

MAPPING EVIDENCE IN NATIONAL LITIGATION ON ECONOMIC AND SOCIAL RIGHTS

This working paper presents research undertaken by Holly Stubbs while hosted by CESR as a recipient of the David W. Leebron Fellowship from Columbia Law School. It explores how methodological challenges associated with economic and social rights play out in the context of litigation, a question of increasing interest to CESR and its partners.

WORKING PAPER

INTRODUCTION: WHY EVIDENCE MATTERS

Economic and social rights protect humanity's most basic needs. Over the last twenty years, there has been a profound increase in the legal enforcement of economic and social rights. Most constitutions now contain some form of protection for these rights.¹ Courts around the world—notably, in Colombia, South Africa, the United States, Canada, Argentina, and India—have also developed substantial jurisprudence enforcing economic and social rights in that time.

Traditionally, human rights litigation has focused on disputes between the parties over a discrete event or set of events—such as an incidence of police violence or forced eviction—and facts that can be laid out through affidavits, testimony, physical documentation, and occasional references to experts. Many economic and social rights violations are different kinds of disputes. They are often the product of long-term policy failures related to complex and, at times, technical matters. Such cases raise a number of issues, meaning that different or additional types of scientific, technical or other specialized evidence are often required, in order to identify a violation.

The first issue is that economic and social rights cases may involve assessing the impact of complex or technical public policy decisions. Judges may not be experts in the substantive areas covered in these policies, just as they aren't in many other areas they adjudicate. Nevertheless, they are experts at reviewing government actions in light of constitutional and other legal protections of human rights.² Scientific, technical or other specialized evidence may provide a basis for drawing legal conclusions about the government's compliance with its human rights obligations.

The second issue is that economic and social rights cases may raise polycentric concerns that judges may be reluctant to become involved with because of political sensitivities and considerations related to the role of the court and its own limitations.³ However, as Scott and Macklem have observed, "courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary".⁴ Additionally, since courts may be more independent, they can use this information to make decisions about public policies that are unaffected by political influence.⁵ Scientific,

¹According to a 2013 study, nearly all new democracies and many established ones include some economic and social rights in their constitutions, though there is a wide variation. The right to education is nearly universal, but the rights to water and food are still very rare. See Courtney Jung et al., *Economic and Social Rights in National Constitutions*, *American Journal of Comparative Law*, Vol. 62 (2014) p. 1046.

²For an overview of the debate regarding justiciability of economic and social rights see Aoife Nolan et al., *The Justiciability of Social and Economic Rights: An Updated Appraisal*, CHRGG Working Paper No. 15 (2009). p. 16.

³Salma Yusuf, *The Rise of Judicially Enforced Economic, Social, & Cultural Rights: Refocusing Perspectives*, *Seattle Journal for Social Justice*, Vol. 10 (2012) p. 758-759 (examining how the Indian case, *Olga Tellis*, and the South African case, *Soo Brammooney*, demonstrate the sensitivity that courts have towards issues of political legitimacy).

⁴Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees?* *University of Pennsylvania Law Review*, Vol. 141 (1992) p. 68.

⁵For a discussion of this concept see Malcolm Langford, *Why Judicial Review*, *Oslo Law Review*, Vol. 1 (2015) p. 52-57.

technical or other specialized evidence also allows courts to inject rights-based analysis into the deliberations and bring the voices of those whose rights have been affected into existing policy debates. Courts can bring new information into the public sphere—particularly from civil society and affected communities—that may be missing from political and legislative processes.⁶ Scholars have called the process of courts provoking and managing debate on public policy topics “dialogic.” They have argued that this “may promote a collaborative search for solutions” which can potentially improve coordination among disconnected state agencies and create public policies framed in the language of rights.⁷

The third issue is that economic and social rights cases may involve large-scale, collective injuries. In these circumstances, traditional remedies, which are mostly backward-looking and focused on repairing the damage done to a claimant—typically through monetary compensation—may not be sufficient.⁸ When judges need to develop innovative remedies that comprehensively retribute victims and alter the underlying causes of violations, evidence of this sort can provide a baseline upon which judges can craft orders that match the realities of the situation. Similarly, evidence that uncovers dysfunctions in government programs can provide a basis for ordering how these programs need to change. Finally, as discussed above, evidence of how and why governments acted provides a platform for dialogue between the court, the petitioners, government actors, and other interested parties; in this way, the court can develop specific remedies, and be a part of the dialogic process that makes these remedies meaningful and effective.

However, of the nature of scientific, technical or other specialized evidence creates a number of unique problems, given that courts are typically less accustomed to dealing with it and rules of evidentiary procedure may preclude or limit its inclusion. Very little scholarship on the litigation of economic and social rights has focused specifically on the question of evidence. It has largely skimmed over how courts, especially those at the national level, have actually measured these rights, what evidence they used to do so, and more generally how they have managed the factual challenges that such cases present. This paper contributes to filling this gap by mapping the types of evidence used in economic and social rights litigation, and the types of legal conclusions such evidence has helped to substantiate. Specifically, a selection of influential economic and social rights cases was analyzed from an evidentiary perspective. After describing the methodology used in Part I of the paper, Part II presents cross-cutting observations about the types of evidence used in the cases reviewed. Part III observes some of the ways that judges used evidence to support conclusions on particular elements of economic and social rights claims, providing illustrative examples from the cases reviewed. The paper concludes by outlining some of the practical questions raised by these observations.

I. METHODOLOGY

This paper maps out different types, sources, and uses of evidence, based on a review of national case law on economic and social rights.⁹ A literature review was conducted that surveyed commentary on the domestic adjudication of economic and social rights, as well as on evidentiary considerations in litigation. Based on this review, 98 cases were selected to reflect an array of rights; different geographic regions,

⁶ *Id.* at p. 15-17.

⁷ César Rodríguez Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, *Texas Law Review*, Vol. 89 (2011) p. 1696. The South African Constitutional Court explained the importance of this process: A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy ... If the process followed by the government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation. *Lindiwe Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (8 October 2009) para 71

⁸ Kent Roach, *The Challenges of Crafting Remedies for Violations of Socio-economic Rights in Social Rights Jurisprudence: Emerging Trends*, in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Malcolm Langford ed., Cambridge University Press, 2008).

⁹ Economic and social rights litigation is broadly defined here to include litigation that involves rights contained in the International Covenant on Economic and Social Rights, even if the domestic protection of those rights is provided through other sources of law (e.g. anti-discrimination legislation or administrative procedures).

legal systems, and levels of socioeconomic development; as well as important evidentiary issues.¹⁰ Selected cases were reviewed at the highest court level for a given case, usually appellate or constitutional courts. A number of the cases reviewed could be described as strategic litigation cases, in that they sought systemic change, while others were more narrowly focused. Where possible, the judgments were read at every level that a public judgment was available (trial, appellate, constitutional, etc.). Any evidence referenced in the judgment, including “bench research,” was documented and its type, source, and the kind of conclusion it was being used to substantiate were noted.

A number of qualifications about the methodology used are warranted. First, given the vastness of the subject, it is far from exhaustive. For example, since the focus was on evidentiary issues unique to economic and social rights, certain types of cases that have been well analyzed for their civil and political rights dimensions were excluded.¹¹ Second, this is a review of judgments and not all evidence entered into the record. Therefore, it does not reflect all evidence that may have influenced the ruling. Third, how courts approach evidence depends on context, including the country’s legal system, the court’s procedural rules, and the institutional capacity of the judiciary. As such the paper’s observations should be considered in light of the importance of contextual factors. Fourth, the review was conducted in English and relied on translations of judgments into English, where available. As a result, certain nuances and specificities may have been missed.

Although this approach does not allow for a comprehensive trends analysis, it does offer a number of interesting observations about the ways judges approach evidence, with particularly illustrative cases cited throughout the paper. In sharing these examples, the paper aims to provide a framework that can foster dialogue among practitioners and jurists about the practical considerations related to preparing and presenting evidence when litigating cases involving economic and social rights.

II: OBSERVATIONS ON TYPES OF EVIDENCE USED

This section offers general observations about how frequently different types of evidence were assessed by courts in the cases reviewed. In particular, it notes differences in the nature (e.g. scientific, statistical, budgetary, first person) and original source (e.g. government, academics, NGOs, claimant, witness) of evidence cited, as well as in the form in which it was presented (e.g. affidavits, expert testimony, exhibits).

Another more contextual observation worth noting is how evidence management procedures and legal doctrines relating to evidence shape how courts interacted with evidence. Unsurprisingly, the procedures and legal doctrines that govern what evidence may be admitted and considered impact courts’ engagement with such information. Although unpacking the specific impact of these procedures on evidence is beyond the scope of this paper, the cases reviewed indicated that court systems that had developed specific processes and arrangements for managing voluminous or complex evidence were more willing and better able to accommodate the types of evidence discussed below.

- a. *In most cases, affidavits, oral testimony, and physical documentation were the main types of evidence used*

The cases reviewed referred mostly to testimony—with claimant testimony often playing a central role — along with physical documentation, affidavits and other similar evidence. The cases reviewed showed that while greater volumes of evidence involving more technical or complex topics may be required in economic and social rights cases, that is not always true. Even in the cases supported by voluminous or complex scientific or social science evidence, judges seemed most persuaded by clear human narratives from those who had personally suffered a violation of their rights. For example, in *Eldridge* the court referred to claimant

¹⁰ See Appendix for a list of cases.

¹¹ Namely mass torts and labor cases involving unionization and freedom of association.

testimony to a significant degree, even though there was a large amount of technical evidence available.¹² For the most part, the cases reviewed were approached in the same fundamental way as other cases centered on specific events; they focused on testimony to explain what claimants had experienced and analyzed whether that experience constituted a violation of a legally protected right.

b. Other types of evidence were used to address arguments about policies or structural issues

In some of the cases reviewed, specifically those that were focused on problematic policy or structural issues, judges relied on evidence of a different nature, including quantitative data, socioeconomic statistics, academic findings from social and “hard” sciences, and budgetary or economic data. For example, when claims encompassed harm to large populations over a long duration, statistics were needed to determine how many people were involved, their level of rights realization, and if different groups felt negative impacts disproportionately.¹³ One observation from the cases reviewed is that when they were about technical topics, for example, related to water, education, or health, different sources of evidence, typically experts, were important. For example, in *Campaign for Fiscal Equity* the court cited academic studies and expert testimony in making findings on the impact of poverty on educational outcomes.¹⁴ Many cases also involved assessing government policies and programs that provided constitutionally guaranteed social goods and services. In assessing these programs, judges cited data about the quantity and quality of these goods and services,¹⁵ budgetary data, and information about the historical or political context.¹⁶ In the cases that required more structural remedies, judges referred to quantitative measurements that indicated what government actions needed to change.¹⁷

c. There was a high degree of reliance on government-produced information

Information produced by government agencies featured heavily in almost every case reviewed. Many governments have bodies that track and analyze social issues, such as the Centers for Disease Control in the United States, for example. It is interesting to note that courts often referred to statements and reports from these bodies to make findings of fact, especially about what governments had done and why and about complex social situations. For example, in *Victoria* the court cites the findings of the Mayor’s Task Force Report regarding the demographics of the homeless population in the city.¹⁸

Information produced by government bodies was especially critical in challenging government arguments and narratives.¹⁹ More generally, many judges seemed to prefer information that originated from

¹² *Eldridge v. British Columbia (Attorney General)*, Canada, Supreme Court [1997] 3 S.C.R.

¹³ See e.g., *Victoria (City) v. Adams*, 2008 BCSC 1363 (using numerous surveys to understand the experience of the homeless population in Victoria in terms of the right to housing); *Ain O Salish Kendra v. Bangladesh*, 2010, 39 CLC (HCD) [5265] (referring to several sources to establish the number of child laborers in Bangladesh and the impact of child labor on their lives).

¹⁴ *Campaign for Fiscal Equity, Inc. v. State of New York*, 719 N.Y.S.2d 475 (2001) (referring to academic studies, government report, and expert testimony to understand the impact of various facts, for example the impact of poverty on educational outcomes); See also, *SU-225/98, Colombia, Constitutional Court* (1998) (relying heavily on medical doctors to understand the impact of meningitis on low income children).

¹⁵ See e.g., *Campaign for Fiscal Equity*, *supra* note 14 at 514 (referring to the number computers, textbooks, library books, and music and science facilities available per student); *MC Mehta v. State of Orissa [Orissa]*, India, High Court of Orissa (1995) (determining that pollution levels along a public water canal were unfit for human consumption).

¹⁶ See e.g., *Rose v. Council for Better Education* 790 SW2d 186 (1989) at 194 (comparing local districts in terms of wide variances in taxable property per student); *Kong Yunming v. Director of Social Welfare*, Hong Kong, Court of Final Appeal A5 FACV No. 2 (2013) (2013) (referring to numerous budgetary documents and the history of the social security program in Hong Kong to understand government constraints in paying social security payments).

¹⁷ See e.g., *Defensora del Pueblo de la Ciudad de Buenos Aires y otro c. Instituto Nacional de Servicios Sociales para Jubilados y Pensionados [Defensora]*, Argentina, Federal Administrative Court of Appeals, Buenos Aires District (1999) (basing a very detailed remedy requiring the provision of necessary goods and services on the findings from various studies); *N.D. Jayal v. Union of India*, India, Supreme Court (2004) (using a Committee of Experts to monitor and report on the development of dam).

¹⁸ *Victoria*, *supra* note 13 (relying on the findings of the Mayor’s Task Force Report regarding the demographics of the homeless population in the city); see also e.g. *Campaign for Fiscal Equity*, *supra* note 14 (using New York State’s 655 Report for 1999 to track educational outcomes over several years).

¹⁹ See e.g., *Shehla Zia v. WAPDA*, Pakistan, Supreme Court (1994) 694 SC Vol. XVI (noting the testimony of many actors from government agencies that countered the government narrative that electromagnetism posed no threat); *Bulankulama v. Min. of*

government sources over information produced by NGOs or academics. This attitude towards non-governmental sources can be summed up in *Prakash Mani Sharma v. Gov't of Nepal* where the Nepalese Supreme Court stated:

[Q]uestions may arise as to how appropriate it would be to seek constitutional remedy on the basis of study report made by non-governmental organizations or on the basis of reports that have been submitted [by those] outside the judiciary. Such questions may arise because in a judicial process [...] evidence is thoroughly examined and [...] it is decided as to whether or not such evidence should be accepted by the court. But it is not possible to follow such legal process in relation to the study or reports made by private or non-governmental organizations, and there could be a risk in determining any conclusion on the basis of such reports.²⁰

The ways that courts regarded information from governments, however, was not universal, and differed by context. In certain cases, courts evinced a less trusting attitude towards government information, while some relied more heavily on evidence from NGOs,²¹ international bodies,²² and academics.²³

III: OBSERVATIONS ON HOW EVIDENCE WAS EMPLOYED

When brought as a civil lawsuit, there are various elements that need to be established for a human rights claim to be successful. Broadly speaking, these include establishing a deprivation, demonstrating duty bearer responsibility, and fashioning a remedy. Although their precise articulation varies from jurisdiction to jurisdiction, the legal standards that underpin each of these elements can be complex in economic and social rights claims.²⁴ Thus, making conclusions on the application of these standards to the facts of a particular case can also pose particular evidentiary challenges.

For example, the first element requires demonstrating that the claimants are unable to meaningfully realize the right and that such a deprivation could qualify as a violation of the right. This can be a complex and nuanced factual question when it comes to economic and social rights cases, because they may be collective in nature and involve technical topics. The second element requires determining whether government actors have met their legal obligations in terms of the right. These obligations are often described using the taxonomy of respecting, protecting and fulfilling rights. In some jurisdictions, procedural requirements,²⁵ as well as requirements to act “rationally” or “reasonably” when developing and implementing programs need to be considered in determining if legal obligations have been complied with.²⁶ Factual questions may arise about what actions government actors took (or failed to take), as well as why and how government actors developed policies or made decisions. The third element requires deciding what would repair the injury to the claimant(s), and in some cases, what would prevent ongoing violations.²⁷

Industrial Development, Sri Lanka, Supreme Court (2000) S.C. Application No. 884/99 (F/R) (relying on findings by a scientific governmental body to argue that government actors had not sufficiently considered the impacts of a mine).

²⁰ *Prakash Mani Sharma v. Government of Nepal*, Nepal, Supreme Court (2008) (SCN, Writ No. 064) at p. 11 (unofficial translation).

²¹ See e.g., *Farooque v. Government of Bangladesh*, Bangladesh, Supreme Court (2002) WP 300 of 1995 (relying on empirical evidence gathered from the NGO involved on the air quality in Bangladesh); *Defensora*, *supra* note 17 (using the findings of an NGO to establish the impacts of extreme poverty on the residents of the area involved).

²² See e.g., *5000 Citizens v. Article 3 of Law No. 28705, EXP. No. 00032-2010-PI/TC*, Peru, Constitutional Court, (2011) (citing statistics produced by WHO, and many other international and academic studies on the impact of smoking on public health); *Ain O Salish Kendra* *supra* note 13, (relying heavily on findings from UNDP, the ILO, and UNICEF to determine the extent and impact of child labor).

²³ See e.g., *Shehla Zia v. WAPDA*, Pakistan, *supra* note 19 (relying heavily on academic studies from outside Pakistan and stating that reliable academic analysis was unlikely to be conducted in country); *Bulankulama*, *supra* note 19 (utilizing academic consensus to challenge government statements about the likely environmental impact of a proposed phosphorus mine).

²⁴ See *Courtis – Standards to Make ESC Rights Justiciable: A Summary Exploration* at p. 382-393 (breaking economic and social rights protections into six broad categories: 1) Negative Protections; 2) Procedural Protections; 3) Equal Protection and Prohibitions on Discrimination; 4) Core Content or Minimum Core; 5) Reasonableness, ‘Appropriateness’, ‘Proportionality’ and Similar Standards; and 6) Prohibitions on Retrogression).

²⁵ These could include requirements for public hearings or consultations, establishing certain steps that must be taken before depriving or granting an entitlement or set up the basis for administrative or judicial review of certain decision. *Id.* at p. 384.

²⁶ See *Courtis*, *supra* note 24 at p. 390-393.

²⁷ Kent Roach & Robert Sharpe, *Taking Remedies Seriously: An Introduction*, CIAJ 2009 Annual Conference (2009) p. 1.

Remedies are largely dictated by the facts of the case, and the remedies available in different jurisdictions vary widely.²⁸

This section presents observations from the cases reviewed regarding the types of evidence used to make decisions on each of these three elements. Evidence was grouped into different categories, based on its nature, source and the form it was presented to the court. These categories include socioeconomic statistics, lay and expert testimony, expert reports, official government documentation, and budgetary data. Official government documentation refers to government-produced data, reports and administrative records. Expert reports refers to studies and research produced by academics, specialized international agencies, and others that might be considered specialists. As will be described below, each element of a case raises particular questions about the facts of the case or how legal principles apply to them, and which specific types of evidence have generally been employed to decide.

Establishing a Deprivation

In order to determine whether a deprivation of economic and social rights has occurred, courts must first assess the situation of the claimant(s), as presented in the case, against relevant human rights norms. Relevant norms include protections against interference with rights enjoyment by the state or by a third party, non-discrimination, minimum core obligations, and non-retrogression.

Who was affected?

Evidence employed: Socioeconomic Statistics, Lay Testimony

Examples of information courts used to determine who was affected include the size and growth rates of the population involved,²⁹ as well as demographic information such as gender,³⁰ racial and ethnic breakdowns,³¹ income levels,³² or disability status.³³ For claims with discrete numbers of claimants, this information often came from lay testimony.³⁴ In cases that involved collective claims, this review found that courts usually established ‘who’ by considering groups as a whole. This evidence was fairly straightforward and mostly consisted of population statistics, the vast majority of which came from government bodies.³⁵

The absence of reliable government data was a major challenge observed by the courts. This was frequently a problem in situations involving groups that are discriminated against or otherwise marginalized. In such cases, courts utilized a number of methods. One method was to note the difficulties in measuring the population, and to adjust their reasoning accordingly. For example, in *Victoria (City) v. Adams*, the judge noted that there had been several recent studies attempting to count the homeless population and that available estimates were likely under-reporting the problem.³⁶ Another method was to utilize a number of sources. For instance, in *Ain O Salish Kendra vs. Bangladesh*, the judgment referenced several newspaper

²⁸ International Commission of Jurists, *Adjudicating Economic, Social and Cultural Rights at National Level: A Practitioners Guide* (2014) p. 215.

²⁹ See e.g., Kong Yunming, *supra* note 16 (considering the measurements of the growth and size of various population groups); Olga Tellis v. Bombay Municipal Corporation, India, Constitutional Court (1986) 2 S.C.R. Supl. 51 at 9. (noting that pavement dwellers were half the population of Bombay).

³⁰ See e.g., *Bedford v. Canada (Attorney General)*, 109 O.R. (3d) 1 2012 ONCA 186 (2012) at para 165; *Victoria*, *supra* note 13 at paras 37 - 38.

³¹ See e.g., Campaign for Fiscal Equity, *supra* note 14; San Antonio Independent School District v. Rodriguez [San Antonio] 411 US 1 (1973) at 12.

³² See e.g., Kong Yunming, *supra* note 16 at para 58; Case No. 2009-43-01 on Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009, Latvia, Constitutional Court (2009) para 18.

³³ See e.g., Eldridge *supra* note 12 at para 8; Bracking and others v Secretary of State for Work and Pensions, United Kingdom, England and Wales Court of Appeal (Civil Division) (2013) [2013] EWCA Civ 1345 at para 5.

³⁴ See e.g. Okwanda v. Minister of Health and Medical Services, Kenya, High Court of Nairobi (2012) Petition No. 94 of 2012 at paras 1-2; Kong Yunming *supra* note 16 at paras 3-6; Government of the Republic of Namibia v. L.M. and Others, Namibia, Supreme Court (2014) [2014] NASC 19 at p. 6-20.

³⁵ For European countries this also including statistics from regional statistical organizations, See e.g. Case No. 2009-43-01, *supra* note 32 (citing data from Eurostat, the European Commission, OECD, and EU-SILC).

³⁶ *Victoria*, *supra* note 13 at paras 37 - 38.

reports that estimated numbers of child laborers, as well as NGO reports, and government statistics.³⁷ Finally, when no government data was available, there were examples where courts referred to surveys and measurements conducted by petitioners or NGOs specifically for the case.³⁸ This type of information was not commonly referenced, however; judgments that did, typically mentioned that the lack of government data was the reason they were relying on this information.

How was the right affected?

Evidence employed: Official Government Documentation, Socioeconomic Statistics, Expert Testimony

It was observed that courts tended to establish a general overview of the circumstances of the claim, in order to understand the factors leading to a particular right's infringement. When the claim was focused on a particular event or set of events in individual cases, this was mainly based on testimony.³⁹ When the case involved determining the impact of policies on the rights of a group, testimony was also often, but not always, a central component.⁴⁰ Testimony is a form of evidence that courts are familiar with, and many of the courts in this review used testimony as the basis for their conclusions. For instance, some judgments stated, without referring to other corroborating evidence, that conditions were "extremely difficult,"⁴¹ "terrible,"⁴² or "desperate."⁴³ That said, other judgments did use quantitative data and expert analysis to supplement claimant testimony, in order to highlight how the claimant's experience was representative.⁴⁴ Expert opinions could come from in-person testimony, affidavits, amicus briefs, and/or academic publications.⁴⁵

When testimony was not sufficient, for example if it was necessary to establish the extent of the rights infringement in a population, courts tended to refer to evidence that quantified the impact of policies. In the cases examined, such assessments were often based on numerical measurements, which served as a baseline for determining the magnitude of the impact of a policy on the right. This meant looking at the total numbers of people affected⁴⁶ or the total size of the area involved.⁴⁷ For example, courts cited statistics on the numbers and proportions of people dying from lack of medical care;⁴⁸ failing to meet educational standards;⁴⁹ or living in unsafe and unsanitary conditions.⁵⁰ These assessments were often quite broad and served to provide an overview or snapshot of the experience of a particular group. For example, the court in *Prakash Mani Sharma* noted a study that indicated that six hundred thousand women in Nepal had suffered from uterine prolapse,⁵¹ and in *Mazibuko* the court noted the totals of people who

³⁷ Ain O Salish Kendra, *supra* note 13.

³⁸ See *e.g.*, City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another [Blue Moonlight], South Africa, Constitutional Court (2011) CCT 37/11 [2011] ZACC 33 at para 6 FN 9.

³⁹ See *e.g.*, Government of the Republic of Namibia, *supra* note 34 (referring to mainly doctor and claimant testimony to establish if the rights to health and privacy had been violated in specific medical procedures); South Bucks District Council & Anor v. Porter, United Kingdom, House of Lords (2004) UKHL 33 (1 July 2004) (referring mainly to testimony to determine if an eviction had been lawful).

⁴⁰ See *e.g.*, Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors [2010] INDLHC 2983 para 28.10 (xiii) (basing an understanding of the effectiveness of government policies that sought to improve maternal mortality by considering the representative experiences of several women); Eldridge, *supra* note 12;

⁴¹ Moselelhanyane and others v. Attorney General of Botswana, Civil Appeal No. CACLB-074-10 (2011) at para 8.

⁴² Olga Tellis, *supra* note 29 at 9.

⁴³ Nokotyana v Ekurhuleni Metropolitan Municipality, South Africa, Constitutional Court (2009) (4) BCLR 312 (CC) at p. 3.

⁴⁴ See *e.g.*, Patricias Asero Ochieng and 2 others v. the Attorney-general & Another, Kenya, High Court of Nairobi (2012) at paras 47-49 (using the Kenyan country report to the United Nations for information about the prevalence HIV/AIDS); Defensora, *supra* note 17 at p. 1 (referring to the report of the Ombudsman to regarding poverty and disease levels in a certain area).

⁴⁵ See *e.g.*, 5000 Citizens, *supra* note 22 (considering numerous academic studies from several amicus curiae briefs).

⁴⁶ See *e.g.*, Prakash Mani Sharma, *supra* note 20 at p. 2; Ochieng, *supra* note 44 at para 47.

⁴⁷ This was frequently necessary in cases that involved water or the environment See *e.g.*, Bulankulama, *supra* note 19 at p. 13, 22-23; Waweru v Republic, Kenya, High Court of Nairobi (2006) AHRLR 149 (KeHC 2006) at para 19.

⁴⁸ See *e.g.*, SU-225/98, *supra* note 14 at para 13; Ochieng *supra* note 44 at para 46.

⁴⁹ Campaign for Fiscal Equity, *supra* note 14 at 516; ERRC v. Ministry of Education, Sofia Municipality and 103rd Secondary School of Sofia District Court, Case 11630/2004, Bulgaria, Sofia District Court (2005) p. 6.

⁵⁰ See *e.g.*, Blue Moonlight, *supra* note 38 at para 2; Olga Tellis, *supra* note 29 at p. 9.

⁵¹ Prakash Mani Sharma, *supra* note 20 at p. 2.

had varying levels of access to adequate water.⁵² In a number of the cases reviewed, courts looked at evidence to determine how common an experience was, to determine its impact on society at large.⁵³

In addition to looking at the overall group experience, courts also looked at evidence distinguishing between different groups in order to assess claims of discrimination or to determine if particular groups were disproportionately impacted. For this, courts used disaggregated social statistics that highlighted experiences for particular groups such as women, children, and minorities.⁵⁴ For example, a Canadian case, *Kearney & Ors v. Bramlea Ltd & Ors, Board of Inquiry*, considered the proportions of women, young people, minorities, and refugees that were able to meet income requirements to assess how rental restrictions impacted their ability to gain housing.⁵⁵

In referring to quantitative measures, courts often also referred to additional information that helped them to interpret this data. This included expert analysis and references to benchmarks.⁵⁶ Courts made use of a variety of different benchmarks, including international or industry best practices,⁵⁷ and geographic comparisons. For example, in *Rose* the court compared outcomes in the state of Kentucky against the average education outcomes nationally.⁵⁸ It was interesting to note the way courts referred to expert analysis, alone or to help interpret relevant data, particularly to explain impacts on rights in more technical or scientific terms,⁵⁹ or when there was a lack of consensus about the impact of a particular policy.⁶⁰

What contextual factors should be considered?

Evidence employed: Expert Reports, Official Government Documentation

Many courts used evidence of broader contextual factors in order to conclude whether a particular situation would constitute a deprivation or violation of economic and social rights.⁶¹ This included evidence related to histories of discrimination, socioeconomic challenges, other rights violations, and political or cultural factors, all of which could help to better understand potential obstacles faced by claimants in realizing their rights. Evidence about context focused on the potential vulnerability of an affected population or the need for this group to be granted heightened government protection. Evidence could also provide insight into the socioeconomic context of the claimants as a group. For instance, the judge in *Victoria* looked at the impacts of poor mental health, social exclusion, and domestic violence on the homeless.⁶² The court in *Prakash Mani Sharma* referred to statistics regarding the enormous health, social, and economic challenges facing

⁵² *Lindiwe Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (8 October 2009) at para 2.

⁵³ See e.g., *MC Mehta v. Tamil Nadu* [Tamil Nadu], India, Supreme Court 1992 Ori 225 (1996) at para 11 (noting the percentages of child laborers in various parts of India to indicate size of the problem throughout the country, and to highlight how certain regions were deeply affected); *Rose*, *supra* note 16 at 917 (using the fact that 35% of the adult population of Kentucky were high school drop outs as part of its assessment that the educational system in Kentucky was failing to provide a satisfactory level of education).

⁵⁴ See e.g., *Sandesh Bansal v. Union of India and others*, India, High Court of Pradesh (2012) Writ Petition No. 9061/2008 at 10 (disaggregating the maternal mortality rate for a particular region). *SU-225/98*, *supra* note 14 at II.26 (citing expert testimony about the impact of meningitis on low-income children in child care situations).

⁵⁵ *Kearney & Ors v. Bramlea Ltd & Ors, Board of Inquiry*, Ontario Human Rights Code, (2001) pg. 17-18

⁵⁶ A benchmark is a reference point against which to judge the saliency of factual indicators and inform evaluations regarding the right. For more information about the use of benchmarks in human rights analysis see Riedel et al., *Indicators – Benchmarks – Scoping – Assessment: Background paper* (2010).

⁵⁷ See e.g., *Emberá-Chamí Community FGM Case*, Colombia, Municipal Jurisdiction Court of Pueblo Rico, Risaralda (2008) at 4.3 (referring to the stance of the International Federation of Gynecologists and Obstetricians regarding FGM).

⁵⁸ Benchmarks that compared geographic locations were often utilized in discrimination cases, particularly regarding the right to education. See e.g., *ERRC*, *supra* note 40 at p. 2 (comparing educational outcomes in all-Roma schools); *Rose*, *supra* note 16 at 197 (comparing outcomes in Kentucky with national educational outcomes).

⁵⁹ See e.g., *SU-225/98* *supra* note 14 (relying heavily on expert evidence from medical doctors to understand the experience of families who do not have access to a meningitis vaccine); *Menores Comunidad Paynemil s/acción de amparo* [Paynemil], Argentina, Provincial Court of Appeals (1997) (relying on expert analysis to establish that children had been impacted by mercury and lead contamination).

⁶⁰ See e.g., *Shehla Zia*, *supra* note 19 (using many experts to analyze the potential impact of electromagneticism); *Bedford*, *supra* note 30 (using numerous experts to determine the impact of indoor sex work on the health and safety of sex workers).

⁶¹ Not all courts considered these issues, but many included contextual factors in protections of economic and social rights. See e.g., *Government of the Republic of South Africa & Ors v Grootboom & Ors* 2000 (11) BCLR 1169 (CC) at para 25 (“Rights also need to be interpreted and understood in their social and historical context.”); *Olga Tellis*, *supra* note 29 at 7 (“There is no static measure of reasonableness which can be applied to all situations alike.”).

⁶² *Victoria*, *supra* note 13 at paras 59-62.

women in Nepal.⁶³ Evidence also pointed to issues impacting the entire society. For example, in *Doucet-Boudreau*, the court expressly noted the long and troubled history of French language programs in government schools.⁶⁴ Evidence such as this, providing context into the history of the situation was particularly important in cases involving historical discrimination against particular groups.⁶⁵ For this, a wide-ranging analysis of academic sources, government reports and similar sources was often used.⁶⁶

Determining State Responsibility

From a human rights perspective, when a court finds a deprivation, it must still determine whether the defendant (which was the government in all of the cases reviewed) has failed to respect, protect, or fulfill the right. In domestic litigation, the standards that underpin these obligations vary by jurisdiction. As articulated in international jurisprudence, however, the obligation to fulfill includes the obligation to take steps to the maximum of available resources; to ensure goods and services are available, accessible, acceptable, and of adequate quality, without discrimination; and to follow process principles. Although courts in various jurisdictions have varied considerably in the degree of deference they give to governments, the standard of review of these norms is typically one of reasonableness, adequacy, or proportionality.

What efforts did the government make?

Evidence employed: Official Government Documentation, Expert Reports, Budgetary Data

In almost all of the cases reviewed, the court looked at documentary evidence (national laws, policies, and programs) to determine what government responsibilities were and whether those had been met. Much of this evidence was straightforward—if exhaustive—and referred to relevant policy documents and testimony from government actors.⁶⁷ To evaluate the *implementation* of laws, policies, and programs *in practice*—in terms of how they translated into goods and services on the ground—courts typically relied on records from government bureaucracies and expert analysis coming from NGOs, think tanks, and others.⁶⁸ This evaluation included determining availability and sufficiency of goods and services produced. To assess this, courts typically relied on measurements of the total quantities of goods that had been produced or services available or rendered. For example, in *Paschim Banga Khet Mazdoor Samity*, the court referred to the total number of hospital beds in a particular region.⁶⁹

However, the fact that goods and services are being produced does not mean that they reach people, making it necessary to look at the quantities actually accessible as well.

It was observed that both testimony and different kinds of indicators were used to evaluate access. Testimony came from government officials or individuals who had attempted to access the goods and

⁶³ Prakash Mani Sharma, *supra* note 20 at p. 2, 15.

⁶⁴ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, Canada, Supreme Court (2003) para 38 (noting the “disappointing” history regarding French language programs in government schools); *see also* *Port Elizabeth Municipality v. Various Occupiers*, South Africa, Constitutional Court (2004) (12) BCLR 1268 (CC) at paras 8, 10, 28.

⁶⁵ *Brown v. Board of Education of Topeka*, 347 US 483 (1954) at FN 11 (noting many social science studies on the impact of segregation); *Eldridge*, *supra* note 12 at para 56 (noting academic works detailing discrimination and marginalization for disabled people in Canada).

⁶⁶ *See e.g.*, *Residents of the Joe Slovo Community, Western Cape v. Thubelisha Homes and Others [Joe Slovo]*, South Africa, Constitutional Court (2010) 2010 (3) SA 454 (CC) at paras 171, 345 (referencing academic works of history of forced removals in the Apartheid era); *Kong Yunming*, *supra* note 16 at paras 55-57 (considering a Task Force report regarding Chinese immigration to Hong Kong).

⁶⁷ *Bracking*, *supra* note 33 at para 6 (referring to a ministerial statement to establish the timeline of the closure of a government program); *Mazibuko*, *supra* note 52 at para 40 (noting “voluminous” evidence covering years of changing policies).

⁶⁸ *See e.g.*, *Campaign for Fiscal Equity*, *supra* note 14 (relying heavily on a number of administrative records to assess quantity and quality of educational resources provided); *Grootboom*, *supra* note 61 at para 57 (relying on city study to determine the number of houses built by government housing programs).

⁶⁹ *Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor. [Paschim]*, India, Supreme Court (1996) AIR SC 2426/ (1996) 4 SCC 37; *N.D. Jayal v. Union of India* 09 SCC 362 at 5 (noting the total number of hospital beds available in a certain area); *See also*, *Grootboom*, *supra* note 61 at para 58 (considering the number of houses built by government housing programs).

services.⁷⁰ In addition to testimony, courts sometimes referred to indicators that compared the size of the population against the quantity of goods and service produced. Examples included available goods per capita;⁷¹ the percent of the population that had actually been able to use the good or service;⁷² and utilization rates.⁷³ In order to assess discrimination or whether particular vulnerable groups were not getting access to sufficient goods, in some of the cases reviewed the court also referred to disaggregated information to determine whether or not goods and services were available to a particular group.⁷⁴

Assessments about the quality of goods and services were generally heavily dependent on expert analysis; although, quality was assessed in a variety of ways, depending on the kind of service or good. In the cases reviewed these ranged from the medical efficacy of antiretroviral drugs covered under a national health insurance program to the publication date and content of library books.⁷⁵ Courts used benchmarks or standards of quality to assess the good or service against. Examples from this review included comparing available health services,⁷⁶ educational resources,⁷⁷ and water available in public waterways to specific benchmarks.⁷⁸

Another key component in determining government responsibility is concluding whether adequate resources had been dedicated to the right.⁷⁹ The cases in this review that did engage in budgetary analysis tended to analyze budgets from a macro level, as part of an overview of government budgetary decisions.⁸⁰ Although, in some it was done in quite a granular way.⁸¹ Official government documents were a key source of evidence on resources.⁸² However, in cases where the government had been unwilling or unable to

⁷⁰ See e.g., *R. v. Secretary of State for the Home Department ex p. Adam, R. v. Secretary of State for the Home Department ex parte Limbuela, R. v. Secretary of State for the Home Department ex parte Tesema*, United Kingdom, House of Lords (2005) [Tesema] (referring to the testimony of a variety of actors as part of their assessment of access to housing and other necessary goods for asylum seekers).

⁷¹ See e.g. Campaign for Fiscal Equity, *supra* note 14 (referring to the number computers, textbooks, library books, and music and science facilities available per student); Sandesh Bansal, *supra* note 54 at 14 (noting the number of health centers per population).

⁷² This was typically based on surveys of claimants or testimony from those involved in providing the good or service. See e.g., Victoria, *supra* note 13 at para 55 (using a survey of the homeless to find that 2/3 reported being turned away from shelters due to a lack of capacity); Sandesh Bansal, *supra* note 54 (noting the percentage of women that had received antenatal checkups).

⁷³ Laxmi Mandal, *supra* note 40 at para 28.10 (xiii) (finding that only a small number of births were happening in institutions); Sandesh Bansal, *supra* note 54 at para 14 (looking at the utilization rates of community health centers).

⁷⁴ See e.g., Sandesh Bansal, *supra* note 54 at para 11 (noting that women from the lowest wealth quintile were much less likely to have access to a birth attendant); “Asylum Benefits Case” BVerfGE, judgment of 18 July 2012, 1 BvL 10/10, 1 BvL 2/11, 1, Germany, Constitutional Court (2012) at para 44 (considering different benefits provided to different ages and groups of people).

⁷⁵ See e.g. SU-480/97, Colombia, Constitutional Court (1997) at 4.1 (b)(c); Campaign for Fiscal Equity, *supra* note 14 at 513.

⁷⁶ See e.g., L.N. & 21 Others v. Ministry of Health, Kenya, High Court of Nairobi (2013) Petition No. 218 of 2013 at para 12 (noting the quality of dialysis machines available in public health institution); Sandesh Bansal, *supra* note 54 (noting cleanliness access to technology, and other issues of physical infrastructure in an inspection of several rural health facilities).

⁷⁷ See e.g., Uday Foundation for Congenital Defects and Rare Blood Groups v. Union of India, India, High Court of Delhi (2010) W.P.(C) No. 8568/2010 (considering the adequacy of government schools nutrition guidelines according to expert consensus regarding nutrition); Campaign for Fiscal Equity, *supra* note 14 at 504 (noting that more than half of the building in the assessment were determined to require major overhauls according to state requirements); Edgewood Independent School District v Kirby 777 S.W. 2d 391 (Tex. 1989) at 393 (noting that one-third of Texas school districts did not even meet the state-mandated standards for class size).

⁷⁸ See e.g., Orissa *supra* note 15 at 8 (noting that pollution levels along a public water canal did not meet scientific standards and were unfit for human consumption and drinking); Santosh Mittal v. State of Rajasthan, India, High Court of Rajasthan (2005) RLW 2005 (1) Raj 486; 2005 (1) WLC 52 at 1.89 – 1.96 (noting that pesticides levels in soft drinks exceed industry standards).

⁷⁹ Budget analysis can be broken into three main areas, revenue, or how money was generated and its sources; how money was allocated between different priorities; and how it was actually spent. For more information about human right analysis of budgets see *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social and Cultural Rights* [Defending Dignity] (2015) at p. 92-112.

⁸⁰ This analysis could be analysis of the overall government, budget or the amounts allocated to specific branches See e.g., Kong Yunming, *supra* note 16 (considering the overall operating budget); see Eldridge *supra* note 12 at p. 10 (noting the overall budget of the health ministry).

⁸¹ For example, considering the costs of specific medical equipment. See L.N. & 21, *supra* note 76 at para 42.

⁸² Testimony from government actors was often necessary to understand how budgeting decisions were made in practice since funding formulas are often quite complex. Kong Yunming, *supra* note 16 (using testimony from government actors and analysis of budgets); See e.g., Campaign for Fiscal Equity, *supra* note 14 at 533 (using testimony from the State Comptroller to find that funding was not being enacted as explained in the relevant documents, but rather was the result of political negotiations);

provide accurate and up-to-date budget information, courts referred to estimates from lawyers or experts, as well as making inferences based on incomplete information.⁸³

Determining whether a State is fulfilling its duty to take steps to the maximum of available resources may include an evaluation of whether resources are being raised in a sufficient and non-discriminatory manner. However, in the cases reviewed, revenue assessments were typically quite general and were limited to a general overview of government funds dedicated towards programs aimed at realizing rights.⁸⁴ For this overview, it was observed that courts referred to evidence of total revenues,⁸⁵ as well as changes in revenue over time, including projections into the future.⁸⁶

That said, there were some cases specifically about whether tax schemes were in line with legal obligations. Examples of cases in this review that considered taxation included some of the American school funding cases, which focused on whether unequal funding systems violated equality protections. For example, the Kentucky Supreme Court in *Rose v. Council for Better Education* assessed how basing revenue on taxable property impacted the amount of revenue available for education in different counties.⁸⁷ In other cases, information about the sources or methods of raising revenue was used to address government arguments that they were unable to raise sufficient funds.⁸⁸

How revenues are allocated is also an essential part of the duty to dedicate maximum available resources. To assess allocations, courts reviewed evidence about funds dedicated to different government programs or policies, as well as within a particular program.⁸⁹ Determining whether allocations targeted at marginalized groups were sufficient and equitable involved comparing allocations between groups.⁹⁰ When gauging how allocations were changing over time, courts looked at evidence of both allocations and costs covering many years,⁹¹ as well as projections into the future.⁹²

Evidence about the cost of delivering goods and services was also relevant in the analysis of allocations. Courts tended to look at quantitative data, along with qualitative analysis based on written and oral testimony from government officials about budgetary constraints.⁹³ This was especially important in cases where the government sought to justify cuts to social programs. Information about the actual cost of programs was sometimes used by courts to counter government claims that providing goods and services would be too expensive.⁹⁴

⁸³ See e.g., *Khosa and Others v. Minister of Social Development and Others*, South Africa, Constitutional Court (2004) (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 62 (using the numbers available to reach estimated conclusions about costs); SU-225/98, *supra* note 14 (relying on cost estimates from outside sources in the absence of government information).

⁸⁴ See e.g., *Edgewood* *supra* note 77, *Rose*, *supra* note 16.

⁸⁵ Most considered total government budgets see e.g., *Kong Yunming*, *supra* note 13 at para 113; SU-480/97, *supra* note 75 at 7.1.

⁸⁶ See e.g., *Blue Moonlight*, *supra* note 38 at para 73; Case No. 2009-43-01, *supra* note 32 at 3.1.

⁸⁷ *Rose*, *supra* note 16 (comparing local districts in terms of wide variances in taxable property per student).

⁸⁸ See e.g., Case No. 2009-43-01, *supra* note 32; *Hartz IV BVerfGE*, judgment of 9 February 2009, 1 BvI 1/09, 1 BvI 3/09, 1 BvI 4/09, Germany, Constitutional Court (2009).

⁸⁹ See e.g., *Eldridge*, *supra* note 12 at para 10; *Grootboom and Others v Oostenberg Municipality and Others*, South Africa, High Court (1999) p. 9-10.

⁹⁰ See e.g., *Grootboom*, *supra* note 61 at para 47 (noting the housing policies targeted at low-income earners).

⁹¹ Depending on the claim this could require evidence going back years or even decades. See e.g., *Kong Yunming*, *supra* note 16 at paras 83 – 95 (considering budgeting decisions made over a period of years and using one fiscal year 2001-2002 as an exemplar to highlight the issues involved).

⁹² See e.g., *Maria Viceconte, Mariela v National State-Ministry of Health and Social*, Argentina, Federal Court of Appeals in Administrative Matters (1998) at XVI b (referring to the amount budgeted for the production of a vaccine); N.D. *Jayal* *supra* note 17 at p. 11-12 (considering that the money allocated could lead to the completion of necessary environmental protection measures in the future).

⁹³ See e.g., *L.N. & 21 Others*, *supra* note 76 at para 42 (referring to testimony regarding the overall needs and competing budgetary interests at a government hospital); *Khosa*, *supra* note 83 at para 60.

⁹⁴ See e.g., *Kong Yunming*, *supra* note 16 at para 88 (noting that a very small percentage of a social security program would be impacted by a residency requirement); *Pl. US 42/04*, Czech Republic, Constitutional Court (2006) at para 29 (finding that the impact on the budget of excluding men from access to welfare programs for the care for disable children was “negligible”).

How reasonable was the government's conduct?

Evidence employed: Official Government Documentation, Expert Reports, Expert Testimony

As discussed, above demonstrating government responsibility involves concluding whether government conduct was “reasonable” or could be justified against a similar standard. In some jurisdictions, procedural norms, such as participation, transparency and accountability, have been codified into requirements that the government must assess how policies could impact rights or justify the process by which they developed relevant policies. To determine whether these norms had been complied with, courts needed to make findings on how policy makers had engaged with relevant actors,⁹⁵ and if policy makers had adequately considered alternative policies.⁹⁶ In the cases reviewed, the court’s analysis was very detail oriented and was often based on a thorough examination of government statements and policy documents from multiple actors, sometimes over the course of many years.

Again, this can involve examining highly technical public policies. Records of the procedures that government policy makers used to make decisions were not enough. Courts often needed specific policy information to evaluate whether those procedures were reasonable and sufficiently rights-based. As a result, they supplemented government documents with expert analysis, academic works, and the findings of international bodies.⁹⁷ Another consideration was the adequacy of the information and expertise relied on in taking decisions. This question came up when determining whether public surveys provided enough information about how much money people needed to live a dignified life,⁹⁸ or whether censuses provided sufficient information about people’s needs in regards to water or housing,⁹⁹ for example.

What factors determined government's conduct?

Evidence employed: Expert Reports, Socioeconomic Statistics

Contextual factors that may constrain a government’s ability to take effective steps towards realizing the right was another relevant consideration in the cases reviewed. Evidence of such factors was mostly based on qualitative analysis and occasionally statistics that provided a snapshot of the issue. For example, in *5000 Citizens* the court made reference to statistics produced by WHO and many other international and academic studies on the impact of smoking on public health, which were included in an amicus brief.¹⁰⁰ Sources in other cases included newspaper reports, NGO reports and academic studies.¹⁰¹

This evidence focused on articulating issues outside of government control, but which could impact its ability to enact policies that realize economic and social rights. Examples of some of the structural issues examined in the cases reviewed include the national or international economy,¹⁰² or the actions of third

⁹⁵ See e.g. Case No. 2009-43-01, *supra* note 32 (basing much of its ruling that government actions in relations to pensions did not adequately engage in consultation for instance noting that certain unions were not allowed to be engaged and that experts were sufficiently consulted when developing the policy); Shehla Zia, *supra* note 19 at p. 11 (noting that the government process lacked public hearings and that academics and experts were not consulted sufficiently when developing an electricity policy).

⁹⁶ Some jurisdictions require that policies are the least restrictive on rights or that evidence of alternative policies be provided before government decisions can be interfered with by the court. See e.g., Case No. 2009-43-01, *supra* note 32 at 2.3 (noting that less impactful alternatives were not considered).

⁹⁷ See e.g., Mazibuko, *supra* note 52; Hartz IV, *supra* note 88.

⁹⁸ See e.g., Hartz IV, *supra* note 88 at para 52 (analyzing statistical surveys for creating funding allocations for a social welfare program to determine if they accurately and adequately measured the amount necessary for a dignified life); Asylum Benefits case, *supra* note 74 at para 82 (noting that the calculation used to determine benefits was not focused on needs).

⁹⁹ See e.g., Joe Slovo *supra* note 66 at para 29 (noting that social and geological surveys were sufficient to count how many people needed housing and their needs); Mazibuko, *supra* note 52 at para 81 (noting the census used to determine the number of households that needed various water services).

¹⁰⁰ 5000 Citizens, *supra* note 22 at p. 9.

¹⁰¹ See e.g., Bangladesh Society for the Enforcement of Human Rights and Others v. Government of Bangladesh, Bangladesh, High Court (2000) at paras 3, 19; Prakash Mani Sharma, *supra* note 20 at p. 15; Case No. 2009-43-01, *supra* note 32 at 5.

¹⁰² See e.g., Ain o Salish Kendra, *supra* note 13 at p. 13 (noting that the issue of child labor is intertwined with the government challenges regarding overall poverty in Bangladesh); Case No. 2009-43-01 *supra* note 32 at 3.1 (noting that government decisions must be considered in light of the severe economic downturn the country was facing); Sandesh Bansal, *supra* note 54 at 25 (noting that the size and population of the state should be considered when assessing government actions).

parties such as corrupt government actors or international financial institutions.¹⁰³ For instance, in *Soobramoney v Minister of Health*, the South African Constitutional Court noted that South Africa was a middle-income country facing many structural problems in its health system.¹⁰⁴ This was used to contextualize the decision of government and hospital officials to ration particular health procedures.

Designing Remedies

Many economic and social rights violations can be addressed by traditional remedies, such as damages or other forms of restitution. Damages calculations may pose challenges for judges that aren't unique to economic and social rights. However, the complex and collective nature of these claims may pose special challenges.¹⁰⁵ They may require more innovative remedies such as ordering the creation of new programs, altering existing programs, or ordering government actors to meet targets or goals and then report back to courts.¹⁰⁶ Certain types of evidence are therefore more likely to be used to fashion these sorts of remedies or oversee their implementation.

What would remedy the violation?

Evidence employed: Official Government Documentation, Expert Reports

In the cases examined, remedies included things such as ensuring that claimants could return to their jobs, providing monetary damages, or other forms of restitution.¹⁰⁷ In addition to restitution, many cases in this review identified remedies that also sought to prevent future violations. These remedies included measures such as declaring the current law or policy invalid or reading in language into statutes;¹⁰⁸ ordering the government to develop policies that meet certain guidelines;¹⁰⁹ requiring the government to provide specific goods and services,¹¹⁰ or requiring court oversight of policy development or implementation, including the monitoring of specific targets.¹¹¹

Developing targeted remedies required detailed information about the modalities and extent of a rights violation and what would be needed to remedy it. Generally speaking, the more detailed the information available to the judges, the more targeted and specific the remedy was. This information was frequently based on in-depth surveys and analysis of the gaps in the particular program or policy.¹¹² This evidence showed for example, that government programs were insufficient and how policies needed to change to

¹⁰³ See e.g., Case No. 2009-43-01 *supra* note 32 at 2.3 (noting that one of the reasons by government actors for their austerity policies was to comply with the requirements of the IMF and European Commission); BSEHR *supra* note 101 at para 33 (using a survey from Transparency International to highlight the challenge of corruption).

¹⁰⁴ See *Soobramoney v Minister of Health (Kwazulu-Natal)*, South Africa, Constitutional Court (1997) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) at para 53 FN 4 (noting an academic work about treatments available in South Africa).

¹⁰⁵ See Naomi Roht-Arriaza, *Reparation and Economic, Social and Cultural Rights*, University of California Hastings College of Law, Legal Studies Research Paper Series, No. 53 (2013); see also Shira Schiendlin, *Judicial Fact-Finding and the Trial Judge*, University of Miami Law Review, Vol. 69 (2014) p. 368 (discussing the difficulty in damage calculations).

¹⁰⁶ Roach, *supra* note 27

¹⁰⁷ See e.g., Government of the Republic of Namibia, *supra* note 34 (providing monetary damages for women whose right to health had been violated); *Diau v. Botswana Building Society*, Botswana, Supreme Court 19 December 2003, No. IC 50/2003 (ordering that the claimant be allowed to return to her job).

¹⁰⁸ See e.g., *Jaftha v. Schoeman and Others, Van Rooyen v Stoltz and Others*, South Africa, Constitutional Court (2004) (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (reading in language); Ochieng, *supra* note 44 (declaring the law in question invalid).

¹⁰⁹ See e.g., *Grootboom*, *supra* note 61 (requiring the development of policy aimed at progressively realizing the right to housing for the most vulnerable); Prakash Mani Sharma, *supra* note 20 (ordering that government create a bill, in consultation with experts and NGOs to realize the right to health for women in Nepal).

¹¹⁰ See e.g., *Defensor*, *supra* note 17 (requiring the government provide drinking water and food to indigenous communities); *Waweru*, *supra* note 47 (ordering a sewage treatment plant to be built).

¹¹¹ See e.g., *N.D. Jayal* *supra* note 17 (creating of an oversight committee that could order remedial changes to the development of dam); *Viceconte*, *supra* note 92 (providing a strict schedule for the implementation of the remedy).

¹¹² See e.g., *Campaign for Fiscal Equity*, *supra* note 14 (outlining the specific requirements of a sound basic education); *Sandesh Bansal*, *supra* note 54 (setting out a detailed list of specific goods and services that must be provided at certain health centers).

improve the *specific* situation involved in the claim. These included general guidelines¹¹³ or specific targets.¹¹⁴ This information typically came from evaluations conducted specifically for the case. For example, in *Sandesh Bansal* the court relied on an in-depth survey and analysis of the quantity and quality of several rural public health facilities.¹¹⁵ This survey was then used as the basis for a detailed list of requirements for all health facilities in the area at a certain level.¹¹⁶

Some courts utilized long-term periodic engagement with a variety of actors, as a way of updating evidence to shape the remedy over time. For example, the Indian Supreme Court in the *People's Union for Civil Liberties v. Union of India* has repeatedly ordered that the government provide detailed audits of its efforts to implement a variety of programs that provide food to those living below the poverty line.¹¹⁷ The content of this information was largely dictated by the findings of a Supreme Court-ordered Commission made up of experts, state representatives and civil society and updated to meet changing circumstances.¹¹⁸

Does the court need to oversee the remedy?

Evidence employed: Litigation History, Expert Reports, Official Government Documentation

Courts are generally more likely to order oversight in cases where the government had a history of not being able or willing to improve the violation in the past.¹¹⁹ Although the decision of whether to engage in oversight was heavily dependent on the context of the case, judgments in this review that ordered long-term monitoring and oversight of government actions often justified their interventions by referring to evidence that detailed the history of the government failures and obstruction in implementing courts' decisions.¹²⁰ This evidence was particularly important if the claim involved marginalized groups. For instance, *Swann v Charlotte-Mecklenberg Board of Education*, a US case on positive obligations regarding racial equality of access to education, the Court was swayed to find that judicial intervention was necessary by evidence of years of extensive obstruction on the part of the school district.¹²¹ In cases where the obstruction was based on incompetence or corruption, statements from government actors were referred to. In a South African case on evictions, *City of Cape Town v. Rudolph*, statements of government actors that indicated an uncaring attitude were sufficient to encourage stronger court intervention in the implementation of remedies.¹²² Additionally, information about the severity and urgency of the situation also encouraged judicial actors to engage in oversight.¹²³

¹¹³ See e.g., Campaign for Fiscal Equity, *supra* note 14 at 550 (ordering that state educational resources meet general guidelines such as "appropriate class sizes" and "sufficient and up to date, books, supplies, libraries, educational technology and laboratories."); Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor., India, Supreme Court (1996) at 15 (requiring that the state government provide a variety of "adequate" goods and services relating to health).

¹¹⁴ See e.g., Laxmi Mandal, *supra* note 40 at 62 (vii) (ordering that government actors provide and monitor certain indicators of maternal health this was based on the lack of these specific numbers in government documents); Sandesh Bansal, *supra* note 54 at 25 (requiring state actors to meet maternal health mortality rate targets).

¹¹⁵ Sandesh Bansal, *supra* note 54 at 21.

¹¹⁶ *Id.* at 23.

¹¹⁷ For one such order see *People's Union for Civil Liberties v. Union of India* [PUCL] No. 196 of 2001, Interim Order of 2 May 2003.

¹¹⁸ For a detailed examination of the complex and on-going implementation of orders in the PUCL case regarding reporting and auditing information, see Lauren Birchfield & Jessica Cosi, *Between Starvation and Globalization: Realizing the Right to Food in India*, Michigan Journal of International Law, Vol. 31 (2010) p. 718-732.

¹¹⁹ See Kamina Aliya Pinder, *Reconciling Race-Neutral Strategies and Race-Conscious Objectives: The Potential Resurgence of the Structural Injunction in Education Litigation*, Stanford Journal of Civil Rights and Civil Liberties, Vol. 9 (2013) (noting these issues in the context of education cases).

¹²⁰ See e.g., Doucet-Boudreau *supra* note 64 at para 66 (noting the history of delay indicated that merely a declaration would likely be insufficient to ensure that government complied); Viceconte, *supra* note 92 (providing a detailed schedule after a long history of delay).

¹²¹ 402 US 1 at 16 (1971). ("[R]emedial judicial authority does not put judges automatically in the shoes of school authorities ... judicial authority enters only when local authority defaults.")

¹²² *City of Cape Town v. Rudolph*, South Africa, Constitutional Court (2003) (11) BCLR 1236 ("The circumstances, and in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents [homeless evicted persons] ... makes this an appropriate situation in which ... a structural interdict, is 'necessary', 'appropriate' and 'just and equitable.'")

¹²³ See e.g., Doucet-Boudreau, *supra* note 64 at paras 29, 40 (noting that the delay would lead to further language assimilation and rights violations); Defensora *supra* note 17 at p. 2 (noting the need for court oversight given the severity of the problem).

CONCLUSION

Many violations of economic and social rights are driven by policy failures. Failed policies continue cycles of poverty and deprivation, allow children to go hungry, communities to drink contaminated water, and people to live in unsafe homes without water or electricity. The large and growing body of case law shows that litigation is a key tool that can help in holding governments accountable for their obligations relating to economic and social rights. This review makes the case that evidentiary considerations play a critical part in the success or failure of this tool. Evidence provides judges with the information needed to make findings on the complicated factual situations involved in these cases. This review indicated that while physical documentation, affidavits and testimony are still key to these cases, protecting economic and social rights often requires other types of evidence that can be complex, voluminous, technical, or novel. The review also showed that courts frequently relied heavily on and preferred evidence from government actors and bodies. This suggests that using courts to protect these rights can require a heavy investment in information gathering. These cases show that evidence—and its sources, form, and nature—should be a central question for litigators.

The review also suggested how certain kinds of evidence are important to or necessary for formulating key elements of an economic and social rights claim. Quantitative and qualitative data and expert analysis can provide insight that helps courts determine how policies impact the rights of people. Measurements of the quality and quantity of goods and services available, information about government budgets and resource, and the procedures and information relied on to develop policies allow courts to assess whether government actions sufficiently protect rights or enable their realization. Budgetary analysis, which interrogates a government's resource decisions in terms of rights, allow courts to assess whether government actions were sufficient for meeting their obligations to realize these rights. Finally, evidence allows judges to build effective and meaningful remedies by providing concrete details about changes that are needed to realize the rights.

This review provides some insight into these issues, but given the scope of the subject, there are many questions unanswered. For instance, what types of evidence are more effective and in what context? How do standards of admissibility or burden of proof affect evidentiary burdens? When are statistics considered more probative than narratives? What makes some courts more willing to engage with some types of evidence than others? More work needs to be done to respond to these questions. This study also alludes to a number of practical challenges that economic and social rights present in terms of complexity, technicality, and volumes of evidence. Efforts to address these challenges will contribute significantly to advancing the evidence courts use to adjudicate and enforce human rights relating to most basic needs.

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ACKNOWLEDGEMENTS: Holly Stubbs undertook research for this paper while she was hosted by the Rights Claiming and Accountability Program at CESR, as a recipient of the David W. Leebron Fellowship from Columbia Law School. Contributions to the paper were provided by program staff, Mihir Mankad and Allison Corkery. CESR would like to thank the following interns, who contributed background research on this topic at an early conceptual stage: Caroline Lichuma, Benjamin Perryman, and Shingir Masanzu.