the integration of different quantitative and qualitative techniques, in order to measure specific legal standards related to the obligations of conduct and of result, and build a compelling case regarding a state's compliance with its obligation to fulfil ESCR.

II. Clarification of the Legal Standards Relevant to the Fulfilment of Economic, Social and Cultural Rights

The nature and scope of obligations related to ESCR differ from those related to civil and political rights, given article 2(1) of the International Covenant on Economic, Social and Cultural Rights, which calls on state parties to:

... *Take steps*, individually and through international assistance and cooperation ... to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant... (emphasis added).³

3 ICESCR art 2(1).

This provision was not designed to be an ‘escape hatch for recalcitrant states’.⁴ However, it has been argued that the terms “progressive realization” and “maximum available resources” are ill-defined and give rise to a certain vagueness that has caused significant difficulties for holding states to account for their obligations under the Covenant.

Nevertheless, over the last two decades there has been significant progress in clarifying and giving content to the legal standards entailed in this provision, through the general comments and concluding observations of the United Nations Committee on Economic, Social and Cultural Rights (the Committee); the work of international experts, including the United Nations special procedures mandate holders; and the jurisprudence of national courts and quasi-judicial adjudication bodies at the national, regional and international levels. These clarifications have helped shed light on the concept of “progressive realisation” such that states can no longer simply hide behind article 2(1) to evade their duties under the Covenant.

Most notably, the Committee has set out that states have tripartite obligations to “respect, protect and fulfil” rights. This is important because it has clarified that ESCR contain both negative and positive duties. The duty to “respect” is a negative obligation that requires the state refrain from interfering with the enjoyment of ESCR, and thus can be implemented immediately. The duty to “protect”, by contrast, requires that the state protect individuals in its territory against violations by third parties, such as corporations, and thus requires some positive action to establish a regulatory system to prevent and remedy violations. Only the duty to “fulfil”, then, is very clearly a positive obligation to be generally achieved progressively through the enactment of policies and programmes to realise ESCR.

Further, as articulated in the Maastricht Guidelines, the obligations to respect, protect and fulfil are each underpinned by obligations “of conduct”, as well as “of result”. The obligation of conduct requires the state to take steps ‘reasonably calculated to realise the enjoyment of a particular right’. The obligation of result requires that states ‘achieve specific targets to satisfy a detailed substantive standard’.⁵ Again, this delimits the concept of progressive realisation; in most cases

4 S Leckie, ‘Another Step Towards Indivisibility: Violations of Economic, Social and Cultural Rights’ (1998) 20 HRQ 81.

5 International Commission of Jurists (ICJ), ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (26 January 1997) <<http://www.unhcr.org/refworld/docid/48abd5730.html>> accessed 12 July 2012 (‘Maastricht Guidelines’) [7].

obligations of result may be achieved progressively (with exceptions, as set out below) while obligations of conduct are immediate.⁶

In relation to results that must be fulfilled immediately, General Comment No. 3 sets out that states have specific ‘immediate obligations’ that are not contingent on resource or time limitations.⁷ These include the duty to ensure non-discrimination, which is an ‘immediate and cross-cutting’ duty requiring that states ‘immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination’.⁸ States also have a core obligation to protect ‘minimum essential levels’ of ESCR.⁹ Failure to do so amounts to a *prima facie* presumption that the state has violated the Covenant, unless it can demonstrate that ‘every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’.¹⁰ While finding consensus on the content of “minimum core obligations” is still elusive, this concept nonetheless has value in insisting that states should always give first priority to ensuring a basic minimum of ESCR, over and above other policy and economic objectives.¹¹ Although not exclusively an obligation of result, deliberately “retrogressive” measures are another *prima facie* violation of the Covenant, unless such measures have been introduced:

after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the state party’s maximum available resources.¹²

6 UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 3: The Nature of States Parties’ Obligations’ (14 December 1990) UN Doc E/1991/23 (‘General Comment No. 3’) [2].

7 Ibid [1].

8 CESCR, ‘General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights’ (2 July 2009) UN Doc E/C.12/GC/20 (‘General Comment No. 20’) [7]–[8].

9 General Comment No. 3 [10].

10 Ibid.

11 Over the past two decades, the Committee has further defined the minimum core of the Covenant’s rights, to specify food, water, health, housing, and education. Looking ahead, it is possible that concepts from other fields, such as the social protection floor, will increasingly enrich the definition of concepts like the minimum core.

12 CESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health’ (11 August 2000) UN Doc E/C.12/2000/4 (‘General Comment No. 14’). The Committee has also elaborated the criteria it will take into account when determining whether a retrogressive measure is justified. See CESCR, ‘General Comment No. 19: The Right to Social Security’ (4 February 2008) UN Doc E/C.12/GC/19 (‘General Comment No. 19’) [42].

The Committee's general comments on specific rights have also articulated standards to guide states' obligations of conduct in fulfilling ESCR. They suggest that a state adopt policies and programs designed to improve the availability, accessibility, acceptability and adaptability and quality of goods and services relevant to the particular right (known as the "AAAAQ" or "4A" criteria). In addition, policies must be designed and implemented in accordance with key human rights principles and procedural rights, including the rights to participation, accountability and transparency. The Committee has also elaborated on the requirement that a state take steps to the "maximum of its available resources", for example identifying criteria for evaluating when resource constraints may be a legitimate explanation for retrogression.¹³ Civil society organisations have similarly been working to give greater clarity to the policy areas relevant when evaluating whether a state is using its maximum resources. The Center for Women's Global Leadership has argued, for example, that assessing "available resources" requires evaluating not only expenditure but also revenue generated and, in some contexts, more complex economic issues such as debt and deficit financing, as well as broader monetary and fiscal policy.¹⁴

Underlying the understanding of these standards, however, is the idea that states enjoy a "margin of discretion" in choosing their policies and in deciding on the level of resources they allocate—although this does not mean that states can evade responsibility for the realisation of ESCR.¹⁵ Reflecting this, courts at the national level have developed tests to judge the legality of measures enacted by states using standards such as "reasonableness", "adequacy" or "proportionality".¹⁶ These concepts seek to evaluate not only results in terms of the relative realisation or deprivation of rights but also the state's conduct, in terms of whether its policies and programmes are "reasonable" in the light of the local context and resource limitations (even if particular people or groups do not have access to a specific right).

13 See, CESCR, 'An evaluation of the obligation to take steps to the "Maximum of Available Resources" under an optional protocol to the Covenant' (10 May 2007) UN Doc E/C.12/2007/1.

14 Center for Women's Global Leadership, 'Maximum Available Resources & Human Rights: Analytical Report' (2011) <<http://cwgl.rutgers.edu/globalcenter/publications/marreport.pdf>> accessed 12 July 2012, 5.

15 Maastricht Guidelines [8].

16 For a further discussion of these principles see ICJ, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: comparative experiences of justiciability' (Human Rights and Rule of Law Series 2, 2008) 33-40; See also, M Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: a socio-legal review' (2009) 6 IJHR 91.

III. The Development of Quantitative Tools to Measure Legal Standards

Traditionally, human rights monitoring has focused on events-based monitoring, which involves an analysis of the facts of a particular case to determine which right was violated, by whom and which remedies are appropriate.¹⁷ In cases where there is a clear, time-bound, action, a clear victim and a clear violator, establishing a violation is relatively straightforward. Indeed, the elaboration of ESCR obligations discussed above—as entailing both negative and positive, as well as immediate and progressive, duties—has confirmed the relevance of such traditional monitoring methods to ESCR. They can be applied comparatively easily to abuses like forced evictions, which involve violations of negative or immediate obligations, like the obligation to respect or of non-discrimination.¹⁸

However, this kind of “violations approach” is far more limited when it comes to addressing the positive obligation to fulfil ESCR. Violations of positive duties are not clear, time-bound events, but usually arise from broader systemic failings of socio-economic policy. The link between the obligation of conduct (of the duty bearer) and the obligation of result (in terms of the impact on the victim) is therefore much more complex, indirect and contingent on resources—and consequently harder to prove. Furthermore, the numerous standards against which both conduct and result should be judged in the context of the obligation to fulfil are complex and multifaceted.

For this reason, monitoring the fulfilment of positive obligations has required new monitoring methodologies that can identify and track trends and patterns to assess the impacts of policies over time. Quantitative tools and techniques—many of which are already widely applied in the social sciences and in development practice—are inherently well suited for this purpose. As discussed further in this section, quantitative tools and techniques have been particularly valuable in capturing the various concepts which underpin the obligation to fulfil ESCR, such as “progressive realization”, “maximum available resources”, the “minimum core”, “non-discrimination” or the “AAAAQ” criteria. For example, human rights actors have increasingly started to use basic statistics and indica-

17 See K Roth, ‘Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization’ (2004) 26 HRQ 63, 68.

18 See, eg A Chapman, ‘A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18 HRQ 23.

tors—many already available in national and international statistical databases—to begin to assess the fulfilment of ESCR in different countries.¹⁹

Progress has been made in establishing sets of indicators, where the data can be regularly reviewed over time. This has allowed an assessment of “progressive realization”. By establishing a baseline (eg the literacy rate in a country as a proxy for the enjoyment of the right to education) and an agreed target or benchmark (eg to achieve 100% literacy by 2015), it is possible to measure whether the realisation of the right to education is improving or deteriorating, whether progress is being made at an adequate pace, and whether the government is achieving its promises through meeting the targets and benchmarks set.

Disaggregating data by specific groups (eg when the literacy rates of ethnic groups, or men and women are set out separately) has also been used to expose disparities in the level of enjoyment of a right that leaves certain groups behind. Although, as discussed further below, these differences cannot conclusively establish a case of discrimination, sharp disparities between groups may signal the need for further analysis of a state’s efforts.

Quantitative data is also important, we would argue, to give content to the idea of the “minimum core” of a specific right. Choosing indicators that reflect the essential core of a right, and which can then be collected and analysed, can help to assess trends and patterns over time in relation to the “minimum core content”.²⁰ For example, the completion of at least a minimum number of years of schooling, or the completion of primary school, might be seen as a useful indicator to establish whether the minimum core content of the right to education is

19 See, eg Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, ‘Human rights Obligations Related to Access to Safe Drinking Water and Sanitation’ delivered to the United Nations General Assembly (6 August 2010) UN Doc. A/65/254; S Kalantry, J Getgen and S Koh, ‘Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR’ (2010) 32 HRQ 253; IACHR, ‘Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights’ (19 July 2008) IACHR Doc OEA/Ser.L/V/II.132 Doc 14 rev 1; J Welling, ‘International Indicators and Economic, Social, and Cultural Rights’ (2008) 30 HRQ 933.

20 For example, CESR used MDG indicators on primary school completion, child malnutrition and maternal mortality to assess compliance with minimum core obligations under the rights to education, food and health in Guatemala. See CESR and ICEFI, ‘Rights or Privileges? Fiscal commitment to the rights to health, education and food in Guatemala’ (2009); See also, C Young, ‘The Minimum Core of Economic and Social Rights: a concept in search of content’ (2008) 33 YJIL 113, 164-167 (discussing the role of indicators and benchmarks as an alternative approach to prescribing content to positive ESCR obligations to the minimum core concept).

being met. High rates of child undernourishment might be used to give a picture of whether or not the right to food is being met at its most basic level.

Descriptive statistics also play an important role in providing the data needed to evaluate the infrastructure, goods and services necessary to fulfil a particular right against the Committee's AAAQ criteria, telling us *what* infrastructure, goods and services on the ground are available (eg doctors per capita) and *where* (hospitals per region), as well as *who* is accessing them. For example, a statistic on the distance children need to walk to get to school can give insights into the extent to which education is physically accessible. However, it is again important that such indicators are purposefully selected, disaggregated and evaluated over time so as to quantify a particular norm. The Right to Education Project, for example, groups accessibility indicators according to those that illustrate physical, economic, administrative, gender, and socio-cultural barriers to accessing school.²¹

A range of conceptual frameworks have been proposed to structure the kinds of data and indicators used in rights monitoring. The Office of the High Commissioner for Human Rights (OHCHR) is a pioneer in this regard, proposing a conceptual framework that seeks to collect data on three types of indicators: structural, process and outcome.²² This incorporates the use of outcome data as a proxy for the results of government policies and the fulfilment of rights. Though, significantly, the framework also emphasises the importance of identifying structural and process indicators that assess the state's legal framework, policies and programs, and the conduct of public officials. In this way, it attempts to capture whether states are meeting their obligations of conduct, as well as their obligations of result.²³

A number of other human rights organisations have looked in greater detail at the concept of "maximum available resources" and have begun to adopt and

21 See Right to Education Project Website, 'Accessibility: Right to Education' <<http://www.right-to-education.org/node/862>> accessed 9 August 2012.

22 'Report of the United Nations High Commissioner for Human Rights' delivered to the Economic and Social Council (26 April 2011) UN Doc E/2011/90 [4]–[29]; OHCHR, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' delivered to the Twentieth Meeting of Chairpersons of the Human Rights Treaty Bodies (6 June 2008) UN Doc HRI/MC/2008/3 (hereafter 2008 Indicators Report); OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' delivered to the Eighteenth Meeting of Chairpersons of the Human Rights Treaty Bodies (June 22 2006) UN Doc HRI/MC/2006/7.

23 The OHCHR indicator framework has been taken up and expanded by other monitoring mechanisms. For a further discussion of these initiatives see *CESR* (n 2).

adapt techniques of applied budget analysis to evaluate how states allocate and spend their resources to assess a government's use of its "maximum of available resources" to realise ESCR.²⁴ Simple descriptive statistics about the state's budget, for example calculating ratios of investment in those sectors and sub-sectors that impact most on ESCR,²⁵ can provide initial insights into which sectors are prioritised in the state's resource allocations, which groups are prioritised and how prioritisations have evolved over time. Methodologies to cost alternative human rights policy initiatives are another emerging area related to budgeting.²⁶ To assess the effectiveness of expenditures, various tools and techniques, some of which are more complex and detailed than others, have been used. For example, "benefit incidence analysis" can identify which groups are benefiting from public expenditures. Citizens' audits, quantitative service delivery surveys (QSDS), and public expenditure tracking surveys (PETS) assess corruption and leakages in actual expenditures that limit the impact of government expenditure.²⁷

Budget analysis can also be used to assess whether resources are being mobilised fairly and effectively through taxation, development assistance, or government borrowing, with methods varying from simple examinations of revenue generation to fuller reviews that look at a state's broader fiscal and monetary policies.²⁸ Auditing the tax system to determine whether it is progressive or regressive; establish the amount of tax revenue foregone in tax concessions, holidays and

24 See, eg M Robinson, 'Budget Analysis and Policy Advocacy: The Role of Non-Governmental Public Action' (IDS Working Paper University of Sussex Institute of Development Studies, 2006); Fundar, International Budget Project and IHRIP, 'Dignity Counts: A guide to using budget analysis to advance human rights' (2004); W Krafchik, 'Background to Applied Budget Work' <<http://www.internationalbudget.org/themes/ESC/budgetintro.pdf>> accessed 8 August 2012.

25 For an explanation of using these ratios, see Felner (n 1 above) 421-424.

26 Equal in Rights, 'A Guide to Costing Human Rights' (2011) <<http://www.equalinrights.org/library/home>> accessed 12 July 2012; E Anderson and M Langford, 'Testing the capacity defence: assessing local and national compliance with the right to water with econometric modeling' (Paper presented at the *International Conference on the Right to Water and Sanitation in Theory and Practice*, Oslo Norway, 27 November 2008); see also G Pizarro and V Roaf, 'Budgeting for the right to water and sanitation—reflections on integrating the right to water in MDG costing models' (paper presented at the International Conference on the Right to Water and Sanitation in Theory and Practice); A Anderson, 'Using quantitative methods to monitor government obligations in terms of the rights to health and education' (CESR Briefing Paper, 2008); Instituto Centroamericano de Estudios Fiscales (ICEFI), 'Más y mejor educación en Guatemala (2008-2021) 'Cuánto nos cuesta' (2007).

27 G Sundet, 'Following the Money: Do Public Expenditure Tracking Surveys Matter?' (U4 Issue, No.8, Chr Michelsen Institute, 2008).

28 R Balakrishnan, D Elson and R Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53 *Development* 27.

loopholes; and determine the contribution that taxes make to GDP, for example, can uncover which groups bear disproportionate shares of the tax burden and whether taxes have redistributive implications or not.

Quantitative techniques are also relevant for measuring the extent to which policy and budgetary cycles uphold principles such as participation, transparency and information. The Open Budget Survey, produced every two years by the International Budget Partnership, for example, scores countries on the extent to which their national budgets meet standards of transparency and accountability.²⁹

Recently, more complex methodologies (adapted from the fields of development and social sciences) have been proposed that attempt to aggregate rights fulfilment into a single number—formulated by calculating a composite score of several indicators. Such methodologies have been appealing as they enable easy comparison and ranking.³⁰ These techniques have also been useful for monitoring “progressive realisation” (where scores are available over time) and in relation to “maximum available resources” (where comparisons can be made across countries on the basis of GDP). One example, proposed by Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, calculates a composite score known as the Social and Economic Rights Fulfillment Index (SERF Index) based on several indicators incorporating the rights to food, education, health, adequate housing, and decent work. The index ranks countries, taking into account their respective level of development, using data for GDP per capita as a proxy for “available resources”.³¹

29 See IBP Website, ‘Open Budget Survey’ <<http://internationalbudget.org/what-we-do/open-budget-survey/>> accessed 8 August 2012.

30 In the development field, indices were seen as a simple tool to encourage policymakers to judge development by improvements in human wellbeing; responding to the ‘excessive preoccupation’ with statistical aggregates such as GNP growth and national income figures. See UNDP, *Human Development Report* (1990) 9.

31 S Fukuda-Parr, T Lawson-Remer and S Randolph, ‘Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment’, Economic Rights Working Paper Series, Human Rights Institute, University of Connecticut (Working Paper 8, 1 August 2008).

IV. Reflections on the Use of Quantitative Tools to Assess Compliance with Economic, Social and Cultural Rights Standards

The development and adoption of quantitative tools for ESCR monitoring, such as those discussed above, has significantly advanced efforts to hold governments to account for their commitments to progressively fulfil ESCR. In particular, the conceptualisation of human rights indicators—as encompassing not only outcome data, but also data on the efforts taken by the state—has been groundbreaking. However, there remains a need to reflect on how these methodologies can best be used in practice. While a comprehensive review of the experiences of practitioners who have used such methods on the ground—whether in litigation, civil society monitoring or policy evaluation—is beyond the scope of this article, this part seeks to draw out a few broad insights and lessons learned in applying quantitative tools for ESCR monitoring. It draws, in particular, from the experience of the Center for Economic and Social Rights (an international NGO for which both the authors have worked).

Overall, the tools and techniques highlighted in the previous part represent major steps forward in operationalising the standards that underpin the obligation to fulfil and provide tremendous resources for human rights advocates in efforts to secure justice for victims of systemic ESCR violations. However, generally speaking, each displays particular strengths in measuring specific aspects of the obligation to fulfil ESCR. Disaggregated socio-economic indicators are well suited to illustrating discrimination. Citizens' audits are an inclusive means of shedding light on the quality of goods and services. Budget analysis is an effective way to uncover whether the state is using its maximum available resources. However, these tools have tended to be developed independently of, and in isolation from, one another, and this has a number of implications.

First, in attempting to be exhaustive, some tools and techniques risk becoming overly technical and complex.³² This makes them potentially complicated to apply in practice, particularly for human rights advocates who are not always skilled in the use of quantitative methodologies. For example, while the identifi-

32 See M Kothari, 'Keynote speech to the International Conference on Budget Decisions and Economic and Social Rights' (Belfast, Northern Ireland 14-15 November, 2009) <<http://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/ResearchProjects/BudgetAnalysis/BudgetDecisionsandEconomicandSocialRights/>> accessed 8 August 2012.

cation of long lists containing hundreds of ‘ideal world’ indicators can be a useful starting point, it can also be intimidating to sift through to apply in real world contexts. Similarly, the mathematical formulas used to calculate human rights indices can be complex and difficult for human rights practitioners.

Furthermore, opportunities for more holistic mixed-methods approaches may be missed. We would argue that many tools and techniques are in fact complementary. Eclectically combining them offers a more rigorous means to collect and analyse data relevant to monitoring ESCR fulfilment. Importantly, using such tools together makes it possible to compare data on the state’s obligations of result with data on its obligations of conduct.

Indicators, for example, have not consistently been used in conjunction with objective reference points or benchmarks. However, this technique is essential in helping to judge whether a state’s performance—in either the results it has achieved, the goods and services it has facilitated, or the resources it has allocated—is reasonable. One simple benchmark that can be used is cross-country comparisons: within the same region or between countries with a similar GDP.³³ For example, the following graph shows how the United States has one of the highest rates of infant mortality amongst OECD countries – which suggests that it may be failing to guarantee a basic minimum level of healthcare for infants. Given that the US has the fourth highest GDP among OECD countries (compared to Slovakia, for example, which is ranked 28), this also points to the fact that this is not necessarily attributable to resource constraints.³⁴

Some methodologies have preferred to avoid using cross-country comparisons that risk being ‘politically explosive’,³⁵ instead referring to targets or goals contained in internationally or regionally negotiated agreements, internationally accepted recommendations or guidelines, or existing national policy frameworks. A range of international agreements set benchmarks or targets on actions to be taken or outcomes to be achieved; the most well-known, of course, being the MDGs. However, while such benchmarks are politically acceptable, they are not always sufficiently ambitious or aligned with human rights standards.³⁶

33 See eg country-focused factsheets produced by the CESR. CESR Website, ‘Country Publications’ <<http://www.cesr.org/section.php?id=43>> accessed 8 August 2012.

34 See CESR ‘Visualizing Rights: United States of America’ (2010) <<http://www.cesr.org/downloads/USA%20Web%20final.pdf>>.

35 Fukuda-Parr et al (n 31) 4.

36 OHCHR, ‘Claiming the MDGs: a human rights approach’ (2008) <http://www.ohchr.org/Documents/Publications/Claiming_MDGs_en.pdf> accessed 8 August 2012.

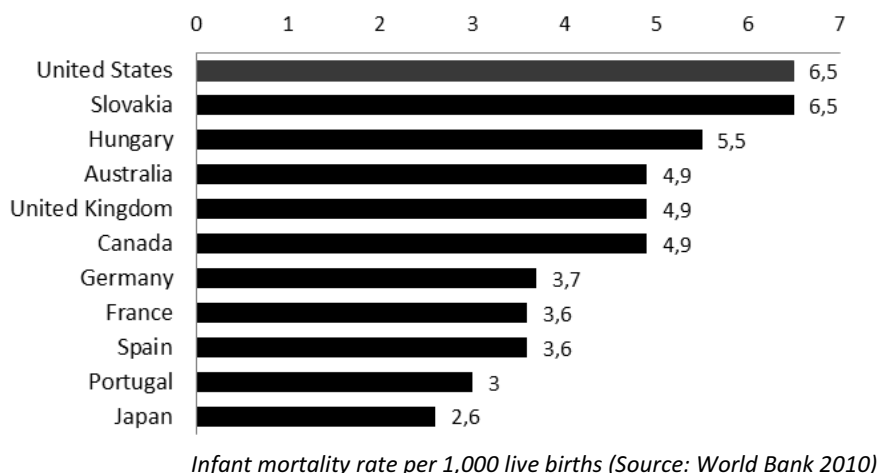


Figure 1: Infant mortality rate, selected OECD countries, 2007

Other approaches that match indicators with benchmarks more explicitly include that of Eibe Reidel, a leading member of the Committee on Economic, Social and Cultural Rights. Reidel advocates that the Committee agree on a set of appropriate benchmarks with a state as part of its periodic reporting process. A ‘scoping’ exercise with other stakeholders would also be carried out to ensure that the benchmarks chosen by the state would be sufficiently ambitious in the context of the state’s level of development.³⁷ Another approach that leaves less scope for subjectivity in benchmark-setting is to use the best standard achieved by a range of similar countries at a particular level of development (using GDP per capita as a proxy). Fukuda-Parr, Lawson-Remer and Randolph adopt this approach in their effort to set an “achievement possibilities frontier” to represent the highest level of enjoyment of a right historically achieved by other similar states.³⁸ This innovative approach avoids the politics of direct country comparisons (as it does not mention the names of specific comparator states) and still provides a way to accommodate different levels of development in quantitative terms; although it does set a high bar in terms of the performance expected of states and does not so far account for factors other than GDP that may explain differences in ESCR outcomes.

37 Riedel, Arend and Suárez Franco, ‘Indicators—Benchmarks—Scoping—Assessment: Background Paper’ (Friedrich Ebert Stiftung, 2010)

<http://www.fes-globalization.org/geneva/documents/HumanRights/6July10_BackgroundPaper_IBSA.pdf> accessed 8 August 2012.

38 See Fukuda-Parr et al. (n 31).

Finally, however, the fundamental challenge in using quantitative methodologies is that they do not give a full, nuanced picture of a state's human rights compliance. Although the trend towards quantification is positive and brings important new additions to the human rights toolkit, a question human rights advocates will continue to face is how to interpret the numbers and figures that they produce. From a human rights perspective, there can be no standardised formula that can say how high or how low particular index rankings, numbers, percentages or ratios must be to equate to human rights compliance, as the Covenant itself 'is, inevitably, devoid of specific allocational benchmarks'.³⁹

In this context, comparing indicators to benchmarks can help judge their reasonableness. However, failure to meet a non-binding benchmark—whether it relates to outcomes, policies or budgets—does not automatically constitute a breach of an obligation, as OHCHR rightly points out.⁴⁰ No one number, nor indeed several numbers, can conclusively diagnose whether a state is meeting its obligation to fulfil ESCR, qualitative judgement is also essential to contextualise the data.⁴¹ So, while methodologies such as index rankings can give an excellent initial overview of a country's situation, they risk providing very reductive interpretations of human rights compliance.

Failure to acknowledge the limitations of quantitative methodologies—as Rosga and Satterthwaite warn—risks turning human rights monitoring activities into an overly technocratic exercise and can also mask the value judgments inherent in the decisions taken when choosing specific indicators and collecting specific data.⁴² This suggests that in the move to quantification, human rights advocates will need to be aware of the debates about the weaknesses, and also the strengths of quantitative—as well as qualitative methods—that have long been discussed within the social sciences.

There is increasing recognition of the need for qualitative assessment among proponents of quantitative methodologies. OHCHR recognises for example that the use of indicators 'does not replace the normative analysis of a human rights situation'.⁴³ The Inter-American Commission has also emphasised the need to

39 P Alston and G Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1997) 9 HRQ 156, 180.

40 OHCHR, 2008 Indicators Report (n 22 above) [19].

41 N Fasel and R Malhotra, 'Quantitative Indicators: a survey of major initiatives' (paper presented at the Turku expert meeting, 10–13 March 2005) 22.

42 A Rosga and M Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27BJIL 253.

43 OHCHR, '2008 Indicators Report' (n 22) [18].

complement quantitative indicators with ‘qualitative signs of progress’ that allow for a deeper analysis of policies and programs.⁴⁴ This will also require infusing human rights values and principles into the collection of data as well as in its interpretation. For example, qualitative information, which is particularly crucial in relation to questions of acceptability and quality, may be collected through interviews and personal testimonies from affected communities; ensuring the data collection retains a “human face”.

Ultimately, while quantitative data can help to diagnose a situation by answering the questions “how much”, “how many”, “to what extent”, “where” or “when”, it is much more limited in terms of suggesting “why” a situation is the way it is. Qualitative, rather than quantitative analysis, can be important for uncovering systemic dysfunctions such as a lack of coordination between state agencies or onerous procurement procedures that prevent the timely disbursement of funds. Qualitative analysis can also be essential for understanding the broader context in which the state is operating. Taking such constraints into account when assessing a state’s human rights compliance does not exonerate the state from failures to make progress in the realisation of ESCR, but it can assist in explaining why a state’s efforts have not been more successful. Rarely will human rights advocates and activists have the technical expertise needed to prove causality between a state’s efforts and the results of those efforts. Even so, contextualising numbers with human knowledge—most importantly the knowledge of rights holders themselves—makes it possible to construct a well-evidenced and holistic argument about rights compliance that helps to make a stronger, more evidence-based linkage between a state’s conduct and its results.

V. OPERA: A Framework for Integrating and Interpreting Quantitative and Qualitative Data to Comprehensively Assess Rights Fulfilment

In light of the conceptual and practical challenges discussed above and drawing from the experience of the international NGO, the Center for Economic and Social Rights (CESR), this article suggests that it can be more effective to eclectically draw on a range of both quantitative and qualitative tools, which enables a

44 *IACHR* (n 19) [28].

more holistic assessment of the obligation to fulfil ESCR. Combining various quantitative and qualitative tools and techniques makes it possible to comprehensively measure the full range of complex and multifaceted standards discussed in the first part of this article; in particular to examine both obligations of conduct and result—and, importantly, make the link between the two.

As a way to systematically combine a range of different tools and techniques, CESR has developed an analytical approach that combines quantitative and qualitative data in a step-by-step framework: the OPERA framework. As illustrated in the graphic below, OPERA stands for Outcomes; Policy Efforts; Resources; and Assessment. Each step of the framework aims to assess a core aspect of the obligation to fulfil ESCR and provides a “checklist” of the relevant standards and principles against which governments’ obligation to fulfil ESCR should be assessed. By methodically assessing a state’s social and economic policies against each of these core elements, the framework aims to systematically link evidence about a state’s performance in terms of its obligations of result with its performance in terms of its obligations of conduct. This enables a more rigorous assessment as to whether or not a state is meeting its obligation to fulfil a particular right or rights.



Figure 2: Summary of the OPERA framework

The OPERA framework is distinct in that it explicitly links human rights standards and principles with a range of quantitative and qualitative techniques that are most appropriate for measuring these standards.⁴⁵ It eclectically draws from a

range of different tools and techniques— structured around a step-by-step framework—to build the case for whether or not a state is meeting its obligations. As the framework was originally developed for NGO advocacy, to date it has primarily focused on techniques that use simple quantitative data, which human rights advocates will be able to apply relatively easily. However, more complex tools may be introduced into any step, depending on the expertise and objectives of the user. In addition, the sequencing of the steps is not meant to be rigid, instead they can be interchanged or emphasised in different ways depending on the key issues faced in different settings. For these reasons, the framework can be applied in various contexts and by a broad range of actors at national or international levels, including national human rights institutions, judicial or quasi-judicial bodies or policy-makers.

Each step of the framework is explained further below, referring to the example of a collaborative assessment carried out by CESR and the Instituto Centroamericano de Estudios Fiscales (ICEFI) on the realisation of the rights to health, education and food in Guatemala.⁴⁶ Although the example here focuses on Guatemala, CESR has used and adapted OPERA in numerous projects in recent years: from reproductive health in Kenya, to the economic and social dimensions of Liberia's transition from conflict, to the impacts of the economic crisis in Ireland and Spain.⁴⁷

Step 1: Outcomes—determining the level of enjoyment of the right

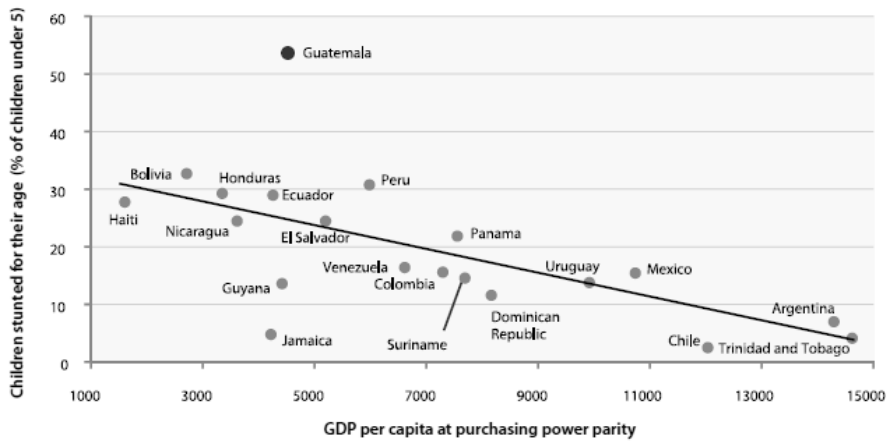
The first step uses quantitative data to approximate trends in the realisation of a specific right in a country. Reflecting the obligation of result, this gives an initial snapshot of the reality on the ground and may suggest *prima facie* non-compliance with the Covenant. Simple descriptive statistics are well suited to this type of assessment. For example, primary school completion rates or youth literacy rates can indicate whether the right to education is enjoyed or not. Selected socio-economic indicators can be analysed at the aggregate level (for the whole popula-

45 For a more detailed explanation of the application of the OPERA framework and its application, see CESR (2012) (n 1 above) and CESR, 'Applying the OPERA Methodological Framework: A case study of the fiscal commitment to the rights to health, education and food in Guatemala' (Briefing Paper, 2012).

46 CESR and ICEFI (n 20).

47 See, CESR Website 'Kenya' <<http://www.cesr.org/section.php?id=37>>; 'Liberia' <<http://www.cesr.org/section.php?id=149>>, and 'Rights in Crisis' <<http://www.cesr.org/section.php?id=139>> all last accessed 8 August 2012.

tion), at the disaggregated level (showing relative outcomes for groups within the population) and, where data is available, over time. This can begin to shed light on whether a country is meeting its obligations to ensure minimum essential levels of a right, non-discrimination and progressive realisation. Reference points or benchmarks help judge the reasonableness of the state's performance on these indicators. As shown in the graph below, for example, in 2005 a high percentage of children under-five in Guatemala were stunted in growth for their age (malnourished). This was far higher than its poorer neighbours, and therefore raised questions about the realisation of the right to food.



Source: Own calculations based on data from UNDP Human Development Report 2007/2008

Figure 3: Rates of chronic malnutrition in Latin America (1996-2005) and GDP per capita (2005)

Step 2: Policy Efforts—evaluating steps taken by the state to realise the right

While poor outcome indicators may suggest a failure to meet the obligation of result, they cannot in and of themselves establish a violation of the right; it is essential to assess whether a state is taking adequate steps towards realising the right in question. In other words, it is necessary to assess state efforts (its obligations of conduct) and to demonstrate the linkages between the policies and programmes adopted, the resources allocated to them, and their results. It is precisely this that the second and third steps seek to do.

The second step begins by identifying the legal and policy commitments made by the state to realise the right in question. It also considers whether legislation governing the right translates these commitments in accordance with their object and purpose. It then looks at what these laws and policies have achieved on the ground, using quantitative and qualitative techniques to judge the infrastructure, goods or services needed to facilitate the enjoyment of the right against human rights standards and principles, including the AAAQ criteria. If monitoring the right to health, for example, this review might look at whether there are policies that set out how to improve the availability and accessibility of healthcare services, whether these policies contain concrete targets, and whether the targets have been met.

Much of step two requires qualitative analysis of laws and policies. However, quantitative data can also be used to assess the availability and accessibility of public services, such as healthcare. For example, the maps of Guatemala below illustrate that high rates of maternal mortality (right) occurred where few deliveries occurred in public facilities (left).

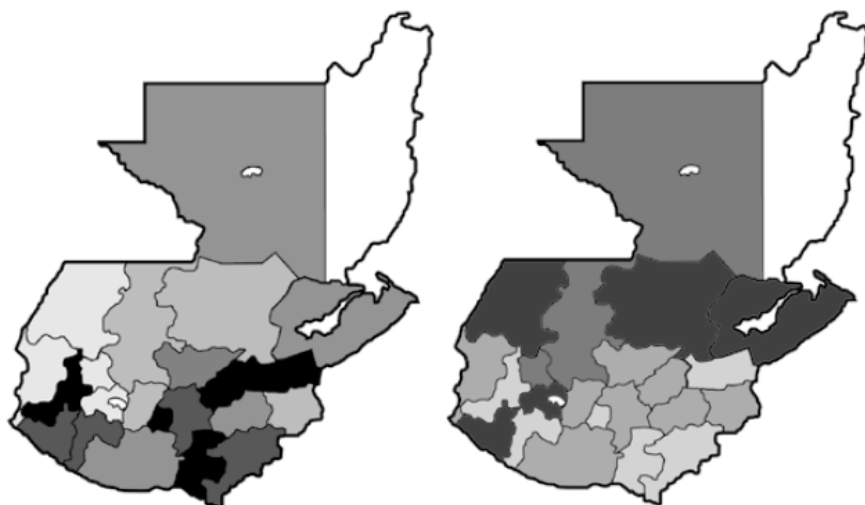


Figure 4: Maps showing proportion of births in public health facilities (left) and maternal mortality rates (right), by department

Note: Darker shades represent higher proportion of births in public facilities (left) and higher rates of maternal mortality (right).

Source: own calculations based on data from epidemiological reports of MSPAS and USAID, 2009

At the same time, collecting qualitative data helps contextualise and further explain the quantitative data. In Guatemala, qualitative data collected on access to emergency obstetric care showed that the provision of these services fell short of international guidelines. In addition, personal testimonies illustrated how access proved extremely difficult for poor women in rural areas, due to the transport costs associated with travelling long distances to hospitals.

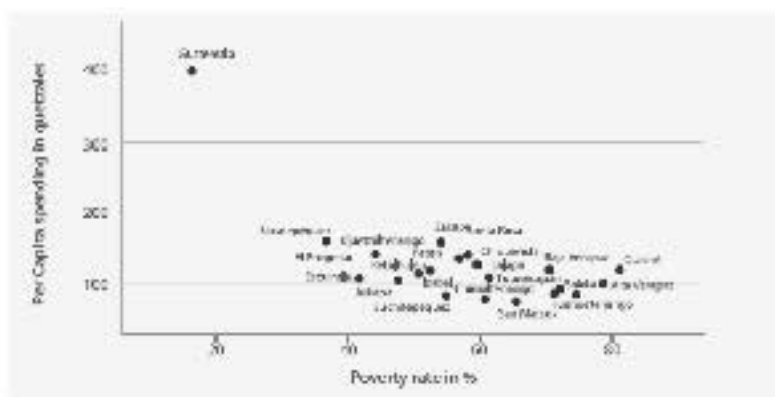
Step 3: Resources—Assessing whether the state is devoting the maximum available resources

The third step uses budget analysis techniques to determine whether the state is devoting its “maximum available resources” to such policies and programs with the aim of meeting its minimum core obligations, promoting equality and progressively realising rights. As underfunding is a persistent problem limiting the implementation of social policies and programs, this step seeks to uncover inefficiencies and inequities in the allocation and expenditure of funds; the fiscal policies that govern the mobilisation of resources; and in the budget cycle process. Budget analysis techniques vary widely in terms of technical complexity, thus the techniques described below are not exhaustive of the field.

The step first gathers information on the state’s budgetary allocations in order to identify the percentages being devoted to specific areas. Although it is difficult to judge whether allocated resources are adequate for the policies proposed, existing national and international benchmarks can be used for an initial judgment regarding the reasonableness of resource allocations. In terms of expenditure, qualitative and quantitative tools and techniques can also shed light on the actual use of resources and uncover losses due to corruption or inefficiency.

In Guatemala, budget analysis found that social spending levels were very low. As shown in the graph below, spending was also highly inequitable. Per capita spending on public health and social assistance was highly concentrated in the region of the capital city, while expenditures in the poor, more rural regions were very low. Looking at resource allocations over time also suggested a case of retrogression, with public per capita spending on education for children aged 5–18 years lower in 2008 than in 2001, for example.

Measuring how the government is generating revenues is another essential part of assessing whether a state is using the “maximum of available resources” because it looks in greater depth at what resources might be available. Where government resources are generated through tax, for example, such an analysis would focus on whether the system is progressive or regressive, or whether tax exemp-



Source: own calculation based on statistics from the Ministry of Public Finance

Figure 5: Per capita spending by the Ministerio de Salud Pública y Asistencia Social and percentage of the population living in poverty, by region (2006)

tions or evasion mean some groups are disproportionately burdened. In the case of Guatemala for, almost 75% of government revenue was generated through indirect consumption taxes: an extremely regressive system that disproportionately burdens poorer groups.

In both the second and third steps, policy and budgetary processes should be assessed against the key procedural human rights principles of participation, transparency and accountability.

Step 4: Assessment—Understanding constraints before making an overall assessment

The last step draws together all the quantitative and qualitative data reviewed in the previous three steps, to make a comprehensive and holistic assessment of whether or not the state is complying with its obligation to fulfil ESCR. This step thus “triangulates” findings about the efforts made by the state, the resources invested and the outcomes achieved.

However, failure to progress towards the realisation of ESCR needs to be put in context of the constraints facing the state which it may have little or no control over. This step therefore starts by analysing such constraints. This draws less on quantitative tools and techniques and more on tools from social sciences, though sophisticated quantitative methods from the economics field, such as econometrics, may be used to try to establish causal relationships between state efforts, con-

straints and outcomes. Although it is seldom possible to carry out a full examination of the political economy, studying how power and resources are distributed and contested can help to uncover *why* government efforts have not been more successful, looking beyond the shortcomings already identified in steps two and three. In Guatemala, the resistance of a powerful elite had obstructed attempts to reform the tax system since the end of the conflict in 1996, although the constraints identified will vary greatly depending on the context and may broadly relate to:

- the conduct of third parties, such as corruption by officials, corporate misconduct, elite capture, aid conditionality etc;
- structural dysfunctions relating, for example, to decentralisation, electoral processes, parliamentary procedures etc; or
- environmental conditions such as natural disasters or conflict etc.

As highlighted in the table below, a collection of quantitative methodologies have been invoked in each step of the analysis. However, the final judgment in this step is necessarily qualitative, relying on a considered evaluation of all the evidence within its local context, interpreted through the lens of the state's human rights obligations. The following box very briefly illustrates this overall step-by-step analysis:

CASE STUDY: MATERNAL HEALTH IN GUATEMALA	
Outcomes	Guatemala had the highest maternal mortality ratio in Latin America, with indigenous women three times more likely to die during child-birth or pregnancy than non-indigenous women. Whereas ratios in comparable countries had declined significantly, Guatemala's had actually increased between 1990 and 2005. Over 50% of maternal deaths were caused by post-partum haemorrhaging, a complication which is largely preventable with skilled care.
Policy Efforts	Despite an exemplary constitutional and legal framework, as well as a strong, normatively-grounded policy framework, data collected on the implementation of policies found serious issues with the availability, accessibility and quality of health services such as emergency obstetric care. Personal testimonies uncovered that it was the physical distance, compounded by high transport costs, which made it extremely difficult for poor women to access hospitals.

Resources	The budget of Guatemala's health ministry had stagnated in real terms and decreased significantly as a proportion of overall health spending, with households taking on a larger share. Low health spending, in turn, could be explained in terms of the extremely low public budget (15% of GDP, compared to the regional average of 27%). This was due to a negligible tax burden on the wealthy. Indirect taxes on consumption constituted 75% of government tax revenues, an extremely regressive tax system that disproportionately burdens the poor.
Assessment	Resistance to the fiscal reforms in Guatemala's Peace Accords came from a powerful elite, which had led to weak regulatory structures and an economic context hostile to reform. As a result, Guatemala's high rates of maternal deaths were not linked to <i>lack</i> of resources, but rather their <i>distribution</i> . This suggested that Guatemala was failing to meet its minimum core obligations concerning the right to health of women, in effect discriminating against its poorer, indigenous population.

In the Guatemala example, framing issues of child malnutrition, maternal mortality and low primary school completion as human rights imperatives gave demands for reform renewed force. By adopting this step-by-step methodological approach, CESR and ICEFI were able to substantiate the human rights arguments and make concrete recommendations on which to engage policy makers more effectively. Recommendations even included estimates of the resources necessary and made proposals on the fiscal reforms needed to ensure higher social spending, better distribution of this expenditure and strengthening of social auditing and accountability to advance the rights to education, health and nutrition.⁴⁸ This put pressure on the state to fully justify its position. Ultimately, Guatemala's Finance Minister made public statements in response to the report on the government's commitment to increase social spending and to introduce progressive tax reforms.⁴⁹

48 CESR and ICEFI (n 19 above) [106-111].

49 'Baja carga tributaria predispone al país al riesgo de una hecatombe social', *Diario de Centro América* (6 November 2009) [4].

VI. Conclusion

As outlined at the beginning of the article, assessing compliance with the obligation to fulfil ESCR has long been a challenge due to the complex and multifaceted concepts of “progressive realization”, “maximum available resources”, “minimum core obligations” and “non-discrimination”. The margin of discretion given to states and lack of specific allocational benchmarks in the Covenant itself make translating these various concepts into specific standards against which to critique states’ actions challenging. This, in turn, has made it difficult to attribute failures to realise ESCR to a government’s actions or omissions in developing and implementing adequate policies and programmes. In other words, until recently, there was a lack of appropriate methodologies that could link poor human rights outcomes (a failure by the state to meet its obligations of result) with deficiencies in social and economic policies and programmes (a failure by the state to meet its obligations of conduct) in a way that could contribute to assessing a state’s compliance with its positive obligation to fulfil ESCR.

As the legal standards have become conceptually clearer however, new and innovative quantitative methods have been developed to try to measure compliance with such standards as “progressive realisation” and “maximum available resources”. But as this article outlined above, while many of the new tools and methodologies have important strengths in measuring specific aspects of these standards, few of them offer a holistic and comprehensive assessment of the obligation to fulfil ESCR. There are also a range of challenges in using only quantitative data and tools for measuring human rights compliance. While quantitative approaches can produce useful data and statistics that help to measure compliance with legal standards, questions will remain regarding the interpretation of data, and while numbers, percentages or ratios can give substantive details which help to answer questions regarding “how much”, “how many”, “to what extent”, “where” or “when” a failure in compliance occurs, quantitative data cannot offer a hypothesis to respond to the question of “why” this occurs. Addressing the “why” question—which is essential in making the link between conduct and results—usually requires rounding out quantitative analysis with the use of more qualitative analysis and a qualitative judgement based on the particular context. This can begin to uncover why there is a lack of compliance and identify “red flags” where improvements are needed, which is important for opening up space for debate and dialogue about alternative approaches regarding how to better comply with the obligation to fulfil ESCR.

This article suggested that a fuller and more holistic assessment of human rights compliance can be achieved by eclectically combining a range of quantitative tools and techniques, but that these tools will also need to be combined with qualitative data and that an overall assessment of compliance is necessary a qualitative judgement. This article also proposed that systemically integrating a range of distinct quantitative and qualitative methods under a flexible overarching framework, such as the OPERA framework developed by CESR, is one way forward in ensuring that the full range of norms and standards are captured in an assessment to build a compelling, well-evidenced argument about a state's compliance with its obligation to fulfil ESCR.

In summary, the OPERA framework sets out a step-by-step approach for the issues that need to be addressed when monitoring the obligation to fulfil ESCR. Within each of these categories there is checklist of indicative questions and suggested methods for answering them. It will ultimately be up to each user to determine which of those questions demand greater attention for the purposes of their monitoring activity and how they can best be answered, depending on the objectives, priorities, and practical constraints in each particular context. By allowing for simple and complex tools to be mixed and matched at each step, the framework aims to remain flexible and applicable to a wide variety of uses and users. It will also be able to evolve as more advanced tools are developed and become more accessible in the future, as part of important efforts to increase accountability for the fulfilment of ESCR. Ultimately, the purpose of developing more rigorous methodologies—and this framework for using them—is to make complex concepts such as “progressive realisation” more measurable and, therefore, no longer obstacles to holding states to account for their ESCR obligations.

Counting What We Know; Knowing What to Count

Sexual and Reproductive Rights, Maternal Health, and the Millennium Development Goals¹

Alicia Ely Yamin and Kathryn L Falb

Alicia Ely Yamin, JD, MPH, Lecturer on Global Health and Director of the Health Rights of Women and Children Program at the François-Xavier Bagnoud Center for Health and Human Rights, Harvard University. Associated Senior Researcher at the Christian Michelsen Institute (Bergen), email: AYAMIN@hsph.harvard.edu.

Kathryn L Falb, ScD, MHS, former Program Manager of Health Rights of Women and Children, François-Xavier Bagnoud Center for Health and Human Rights, Harvard University, email: kfalb@hsph.harvard.edu.

Abstract: The sole reference to sexual and reproductive health in the Millennium Development Goals (MDGs) is in MDG 5, which relates to improvement in maternal health. A great deal of attention has been focused upon measuring achievement of this goal, which called for a 75% reduction in maternal mortality ratios from 1990 by the year 2015. Although no scenario suggests that MDG 5 will have been reached by 2015, a number of new comprehensive estimation exercises have shown varying calculations. We fully concur with the need to systematically assess progress on maternal health in order to hold governments and other actors accountable. However, in this article, we agree with others that it was inappropriate for the MDGs to become national planning targets and argue that in the case of MDG 5, this elision was exacerbated by the principal indicator chosen: maternal mortality ratios (MMRs). Second, we explain why MMRs are inappropriate indicators to measure national progress from a human rights perspective and, in turn, set out criteria derived from human rights principles to apply in selecting indicators to measure maternal mortality, and provide the example of process indicators related to emergency obstetric care. Third, we go on to note that the debate about measuring maternal mortality in the context of the MDGs has in many ways displaced the larger and more important political debate, highlighted at the Cairo Conference in 1994, about what societal reforms are required to advance women's sexual and reproductive health and rights. Finally, we argue that real progress on women's health and rights pre- and post-2015 requires reopening that debate, and we call for engagement by the SRHR communities in this process.

1 This article is partially based on Alicia Yamin's presentation at the "Network on Quantitative Methods for Human Rights and Development" in New York City on 6 June 2011, as well as her blog for Women Deliver "Reclaiming a Seat at the Table: A Call for Engagement by the Sexual and Reproductive Health and Rights Communities" October 19, 2011, www.womendeliver.org.

Keywords: Human Rights; Maternal Health; Sexual and Reproductive Rights; Millennium Development Goals.

I. Introduction

It is a truism that we measure what we think about, and we think about what we care about. This article starts with the premise that we ought to care about sexual and reproductive health and rights (SRHR) because progress in the world requires that all people have some control over their bodies and, in turn, their lives. Such control requires autonomy, but it also requires entitlements to health facilities, goods and services, as well as a broad range of social determinants; it requires changes in laws and policies as well as in social, cultural and institutional practices.² Many of these fundamental aspects of SRHR are not readily susceptible to quantitative measurement. For example, the degree of active participation by men and women in policies and programs is critical to assessing their effective enjoyment of SRHR; however, it is not well-captured by a numerical indicator. Nevertheless, some aspects of SRHR can, and should, be measured in order to evaluate whether “adequate progress” is being made with respect to the progressive realisation of the highest attainable standard of health, and other rights, as called for under international law.³

In the year 2000, the Millennium Declaration set out an unprecedented shared vision of development that committed states to time-bound targets for reducing poverty in the world. The Millennium Development Goals (MDGs) were intended to implement that vision by establishing specific goals, targets and indicators to be achieved by the year 2015. One of those goals (MDG 5) related to improvement in maternal health and called for a 75% reduction in maternal mortality ratios from 1990 levels by 2015.⁴ In 2007, another target (MDG 5B), relating to universal access to reproductive health, was added.

In this article, we start by reviewing where we are now in terms of measuring achievement of MDG 5. However, we agree with critiques raised by others that it was inappropriate for the MDGs to become national planning targets. We argue

2 UN Committee on ESCR, ‘General Comment 14: The Right to the Highest Attainable Standard of Health’ (2000) UN Doc. E/C.12/2000/4 (‘General Comment 14’).

3 Ibid arts 2, 58-59.

4 United Nations Summit, ‘Goal 5: Improve Maternal Health Fact Sheet’ (DPI/2650 E/Rev1, 2010).

that in the case of MDG 5, this elision was significantly exacerbated by the principal indicator chosen: maternal mortality ratios (MMRs), and we go on to explain why MMRs are inappropriate indicators to measure national progress from a human rights perspective. In light of this analysis, we then set out criteria derived from human rights principles to apply in selecting indicators to measure maternal mortality, as well as other health conditions, and use the example of process indicators related to emergency obstetric care. However, we go on to assert that the debate about measuring maternal mortality in the context of the MDGs has in many ways displaced the larger and more important political debate, highlighted at the Cairo Conference in 1994, about what societal reforms are required to advance women's sexual and reproductive health and rights. In this context, we argue that real progress on women's health and rights pre- and post-2015 requires that that debate is reopened, and we call for engagement by SRHR communities in this process.

II. Progress of MDG 5: What Do We Know and Where Are We Now?

As others have noted, the MDGs were never intended to be used as national planning targets.⁵ They were conceived as global goals that would focus international attention on selected issues relating to poverty reduction and, in turn, would mobilise aid from the North to the South to address those issues. The reductions called for under the Goals were based on global figures over the previous twenty-five years; in any given national context, those percentages become almost entirely arbitrary. However, the MDGs presented a framework that could be measured and monitored and they quickly began to be used by donors and national governments alike to set national planning targets, frequently displacing domestic processes that had been underway previously.

Notwithstanding the fact that this one-size-fits-all, top-down approach was highly problematic as a model for development, the conversion of the global goals into national targets—i.e. each country was to reduce maternal mortality by

5 Sakiko Fukuda-Parr and Joshua Greenstein, 'How Should MDG Implementation be Measured: Faster Progress of Meeting Targets?' (2010) Working Paper Number 63/May 2010, International Policy Centre for Inclusive Growth <<http://www.ipc-undp.org/pub/IPCWorkingPaper63.pdf>>; Jan Vandemoortele, 'The MDG Conundrum: Meeting the Targets Without Missing the Point' (2009) 27 Development Policy Review 355.

75% from its 1990 levels—could potentially have provided a new opportunity for civil society to hold governments accountable for accelerating progress with respect to maternal health. Indeed, the MDGs did spur governmental prioritisation⁶ of maternal health in planning documents and poverty reduction programs, and in turn civil society activities around maternal health in many countries. However, the indicator selected in relation to MDG 5A was especially inapposite for promoting effective accountability for national progress.

MDG 5A was not only measured by, but also framed in terms of reduction in the maternal mortality ratio (MMR): measured in terms of deaths of women from maternal causes over 100,000 live births.⁷ MMRs are not complete reflections of levels of maternal mortality because they do not account for fertility rates. Moreover, MMRs are notoriously unreliable due to a number of factors, including the quality of the underlying source data regarding the number of maternal deaths, and varying specifications of statistical models including, but not limited to, the selection of covariates and handling of HIV-related deaths.⁸ These challenges were well known when MMRs were chosen to measure MDG 5 and, as a result, access to skilled birth attendance was added as a much more continually measurable and reliable indicator of government efforts. When MDG 5B was added, it also was to be measured through coverage indicators, including contraceptive prevalence rate, adolescent birth rate, antenatal care coverage, and unmet need for family planning. Nevertheless, at the political level—which drives funding as well as media attention—MMRs became *the* indicator by which progress was measured in relation to MDG 5 in general.

In 2007, global estimates of maternal mortality burdens suggested that remarkably little progress had been made for decades.⁹ By the time the 2010 MDG summit was approaching, there was a political consensus that there had been lagging and uneven progress with respect to MDG 5, as well as MDG 4, relating to child health. The narrative became that at least 70% of countries were

6 Fukuda-Parr and Greenstein (n 5).

7 According to the World Health Organization, maternal mortality is defined as the death of a woman 'while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes.' For more information, See <<http://www.who.int/healthinfo/statistics/indmaternalmortality/en/index.html>>

8 Carla Abouzahr, 'New Estimates of Maternal Mortality and How to Interpret Them: Choice or Confusion?' (2011) 19 *Reproductive Health Matters* 117; Cesar G Victora, 'Measuring Progress Towards Equitable Child Survival: Where are the Epidemiologists?' (2007) 28 *Epidemiology* 669.

9 Kenneth Hill and others, 'Estimates of Maternal Mortality Worldwide between 1990 and 2005; An Assessment of Available Data' (2007) 370 *Lancet* 1311.

not on track to meet these two goals. The countries that were failing to meet what had by this time come to be understood as national targets were disproportionately found in sub-Saharan Africa.

As a result, at the 2010 MDG Summit, the United Nations Secretary General launched a Global Strategy for Women's and Children's Health (Global Strategy), which involved unprecedented political advocacy around women's and children's health. The Global Strategy resulted in the commitment of approximately \$US 40 billion in new funding, as well as other significant policy and service delivery commitments by both donor states and national governments, along with the private sector, health professional associations, foundations and non-governmental organizations.¹⁰

However, in 2010, 2011 and 2012 new estimations of maternal mortality levels were released that seemed to paint a somewhat rosier picture of progress than had previously been estimated, although the countries with the highest burdens of maternal mortality still fell short of the MDG targets. In 2011, Lozano and colleagues offered new estimates of maternal and child mortality to assess progress towards MDGs 5 and 4, in relation to child health, based on an expansion of data sources and updated analyses.¹¹ They found that only thirteen countries were "on track" to meet MDG 5 by 2015 and only nine countries were likely to meet both MDG 4 and MDG 5. Nonetheless, the authors concluded that even though many countries were not going to meet the targets, they were progressing in the right direction, while twenty countries have shown no progress or increases in maternal mortality.¹² A more recent set of estimates was published by the World Health Organization (WHO), UNICEF, UNFPA and the World Bank in 2012; the authors concluded that in 2010, an estimated 287,000 maternal deaths occurred. Ten countries were documented to have met the MDG 5A target of reducing maternal mortality ratios by 75% while nine countries were "on track" to meet the goal.¹³

The study by Lozano et al. and the WHO updated estimates released in 2012 followed two comprehensive estimation exercises of maternal mortality published in 2010, with varying calculations. The WHO, UNICEF, UNFPA and the World Bank estimated that there were 358,000 maternal deaths in 2008,¹⁴ while

10 Commission on Information and Accountability for Women's and Children's Health, 'Keeping Promises, Measuring Results' (Final Report of the Commission) (2011).

11 Rafael Lozano and others, 'Progress Towards Millenium Development Goals 4 and 5 on Maternal and Child Mortality: An Updated Systematic Analysis' (2011) 378 *Lancet* 1139.

12 Ibid.

13 WHO and others, *Trends in Maternal Mortality: 1990 to 2010* (2012).

14 WHO and others, *Trends in Maternal Mortality: 1990 to 2008* (2010).

another study published in the *Lancet*, Hogan et al, from the Institute for Health Metrics and Evaluation (IHME) estimated there to be 342,900 maternal deaths for that same year.¹⁵ Although these overall estimates appear remarkably close, there were actually notable differences between these two studies.

First of all, the pace of progress differed substantially; the WHO (2008) estimated an average rate of 2.3% decline, while researchers at IHME (corresponding to the Hogan analysis) estimated a significantly different and smaller declining rate of 1.3%.¹⁶ Moreover, in a substantial number of countries, the two studies differed as to whether there had been declines or increases in maternal mortality levels. For example, the WHO (2010) estimated that Nigeria had an MMR of 840 per 100,000 women, compared to 1,100 maternal deaths per 100,000 women in 1990, which corresponded to a 24% decline in maternal mortality.¹⁷ However, Hogan et al. estimated that, in 2008, Nigeria had an MMR of 608 per 100,000 women. This estimate was substantially higher than their estimate of Nigeria's MMR in 1990: 516 maternal deaths per 100,000 women.¹⁸

As Byass and Graham argue, publishing multiple estimates may create undue confusion or uncertainty.¹⁹ In this case, the differing results in the IHME and WHO et al. studies reflect different statistical decisions regarding covariate selection, data collection, and modelling selections, including the treatment of HIV-related deaths. The lack of quality data in many countries with the highest burdens of maternal mortality means that such estimation exercises rely heavily on statistical modelling to produce their results. In fact, allocating funding for strengthening civil registrations and proper training related to coding of maternal deaths within countries is often ignored within debates on statistical modelling. Yet, the gaps in underlying data, and statistical assumptions and nuances are too often overlooked when these results are published.

Further, messaging and interpretations of data can have implications for government policy as well as global funding. For example, when the IHME study appeared, one of the co-authors, Christopher Murray was quoted on the front page of the *New York Times*, referring to Eastern and Southern Africa, saying '.... if you want to tackle maternal mortality in those regions, you need to pay attention to the

15 Margaret C Hogan and others, 'Maternal Mortality for 181 Countries: 1980-2008: A Systematic Analysis of Progress Towards Millennium Development Goal 5' (2010) 375 *Lancet* 1609.

16 *Abouzahr* (n 8).

17 *WHO and others*, '1990 to 2008' (n 14).

18 *Hogan and others* (n 15).

19 Peter Byass and Wendy J Graham, 'Grappling with Uncertainties Along the MDG Trail' (2011) 378 *Lancet* 1119.

management of HIV in pregnant women. It's not about emergency obstetrical care, but about access to antiretrovirals'.²⁰ In fact, pregnant HIV positive women need both antiretrovirals (ARVs) and access to emergency obstetric care (EmOC). Ignoring ample evidence to the contrary, so-called "pro-life" groups also immediately jumped in to argue that the improved MMRs showed that lifting abortion restrictions was unnecessary to promote declines in maternal mortality.²¹ For their part, civil society groups in individual countries often attack governments when a new estimate shows an increase instead of a decline, even though it may be due to different statistical modelling, or even improved surveillance at the national level.

Beyond the misunderstanding, misuse and politicisation of data, from a human rights perspective these estimations of MMRs are simply not appropriate for monitoring progress or for an assessment of what is effective, and what is not. From a statistical point of view, overlapping confidence intervals yield inclusive results regarding changing trends over time for certain countries. For example, the IHME – Hogan study estimated that in 1980 Afghanistan had 1,640 maternal deaths per 100,000 live births with a confidence interval of (632 – 3,527). In 2008, estimated maternal deaths decreased to 1,575 deaths per 100,000 live births. However, the confidence interval substantially overlapped with the 1980 estimate (594 – 3,396) which means that it is simply impossible to say whether and to what extent levels of maternal mortality have declined in Afghanistan over the past few decades.²² The first WHO et al. data are equally ambiguous. The WHO study estimated a somewhat lower MMR in 2008 for Afghanistan (1,400 maternal deaths per 100,000 live births) yet still had a wide confidence interval (740–2,600).²³ The following subsequent analyses from the IHME –Lozano study calculated that Afghanistan had a MMR of 1,046.8 in 1990 (confidence interval: 811.0– 1,312.2) and 880.8 MMR in 2011 (confidence interval: 685.4– 1,104.8).²⁴ Although the years of comparison vary slightly between 2011 and

20 Denise Grady, 'Maternal Deaths Decline Sharply Across the Globe' *The New York Times* (New York, 13 April 2010).

21 -----, 'World Health Organization Report Recognizes Lower Maternal Mortality Rate' (*Catholic News Agency*, 24 September 2010) <<http://www.catholicnewsagency.com/news/world-health-organization-report-recognizes-lower-maternal-mortality-rate/>>; Patrick Goodenough, 'U.N. Report on Maternal Deaths Disregards Optimistic New Statistics' (*CNS News*, 18 June 2010) <<http://www.cnsnews.com/news/article/un-report-maternal-deaths-disregards-optimistic-new-statistics>>; Doug McGee, 'Abortion Doesn't Lower Maternal Mortality' (*Texas Right to Life*, 7 July 2010) <<http://www.texasrighttolife.com/a/134/Abortion-doesnt-lower-maternal-mortality>>

22 *Hogan and others* (n 15).

23 *WHO and others*, '1990 to 2008' (n 14).

24 *Lozano and others* (n 11).

2008, the latter study, which was characterized by different source data and modelling strategy, yielded a substantially lower calculation of MMRs in Afghanistan; yet the confidence intervals between all estimates overlap substantially. The most recently updated analyses from WHO et al. estimated a much lower MMR of 460 in 2010 (confidence interval: 250-850). In addition, estimated trends across the past two decades of maternal mortality ratios in Afghanistan add further confusion to interpretation of estimates.

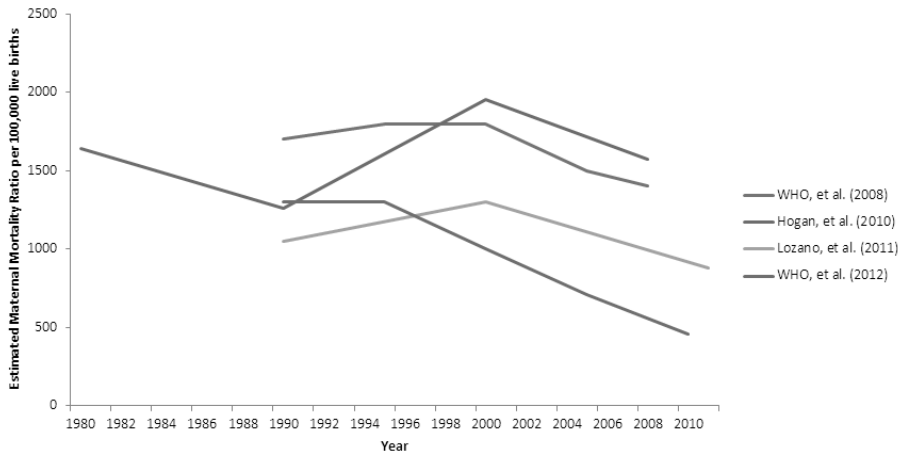


Figure 1. Point estimates and confidence intervals of recent maternal mortality ratio estimate exercises for Afghanistan.

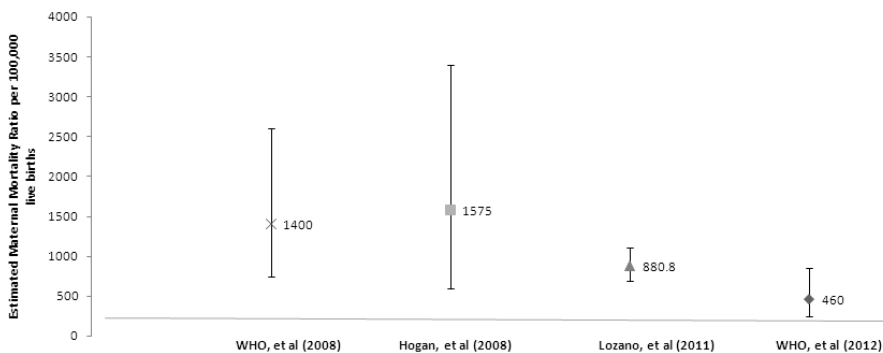


Figure 2. Trend estimates for maternal mortality ratio in Afghanistan from 1980-2011, by estimating body and year.

In short, although we might say that the trends are all moving in the same direction, it is impossible to draw hard conclusions regarding exactly what has happened in Afghanistan during the period covered by the MDGs, and the same is also true of the other countries with the highest levels of maternal mortality. Moreover, elevated MMRs, in and of themselves, provide no indication of what priorities should be adopted by these governments in addressing maternal mortality. There is, of course, a need to systematically assess progress relating to maternal health, in order to hold governments and other actors accountable both for certain policy efforts and also outcomes. However, the use of MMRs to measure national progress with respect to MDG 5 has not enhanced meaningful accountability in a human rights framework. To know what would promote human rights-based accountability, it is important for us to know what we are counting and why.

III. Selecting Quantitative Health Indicators to Promote Human Rights Accountability

From a human rights perspective on measurement, as Kate Raworth has argued, we are really interested in ‘what implications can be drawn [from the indicators] regarding the conduct and accountability of policymakers and state officials’.²⁵ Given this understanding, we can identify certain criteria for numerical indicators in assessing progress with respect to the realization of the right to health, and economic and social rights more broadly. These criteria, which shall then be addressed in turn, include being: objective, continuously (or at least very frequently) measurable, comparable across time and place, programmatically relevant, susceptible to disaggregation to show disparities and discrimination within countries, and susceptible to audit by affected population groups.²⁶

First, indicators must be objectively measurable with clear definitions and transparency in data collection efforts in order to accurately compare across countries and regions, and over time periods. Just as we demand that equally situated people be treated equally in human rights; country performances must be subjected to the same principle of equal treatment in measurement. Subjective rank-

25 Kate Raworth, ‘Measuring Human Rights’ (2001) 15 *Ethics and International Affairs* 111, 124.

26 Alicia Ely Yamin, ‘Toward Transformative Accountability: Applying a Rights-Based Approach to Fulfill Maternal Health Obligations’ (2010) 7 *SUR* 95.

ings undermine the usefulness of indicators for human rights accountability, irrespective of how meticulous the designing committee is. As Raworth argued, all rankings are subject to the questions of 'Who' (who did them?); 'Why' (for what purpose?); and 'so what?', if that particular group asserts a particular ranking.²⁷ Measurement is not a neutral process. As Sally Engle Merry has written, the use of many indicators—including the MMR—'...typically conceal their political and theoretical origins. They rely on practices of measurement and counting that are themselves opaque'.²⁸ Indeed, in arriving at estimates, assumptions of statistical models are often fraught with political and often non-articulated theoretical assumptions. However, it is imperative from a human rights perspective that there be clarity with respect to both assumptions and exact modelling practices, in order to ensure transparency, reliability and replicability.

Second, quantitative indicators should be measurable either continuously or with as frequent a periodicity as possible so that particular administrations can be held accountable for their policies and programmatic actions and level of performance in the current context. Indicators that reflect failures that may have subsequently been addressed or reflect long-standing issues not susceptible to change over the course of one administration are less useful for holding governments accountable. Thus, for example, the Sisterhood Method²⁹ of collecting empirical data on deaths to calculate maternal mortality ratios (MMR) generally looks back at least seven years, which renders it inappropriate for measuring progress or comparisons of trends across geographic areas.³⁰ New administrations often argue that they are doing better than the old numbers reflect.³¹

Third, the only way to tell if administrations have changed course and are doing better (or worse) than prior governments is to choose indicators that are

27 Raworth (n 25).

28 Sally E Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2009) 103 Proceedings of the Annual Meeting (American Society of International Law) 239.

29 Wendy Graham, William Brass and Robert W Snow, 'Estimating Maternal Mortality: The Sisterhood Method' (1989) 20 Studies in Family Planning 125.

30 WHO and UNICEF, 'The Sisterhood Method for Estimating Maternal Mortality: Guidance Notes for Potential Users' (1997).

31 The Sisterhood Method indirectly calculates the probability of maternal death by inquiring whether any deceased sisters have died while they were pregnant, during childbirth, or within six weeks after pregnancy during a survey or census, thereby providing a lifetime or ever measure of risk of maternal death and is less useful to assess recent changes in risk of maternal death: *Graham, Brass and Snow* (n 29). The *indirect* sisterhood method asks women about four items related to ascertaining maternal mortality about their sisters. The *direct* sisterhood method occurs when women are asked additional questions regarding the circumstances of their sisters: *Ibid.*

programmatically relevant. Selecting programmatically relevant indicators is essential to ensure governments and actors are taking ‘*appropriate*’ (emphasis added) steps and measures towards the reduction of maternal mortality and realisation of women’s health rights, in keeping with their obligations under international law.³² In maternal health, as indicated above, MMRs do not tell us what the government needs to be doing, and, often, high MMRs are due to very different reasons. For example, sometimes quality of care may be abysmal despite the fact that most women deliver in facilities (e.g. Dominican Republic),³³ while in other cases, high MMRs reflect lack of ability to pay for treatment or health services which leads to women opting out of the health sector.³⁴

Fourth, the ability for an indicator to be disaggregated is essential so that we may detect disparities and potential discrimination within countries, which are of key importance in a human rights framework. For example, disaggregated data has showed that indigenous women in Guatemala are three times more likely to die from maternal causes than non-indigenous women.³⁵ Disaggregation of MMRs is of course possible, but as sample sizes grow smaller, confidence intervals grow larger, making meaningful interpretation even more difficult. However, indicators of unequal access and utilisation of inadequate reproductive health services provide significant and programmatically useful data for maternal health programs, which may be particularly relevant for indices such as skilled birth attendance.³⁶ In Guatemala, the greatest disparities can be illustrated in skilled birth attendance, such that poor women are over 2.5 times less likely to have births attended by skilled health professionals. Rural women were similarly less likely to have skilled birth attendance.³⁷

32 International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Alicia Ely Yamin and Deborah P Maine, ‘Maternal Mortality as a Human Rights Issue: Measuring Compliance with International Treaty Obligations’ (1999) 21 Human Rights Quarterly 563.

33 S Miller and others, ‘Quality of Care in Institutionalized Deliveries: The Paradox of the Dominican Republic’ (2003) 82 International Journal of Gynecology and Obstetrics 89.

34 Eugénie Kabali, Catherine Gourbin C and Vincent De Brouwere, ‘Complications of Childbirth and Maternal Deaths in Kinshasa Hospitals: Testimonies from Women and their Families’ (2011) 11 BMC Pregnancy Childbirth 1.

35 Fernando Carrera, Ignacio Saiz and Alicia Ely Yamin, ‘Rights or Privileges? Fiscal Commitment to the Rights to Health, Education and Food in Guatemala’ (Executive Summary) (2009).

36 Aluisio JD Barros and others, ‘Equity in Maternal, Newborn, and Child Health Interventions in Countdown to 2015: A Retrospective Review of Survey Data from 54 Countries’ (2012) 379 Lancet 1225.

37 Carrera, Saiz and Yamin (n 35).

Finally, in keeping with the human rights principle of meaningful participation, ideally, the populations affected should be able to audit these data collection and measurement practices, in order to evaluate their local health centres and the policies and programs at district and national levels. For example, the availability of contraception options, as well as stock-outs, can be observed by local communities at their health centre and that information can be valuably compiled to pressure government action. Even when this is not possible, at a minimum, national health institutions should be engaged in the calculation of indicators and the methods of calculation should be made accessible to the wider public so that the methodology is well understood and seen as legitimate in by the affected populations. Unfortunately, this is often not the case, particularly so with indicators that require extremely sophisticated statistical modelling or rely on a variety of different empirical survey methods through Demographic and Health Surveys. Carla Abouzahr noted in her review of two 2010 global estimation of maternal mortality exercises that neither the United Nations nor Institute for Health Metrics and Evaluation (IHME) involved institutions from developing countries. This lack of engagement, minimal local ownership, and insufficient local capacity-building of data collection and analysis could bring few beneficial results to the country themselves.³⁸

As MMRs are inadequate to assess national progress, coverage or process indicators are required to meet these human rights criteria for accountability in the case of maternal health. The family planning and skilled birth attendance indicators included in the MDGs are critical, as both are essential components of any strategy to address maternal mortality. However, neither alone is sufficient, as they reveal little about the overall functioning of the health system, which is an essential element in improving maternal health. Indeed, the only widely accepted indicator that relates to the health system are process indicators that measure the availability and use of emergency obstetric care (EmOC), and wider application of these indicators could usefully complete the picture.³⁹

EmOC, or standardised obstetrical services provided at qualified health facilities that have the capacity to treat emergency obstetric complications, is a pillar of

38 Abouzahr (n 8).

39 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 Human Rights Quarterly 1200; Alicia Ely Yamin, 'Toward Transformative Accountability: Applying a Rights-Based Approach to Fulfill Maternal Health Obligations' (2010) 7 SUR 95; Yamin and Maine (n 32).

maternal mortality reduction and has been set out as a priority obligation by both the ESC Rights Committee and the CEDAW Committee.⁴⁰ These indicators, endorsed by UNICEF, UNFPA and the WHO since 1997 and reiterated in a 2009 handbook on measuring emergency obstetric care, pose questions related to the availability, accessibility and quality of EmOC, and, indirectly, medicines and supply chains. They also establish whether enough women are using the facilities, based on population estimates of women who are expected to experience obstetric emergencies, and importantly whether the women who are experiencing such emergencies are using the facilities (including those who need Caesarean sections) rather than merely the women who live nearby.⁴¹

First, the EmOC indicators are based on objective data that calls for counting patients and using a population-based denominator. Second, they are continuously measurable, as data from the different relevant facilities in a catchment area can be compiled at any time and calculated immediately. Third, they are directly programmatically relevant because EmOC is a critical factor in preventing maternal deaths; although most complications are neither preventable nor foreseeable, it has long been known that they are treatable with a handful of interventions used to define the EmOC signal functions. Fourth, they are subject to disaggregation, at least regionally, and this information can be cross-tabulated to some extent with data on income, race and ethnicity. Finally, the EmOC indicators potentially are also usable by local populations to monitor their own health facilities and evaluate whether they are performing the signal functions, have the appropriate medications and supplies on hand, are equipped with staff twenty-four hours a day, and so forth.⁴²

The EmOC indicators have been, and continue to be, subject to refinements. For example, some scholars have recently argued that a more useful indicator would use the denominator of births, rather than population, to establish distributions of EmOC.⁴³ However, the principal problem with the EmOC indicators is that, despite universal agreement on the critical role that EmOC plays in preventing maternal mortality,⁴⁴ other than Caesarean section rates, these indicators

40 CEDAW, 'General Recommendation No. 24: Women and Health (1999) UN Doc. A/54/38/Rev.1, chap 1 ('General Comment 24'); General Comment 14.

41 WHO and others, 'Monitoring Emergency Obstetric Care: A Handbook' (2009).

42 *Yamin*, 'Toward Transformative Accountability' (n 39).

43 S Gabrysch, P Zanger and OM Campbell, 'Emergency Obstetric Care Availability: A Critical Assessment of the Current Indicator' (2012) 17 *Tropical Medicine and International Health* 2.

44 Anne Paxton and Tessa Wardlaw, 'Are We Making Progress in Maternal Mortality?' (2010) 364 *New England Journal of Medicine* 1990.

are still not collected on a population-wide basis in most countries. This sharply contrasts with the fact that EmOC is considered a core obligation of States Parties to the Women's Convention and an obligation of highest priority under the ICE-SCR, in relation to the right to health. In addition, EmOC is underscored in the resolutions from the Human Rights Council regarding maternal mortality and human rights and specifically set out as part of the UN Technical Guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality.⁴⁵

The Countdown to 2015, a global collaborative effort to synthesise and advocate for maternal, newborn, and child health, including the establishment of quality indicators to track progress,⁴⁶ importantly adopted two indicators related to EmOC: (1) national availability of emergency obstetric care services and (2) Caesarean section rates. In the process of eliciting commitments to the Global Strategy on Women and Children, numerous countries asserted that they wanted to improve access to EmOC.⁴⁷ Nonetheless, the 2011 WHO Information and Accountability Commission report did not include EmOC among the eleven indicators (six related to maternal health) that it selected, precisely because they are not available in enough countries.

However, one of the lessons from the MDGs is that data collection is driven by political demands for it. One of the most positive effects of the MDGs has surely been more attention being paid to improved data collection, data harmonisation, and so forth. Indeed, the WHO Accountability Commission called for a strengthening of Health Information Systems.⁴⁸ There is no reason that EmOC data could not be collected on a national basis in more countries, especially those with high burdens of maternal mortality. Indeed, investing in Health Information Systems specifically in terms of health facility and GPS data to be able to effectively calculate the EmOC indicators on a systematic basis would support

45 UN Human Rights Council Res 11/8, 'Preventable Maternal Mortality and Morbidity and Human Rights' (2009) Eleventh Session; UN Human Rights Council Res 15/17, 'Preventable Maternal Mortality and Morbidity and Human Rights: Follow up to Council Resolution 11/8' (2010) Fifteenth Session; UN Human Rights Council Res 18/2 Eighteenth session (2011); UN Human Rights Council Res 21/3 Twenty-first session (2012). General Comment 24; General Comment 14.

46 WHO, *Countdown to 2015 Decade Report (2000-2010): Taking Stock of Maternal, Newborn, and Child Survival* (2010).

47 The Partnership for Maternal Newborn and Child Health, *Analysing Commitments to Advance the Global Strategy for Women's and Children's Health. The PMNCH 2011 Report* (2011).

48 *Commission on Information and Accountability for Women's and Children's Health* (n 10).

meaningful accountability for an important dimension of SRHR: reducing maternal mortality.

IV. Taking a Step Back and Where We Go From Here

Maternal health is, however, only one important dimension of SRHR. Indeed, the Programme of Action of the 1994 International Conference on Population and Development (ICPD) represented a historic paradigm shift where demographic fertility changes ceded importance to reproductive rights. For the first time, the previously disparate set of care and interventions –ranging from freedom from gender-based violence to access to care for sexually transmitted infections– was captured under the umbrella of “reproductive health.” In the ICPD Programme of Action reproductive health was defined as:

A state of complete physical, mental, and social well-being in all matters relating to the reproductive system and to its functions and processes. It implies that people have the capability to reproduce and the freedom to decide if, when and how often to do so. ... Reproductive health care also includes sexual health, the purpose of which is the enhancement of life and personal relations.⁴⁹

This broad understanding of reproductive health and rights was then extended in Beijing in 1995, at the Fourth World Conference on Women.⁵⁰ It was clear that implementation of these broad visions would require societal changes, shifts in power and gender relations, as well as changes in health care delivery. Therefore, the understanding of SRHR set out in the ICPD was inherently political—and contested.⁵¹

The SRHR communities continued to make strides following Cairo and Beijing. For example, laws and policies regarding gender-based violence were passed in virtually every country of the world.⁵² Nonetheless, there were also challenges

49 International Conference on Population and Development, ‘Summary of the Programme of Action, Paragraph 7.2’ (DPI/1618/POP--March 1995, 1994)

50 United Nations, ‘Beijing Declaration and Platform for Action’, UN Doc. A/CONF.177/20, art 94 (1995).

51 Ellen Chesler and Wendy Chavkin, *Where Human Rights Begin: Health, Sexuality, and Women in the New Millennium* (Rutgers University Press 2005); Laura Reichenbach and Mindy Jane Roseman (eds), *Reproductive Health and Human Rights: The Way Forward* (University of Pennsylvania Press 2011).

52 UN Committee on ESCR, ‘Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women’, UN Doc. E/CN.4/2003/75/Add.1 (2003).

in 'bringing Cairo and Beijing home', including a lack of operational guidance and inadequate associated indicators.⁵³

However, it was political regrouping on the international stage and reinvigorated opposition by fundamentalists and other conservative groups that led to a departure of SRHR paradigm by the end of that decade, and resulted in the absence of reproductive and sexual rights in the Millennium Declaration. As Crossette has noted, given the deliberate omission of reproductive rights in the Millennium Declaration, it was hardly surprising that there was only one MDG related to reproductive health in any way, and then only to the relatively depoliticised question of maternal health.⁵⁴

Human rights scholars have commented on the reductionism of the MDGs in general.⁵⁵ The eight numerical targets obscured complex power relations in achieving rights. They ignored international legal frameworks and selectively excluded certain rights. Moreover, they were devised and applied in a top-down manner that precluded participation by affected groups, and they largely overlooked important equity and accountability concerns. All of these critiques, as well as others, apply with particular force to MDG 5.

Nonetheless, the MDGs garnered unprecedented global support- as well as funding. That the funding followed the narrowing of the ICPD agenda to maternal health, undermining a holistic approach to people's SRHR, was inextricably related to the power of indicators to drive development policy. The human rights community has carried out cutting-edge and innovative work in relation to maternal health rights during the first twelve years of the MDG's process, which succeeded in ground-breaking resolutions being passed by the Human Rights Council, as well as illustrating through reports how inextricably embedded maternal health is in broader SHRH.⁵⁶ Path-breaking litigation was also brought, establishing the right to maternal health as enforceable in countries from Brazil to India.⁵⁷

53 Alicia Ely Yamin, *Learning to Dance: Advancing Women's Reproductive Health and Well-Being from the Perspectives of Public Health and Human Rights* (Harvard Series of Health and Human Rights ed, FXB Center for Health and Human Rights 2005) 3; Anna Glasier and others, 'Sexual and Reproductive Health: A Matter of Life and Death' (2006) 368 *Lancet* 1595.

54 Barbara Crossette, 'Reproductive Health and the Millennium Development Goals: The Missing Link' (2005) 36 *Studies of Family Planning* 71.

55 Phillip 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 *Human Rights Quarterly* 755; Malcolm Langford, 'A Poverty of Rights: Six Ways to Six the MDGs' (2010) 41 *IDS Bulletin* 83; Malcolm Langford, *Claiming the Millennium Development Goals: A Human Rights Approach* (2008).

Yet these broader human rights concerns and activities were happening around the margins of mainstream development efforts, which had become fixated on achieving—and therefore measuring—numerical progress with respect to MDG 5. An entire industry sprang up around these efforts to enhance global modelling and estimation exercises with respect to MDG 5; the number of studies and secondary presentations regarding those studies have proliferated enormously and are used as key benchmarks on the status of maternal and child challenges in public health conferences.⁵⁸ The indicator has come to drive a certain technical agenda regarding the relatively depoliticised domain of maternal—often connected with child—health.

Furthermore, the MDGs function as a normative narrative as well, and this narrative has in many ways become a throwback to pre-ICPD, where there is no global normative commitment to SRHR *per se*. In turn, this narrative shift had concrete effects on funding and programming.⁵⁹ For example, despite being a target under MDG 5B, in 2010 family planning investment only amounted to approximately \$US 3.1 billion dollars.⁶⁰ Yet, there are approximately 215 million women who have an unmet need for family planning; addressing these contraceptive needs alone could reduce maternal mortality by up to one-third.⁶¹ Moreover, the overall portion of overseas development assistance that had been allocated for family planning steeply declined between 2000 and 2008 from 8.2% – 3.2% resulting in less money being allocated to family planning than prior to 2000.⁶²

If family planning was pushed to the periphery of the international agenda during the first decade of the MDGs, addressing the estimated 13–18% of maternal mortality due to unsafe abortions around the world⁶³ was often explicitly excluded from the technocratic approach to maternal mortality, due in large

56 Amnesty International, *Deadly Delivery: The Maternal Health Care Crisis in the USA* (2010); Center for Reproductive Rights, *Broken Promises: Human Rights, Accountability, and Maternal Death in Nigeria* (2008); Human Rights Watch, *Unaccountable: Addressing Reproductive Health Care Gaps* (2010).

57 UN Committee on the Elimination of Discrimination Against Women, *Alyne da Silva Pimentel Teixeira vs. Brazil* (2008) UN Doc. CEDAW/C/49/D/17/2008; *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors*, W.P. (C) Nos. 8853 of 2008 (High Court of Delhi).

58 R Derman, 'Overview of Global MCH Challenges – Why Can't We Get it Right?' (American Public Health Association, 139th Annual Meeting and Exposition).

59 Shiyama Kuruvilla and others, 'The Millennium Development Goals and Human Rights: Realizing Shared Commitments' (2012) 34 Human Rights Quarterly 141.

60 Guttmacher Institute, 'Facts on Investing in Family Planning and Maternal and Newborn Health: Updated November 2010 Using New Maternal and Neonatal Mortality Data' (Fact Sheet) (2010); Shusheela Singh and others, *Adding it Up: The Costs and Benefits of Investing in Family Planning and Maternal and Newborn Health* (2009).

61 *United Nations Summit* (n 4).

62 *Ibid.*

measure no doubt to a lack of political will.⁶⁴ Addressing abortion ineluctably touches upon power relations and cultural and religious norms that donors as well as national governments were happy not to tackle. For example, the Gates Foundation, one of the largest donors in this field, does not fund any abortion-related activities⁶⁵ and the United States government under the Bush administration explicitly had adopted a Global Gag Rule, which precluded organisations receiving US funding support from even providing abortion counselling.⁶⁶

Other fundamental issues of SRHR, which were not directly related to reductions in maternal health, have fared even more poorly in terms of funding and programming. If the MDGs placed a spotlight on maternal mortality, there were many issues highlighted at Cairo and Beijing—such as those relating to sexuality—which were then partly obscured by the long shadow cast from that spotlight. As a result, the traditional SRHR community, disenchanted with the MDGs from the outset, became increasingly disengaged as the years wore on.⁶⁷ In 2010, a group that included some prominent academics and activists even met in Malaysia to call for the ‘repoliticization of sexual and reproductive health’.⁶⁸

At the same time, the extraordinary attention devoted to achieving MDG 5 (and concomitant attention given to measuring the lagging progress) led to the development of a Global Strategy on Women’s and Children’s Health in 2010 (Global Strategy). As a result of this effort, a number of advocacy, technical assistance, and accountability initiatives have occurred at the international level: the Every Woman, Every Child Campaign was initiated; the G8 and the African Union both made further commitments in early 2011; a UN Innovation Working Group was formed to support innovative approaches to financing and service

63 SR Fawcus, ‘Maternal Mortality and Unsafe Abortion’ (2008) 22 *Best Pract Res Clin Obstet Gynaecol* 533.

64 David A Grimes and others, ‘Unsafe Abortion: The Preventable Pandemic’ (2006) 368 *Lancet* 1908.

65 Barbara B Crane, ‘Safe Abortion and the Global Political Economy of Reproductive Rights’ (2005) 48 *Development* 85.

66 Barbara B Crane and Jennifer Dusenberry, ‘Power and Politics in International Funding for Reproductive Health: the US Global Gag Rule’ (2004) 12 *Reprod Health Matters* 128; Duff Gillespie and others, ‘International Family-Planning Budgets in the “New US” Era’ (2009) 373 *Lancet* 1505.

67 Marge Berer, ‘Maternal Mortality or Women’s Health: Time for Action’ (2012) 20 *Reproductive Health Matters* 5.

68 Reproductive Health Matters and Asian-Pacific Resource and Research Centre for Women, ‘Repoliticizing Sexual and Reproductive Health and Rights’ (2011) Report of a Global Meeting Langkawi, Malaysia 3-6 August 2010.

delivery, as well as scale up; the Partnership for Maternal, Newborn and Child Health (PMNCH) undertook a follow-up study of commitments made at the MDG summit in 2010 and 2011; and a World Health Organization Information and Accountability Commission was established, which recommended (among other things) the creation of both national level accountability mechanisms and a global independent Expert Review Group (iERG) to review progress on implementation of recommendations made by the accountability commission.⁶⁹ This intense flurry of activities and commitments surpassed, by any measure, those made after the International Conference for Population and Development (Cairo) from funding to political commitments.

The creation of an iERG, as well as the national oversight mechanisms, was an important acknowledgement of the need for greater accountability in the MDGs, and a recognition of the human rights community's efforts throughout the process, and with respect to MDG 5 in particular.⁷⁰

It is, however, unclear how broadly the iERG will interpret its mandate and how robust and independent the national accountability mechanisms will prove to be.

The WHO Accountability Commission report noted that the ultimate goal of the iERG is to draw on all existing evidence, from both national and global levels, to make recommendations to improve accountability frameworks. A key component of such work may include the selection of meaningful and transparent indicators. However, as noted above, the indicators chosen by the Commission, were extremely narrow and related exclusively to the delivery of certain aspects of maternal health care: maternal mortality ratio (MMR); the met need for contraception; antenatal care coverage; antiretroviral prophylaxis among HIV positive pregnant women to prevent mother to child transmission of HIV and antiretroviral therapy for women who are treatment-eligible; the presence of a skilled attendant at birth; and postnatal care for mother and babies (the percentage of mothers and babies who received postnatal care visit within two days of childbirth).⁷¹ Indeed, some of these indicators are questionable even from that narrow vantage point, as is the failure to include an emphasis on EmOC. Yet, more importantly, focusing this narrowly further closes out the possibility of using the MDGs process, and the Global

69 *The Partnership for Maternal Newborn and Child Health* (n 47); *Commission on Information and Accountability for Women's and Children's Health* (n 10).

70 *Commission on Information and Accountability for Women's and Children's Health* (n 10).

71 *Ibid.*

Strategy to open debates at national and international levels regarding what is necessary to promote gender equality and SRHR.

The way in which both the iERG and the national-level oversight mechanisms function will not only determine accountability for advancing SRHR in the next few years, but will also likely foreshadow the nature and degree of accountability we might expect in a post-2015 world. It is critical that both the iERG and national mechanisms in relation to SRHR adopt a broad and non-technocratic approach to reproductive and sexual health. Amongst other things, opening up the agenda requires going beyond the indicators listed in the WHO Accountability Commission report. As others have argued, comprehensive human rights accountability requires the use of structural indicators, as well as indicators of policy effort. Structural indicators include legal and institutional frameworks, as well as the existence of relevant institutions, such as an accessible monitoring body, as well as a national human rights institution that has a mandate which includes SRHR, and effective redress mechanisms. Indicators of policy effort include the participatory and transparent development of National Strategies and Plans of Action for SRHR based on comprehensive situation analyses across multiple levels of governments, with a focus on evidence-based interventions,⁷² and budgetary allocations and implementation.

At the time of writing, it is as yet unclear how the iERG and the national oversight institutions will operate and the degree of governmental support and independence that they might acquire in different countries. However, it is very clear that these mechanisms will only be able to function optimally with robust advocacy and pressure from the SRHR community. The UN's Global Strategy for Women's and Children's Health requires reclaiming a broader vision of "global", which entails attacking shared problems across regions rather than merely mobilising aid to the 49 worst-performing countries, and a broader vision of "women's health".

Moreover, looking at the broader socio-political context, there is cause for concern about the possibilities for a broader development agenda that takes SRHR seriously. For example, the neglect of family planning for the first decade of the MDGs was suddenly reversed in 2012 with multi-billion dollar infusions of funding into family planning initiatives from the Gates Foundation and UK Department of International Development, as well as heightened attention in international development circles.⁷³ However, "sustainable development" rather

72 Yamin, 'Toward Transformative Accountability' (n 39).

than reproductive rights seems to be driving the renewed attention to family planning. The need to fight climate change, to reduce greenhouse gases by curbing population growth, is increasingly cited as a reason for the focus on family planning—alongside economic growth. Melinda Gates, for example, has attributed the East Asian economic miracle of the 1980s (when GDPs skyrocketed) ‘in large part’ to concerted government family planning initiatives.⁷⁴ Although the outcome document from the recent Rio Conference on Sustainable Development includes some mention of both human rights and women’s empowerment,⁷⁵ it is desperately weak on both the interdependence of civil and political rights with economic and social rights, as well as women’s inherent rights to lives of dignity and full participation in society. Women’s roles are apparently seen as of instrumental value, and civil rights appear to be perceived as a potential barrier to economic development. This is dangerous, and bodes poorly for the possibilities of getting the future we want through global development initiatives post-MDGs.

V. Concluding Reflections

Maternal mortality is notoriously difficult to measure. SRHR, which is not simply the absence of maternal mortality, is even more difficult to measure. However, while maternal mortality is difficult to measure for statistical and practical reasons, attempting to measure the enjoyment of SRHR implicates an attendant host of conceptual and normative complexities. In selecting a few numerical indicators, and in highlighting one—the MMR—the MDGs process largely attempted to erase those complexities. In the course of the MDGs, the narrative of progress became driven by an extreme focus on measurement of that one numerical indicator; questions regarding the root causes of maternal mortality, let alone gender inequality and obstacles to promoting a broader SRHR were lost in the process.

Justifiably disappointed with the formulation of the MDGs, the SRHR community has remained detached throughout the last decade. However, it is a mistake for the reproductive and sexual rights movements to fail to engage with the

73 Ewen MacAskill, ‘Global Summit Aim to Reverse Years of Family Planning Neglect’ (*The Guardian*, 10 June 2012) <<http://www.guardian.co.uk/global-development/2012/jun/10/global-summit-family-planning>> accessed 26 June 2012.

74 Melinda Gates, ‘Family Planning: A Force for Good Across Africa’ (*The Independent*, 2012).

75 UNCSO Secretariat, ‘Population Dynamics and Sustainable Development’ Issue Briefs No 14, Rio 2012.

MDGs process now at this pivotal time because the funding attached to this process, and the post-2015 framework, will inevitably affect the way in which development and health programming is carried out and that, in turn, will deeply impact SRHR for decades to come.

For example, if women's SRHR are to be protected, the argument that economic growth objectives are hindered by high rates of population growth cannot be considered in isolation from the broader context of growing inequality in access to basic resources and livelihoods, and the way national economies are inextricably affected by the global economic system. With the Cairo +20 meeting (which will mark two decades since the ICPD) beckoning in 2014, and the planning for a post-MDGs development agenda, we are now entering a critical time for the creation of a global development model designed to increase choices rather than limit them. If we really care about the well-being of poor women, we will ensure they have access to contraception and EmOC, moreover we will also ensure that health systems meet their health needs more fully, that laws and policies promote gender equality, and that they also have access to education, employment, adequate food and housing and other basic human rights.

This is the time to reopen the political debates that have been displaced by the narrow focus of the MDGs. As planning unfolds with respect to both ICPD in 2014, and creating a post-2015 development agenda, we need recapture a more global and emancipatory- and therefore inherently politically contested narrative- of SRHR, and of development more broadly.⁷⁶

76 Sakiko Fukuda-Parr, 'Recapturing the Narrative of International Development' UNRISD Overarching Concerns Paper No. 12 (2012).

Economic and Social Rights Across Time, Regions, and Legal Traditions:

A Preliminary Analysis of the TIESR Dataset¹

Courtney Jung and Evan Rosevear

Courtney Jung, Professor of Political Science, University of Toronto, email: courtney.jung@utoronto.ca.

Evan Rosevear, JD/PhD student, Department of Political Science and Faculty of Law, University of Toronto, email: evan.rosevear@utoronto.ca.

Abstract: Nearly all written constitutions in the developing world contain one or more economic and social rights. However, some rights are more commonly enshrined than others, and there is wide variation in terms of whether such rights are identified as justiciable – enforceable in a court of law – or merely aspirational. The most interesting variations occur along three dimensions: time, region, and legal tradition. Most constitutions are new, and the contemporary constitutional model affords greater standing to economic and social rights than the previous post-War model. There are significant regional differences in the relative prevalence of such rights, and some regions exhibit a clear regional norm with respect to economic and social rights. Finally, the constitutions of common law countries are significantly less likely to include economic and social rights, and to identify them as justiciable, than those of civil law countries. This article reports some of the initial findings of a new dataset measuring the constitutional entrenchment of economic and social rights.

Keywords: Economic Rights; Social Rights; Constitutions.

Economic and social rights (ESRs) guarantee rights to unionise, strike, and fair wages, and they promise access to housing, healthcare, education, and social security. Along with civil and political rights, they are enshrined in the Universal Declaration of Human Rights,² and they bind states signatory to the International Covenant on Economic, Social, and Cultural Rights ('ICESCR').³ In addition,

1 The authors gratefully acknowledge the advice, assistance, and feedback offered by the members of the TIESR Advisory Board, and by our partners: The Comparative Constitutions Project; The Center for Economic and Social Rights; and The CIRI Human Rights Data Project. Thanks also to the anonymous reviewers who offered helpful comments on the paper. Our greatest debt is to Salvator Cusimano who collected most of the data for this project. This research was funded by a grant from the Social Sciences and Humanities Research Council of Canada.

2 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

3 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICESCR').

many new democracies have included economic and social rights in their constitutions, committing their governments, at least rhetorically, to the progressive realization of minimum standards of social welfare.

The Toronto Initiative for Economic and Social Rights (TIESR) Dataset measures the presence, absence, and justiciability of seventeen separate economic and social rights in 136 constitutions in Asia, Africa, Europe, and Latin America.⁴ English versions of the constitutional documents were retrieved from Constitutions of the Countries of the World Online and from national government websites.⁵ The dataset is freely available online, and also includes data on constitutional commitments to a free market, expropriation, and ratification of the International Covenant on Economic, Social and Cultural Rights.⁶

In the last thirty years, economic and social rights have gained widespread currency and legitimacy. The debate over whether such rights are justiciable seems largely to have been settled by case law.⁷ There is also an extensive scholarly literature on such rights, affording insight into the scope and effectiveness of eco-

4 Effective June 2012, the TIESR dataset has been expanded to include data on 190 countries, including western Europe, North America, and the small island nations. This data is also available online, but is not analysed in this article. Specifically, the dataset codes the rights to: property; strike; join or form a trade union; a fair wage; rest and leisure; employment-derived social security; a healthy working environment; child protection; education; healthcare; social security; food and water; land; adequate housing; development; a healthy environment; and, environmental protection. In this chapter, we exclude the right to property from the analysis to sidestep controversy regarding whether or not it qualifies as an ESR. The right to property nevertheless appears in 95.9 % of the constitutions in our dataset, making it the most universally entrenched ESR, if indeed it is an ESR.

5 Max Planck Institute for Comparative Public Law and International Law, 'Constitutions of the Countries of the World Online' (Oxford University Press no date).

6 The TIESR dataset is available online at <http://www.tiesr.org>. The dataset was independently coded by two researchers; any disagreements between the coders were settled by a separate panel. We nevertheless request that users assist in improving the data's reliability by reporting mistakes/differences of interpretation by sending an email to contact@TIESR.org. A detailed description of coding procedures is outlined in: Courtney Jung, 'Coding Manual: A Description of the Methods and Decisions Used to Build a Cross-National Dataset of Economic and Social Rights in Developing Country Constitutions', (Report) 9 November 2010.

7 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); Christian Courtis, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability' (International Commission of Jurists 2008), Human Rights and the Rule of Law Series; Shivani Verma, 'Justiciability of Economic Social and Cultural Rights: Relevant Case Law' (International Council on Human Rights Policy 2005).

conomic and social rights in particular jurisdictions.⁸ Much of this literature is focused on those countries – including India, South Africa, and a handful of Latin American countries – that are leading the way in using courts and ESRs to alleviate the effects of poverty and improve human well-being.⁹

The TIESR dataset is aimed at grounding this qualitative literature with quantitative data on the presence, absence, and formal justiciability of economic and social rights in contemporary constitutions. This dataset provides basic information about where such rights are constitutionally enshrined, which rights have become common (and which are still fairly rare), and where they are identified (*in the constitution*) as subject to judicial remedy. Although such constitutional status does not guarantee that citizens can in fact seek judicial remedy, it helps to characterise contemporary constitutional models, and identifies where constitutions afford economic and social rights equal status with civil and political rights.¹⁰ In more than one third of constitutions, those ESRs that are included in the constitution are formally identified as justiciable: enforceable through the domestic court system and subject to legal remedy. Another third identify most economic and social rights as aspirational principles. The remaining third include a mix of aspirational and justiciable rights.

With respect to ESR incorporation, constitutions exhibit significant variation along the dimensions of time, region, and legal tradition. Most of the world's

8 See, eg Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005); Paola Bergallo, 'Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina' (2010) 89 *Texas Law Review* 1611–1641; Rodrigo M Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health' (2010) 52 *Latin American Politics and Society* 67–97; Yasuo Hasebe, 'The Supreme Court of Japan: Its adjudication on electoral systems and economic freedoms' (2007) 5 *International Journal of Constitutional Law* 296–307; Jashpal Kaur Bhatt, 'Gender Discrimination in Employment: How Far Does Art. 8 of the Federal Constitution Guarantee Gender Equality?' (2006) 6 *Malayan Law Journal* 44–68.

9 See, eg Inga Winkler, 'Judicial Enforcement of the Human Right to Water: Case Law from South Africa, Argentina and India' (2008) 11 *Law, Social Justice and Global Development Journal*; Anashri Pillay, 'South Africa: Access to Land and Housing' (2007) 5 *International Journal of Constitutional Law* 544–556; Albie Sachs, 'The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case' (2003) 56 *Current Legal Problems* 579–578; Octavio Luiz Motta Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil' (2010) 89 *Texas Law Review* 1643–1668.

10 Justiciability is ultimately an interpretive construction. In India, for example, most ESRs are identified in the constitution as directive principles, and yet have been interpreted as justiciable. Other constitutions include justiciable rights that have been interpreted as non-justiciable. Whether rights are identified in the constitution as justiciable is not an indicator of whether they are in fact justiciable. But it is an indicator, as we argue, of their relative textual status.

constitutions were written after 1974, and the vast majority of these include a range of economic and social rights. Some of these rights are almost as common in contemporary constitutions as the usual panoply of civil and political rights. However, within the last 35-year period there has also been substantial variation. Constitutions written between 1974 and 1989 are more likely to include ESRs, and significantly more likely to identify them as justiciable, than constitutions written after 1990.

There are also important regional differences. Latin America and the former Soviet satellites and republics are the regions that are most likely to include economic and social rights in their constitutions. Such rights are most often justiciable in Latin America through the mechanism of *amparo*.¹¹ Latin America, the former Soviet region, and the Arab States demonstrate sufficient internal consistency with respect to how their constitutions treat economic and social rights that they appear to reflect a regional model or norm. The constitutions of Asia and Sub-Saharan Africa, on the other hand, contain almost as much internal variation as the dataset as a whole, and cannot reasonably be identified as regions with respect to constitutional commitment to economic and social rights.

Legal traditions also correlate significantly with constitutional entrenchment of economic and social rights. The constitutions of common law countries are significantly less likely to include the so-called positive economic and social rights than the constitutions of civil law countries. The difference here is sufficiently striking to suggest that legal traditions may affect constitutional norms regarding rights, and that common law countries continue to generate more classically liberal constitutions that favour civil and political rights over economic and social rights. Countries that also have Muslim or customary law are even less likely than common law countries to enshrine ESRs.

I. The TIESR Dataset

This article analyses data on the presence, absence, and justiciability of economic and social rights in 136 constitutions. Economic and social rights are designed to

11 *Amparo* is a remedy for the protection of constitutional rights, found mainly in Latin America and the Philippines, which allows individuals to seek remedy in cases where their rights have been violated. For a comprehensive discussion of this concept, see Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press 2009).

protect human well-being and quality of life – their goal is to create either a minimum standard or roughly equal access to economic and social well-being. A large number of economic and social rights are identified in the ICESCR. This document includes the right to work, to form or join a trade union, to strike, to social security, to child protection, to food and housing, to healthcare, and to education. Yet it does not exhaust the total number of rights that can be found in contemporary constitutions, which may also include the right to water, land, a healthy environment, and environmental protection. The TIESR dataset's rights catalogue was built iteratively, starting with a core of rights drawn from the ICESCR, and subsequently either adding rights, or amending the parameters of pre-existing rights, in response to their constitutional articulation.

Some of the rights we included in the dataset are controversial or require additional explanation. A right to education appears in two different ways: as a right to choose the education of your child (often the concern here is with secular or religious education); and, as a responsibility of the government to provide education. We coded only the latter as an ESR; the former is more aptly understood as a civil and political right to free choice. The right to land is normally qualified with reference to specific sectors of the population, most often indigenous peoples, and is largely absent outside of Latin America. The category of 'social security related to employment' includes such benefits as unemployment, severance pay, maternity leave, sick leave, and so on that rely on an underlying condition of employment. This right is distinct from social security, which includes programs that are based on a person's status as a human being rather than as a worker, such as social insurance, welfare and food stamps.

The survey instrument¹² used to collect the TIESR dataset was adapted from the template used by researchers in Elkins and Ginsburg's Comparative Constitutions Project (CCP) to code the constitutions of the countries of the world.¹³ In comparison with the CCP, the aims of the TIESR project are quite limited; it codes only ESRs in extant constitutions. Yet, within these limits it is more expansive, in that it captures the constitutional status (or "strength") of such rights – as justiciable, aspirational, or absent.

Some constitutions confer justiciable status on some or all ESRs, while others treat such rights as aspirational principles. Although the textual status of a right is no guarantee of its actual implementation, constitutional texts offer clues regard-

12 Jung, 'TIESR Coding Manual' (n 6).

13 Zachary Elkins, Tom Ginsburg, and James Melton, 'The Comparative Constitutions Project: A Cross-National Historical Dataset of Written Constitutions', 22 July 2008, Survey Instrument.

ing the relative standing of particular rights, the scope of state responsibility, and the appropriate role of the law. The legal community has historically accorded secondary status to economic and social rights – in part because they believed such rights were not amenable to judicial review or enforcement.¹⁴ Older constitutions that included ESRs, such as the Indian constitution, identified them as directive principles of state policy.¹⁵

Now, however, many constitutional texts identify ESRs as justiciable, according them equal status, at least on paper, with civil and political rights. Along with constitutional presence, constitutional status – either justiciable or aspirational – is another indicator of the contemporary standing of economic and social rights.

Nevertheless, whereas the presence or absence of individual rights is fairly straightforward, whether a constitution identifies a right as justiciable can occasionally involve a judgment call. Indeed, some constitutions are presumably designed to be vague on this question, leaving the relative standing of a right open to judicial interpretation. We define justiciability as a condition under which particular rights appear to be formally enforceable through the domestic court system, as manifest in the relevant constitutional text. Courtis specifies that justiciability entails ‘the possibility for alleged victims of violations of... rights to file a complaint before an impartial body, and request adequate remedies or redress if a violation is deemed to have occurred’.¹⁶ Mapulanga-Hulston notes further that the key factors in determining justiciability are ‘whether the right would be suited to determination in judicial proceedings, whether it vests an

14 See eg Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press 1986); Dennis M Davis, ‘The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles’ (1992) 8 South African Journal on Human Rights 475–490; Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2005) 115 Yale Law Journal 1356, 1406. There have also been concerns that judges and the judiciary lack the requisite training and institutional capacity to understand the policy implications of their decisions with respect to ESRs and/or that the budgetary implications of such decisions cannot legitimately be made by the courts. See eg Michael C. Tolley, ‘The Judicial Enforcement of Socio-Economic Rights in Comparative Perspective’, 29 August 2008; Paul C Weiler, ‘Rights and Judges in a Democracy: A New Canadian Version’ (1984) 18 Michigan Journal of Law Reform 51–92; c.f. Sachs, ‘The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case’ (n 9).

15 See Constitution of India, 1950 Pt IV, arts 36–50.

16 Christian Courtis, ‘The Right to Food as a Justiciable Right: Challenges and Strategies’ in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, (2007) vol. 11, 318.

enforceable right in the individual, and whether it lends itself to sufficiently specific obligations on the part of states'.¹⁷

Many constitutions are clear that those rights identified as “fundamental” or “primary”, or listed in a particular section of the constitution, are judicially enforceable. Constitutions may explicitly distinguish between “fundamental” rights, which they identify as justiciable, and “directive principles of state policy”, which are aspirational.¹⁸ For example, the Albanian Constitution contains several ESRs that are subject to judicial review.¹⁹ However, those rights articulated in article 59(1), including the right to housing, are qualified by 59(2), which states that ‘fulfillment of social objectives may not be claimed directly in court. The law defines the conditions and extent to which the realization of these objectives can be claimed’.²⁰ Historically, the distinction between justiciable and aspirational rights corresponded with a bifurcation between “civil and political” and “economic and social” rights. This is no longer the case, and it is now common to see ESRs grouped with “fundamental” rights and explicitly identified as justiciable.

To ascertain justiciability, coders first identified where the right appeared in the constitution. Coders also considered the significance of language in determining justiciability. Some constitutions, for example, identified certain matters as a duty or obligation of the state. This phrasing is particularly common when it comes to environmental and child protection, which are often represented in such a manner rather than explicitly in the language of “rights”. In instances where the constitution included such language, and where provisions for judicial enforcement were also laid out in the constitution, we coded the variable as justiciable, even though the word “right” did not appear.

Additionally, in order for any right in a particular constitution to be coded as justiciable, the constitution must include an explicitly stated mechanism of judi-

17 Jackbeth K Mapulanga-Hulston, ‘Examining the Justiciability of Economic, Social and Cultural Rights’ (2002) 6 *International Journal of Human Rights* 29, 36.

18 We use the terms “aspirational” and “directive” interchangeably. Although, strictly speaking, they may not be synonymous in all cases, it has not been possible to identify reliable differences in the way they are used across jurisdictions. Not all rights identified as “fundamental” are also justiciable, and some justiciable rights may appear in other sections of constitutions. Many constitutions do identify certain rights as “fundamental”, however, and are clear that fundamental rights are justiciable. In such cases, we used this information as a coding principle.

19 Specifically, the rights to form or join a trade union (art 50), strike (art 51), employment derived social security (arts 49.2, 52.2), child protection (art 54), education (art 57), healthcare (art 55), and social security (art 52.1) are justiciable elements of the Albanian constitution (‘Kushtetuta e Republikës së Shqipërisë [Constitution]’, 1998)

20 Ibid.

cial review.²¹ Constitutions that enshrine justiciable ESRs normally include provisions for individuals to make claims in court to demand the review of alleged human rights violations. Constitutions that include justiciable rights state (whether explicitly or implicitly) that individuals have the power to initiate judicial review. Where the standing of individuals was unclear, or did not exist, the researchers made a note of this and coded rights as “aspirational”.

These sorting criteria were first used to ascertain whether economic and social rights existed as a general category—with the same status, as justiciable or aspirational—within a constitution. Some constitutions have separate sections that list rights, and some have a neat distinction between civil and political, economic and social (and cultural) rights. However, many constitutions are not written in this manner, and rights are often scattered throughout a constitutional text. About one third of the constitutions in our dataset identify some ESRs as aspirational and others as justiciable. In other words, it was not possible to identify entire constitutions as “justiciable” or “aspirational”. Each right was therefore analysed separately, and coded according to the trichotomous categorisation outlined below and in Table 1 – as justiciable, aspirational, or absent.²²

21 One anonymous reviewer suggested that ‘the requirement for an explicit mechanism of judicial review would mean that in the US (and in many constitutions patterned after the US constitution) even civil and political rights would be coded as non-justiciable. Is this coding rule leading to systematic under-counting of ESR in common law constitutions that take judicial review for granted?’ Happily, the answer is no. There are 38 constitutions in the dataset that have no justiciable rights at all. Not a single one of these is a pure common law constitution (according to the Juri-Globe classification). Three of the 38 (Bahrain, Qatar, and Yemen) are classified as civil, common, customary, and Muslim law countries. The rest are civil law or civil and Muslim or customary law countries. Although there are countries that treat rights that appear to be aspirational as justiciable, and countries that treat rights that appear to be justiciable as aspirational, common law countries do not appear more likely than civil law countries to exhibit the former tendency. The TIESR Dataset is limited to a study of constitutional text alone.

22 Constitutional clauses regarding expropriation (EXPR) and free markets (FMKT) were also coded in the dataset. However, both of these variables were coded dichotomously: as either absent or present. EXPR was not included in the current analysis as it was deemed to be a guarantee accruing to the state rather than accruing to individuals and as such did not fit with the general theme of the analysis, which relates to rights accruing to individuals in national constitutions. Similarly, it was felt that FMKT did not represent a specific right accruing to individuals, but rather described a particular form of economic organisation and as such also did not fit in with the focus of the current analysis. Further details regarding the coding criteria can be found in the survey instrument. *Jung*, ‘TIESR Coding Manual’ (n 6).

Table 1. Rights coding values

<i>Value</i>	<i>Label</i>	<i>Criteria</i>
2	‘Justiciable’	<ul style="list-style-type: none"> • The government can be taken to court for failing to guarantee the economic and social rights promised in the constitution. • Citizens have legal recourse to ensure the fulfilment of their constitutional rights; there is usually a mechanism for judicial review enshrined in the constitution.
1	‘Aspirational,’ or ‘Directive Principle of State Policy’	<ul style="list-style-type: none"> • Enumeration of constitutional rights intended to guide state policy and/or express ideals, but these are not binding. Directs government to take social welfare into account when making policy decisions, but creates no obligation to do so. • Citizens do not have legal recourse to ensure the fulfilment of their constitutional rights. • ESRs are not considered fundamental rights.
0	‘Absent’	<ul style="list-style-type: none"> • The item is not mentioned in the constitution: neither as a justiciable or aspirational right, nor as a directive principle.

Using this coding framework, we found that the five most commonly enshrined ESRs are also the most commonly justiciable, albeit not in the same order (see Table 2). Whereas the right to education is the most commonly occurring ESR, appearing in 89 % (121) of constitutions, the right to form or join a trade union is the most commonly justiciable, in 58 % (79) of constitutions. Similarly, the four least common ESRs — the rights to housing, to food and water, to land and to development — were also least often justiciable. With the exception of the right to form or join a trade union, rights accorded to individuals on the basis of their status in the labour market—the rights to strike, social security related to employment, a fair wage, rest and leisure, and a healthy work environment—occur in roughly half of all countries (45 %-60 %) and are justiciable in roughly one third (29 %-39 %). These “worker’s rights” cluster in the middle in both columns (see Table 2) and, as we shall see below, are those that exhibit the greatest variation across region, time, and legal tradition.

Table 2. Frequency of constitutionalised economic and social rights

<i>Present</i>			<i>Justiciable</i>		
Right	#	%	Right	#	%
Education	121	89.0	Trade Union	79	58.1
Health	112	82.4	Health	67	49.3
Social Security	108	79.4	Child Protection	60	44.1
Trade Union	107	78.7	Education	56	41.2
Child Protection	100	73.5	Social Security	55	40.4
Environmental Protection	86	63.2	Strike	53	39.0
Social Security/ Employment	82	60.3	Social Security/ Employment	46	33.8
Strike	78	57.4	Healthy Environment	45	33.1
Healthy Environment	73	53.7	Fair Wage	44	32.4
Fair Wage	72	52.9	Leisure	43	31.6
Leisure	68	50.0	Healthy Work	40	29.4
Healthy Work	61	44.9	Environmental Protection	39	28.7
Housing	58	42.6	Housing	33	24.3
Food/Water	33	24.3	Food/Water	18	13.2
Land	29	21.3	Land	15	11.0
Development	15	11.0	Development	8	5.9

II. Rights and Time

Nearly every nation now possesses a written constitution, and the majority of these contemplate the judicial review of legislative action premised on a set of rights accorded to individual members of society. Of the 136 countries analysed in this article, all but 4 contain at least one economic or social right (ESR), while 116 contain 5 or more. Moreover, 91 constitutions contain a least 1 explicitly justiciable economic or social right. In short, the contemporary constitutional model tends to accord standing to economic and social rights to an extent rarely contemplated in earlier constitutions.²³ The fact that such rights are often explic-

itly identified as justiciable also confirms earlier findings that the contemporary constitutional model includes a more expansive notion of the proper scope of the judiciary²⁴.

One of the most salient aspects of these constitutions is that they are new. Nearly 80 % of the constitutions we analysed were written after 1974, and about two-thirds have been written since 1989. Most of the “old” constitutions have also been substantially amended in the last thirty-five years. The period between 1974 and 2010 nevertheless contains substantial internal temporal variation, which we tried to capture by organising the constitutions by date and dividing them into four distinct “eras”, based on broadly relevant global events and trends that could (hypothetically) have affected constitution drafting. In particular, we hypothesise that, with respect to ESRs, there may be relevant differences between constitutions drafted in the post-War period (1945-1973);²⁵ in the “third wave” of democratisation (1974-1989);²⁶ during the height of the Washington Consensus (1990-1999);²⁷ and in the post-Washington Consensus era (2000-present).²⁸

As others have also noted, the average number of rights in a constitution has increased dramatically over time.²⁹ This is also true of economic and social rights. Indeed, every constitution adopted since 1974 contains at least one ESR. As

23 Davis (n 14).

24 Ran Hirschl, *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

25 Ginsburg identifies the post-war period as a distinct era of constitution-making. Tom Ginsburg, ‘The Global Spread of Constitutional Review’ in Keith E Whittington and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008).

26 Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma 1991).

27 John Williamson, ‘What Washington Means by Policy Reform’ in John Williamson (ed), *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics 1990). This period is characterised by a demand for fiscal austerity, structural adjustment, and open markets.

28 Kerry Rittich argues that the post-Washington Consensus period includes contradictory imperatives. Ostensibly driven by a backlash against the Washington Consensus, IFIs have prioritised human rights, even though they continue to resist economic and social rights. At the same time, transactional freedom, property rights, and the entitlement to participate in markets have been elevated to the status of basic human rights. Kerry Rittich, ‘The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social’ (2004) 26 *Michigan Journal of International Law* 199–244.

29 David S Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99 *California Law Review* 1163–1258; see, also Christopher Jeffords, ‘Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions’ Economic Rights Working Paper Series, The Human Rights Institute, University of Connecticut August 2011.

shown in Table 3, constitutions drafted before 1974 contained an average of 6.8 ESRs, those drafted between 1974 and 1989 had an average of 9.7 ESRs.³⁰ This initial increase was nevertheless subsequently followed by a slight, but consistent, decline over the next two decades. Although ESRs are much more common in contemporary constitutions than they are in “old” constitutions, they appear less frequently in those constitutions written during and after the period of the Washington Consensus (See Table 3). Constitutions written between 1990-1999 include an average of 9.5 economic and social rights, and those written after 2000 include an even lower 8.9 ESRs. This finding is somewhat surprising due to the regional effect that one might have expected from constitution drafting in the 1990s in the former Soviet states and in Latin America. All but one of the rights-heavy former Soviet constitutions were written in the 1990s; while seven of the twelve “new” (post-1974) constitutions in Latin America were written after 1990. When such rights did make it into constitutions written after 1989, they were also much more likely to be aspirational: non-binding guidelines for policy-making. The pattern of marked expansion followed by some contraction is more pronounced with respect to justiciable rights. Constitutions written after 1974 include an average of more than twice as many justiciable rights as those written before 1974; 18 of the 19 constitutions written in the 1974-1989 period, which are still in force, include at least one justiciable ESR.³¹ Regardless, the number of constitutions drafted without any justiciable rights increased significantly after 1989 (See Table 3).

Table 3. Economic and social rights per constitution over time

Era	<i>Average (#)</i>		<i>Median (#)</i>		<i>No ESRs (%)</i>		N
	Present	Justiciable	Present	Justiciable	Present	Justiciable	
Pre-1974	6.8	3.1	8	1	13.3	46.7	30
1974-1989	9.7	6.5	10	7	0.0	10.5	19
1990-1999	9.5	5.7	10	5	0.0	32.3	65
2000-Present	8.9	5.5	8.5	6	0.0	36.4	22
Global	8.8	5.2	9.5	2.5	2.9	33.1	136

30 We refer to constitutionally enshrined ESRs in two ways: as justiciable and as present. The former refers only to those rights that meet the criteria for coding as “justiciable” that is outlined above, while the latter includes both justiciably and aspirationally enshrined rights.

31 The 1982 Chinese Constitution is the exception here; although it does, however, include 10 aspirational ESRs.

Aggregate trends, however, are only part of the picture. Specific rights also exhibit different patterns of variation. Worker's rights,³² such as the right to form or join a trade union, tend to increase after 1973, but the frequency of their adoption in any form decreases in subsequent periods (particularly after 1999). Rights to housing, food and water demonstrate a similar pattern – increasing after 1973, only to then decline in prevalence. Rights to healthcare, education, child protection, and social security, on the other hand, show the same initial jump, yet without the subsequent decline. For those rights, the initial sharp increase is followed by a slight but steady proliferation (particularly after the millennium). Similarly, the rights to a healthy environment and to environmental protection have become increasingly entrenched over time.

III. Rights and Regions

Disaggregating the data by region also revealed interesting patterns of ESR entrenchment. We divided our cases into five regional categories, chosen on the basis of standard geographical conventions and/or historical linkages. The regions are Latin America, Sub-Saharan Africa, former Soviet satellites and republics, the Arab States, and Asia. Statistically, fifteen of the sixteen ESRs we measured show significant variation across regions.³³ Three of the five regions we identified—Latin America, the former Soviet satellites and republics, and the Arab states—exhibit a high degree of internal consistency in the type and strength (justiciable or aspirational) of rights adopted. In these regions at least, it seems reasonable to talk about a regional model of ESR incorporation. In Sub-Saharan Africa, there is a high degree of internal variation with respect to ESR incorporation, which fol-

32 Specifically, the rights to strike, form or join a trade union, rest and leisure, have a healthy working environment, social security derived from employment, and receive a fair wage.

33 The exception was the right to development, which is absent in all but a few states. When cross-tabulated with region, all but the right to development (DEVT) return Cramers V values ranging between .275 and .454 that are statistically significant at the $p < 0.01$ level, rejecting the null hypothesis and demonstrating that regional variation is statistically significant (i.e. the regions we chose are supportive of systematic difference between regions). Cognisant of the notable difficulty in precisely interpreting this measure, we invoke it only as suggestive of meaningful regional difference and do not seek to advance particular claims about the strength of the associations. For a broader discussion of the issues surrounding the analysis of nominal data see, eg HT Reynolds, *Analysis of Nominal Data* (2nd edn, Sage 1984), Quantitative Applications in the Social Sciences.

lows no obvious pattern. Asia appears to be more appropriately divided into two or three sub-regions.³⁴

Table 4. *Economic and social rights per constitution by region*

	Average (#)		Median (#)		None (%)		n
	Present	Justiciable	Present	Justiciable	Present	Justiciable	
Arab States	5.6	1.5	6	0	4.8	76.2	21
Asia	7.6	2.9	8	1	12.5	41.7	24
Former Soviet States	10.6	8.4	11	10	0.0	16.0	25
Latin America	12.4	9.2	13	12	0.0	13.6	22
Sub-Saharan Africa	8.3	4.4	8	2	0.0	27.2	44
Global	8.8	5.2	9.5	2.5	2.9	33.1	136

The *Arab States* region includes twenty-one constitutions,³⁵ thirteen of which were adopted after 1989. All of the countries in this region, except Turkey, employ some form of ‘Muslim Law,’ either exclusively or in combination with civil law and/or common law.³⁶ Constitutions in this region have the lowest average number of ESRs, in terms of both presence and justiciability. Three-quarters of Arab States’ constitutions contain no justiciable ESRs. Nevertheless, the post-2000 incidence of justiciable rights four per constitution $\frac{3}{4}$ is substantially higher than the previous average of less than one.³⁷

Asia includes twenty-four constitutions,³⁸ and a wide range of legal traditions. This region contains the largest proportion of “old” constitutions, with only thir-

34 In fact we tried to do this, but the Asian sub-regions had too few cases to allow for statistical manipulation. As it is, our regions are in general roughly the same size, with the exception of Sub Saharan Africa.

35 The twenty-one constitutions of *Arab States* region are Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates and Yemen.

36 For present purposes, “Muslim Law” is defined as ‘an autonomous legal system, which is of a religious nature and predominantly based on the Koran. In a number of countries of Muslim tradition, it tends to be limited to the laws relating to personal status, although personal status can be rather broadly defined’, Louis Perret and others, ‘World Legal Systems’, (2008) JuriGlobe Research Group <<http://www.juriglobe.ca/eng/index.php>> accessed 20 January 2011.

37 The 1974-1989 period does exhibit an average of eight justiciable rights per constitution, but this is derived from a single case, Iran’s 1979 Constitution, and can reasonably be considered an outlier.

38 Afghanistan, Bangladesh, Bhutan, Brunei, Cambodia, China, East Timor (Timor Leste), India, Indonesia, Japan, Laos, Malaysia, Mongolia, Myanmar, Nepal, North Korea (DPRK), Pakistan, Philippines, Singapore, South Korea, Sri Lanka, Taiwan, Thailand, Vietnam.

teen adopted after 1974.³⁹ Although as a whole Asia has no common legal or constitutional tradition,⁴⁰ with regard to ESR incorporation, a few sub-regional clusters are identifiable. Bangladesh, Sri Lanka, Nepal, and Pakistan appear to have emulated the Indian constitutional model by enshrining a wide range of economic and social rights, predominantly as directive principles of state policy.⁴¹ Asia also includes three of the four countries with no constitutionally enshrined ESRs: Brunei, Singapore and Malaysia. Finally, there are a number of countries whose constitutions generally include the five most common rights, exclude all of the least common rights, and have a generally lower than average incidence of “worker’s rights”: Afghanistan, Indonesia, Japan, South Korea, Taiwan, Vietnam, Laos, and Bhutan.

The *Former Soviet Satellites and Republics (FSSR)* include twenty-five constitutions⁴² which, with the exception of Hungary (1949), were all written in the context of post-1989 democratic transitions. To some extent, these constitutions exhibit a common pattern of ESR incorporation. Constitutions in this region tend to contain both workers’ rights and the more standard set of social rights,⁴³ and they exclude rights to land, housing, food and water, and development. In this region, ESRs are also much more likely to be justiciable than aspirational. Nevertheless, despite their common heritage and the temporal proximity of their drafting, these constitutions are hardly uniform. Sadurski argues that the incorporation of economic and social rights in former Soviet constitutions was shaped by a tension between elite commitments to free-market reform and popular expectations regard-

39 However, twenty-three constitutions (all but Japan) have been amended in some fashion since 1974, while seventeen have been amended post-2000.

40 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003). Cabestan suggests that a number of factors, including colonialism, ‘forced openings,’ rejection of western domination, and Islam, have played important roles in differentially shaping the development of national legal systems in Asia, highlighting at least three major ‘types’ of law in the region: common law; Romano-Germanic law; and socialist law. Jean-Pierre Cabestan, ‘Constitutionalism and Western Legal Traditions in Human Rights in Asian Legal Systems: With a Special Focus on Chinese Legal Systems’ in Jorge Costa Oliveira and Paulo Cardinal (eds), *One Country, Two Systems, Three Legal Orders: Perspectives of Evolution* (Springer Berlin Heidelberg 2009).

41 Iain Byrne and Sara Hossain, ‘South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan, and Sri Lanka’ in *Langford* (n 7) 125–26.

42 The twenty-five constitutions of the *Former Soviet Satellites and Republics* are Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.

43 Namely, child protection (CPRO), education (EDUC), healthcare (HLTH), and social security (SSEC).

ing the social welfare responsibilities of states.⁴⁴ These conflicting imperatives were resolved differently, he argues, in each constitution-drafting process⁴⁵. The constitution of Bosnia-Herzegovina, written in 1995, is the consistent outlier in this group, with almost no ESRs⁴⁶. Conversely, the Serbian constitution of 2006 includes a wide range of justiciable economic and social rights.

Latin America includes twenty-two constitutions,⁴⁷ and forms the most generally cohesive regional body of constitutions.⁴⁸ Depending on the classification scheme, either nineteen or twenty of these constitutions emerge from civil law systems—Belize is a common law country, Guyana is mixed civil and common law,⁴⁹ and Cuba's legal system is considered by some to be socialist.⁵⁰ Coupled with the prevalence of *amparo*, Latin American constitutions exhibit a pattern of strong ESR entrenchment. This region has the highest average and median aggregate numbers of both present and justiciable rights—with every right except the right to development present in more than 60 % of the constitutions. The four “standard” social rights are particularly well represented: the right to education is present in every constitution and the rights to health, social security, and child protection are present (respectively) in twenty, nineteen, and eighteen of the twenty-two constitutions in the region. Even the four least common rights — to land, housing, food and water, and development — are significantly more common in Latin American than in any other region. Moreover, Latin America does not follow the general pat-

44 Wojciech Sadurski, 'Postcommunist Constitutional Courts in Search of Political Legitimacy' (2001) European University Institute, EUI Working Paper; LAW 40

45 Sadurski, 'Rights Before Courts' (n 8)

46 In discussing the same broad region, Sadurski finds that nine constitutions in the region contain generous economic and social rights protections, six contain limited social rights protections although do include relatively strong protections of workers' rights; three protect social rights reasonably well but offer few other protections; and two contain “very few at all”. This is somewhat at odds with our own findings. We suspect that the majority of the divergence is a result of constitutional changes subsequent to the publication of the volume. However, in a least one case (that of Georgia), our reading of the constitution is at odds with that of Sadurski, whereas he finds the Georgian Constitution to contain ‘very few’ economic and social rights, our analysis, on the other hand, finds ten justiciable ESRs in the constitution. *ibid.* 177–78; see, also Malcolm Langford, ‘Hungary’ in *Langford* (n 7) 250.

47 Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.

48 See eg Paolo G Carozza, ‘From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights’ (2003) 25 281–313; *Brewer-Carias* (n 11).

49 Perret and others (n 36).

50 Rafael La Porta and others, ‘The Quality of Government’ (1999) 15 *Journal of Law, Economics, and Organization* 222–278.

tern of a marked increase in ESR protection after 1973. Instead, Latin American constitutions generally included at least some economic and social rights long before the contemporary period, starting with the Mexican constitution in 1917.⁵¹

Sub-Saharan Africa includes forty-four constitutions,⁵² with several interesting features. For example, nearly two-thirds of the constitutions in the region were promulgated in the 1990s, and three-quarters include some aspect of customary law. Nevertheless, this region has no common legal or constitutional tradition, and appears to exhibit as much internal variation as the sample as a whole does. At the same time, the African Charter on Human and Peoples' Rights, promulgated in 1981, recognises economic, social, and cultural rights at the same level as civil and political rights. Although the Charter has mostly generated litigation on civil and political rights, it is also an important source of emerging ESR jurisprudence in Africa.⁵³ Through their membership in the Organization of African Unity, even countries with weak constitutional commitments to ESRs derive a justiciable obligation to protect such rights. This source of ESR incorporation is not measured by the TIESR Dataset.

Individually, the rights highlight the general patterns discussed above. When the Phi values are calculated by right by region, the constitutions of the Arab States are negatively associated with almost every right.⁵⁴ There are relatively

51 *Carozza* (n 48).

52 The forty-four constitutions of *Sub-Saharan Africa* are those of Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Republic of the Congo, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, The Gambia, Togo, Uganda, Zambia and Zimbabwe.

53 Danwood Mzikenge Chirwa, 'African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights' in *Langford* (n 7).

54 We used Phi to measure the associations between individual ESRs and both region and legal tradition. This measure is similar to the "goodness of fit" test based on the calculation of Chi-Square, only it eliminates the variations in magnitude that occur as a result of sample size by standardising the results, thus providing a more consistent and comparable measure. If the relationship is found to be significant, the null hypothesis that the two variables are statistically independent is rejected. This means that there is a statistically significant association between the two variables. Statistical significance does not, however, mean that that an association is meaningful. The number reported in the cell, the Phi coefficient for that particular relationship, is what indicates the strength in this case. Using the example of the relationship of French Legal Tradition and the right to strike: 39.2 % (0.392*100) of the variation in the presence of the right to strike can be derived from the value of the French legal tradition variable (or the reverse). In other words, if we assume (for the present) that there is some kind of non-spurious relationship between the two, we can explain about 40 % of the change in the value of one variable with the value of the other variable.

fewer significant associations between ESRs and Asian constitutions, but those that are significant are all negative. Sub-Saharan Africa displays almost no directional associations, and both the former Soviet states and Latin America exhibit positive correlations. Put simply, ESRs are least likely to be found in the constitutions of Arab States, somewhat more likely to be found in those of Asian countries, most likely to be found in Latin American constitutions, and fairly common in Former Soviet Republics. The former Soviet region is slightly more likely than any other region to have justiciable economic rights, but the distance from Latin American constitutions is not great. Justiciable economic rights are less common in Sub-Saharan Africa, and rare in Asia and the Arab States.

IV. Rights and Legal Traditions

There appear to be two dominant frameworks for classifying legal tradition. The first, developed by the JuriGlobe project, identifies four types of legal tradition: civil law, common law, Muslim law, and traditional or customary law.⁵⁵ The second, advanced by La Porta and others, is a system of classification based on “legal origin” derived from commercial legal practices. This scheme includes five categories: common, French civil, German civil, Scandinavian, and socialist.⁵⁶ Legal tradition refers to the rules, practices, and norms of law and legal reasoning that exist in a particular jurisdiction. It is not the same as constitutional tradition, and, although it is reasonable to expect the former to influence the latter, the degree of that influence is likely to vary depending on any number of extra-legal circumstances.

The TIESR Dataset reveals that civil law countries are significantly more likely to include economic and social rights than common law countries.⁵⁷ It has been suggested that the correlation between civil law traditions and economic and social rights is an effect arising from the fact that the developing world (which is mostly civil law) is leading the way with respect to ESR entrenchment.⁵⁸ While this is true, our data indicate that, even within the developing

55 *Perret and others* (n 36).

56 *La Porta and others* (n 50). However, our analysis excluded the Scandinavian and German legal traditions, of which there were (respectively) zero and three instances in this iteration of the TIESR data.

57 Classified according to the Juriglobe system. *Perret and others* (n 37).

58 This reasonable interpretation was proposed by an anonymous reviewer of this paper.

world, constitutions in civil law countries are significantly more likely to entrench economic and social rights than those in common law countries.

Donald Kommers has argued that because common law countries endorse the principle of judicial review, they tend to have stronger rights protections than civil law countries. The latter, he argues, tend to reject US style judicial review on the principle that the twin commitments to generality and the service of the commonweal, which underpin civil law, are best served through national assemblies, which are the source of all law.⁵⁹ This finding, which focused exclusively on civil and political rights, highlights important differences in the ways economic and social rights are advanced and entrenched. Our data indicates that economic and social rights are not only more prevalent but significantly more likely to be identified as justiciable in the constitutions of civil law countries.⁶⁰

Table 5. Association of legal tradition with economic and social rights: JuriGlobe

	<i>Civil Law, n=112</i>		<i>Common Law, n=35</i>		<i>Customary Law, n=57</i>		<i>Muslim Law, n=34</i>	
Right	Present	Justiciable	Present	Justiciable	Present	Justiciable	Present	Justiciable
FRWG	.220	.238*	(.254)*	(.299)**	(.244)*	(.333)**	(.374)**	(.399)**
TRDU	.183	-	-	-	-	(.215)	(.280)*	(.301)**
STRK	.498**	.330**	(.479)**	(.298)*	(.262)*	(.343)**	(.464)**	(.357)**
LEIS	-	.232*	-	(.292)*	(.224)*	(.289)*	(.238)*	(.320)**
HWRK	-	-	-	-	-	(.221)	(.282)*	(.335)**
SSEM	-	-	-	(.208)	(.316)**	(.355)**	-	(.305)**
SSEC	-	.264*	-	(.279)*	-	(.336)**	(.210)	(.372)**

59 Donald P Kommers, 'Judicial Review: Its Influence Abroad' (1976) 428 *The Annals of the American Academy of Political and Social Science* 52–64. Conceptually, the centralised judicial review function of constitutional tribunals in civil law legal traditions has been seen as fulfilling the role of a "negative legislature". As such, while it may be perceived as legitimate for such a court (although not the ordinary or lower courts of the jurisdiction) to disallow a statute for violating the constitution, the idea of such a court taking a positive legislative role, for example the imposition of fiscal obligations in the pursuit of rights realization, has traditionally been seen as illegitimate. Victor Ferreres Comella, 'Courts in Latin America and the Constraints of the Civil Law Tradition' (2010) 89 *Texas Law Review* 1967–1975; Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 *The Journal of Politics* 183–200.

60 Nevertheless, Langford also argues that 'social rights jurisprudence is almost always significant in those jurisdictions that have developed robust judicial or quasi-judicial review for civil and political rights', *Langford*, 'The Justiciability of Social Rights' (n 7) 10. Full or part common law systems are nevertheless much more likely to include ESRs than part Muslim and customary law states. See n 54 for a discussion on the statistical method.

	<i>Civil Law, n=112</i>		<i>Common Law, n=35</i>		<i>Customary Law, n=57</i>		<i>Muslim Law, n=34</i>	
Right	Present	Justiciable	Present	Justiciable	Present	Justiciable	Present	Justiciable
CPRO	.203	-	-	-	-	(.275)*	(.231)*	(.342)**
HLTH	-	.231*	(.213)	(.253)*	-	(.317)**	(.178)	(.345)**
LAND	-	-	-	-	-	(.204)	(.218)	(.203)
HOUS	-	.217	-	(.176)	(.190)	(.342)**	-	(.248)*
FOWA	-	-	-	-	-	(.200)	-	(.175)
EDUC	-	-	(.169)	(.176)	-	(.271)*	(.285)*	(.331)**
DEVT	-	-	-	-	-	-	-	-
HENV	.266*	.285*	(.296)*	(.307)**	-	(.312)**	(.417)**	(.334)**
ENVP	-	.294*	-	(.299)**	-	(.341)**	(.299)**	(.291)*

— *sig.* <.05 * *sig.* <.01 ** *sig.* <.001

The general trend is that full or part civil law jurisdictions are the most likely to have constitutions with ESRs in them, and most likely to identify those rights as justiciable. The two regions of the world that most commonly entrench ESRs (Latin America and the former Soviet region) are also overwhelmingly civil law jurisdictions, suggesting that the regional effect is driven by a common legal tradition. Within Latin America, where there is a strong regional norm of ESR entrenchment, the two common law and part common law countries – Belize and Guyana – are notable outliers, with very few economic and social rights. Besides legal tradition, the regional effect may also be driven by the diffusion of ideas and policies through epistemic communities, common perceptions regarding the requirements of global competition, and the tendency of countries to copy neighbouring or regionally influential constitutions.⁶¹

Unlike that of the JuriGlobe project, La Porta's classification framework is exclusive—a country can only be positively coded in one category. This results in markedly fewer civil law jurisdictions. Nonetheless in the two generally analogous

61 See, eg Frank Dobbin, Beth A Simmons, and Geoffrey Garrett, 'The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?' (2007) 33 *Annual Review of Sociology* 449–472; Fabrizio Gilardi, 'Who Learns from What in Policy Diffusion Processes?' (2010) 54 *American Journal of Political Science* 650–666; Kurt Weyland, 'Theories of Policy Diffusion: Lessons from Latin American Pension Reform' (2005) 57 *World Politics* 262–295; Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1–35; Margaret E. Keck and Kathryn Sikkink, 'Transnational Advocacy Networks in International and Regional Politics' (1999) 159 *International Social Science Journal* 89–101.

categories — French/civil and UK/common — the directions of association are in agreement across both systems. Unsurprisingly, the socialist legal tradition also shows evidence of a positive relationship with ESRs (with the exception of the right to land).

Table 6. Legal Tradition with Economic and Social Rights: La Porta.

	<i>French, n=67</i>		<i>UK, n=32</i>		<i>Socialist, n=32</i>	
	Present	Justiciable	Present	Justiciable	Present	Justiciable
FRWG	-	.176	(.174)	(.310)**	.177	-
TRDU	-	-	-	.199	-	-
STRK	.392**	.200	(.535)**	(.331)**	-	-
LEIS	-	-	-	(.258)*	.253*	.236*
HWRK	-	-	-	-	.173	-
SSEM	(.183)	-	-	-	.210	.205
SSEC	-	-	-	(.238)*	-	.227*
CPRO	-	-	(.174)	-	-	-
HLTH	-	-	-	(.282)*	.216	.289*
LAND	-	.260*	-	-	(.294)*	(.199)
HOUS	-	-	-	(.232)*	-	-
FOWA	-	-	-	-	-	-
EDUC	-	-	-	(.193)	.199	.192
DEVT	-	-	-	-	-	-
HENV	-	.176	(.314)**	(.273)*	-	-
ENVP	-	-	-	(.268)*	-	-

— *sig.* <.05 * *sig.* <.01 ** *sig.* <.001

We have no clear hypothesis regarding the correlation between ESRs and civil law countries or the seeming reluctance of common law countries to incorporate ESRs into their constitutions, even in the contemporary (ESR-friendly) era. Nevertheless, coupled with the earlier research that found a positive correlation between rights protection and common law countries, our data suggests that common law countries are not rights-friendly per se, but that they tend to endorse judicially enforceable guarantees which limit government activity, and have been more reluctant than civil law countries to embrace the so-called positive rights. This finding generally corroborates Law and Versteeg's characterisa-

tion of common law countries as “libertarian”.⁶² Common law countries appear more likely to endorse a particular conception of rights as individual protections from state intervention, rather than state obligations toward citizens. On the other hand, civil law jurisdictions, long considered hostile to the judicial imposition of obligations on legislators, are at least formally supportive of a role for the judiciary beyond that of a negative legislator, and they are more likely than other legal systems to entrench justiciable positive rights claims.⁶³

V. Conclusion

The TIESR dataset identifies the constitutional presence, absence, and justiciability of ESRs. This data can be used to conduct research into the transformation of constitutional texts, changing conceptions of the appropriate scope of the judiciary, the evolving legitimacy of economic and social rights, and contemporary conceptions of the scope of state responsibility, contemporary constitutional models, the relationship between such rights and neoliberal economic policy, and the effect of such rights on human well-being. To these ends, the dataset was designed to disaggregate as much as possible in two directions.

First, it includes seventeen different economic and social rights, where other datasets include only five or six, or subsume three or four different rights under one category. By including the full range of ESRs, we are able to establish which particular economic and social rights are proliferating and which are still relatively rare. Indeed we found that there is such wide variation in the incorporation of different ESRs that it seems unreasonable to think of them as a coherent category. While some ESRs are practically universal, others are still rarely enshrined in national constitutions. By merely counting how often they appear in constitutions, we are able to disaggregate the universe of ESRs into three distinct ‘families’ of rights: standard social rights (which are very common), non-standard social rights (which are quite rare), and worker’s rights (which vary the most significantly across constitutions). The five standard social rights are education, health-care, trade union, child protection, and social security. The four non-standard

62 *Law and Versteeg* (n 29).

63 This trend is observable in both legal classification schemes. Under the Juriglobe scheme, those countries with a full or partial civil law tradition average 5.8 justiciable ESRs per constitution, while those without such a tradition have an average of 2.3. Under the *LaPorta and others* classification the trend is attenuated but still apparent: constitutions in jurisdictions with French legal origins average 5.7 justiciable ESRs and those without average 4.6.

social rights are housing, food and water, land, and development. Worker's rights include leisure, healthy work environment, strike, and fair wage.

Second, we can tell where they are spreading. Although it is true that constitutions written in the last thirty-five years are much more likely to include ESRs than the post-war constitutions, there is still a wide variation that reveals interesting patterns. ESRs are most common in Latin America and the former Soviet region, and least common in the Arab States and parts of Asia. Constitutions written between 1974 and 1989 include a higher average number of rights than constitutions written after 1990. Constitutions in civil law countries are significantly more likely than constitutions in common law countries to include ESRs. Constitutions that include some aspect of Muslim or customary law are least likely to include ESRs.

Third, the dataset attempts to establish the constitutional status of each individual right: as either absent, aspirational, or justiciable. Whether rights are practically justiciable depends in (large) part on factors beyond the constitution alone.⁶⁴ Nevertheless, constitutional texts offer a variety of insights regarding the contemporary status of ESRs. Even if constitutionally entrenched justiciability does not guarantee legal remedy, it may reveal where economic and social rights have formally co-equal status with civil and political rights in the constitution. Since ESRs have long been considered subordinate to civil and political rights, their comparative standing within a constitution – as justiciable, like most civil and political rights, or merely aspirational – may tell us as much about their relative contemporary status as measuring their mere presence or absence. We acknowledge that constitutional texts are not a sufficient indicator of the extent to which economic and social rights are respected or implemented in particular countries, but we argue that they are a good indicator of the relative contemporary standing of such rights, and of the legitimacy of the judiciary.

The dataset itself offers little in the way of conclusive evidence regarding the effect of constitutionally entrenched economic and social rights on human well-being. However, because it provides such a detailed account of the status of every right in most constitutions, it can be used in conjunction with other data to measure the impact of specific rights and the relevance of textual distinctions regarding justiciability on human well-being. Such data puts researchers in a position to explore whether a rhetorical commitment to rights and justiciability signals an actual commitment to human welfare.

64 Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998); Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008).

Book Review

Arzoo Osanloo, *The Politics of Women's Rights in Iran* (Princeton University Press 2009), ISBN: 9781400833160

Reviewed by Sevda Clark

One year after the publication of Osanloo's monograph, Australian-Muslims, author Randa Abdel-Fatah (*Does My Head Look Big in This?*) and Susan Carland, lecturer in politics at Monash University, in an op-ed entitled 'Muslim Feminists Deserve to be Heard' wrote that:

Orientalists writing on Islam and Muslims have tended to represent Muslim women as infantilised and oppressed, victims in need of rescue by the enlightened West. This is a classic example of the tyranny of self-projection, where the "rescuer" assumes a position of superiority so the belief systems, values and norms of Muslim women are judged against the Western experience.

The work of Muslim human rights and social justice advocates is discredited and ignored. It is as if liberation and freedom are the monopoly of secular feminists. Muslim women are apparently too downtrodden to care to make a difference.

If they do insist on fighting for equality and justice within an Islamic perspective, their efforts are dismissed, assuming freedom and Islam are mutually exclusive, or, worse, that Muslim women are brainwashed, suffering from a form of religious Stockholm syndrome.¹

So who are these Muslim women who advocate for rights? In order to interrogate this question, Iran presents a felicitous case study. In the context of the highly charged and politicised nature of politics, women's rights and human rights in international politics and literature, an examination of just how rights-conscious women in Iran are, makes for fascinating reading. In this book, Osanloo tells the stories of many of her interlocutors, (a result of interviews conducted over almost

1 <http://www.smh.com.au/opinion/society-and-culture/muslim-feminists-deserve-to-be-heard-20100127-mywf.html#ixzz27Vj19Ipd>.

a decade of over 200 women) of whom, she writes, ‘Ninety-nine percent of the women I interviewed referred to themselves as Muslim’ and that ‘Rarely did I meet a woman who said that she did not give spirituality an important place in her life, even if it was not always within institutionalized religion’ (p 17). She writes of the way in which the discursive ‘sites’ which she studies reveal that a ‘new type of Iranian woman is invented, not a “Western” woman, not the monolithic “Muslim woman”’ (p 13). A picture is offered, for example, in the description of Ms. Hajinouri, a former Parliamentarian and founder of a well-known nongovernmental organisation, who, in ‘full chador, perfectly wrapped’ (though it did not ‘wear her; her poise and grace defined her dress’) described every last detail of Iran’s Civil Family Law Code to a buzzing crowd of women: ‘Her assured earnestness in urging women to fight for their rights by filing legal claims and going to the courts, however, brings into question just what it means to be the feminine model of the Islamic faith’ (p 102).

As a successful refugee lawyer, Osanloo found her way into cultural anthropology after what she described as her scepticism towards “human rights”. This is perhaps not so surprising in light of human rights scholarship, such as that of Sally Engle Merry, which draws parallels between imperialism and human rights: ‘The practice of human rights is burdened by a colonialist understanding of culture that smuggles nineteenth-century ideas of backwardness and savagery into the process, along with ideas of racial inferiority. Rather than using these clearly retrograde terms, however, human rights law focuses on culture as the target of critique, often understood as ancient tradition’.² What Osanloo thus provides is a refreshing antidote to the usual stand-off between “human rights” and “culture” (‘rights, in this equation, had no culture, while culture was often devoid of rights’ (p xi)) through unveiling a central tenant anthropologists have known for years – to lawyers: that is, that “rights” themselves are a cultural product which is not “bounded and static”.

In so doing, Osanloo writes that her wish is to ‘give a perspective on the marginalized voices in [the debates on women’s rights and human rights in Iran] that are often neglected, dismissed, or discounted because of political rhetoric on the Islamic republic’ (p xiv) and that ‘denying the existence of such voices ... serves to reinforce the stereotype that women in Iran, and perhaps the greater Middle East and North Africa (MENA) region, are passive victims in need of saving’. She ‘weaves in ethnographic accounts’ in the form of narratives in order to ‘give this

2 Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006) 226.

literature more material context' (p 22). Critical race feminists have been similarly using, and advocating for the use of narrative techniques in legal scholarship to bring in the woman's voice into legal literature – drawing on Carol Gilligan's ground-breaking book entitled *In a Different Voice*³ – highlighting the unique perspectives that women bring to theory and practice. The voices heard 'in the narratives are not the judges and lawmakers who conventionally occupy our scholarly attention, but women: women who may also be minorities or members of other disadvantaged groups'.⁴ The women subject to Osanloo's lens are a specific class of urban, self-defined "middle-class" women from Tehran. And the choice is essential for her examination.

In arguing that the reformist period of Prime Minister Mohamed Khatami (1997 – 2005) witnessed a return to a kind of "rights talk" with liberal intonations, which the Iranian regime under Khomeini had attacked as fundamentally incompatible with Islam, Osanloo offers the concept of "Islamico-civil rights talk". Where the hybrid form of 'Islamic Republicanism' creates this new 'modern' animal – a fact lost on most observers, demonstrating that 'Iran's nation-state and its laws are a product of modern forces' (p 169): 'the acceptance of and accession to the nation-state system and a republican polity are also expressions of political rationality so subtle, that they are often overlooked by scholars, not to mention politicians and journalists who argue that Islam is incompatible with democracy' (p 183). The framing of her study is a key way in which she sets out to support her claims, where she wants her 'data to reflect what I saw as a rupture, crystallized' after a particular event. At one end of the "frame" is International Women's Day 8 March 1979, when thousands of women in Iran marched to protest the new regime's interference with their 'unsanctionable spaces: their hard-fought civil and political liberties' (p 2). While protesting (which continued for three days after) women carried banners demanding 'freedom in the choice of clothes', 'equal rights with men', the 'abolition of laws discriminating against women', and 'free speech and association' – cries which were condemned by the then new government as 'tools of Western imperialist forces who sought to undermine Iran's commitment to Islam' (p 3). The other boundary of her study, skipping ahead 20 years to April 1999, when supporter of the revolution and head of her own NGO, Azam Taleghani told a newspaper: 'Throughout history,

3 Feminist legal scholars who embrace this view often speak of women's "different voice", borrowing from Carol Gilligan's ground-breaking book Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (London: Harvard University Press, 1982).

4 Kathryn Abrams, 'Hearing the Call of Stories', 79 California Law Review 971, 975.

women have won certain rights but unfortunately were never officially entitled to them ...The laws of the country have to be modified to enable women to truly exercise their legitimate rights'; and Ayatollah Yazdi, Iran's Judicial Chief reaffirming 'the equality of people before the law' in another newspaper. Osanloo's framing thus enables her to consider 'what conditions have allowed for the discussion of rights to materialize in a language that was unacceptable just after the revolution' (p 7). Hence Osanloo's choice then, to limit her studies to the same class of women from Tehran who had been present at the protests in 1979.

One of the central critiques by feminist scholarship of international law, and human rights law specifically, is the public/private dichotomy. One of the "sites" which Osanloo examines in her study is the scriptural study group, "Qur'anic Meetings", which she states 'evidences the false dichotomy between public and private sites'. Osanloo's choice to look to such 'smaller actors', at the cross-roads between the state and the individual, in the Iranian landscape is revealing of the women's perceptions of their rights. We hear the voices of the women at the various sessions, discussing everything from individual freedom and responsibility to the relationship with God. Thus, the settings 'allowed women to assert themselves as credible and political actors' (p 95). Osanloo successfully conveys that these sessions see the changes in rights discourse among the women in the study to manifest, a 'crucial step given the lack of credibility afforded to women of this same demographic group when they called for their rights in March 1979. At that time, without having authenticated their calls for certain political and social freedoms within an Islamic standpoint, the revolutionary forces in the country were able to discredit the women as Western puppets' (p 95-6).

Discussions about the rights of Muslim women, it seems, cannot proceed without what Osanloo has described as a 'fixation on the attire of some Muslim women' – an obsession which is equally played out in the European context with the banning of various forms of Muslim dress across a number of European states. Indeed, Osanloo demonstrates that, akin to the rhetoric of colonisation – where women's bodies were the sites where various political battles were fought – they are replicated in contemporary international politics. Indeed this is identified by Osanloo as the link between women's rights in Iran and the global war on terror (p 201-203). Nicely woven into the thread of the ethnographic accounts she presents, are interesting glimpses which seem to defy the Muslim-woman-as-victim story: French lingerie being sold at the "Qur'anic Study" group and the account of Ms. Mowlaverdi, the legal expert at CWP (Center for Women's Participation) who was 'elegant in her long black chador, from under which a brightly coloured headscarf peeked out'. Of notice to this reviewer are that these images

operate as a sub-text: where, like the bright colours peeping out from under the chadors (one thinks of Mary Poppins' underwear peeping out from under her conservative dress) to subvert the all-too-familiar victim narrative – a subtle attempt at 'contesting the binaries' which usually frame such debates. Tellingly, in the section of the monograph book where Osanloo deals, albeit briefly, with the issue of dress, she seamlessly moves directly onto socio-economic issues, such as rights to housing, and accessibility for people with disabilities – issues that are generally not brought to the fore when addressing women's rights generally. Her interlocutor tells of some 'interesting results' in government offices of having women working outside of the home: including on-the-job day care, nursing breaks at the workplace, and school vans bringing children to their mother's work place (p 192). It begs the question whether there is more of a focus on civil and political rights in the debates about the rights of Muslim women more generally, as opposed to their socio-economic rights? In this regard, this reviewer has argued elsewhere, that in the context of the "headscarf" judgments of the European Court of Human Rights, for example, Muslim women's essential socio-economic rights to work in order to secure an independent living, are obscured behind the smoke-screen of the right to freedom of religion or belief. Further questions become glaringly apparent: are socio-economic rights as important as civil and political rights in the women's rights debates concerning women in Iran? Are they adequately addressed in the scholarship and advocacy? Osanloo opens up the doors to further research of the full-range of women's 'rights' including studies of socio-economic rights protection of women in Muslim-majority countries.

The Islamic Human Rights Commission was established in 1994 as a body to educate about human rights, and that 'as a body, [it] becomes one of the institutions of a rational bureaucratic state and one of the markers of legitimacy for the state. Osanloo argues that 'while Iran perhaps cannot compete with first-world nations in terms of economic development or gross national product, an existing legal infrastructure and human rights standards in particular, play key roles in its assertion of sovereignty and legitimacy (p 179)'. Yet, she highlights the pressure that the Commission has come under since 2005, which seemingly dims the picture for furthering of rights protection in Iran. However, it seems there may be a twinkle of hope in the Center for Women's Participation (CWP). CWP is identified as being among the many organisations in Iran that work on behalf of women's and children's rights, as evidenced by its success in lobbying Iran's legislature to ratify the Convention on the Rights of the Child (CRC) (p 186). Despite the slashing of the CWP's budget since 2005, being a player in issues of children's rights, it may be the case – though Osanloo does not comment on this

directly – that as the most ratified human rights treaty (Iran having ratified it in 1994; the USA and Somalia remain the two states holding out), the CRC, as the Trojan horse of human rights may have increased significance for rights advocacy in Iran.

In summation, *The Politics of Women's Rights in Iran* is essential reading for human rights scholars, advocates (and sceptics alike), and practitioners who are grappling to find pathways beyond the stale and polarised discourses concerning human rights in Iran.