PUBLIC INTEREST LITIGATION, SOCIAL RIGHTS AND SOCIAL POLICY

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Abstract: The paper investigates litigation as a strategy to advance the social rights of marginalized people, asking under what conditions it is likely to be effective – in the narrow sense of winning cases, and in the broader sense of changing social policy. It draws on reported experiences with social rights litigation in different parts of the world to develop a framework identifying conditions that are favourable to public interest litigation by contributing to: effective voicing of social rights grievances; responsiveness of courts to social rights claims; judges’ capability to find appropriate remedies; authorities’ compliance with judgments and implementation through social policies. It finds that competent public interest litigators (supported by international expertise), is a key to winning cases in court, but that real policy impact is rare without organisations and social movements that can utilise the litigation process as part of a broader strategy of social and political mobilisation. Litigation on its own has limited potential to change the situation on the ground, but creates opportunities for other actors. With a ‘receptive apparatus’ in place litigation seems to be effective in bringing out facts that can be used for advocacy purposes, fed into social and political discourses and directly inform policy processes.

Keywords: social rights litigation; public interest litigation; social transformation; access to justice; judicial reform; judicial independence; legal culture

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Introduction

What is the potential of social rights to deliver on the promise of social transformation through law?\(^1\) Can public interest litigation contribute to more equitable and socially sustainable development outcomes? The paper examines the modalities and dynamics of litigation processes in order to assess the potential and limitations of litigation for shaping social policy in developing and transitioning countries.\(^2\)

In a growing number of countries public interest litigation is used – and proposed – as a strategy to influence social policy in fields such as health, environment, housing, land, education and gender. Activists see it as a channel through which the voice of the marginalized can be articulated into the legal-political system and as a mechanism to make the state more responsive and accountable to their rights. International NGOs and networks specialise in particular areas of cause lawyering, in which they undertake and support litigation efforts in various parts of the world.\(^3\) And donors have been supportive of public interest litigation and encourage it as a strategy, also in the least developed countries. This in turn has provided local NGOs and activists who have not previously engaged in public interest litigation with incentives and inspiration to take up test cases.\(^4\)

This display of trust in litigation among activists and donors is surprising in view of the academic scepticism towards the effectiveness of courts in effecting social change, even in countries with reasonably strong and well-functioning legal systems.\(^5\) And all the more so given the weakness plaguing courts in many developing and transitioning countries.\(^6\)

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\(^1\) The paper draws on Domingo, Gargarella, and Roux (eds) (forthcoming), in particular Chapter 2 (Gloppen, forthcoming) and the concluding analysis (Gargarella, Domingo, and Roux, forthcoming). It also builds on collaborative work in the CMI ‘Courts in Transition’ group, (Gargarella, Gloppen and Knudsen, 2004).

\(^2\) In line with the concept paper framing this conference, social policy is understood as “a series of public policies designed to promote social development, undertaken by a variety of actors through a range of instruments.” For purposes of formulating social policies, social development is “the process of increasing the assets and capabilities of individuals to improve their wellbeing; the capacity of social groups to exercise agency, transform their relationships with other groups, and participate in development processes; the ability of society to reconcile the interests of its constituent elements, govern itself peacefully, and manage change. Social policies then are public policies aimed at three levels: promoting equality of opportunity to benefit individuals (micro level), equality of agency and institutional reform to benefit groups (meso level), and horizontal and vertical social integration to benefit society (macro level).” (World Bank 2005, highlights omitted)

\(^3\) International NGOs and networks for public interest litigation are active in areas such as the right to housing, environmental rights, indigenous peoples’ rights, and health (HIV/aids, anti-tobacco litigation).

\(^4\) External encouragement to move from traditional legal advice clinics to strategic test case litigation was communicated in several interviews with NGOs working in the legal sector in Malawi, Zambia and Tanzania but was also expressed as an internal ambition.

\(^5\) For a critical analysis of the potential of law and courts for creating social change, see Rosenberg (1991). See also (Schultz and Gottlieb 1996). Scholars have also questioned the efficacy of what are widely regarded as great triumphs of public interest litigation, such as Brown v Board of Education (The 1954 case in the US on desegregation in schools) (Bell 2004). There is also an extensive theoretical debate on whether social rights belong in the courtroom, questioning the justiciability of social rights on normative as well as methodological
Against this background, the paper examines litigation as a strategy to advance the social rights of poor and marginalized groups, asking under what conditions it is likely to be effective – in the narrow sense of winning cases, and in the broader sense of changing social policy. Drawing on experiences with social rights litigation in countries with varying legal systems and socio-political conditions, the paper dissects the litigation process and develops a framework to understand the dynamics and challenges involved at the various stages. Using a comparative lens, it seeks to identify conditions that are favourable to public interest litigation, as well as the potential and limitations of litigation as a policy shaping strategy.

The aim of the article is to present "an anatomy of social rights litigation", an overarching perspective on litigation as a strategy to advance social rights in various social and political contexts that may serve as a heuristic tool for critical thinking among activists and policy-makers, and stimulate further academic inquiries. The synthesizing nature of the paper implies sacrificing detail and although it draws on a range of empirical experiences, the paper is not based on systematic comparative research and the findings should be taken as preliminary rather than conclusive and exhaustive.

### Litigating to advance social rights

Focus is on public interest litigation as a strategy to advance the protection of economic and social rights for marginalized groups. For the purpose of this paper ‘public interest litigation’ is used broadly to refer to legal action to establish a legal principle or right that is of public importance and aimed at social transformation. The modalities of bringing such cases vary between legal systems, and public interest litigation as the term is used here, cover a range of different legal actions - class actions as well as individual cases, directed against the state or private companies (including mass tort claims).

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6 For an overview of the many problems plaguing legal systems in many parts of the world, giving rise to widespread anti-poor bias, see for example Anderson (2003); Decker, Sage and Stefanova (2005).
7 Sources include findings from the CMI “Courts in Transition” research program, including two workshops on “Courts and Social Transformation” (Johannesburg, December 2003, and Buenos Aires, December 2004) bringing together research on Africa, Latin America, Asia and Eastern Europe. The findings are presented in Domingo, Gargarella and Roux, (forthcoming). Own interviews with judges, lawyers and activists in South Africa, Malawi, Zambia, Tanzania and Uganda also inform the analysis, along with published material, among which a study by the Centre on Housing Rights and Evictions, on litigating social economic and cultural rights, proved particularly informative. It covers 21 case studies and presents interviews with 46 lawyers, judges, civil society and community leaders (COHRE 2003).
8 It is used synonymously with ‘public impact litigation’, ‘social impact litigation’ and ‘strategic litigation’ and ‘test case litigation’, and the institute of Public Interest Litigation as developed by the Indian Supreme Court is thus one form of this broader term of public interest litigation.
Public interest litigation relates to the protection of economic and social rights in various ways. In some cases social rights norms are the explicit basis of the litigation, either in the form of international human rights norms or social rights laid down in domestic constitutions and legislation. But social rights litigation narrowly conceived is not the only way in which litigation can advance the social rights conditions in a particular field or for a group of people. Civil and political rights have also been used to indirectly establish social rights, and litigation based on the right to equality has extended social benefits to new groups.\(^9\) In addition, \textit{auxiliary litigation} has provided political and social space enabling groups and individuals to voice claims and struggle more effectively for social rights in other arenas. This takes different forms, from carefully planned test case litigation aimed at securing the freedom of speech and assembly for activists and social movements, to more ad-hoc measures to keep activists out of jail when they are arrested for breaking the law.\(^10\) The focus of this article is on social rights litigation in the narrow sense, but it is important to keep in mind that this is only a part of a larger picture. And arguably not even the most important part from the perspective of social policy and transformation.\(^11\)

Public interest litigation as understood here, aims to change the situation of marginalized people for the better, not only for the individuals who are party to the litigation, but all similarly situated. The ultimate goal is social transformation - to alter structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or sexual orientation.\(^12\) This means that the value of litigation should not only be judged in terms of how a case fares in court (\textit{success in the narrow sense}), or whether the terms of the judgment are complied with (\textit{immediate impact}). It is as important to look at the \textit{systemic impact} – the

\(^9\) Examples here include the reliance by the Indian Supreme Court on the right to life and human dignity to develop a social rights jurisprudence. See (Sudarshan in Domingo, Gargarella and Roux forthcoming; Tripathi 1993; Saharay 2000; Dasgupta 2002; Mohapatra 2003)

\(^10\) On this point see also Cavallaro and Schaffer (2004).

\(^11\) See Domingo, Gargarella and Roux (forthcoming) and Cavallaro and Schaffer (2004).

\(^12\) I owe this formulation to Roberto Gargarella. As understood here, social transformation is assumed to be a desirable social goal that the courts should contribute towards. This is a value laden idea which and raises fundamental questions. Ideological positions differ on what constitutes morally irrelevant differences and whether a particular change in the legal and social status of particular groups in itself is positive or negative. And even in the absence of such differences, views are likely to diverge regarding what the wider implications of ‘social transformation decisions’ are – socially, economically, and morally – and whether or not they are conducive to the long term development of society. The idea that courts should be geared towards the social transformation of society also opens fundamental controversies regarding the proper role of courts and the demarcation between law and politics. The question of the legitimate role of courts in processes of social transformation, and whether an active role for the courts on social rights issues turn them into purely political bodies, and undermine their legally grounded legitimacy, is discussed in Gloppen (forthcoming) and generally in Domigo, Gargarella and Roux (forthcoming).
broad impact of the litigation process on social policy, directly and through influencing public discourses on social rights and the development of jurisprudence nationally and internationally. The systemic impact of public interest litigation is not necessarily directly related to its success in court, the litigation process may also indirectly impact on public discourse and policy.

Still, winning cases remains a core issue, and the paper starts by examining what it takes for groups engaging in social rights litigation to win in court, before going on to look more broadly at the ways in which litigation affect social policy.

**Factors affecting success in the narrow sense, or ‘How to win in court’?**

To bring out how various factors influence the likelihood of getting a favourable court judgment in cases concerning the social rights of marginalised groups, we can start by disaggregating the litigation process to bring out its main structural components. These are illustrated in Figure 1.

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**Figure 1: The Main Components of the Litigation Process**

<table>
<thead>
<tr>
<th>Marginalized groups’ voice</th>
<th>Court responsiveness</th>
<th>Judges’ capability</th>
<th>Authorities’ compliance/implementation</th>
<th>Systemic change / Social policy</th>
</tr>
</thead>
</table>

(a) social rights cases brought to court; (b) cases accepted by the courts; (c) judgements giving effect to social rights; (d) transformation effect (impact on social rights/inclusion of marginalised groups)

The figure simplifies actual litigation processes in a number of ways, three of which merit particular notice. Firstly, it does not distinguish between courts at different levels (local courts; national courts, international courts and tribunals), and thus ignores important sources of variations between litigation processes, and between the courts and their political environment. Secondly, and related, the framework does not take account of appeal procedures, and the analysis does thus not explicitly consider how the dynamics of litigation is affected by where in the legal system the entry point for the cases are, or by potentially expensive and time consuming appeals. Thirdly, the framework is exclusively focused on the formal legal system, which in many developing countries serves a very small part of the population and accounts for a minor part of the processes for adjudicating disputes and
dispensing justice. The analysis thus risks overemphasising the importance of the formal courts and ignore legal strategies directed at other forums (customary courts, ombudsmen) and the interplay between these bodies and the formal court system. These limitations are not inherent to the framework in the sense that they these aspects cannot be included in analyses undertaken in terms of it, but unless specifically addressed, they do represent ‘blind spots’, and in the following analysis the are only addressed in passing.

Turning to the figure itself, at the most basic level, we can distinguish various stages or hurdles that need to be overcome for litigation to succeed: firstly, groups whose rights are violated must be able to identify and articulate their rights claims and voice them in the legal system or have their rights asserted on their behalf; secondly, judicial bodies must be responsive to social rights claims that are voiced in the sense of accepting them as matters belonging within their domain; and thirdly, the judges must be capable of finding adequate legal means to address the social rights claims and find effective remedies.

Furthermore, as noted above, for progressive social rights judgments to have a social impact, they must be authoritative, in the sense that they are accepted, complied with and implemented through legislative and executive/administrative action, and translated into systemic change through social policy and political practice. The outcome of each stage in turn depends on a complex interaction between different factors, as illustrated below.

There are differences between systems, but generally (and particularly in the common law tradition) courts are reactive institutions, responding to cases that are placed before them, rather than acting on their own initiative. It is thus important to understand the process whereby claims emerge; under what conditions are grievances concerning the social rights of marginalized groups likely to be transformed into effective voice in the form of litigation?

The voicing of social rights claims

As Figure 2 illustrates; a crucial parameter of the ability of marginalised people to voice rights claims and seek redress through the legal system, is their opportunity situation, the formal/systemic and informal barriers that defines them as litigants in the legal process (Moore 1987). Whose claims are voiced in a particular context, and how they are voiced, depends on the affected people’s own resources to articulate and mobilize as well as on the interaction between marginalised groups and public interest litigators.

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13 See for example Chirayath, Sage and Woolcock (2005).
Figure 2: Factors Impacting on Litigants' Voice

<table>
<thead>
<tr>
<th>Marginalized groups' resources to articulate and mobilize</th>
</tr>
</thead>
<tbody>
<tr>
<td>Associative capacity, Cohesion, Awareness, Legal literacy, Economic resources, Media</td>
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<tr>
<th>Public interest litigators</th>
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<tbody>
<tr>
<td>Accessibility, quality, Legal service organisations, pro-bono litigation, specialized 'back-stop' organisations (national/international), Public legal aid and litigation institutions</td>
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<table>
<thead>
<tr>
<th>Formal Barriers</th>
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<tbody>
<tr>
<td>Nature of the law and the legal system, Structure (plural vs. unitary legal system), Rules of standing, formality, bureaucracy, courts' jurisdiction, capacity, formal position of social rights</td>
</tr>
</tbody>
</table>

(a) Marginalised litigants' VOICE

Two sets of actors are central to the voicing of social rights claims; those whose rights are violated (marginalized people); and those taking the cases to court (public interest litigators). In some situations marginalised people bring their own case, but usually legal professionals are involved at some stage. These may be local, national or international legal services organisations and networks, law schools’ legal clinics, individual lawyers acting pro-bono or on a contingency-fee basis, or public institutions.

The initiative to litigate may come from either set of actors, and who is in the drivers’ seat has implications for the nature of the process. For social rights claims to emerge from marginalized groups themselves, and be translated into a form that is suitable for litigation, several hurdles have to be overcome, each of which involves significant challenges and requires resources. First, they need to have an understanding of the situation they experience as violating their rights and be aware that legal remedies may exist; they must also be able to identify their grievance in a way that is sufficiently explicit to provide the basis for litigation, as well as identify who to blame – who bears moral and legal responsibility for the situation.

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14 Legal service organisations (LSOs) work to achieve equal justice for poor people through community education, advice, legal counsel and representation for individuals and groups, systemic advocacy through litigation and lobbying, and/or training for NGOs, civil society organisations and government. They may be free-standing organizations only doing legal work or part of a larger organization. (World Bank 2003: 2) See also (Manning 2001:4)

15 In some countries public interest litigation is undertaken by public institutions such as ombudsmen, human right commissions, or, like in Brazil, by public prosecutors (the Ministerio Publico) (Arantes 2003).
that constitutes the rights violation. And they must be able to mobilise the legal resources to transform their grievances into legal claims that the system will accept.\textsuperscript{16}

There are barriers as each stage of this process. Some are practical: marginalised people in many cases lack basic legal literacy and are not aware of their rights or don’t see the problems and grievances they experience in terms of rights violations.\textsuperscript{17} They also often lack sufficient information about who is to blame for the problems they experience, how they can be held responsible, and where their claims can be addressed. The most marginalised, such as poor, rural people in developing countries, generally cannot access legal expertise. The capacity and outreach of legal service organisations tend to be limited and rarely goes beyond the urban areas. And even where legal resources are physically within reach, the most marginalised in many cases lack the resources necessary to make use of them, due to lack of knowledge, language barriers, or the costs and time involved (Gargarella 2002).

But as important as the practical hurdles that need to be overcome for marginalised people to transform their social grievances into rights claims before the courts, are the motivational barriers. Many poor and marginalised people have a deep distrust and fear of the legal system – and not without reason. Law is often described as frozen power, and in reflecting power relations in society, tends to have an anti-poor bias.\textsuperscript{18} Many poor and marginalised people live their lives in conditions of illegality – as illegal immigrants; as squatters in informal settlements or on the streets; as employed in the informal sector or accessing their livelihoods and basic utilities and services in breech of the law. This in turn subjects them to various forms of insecurity and vulnerability, contributing to their poverty.\textsuperscript{19} For many, the law and justice system offers little in terms of protection, and their only encounter with the legal system is in a punitive capacity, and often in ways that are perceived as arbitrary and corrupt. This is particularly true of poor people developing countries, where

\textsuperscript{16} For a schema of the stages in the voicing of claims, see Anderson (2003) and Felstiner, Abel and Sarat (1981).
\textsuperscript{17} Often those whose social rights are most severely violated lack this knowledge. To what extent there are civil society and community organisations mobilizing around social rights issues, legal literacy and rights awareness programmes in place, human rights education in schools, and a focus on social rights issues in the media, are important factors influencing the level of rights awareness and legal literacy and thus the likelihood of social rights claims being voiced.
\textsuperscript{18} “Structures of inequality affect both the creation of justice sector institutions and the context within which they operate; they are embedded in the rules, practice and norms that perpetuate these institutions. Legal and regulatory institutions, in turn, affect the distribution of opportunities and the processes by which these opportunities can be leveraged to enhance well-being” (Decker Decker, Sage and Stefanova 2005: 4).
\textsuperscript{19} The poverty-lawlessness dynamic is laid out by Anderson (2003). Kanyongolo and Gloppen (2005) describes how this dynamic plays out in the Malawian context, and how the (mal)functioning of the legal system serves to reinforce poverty in Malawi.
The legal system is often very poor, plagued by corruption and subject to elite capture. In some cases the legal system, and the law itself, lacks legitimacy because it is perceived as a tool of domination by the state. In other cases statutory law and legal institutions are at odds with more socially entrenched customary law. Where the basic legitimacy of the system is lacking, it also affects the motivation for turning to the state for support.

Both practically and in terms of motivation, the nature of the law and legal procedures impact on the ability of marginalised groups to voice social rights claims. The legal basis for social rights in the country’s constitutional and legal framework is important, along with the status of public interest law. But what emerges from comparative evidence as the most important for voicing of claims by marginalised groups are certain aspects of legal procedure. The first, and arguably most important, is the status regarding who is qualified to take a case to court (the criteria for *locus standi*). A striking feature of countries where courts have become an important arena for the pursuit of social rights, such as India, South Africa and Hungary, is that they have lenient criteria for standing and allow an organisation or individual to litigate on behalf of others. Reduction in legal formalities is another factor that seems to be important. Related to this is the procedure adopted for court proceedings, whether the parties are supposed to provide all the evidence – or whether the judges themselves undertake investigations. The introduction of public interest litigation in India in the 1980s provides a vivid demonstration of the importance of these barriers. When the Supreme Court made direct access in such cases simple, cheap and un-bureaucratic, introducing a non-adversarial process and lenient criteria of legal standing, this resulted in a surge of public litigation.

Thirdly, it important whether it is

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21. For the relative importance of traditional legal institutions see Chirayath, Sage and Woolcock (2005).
22. In addition to the aspects of the legal system discussed below, relevant aspects include the point of entry into the legal system, appeal procedures and possibilities for direct access to the higher courts; as well as the standards for judicial review – whether the courts review legislation (only) in abstract or (only) in response to concrete cases. (Gargarella, Domingo and Roux, forthcoming).
23. A landmark case is *People’s Union for Democratic Right vs. Union of India* (1982 (2) S.C.C. 253) where the Indian Supreme Court held that a third party could directly petition the court, through a letter or other means, and seek its intervention in a matter where another party’s fundamental rights were being violated. (Baxi 1985; Bhagwati 1985).
24. But the Indian example also illustrates problems associated with lowering access barriers, in terms of handling the increased case load, hinder misuse of the procedure, and prevent public interest litigation from becoming a means for the advancement of middle-class concerns, for example in the environmental field, on behalf of the
possible to claim a right on behalf of a larger category of people similarly situated – whether
individuals are allowed to act in concert when they face common grievances “[R]equiring
each individual to initiate a separate case … entails a waste of social energy and a weakening
in the strength of the claim” (Scott and Macklem 1992, 141). The development of class action
in many countries, particularly in Latin America, seems to encourage the pursuit of social
justice through the use of courts (Gargarella, Domingo and Roux, forthcoming).

The motivation for pursuing legal action also depend on the availability of alternative
channels and strategies for mobilizing on social right issues or addressing individual
grievances, such as electoral mobilization, lobbying of political bodies, strikes and
demonstrations or media campaigns – or through alternative court-like institutions such as
ombudsman institutions 25, human rights commissions or traditional courts and tribunals. 26
Given that litigation is not an objective in itself, but rather a possible means to be heard and
improve their situation, there is little reason for marginalised groups to turn to this if
alternative strategies offer quicker or better prospects for success, are seen as more cost-
effective, less risky or more appropriate. This does not mean that litigation is always ruled
out where potentially more effective alternative avenues exist. In some cases, litigation forms
part of a broader strategy, and is valued both for its mobilisation potential and for the official
recognition that the court can give of the grievance as a rights violation.

Despite the disincentives and obstacles that prevent marginalised people from initiating
a legal process and mute their collective voice, there also instances where cases are lodged by
marginalised groups. 27 What are the resources and strategies they use to overcome the formal
and informal barriers?

A key factor is associative capacity - the ability to join forces, form associations with
the capacity to mobilize around social rights issues, generate expertise and financial resources
locally and internationally, and sustain collective action. 28 Material as well as immaterial

25 Pilar Domingo shows how poor people in Bolivia, rather than using the formal courts, which are lacking in
legitimacy, has tended to voice their grievances to the Human Rights Ombudsman, and demands for recognition
of traditional law ( Domingo,Gargarella and Roux, forthcoming).
26 Developing countries are often characterized by a legal pluralism which often includes a strong informal judicial system based on ‘traditional’ or ‘customary law’ (Nader 2001). In many cases the lower costs, easy
access as well as, in some cases, high local legitimacy of informal judicial systems may provide poor people with a disincentive to seek redress through the formal judicial system. (Gargarella, Gloppen and Knutsen 2004; Nader 2001) Customary systems may be integrated with the formal judicial apparatus (fulfilling functions within the lower courts) or function an independent judicial system operating in parallel to the formal one.
27 See Epp (1998); Domingo, Gargarella and Roux (forthcoming).
28 For the importance of mobilization from below, see Epp (1998).
resources (ethnic identity, group solidarity, geographical proximity and stability, leadership and organisational skills, members’ individual and collective knowledge and rights’ awareness) are used to mobilize and launch collective action through the judiciary. The strategies used are as important – the ways in which claims and grievances are publicized (for example though protest-marches and public rallies) and turned into a mainstream legal process. This, in turn, leads us to the importance of personal agency. Personalities and leadership is central to understand why some marginal groups are able to articulate their concerns is such a way as to pave the way for a judicial process or inquiry, and to keep the process going once it is set in motion.

Whether groups are able to link to legal expertise seems particularly important for their ability to voice legal claims. Social rights cases are typically complex legal matters and (even if permitted to do so) the ability of lay people to effectively argue their own case is limited (depending on the standards of proof, and whether the litigants are assumed to provide all information). For poor people, whose social rights are most at risk this means that their ability to voice social rights claims is strongly related to the availability of free/affordable legal assistance – and to the quality of the legal services that are available.

In many cases the process of voicing social rights claims are not driven by marginalized groups themselves, but rather initiated from the outside, by public interest litigators, local or international. Public interest litigators are an increasingly internationalized set of actors, inspiration, legal strategies and resources flow across borders and many organisations and networks have to a long-term commitment to a particular cause or to the development of jurisprudence in a particular field (Sarat and Scheingold 2001). Externally driven litigation may be a more or less ad-hoc effort to assist in concrete situation, but in many cases the litigation is part of a long term strategy to build jurisprudence, with careful selection of good case to litigate (COHRE 2003). External initiatives to litigate bypass many of the barriers discussed so far and ease the formulation of claims. However, fear, cultural distance and rejection of the formal legal system as irrelevant and illegitimate, may not only discourage marginalised people from initiating legal strategies to claim their rights, as discussed above. It may also prevent them from cooperating with organisations or individuals acting to make claims on their behalf. And even if they accept, people whose social rights are most at risk – the very poor, socially outcast, people in deep rural areas, without a permanent

29 Eksempler – Gay rights, hiv/aids - TAC
30 Legal aid work is often low status and poorly paid, which affects the possibilities for recruiting and retaining well qualified staff
home or without a functioning social structure – often also lack the means for interacting with NGOs and public interest litigators.  

Externally initiated cases can be voiced with minimal input from those whose social rights are violated, and many well known social rights cases are initiated and driven by professional public interest litigator litigators. However, also when the impetus comes from outside, the litigators emphasise the importance of interacting with the marginalised communities and the existence of an organisational structure on the ground. It influences the nature of the voice and affects the chances of winning in court, both by adding strength and concreteness to the claims that are presented to the court, and in terms of external mobilisation adding momentum to the litigation process. It is, as we shall see, capacity to mobilize around the claims also influences the chances of reaping political effects from litigation process, whether or not it results in a positive judgment.

It should be noted that the aims of professional public interest litigators do not necessarily fully converge with the aims of those on which behalf the litigation is undertaken. The success of social rights litigation can be perceived in different ways (improvement in social conditions; winning the case; building progressive jurisprudence, changing social policy) and is many cases mean different things to the different actors involved in the process. This in turn has implications for what is regarded as an effective voicing of claims. Effective voicing of claims in the sense of cases with a reasonable chance of success in court, does not necessarily equal most effective in influencing social policy - or reflecting the most pressing issues for marginalized groups. This will be discussed in more detail later.

To sum up the discussion so far, legal mobilisation and voicing of social rights claims from below depends on whether sufficient resources can be mobilised to overcome the barriers marginalised groups face when relating to the legal system – the formal access barriers of the legal system; practical barriers relating to cost, distance and lack of information; and motivational barriers caused by cultural and social distance and negative perceptions of the legal institutions. The most important resources in this regard seem to be their associative capacity, the extent to which they are able to articulate and mobilize around legal issues, and to access quality legal services. The nature of the interaction between marginalised people and public interest litigators is particularly important for the effectiveness of the voice. Where professional legal service organisations drive litigation, the barriers to voicing social rights

31 See COHRE 2003
32 See COHRE 2003
33 See COHRE 2003; Hayward (2005)
claims are fewer, even though the law and the legal procedure may nevertheless pose substantial hindrances, but experience shows that involvement from affected people on the ground nevertheless is important for litigation to have political effects.

The voicing of social rights claims is the first phase of the litigation process. The next hurdle is the entry into the legal system – whether the court is responsive to the social rights claims and accepts the case as a matter belonging within its proper jurisdiction.

**The responsiveness of the courts**

Legal systems vary in their *responsiveness*, or willingness to accept social rights cases and public interest litigation. Differences are due both to the formal criteria of standing and admissibility and the judges’ practicing of them. Figure 3 outlines the main factors perceived to impact on the court’s responsiveness to social rights litigation.

*Figure 3: Factors Conditioning Courts’ Responsiveness to Social Rights*

[Diagram showing factors affecting courts' responsiveness]

As the figure indicates, the courts response is partly a function of the *voice* – both its content and its form. Whether or not a court accepts a case depends on the merits of the case as well as the manner in which the claims are articulated, the legal strategies employed by the litigants and the skill with which the case is framed. Again, this makes access to quality legal services central, and more so the less open and responsive the system itself is to marginalised
groups’ social right claims. The responsiveness of the legal system in turn depends on two sets of factors: formal characteristics of the law and the legal system; and the nature of the judiciary.

The formal features of the legal system discussed above as influencing prospective litigants’ decisions concerning whether or not to spend their resources on legal strategies, are also relevant for the courts’ responsiveness (which is what accounts for their motivational force): rules of standing and legal procedure, whether there is a legal basis for litigating in the public interest and under what circumstances. Whether a court accepts a social rights claim also depend on the legal basis for the claim, including the protection of social rights in domestic legislation, the constitutional protection of social rights, and the status of international social rights conventions in domestic law. Where social rights are recognized it is important whether they are explicitly justiciable or defined as ‘directive principles’ outside the scope of the courts’ jurisdiction. In some cases inequalities built into the law, for example discriminating against the rights and legal standing of women or indigenous people, influence the admissibility of the case.34

But as important as the legal formalities in themselves is how the judges on the bench interpret the law as it relates to admissibility of social rights claims and legal standing. The importance of interpretation in this field is best illustrated with reference to Indian judges’ relaxation of standing rules and procedures for social rights litigation, and their inference of social rights from constitutional right to life and dignity, in as context where the constitution did not provide a clear basis for adjudicating social rights. In contrast, in some African countries where the constitutional basis for social rights seem stronger prima facie, such as in Malawi, judges have interpreted the constitution and the law in a restrictive way, maintaining very limited criteria for standing, dismissing public interest litigation, and declining jurisdiction on social rights.35 Similarly, in Latin America, despite the fact that social rights are laid down in the constitution (Domingo, Gargarella and Roux, forthcoming). But while few disagree that judicial interpretation is important, there is less agreement in the literature regarding factors that are most decisive for judges’ interpretation.36

In many cases political pressure and corruption decisively influence judges’ decisions, generally, and with regard to which cases to admit, thus disadvantaging poor and politically

34 See discussion in Decker, Sage and Stefanova 2005:8 -11.
35 For an analysis of the restrictive interpretation of standing public interest litigation in Malawi, see Kanyongolo and Gloppen, (2005).
36 Most of this literature is focussed on the US, but some efforts are also done to investigate this in developing and transitional countries, see for example (Helmke 2005), van Doepp (2005)….
marginal litigants. In developing and transitional contexts with weak legal systems, lacking internal accountability mechanisms, there are few effective sanctions against judges’ submitting to extra-legal influences. Particularly where there is a societal tolerance for corruption and notions of judicial independence are not embedded in the legal culture. Corruption and extra-legal pressure aside, the nature of the legal culture is important, shaping the norms of appropriateness in the legal community concerning the theories of legal interpretation and the prevailing understanding the relationship between law and politics. But how legal norms are interpreted in a particular case is also linked to the individual judge’s personal, ideological and professional values, which combines with the legal culture to shape his or her perception of their own role, the understanding of what is the appropriate way to deal with social rights and to what extent social rights are within the proper domain of the courts. The courts’ sensitivity – individually and collectively – to the concerns of marginalised people is crucial to their interpretation of the law.\(^{37}\) This may be affected by training and experience, but is most profoundly influenced by the composition of the bench (the judges’ social, cultural and ideological background, their legal education and professional qualities, integrity and commitment). Studies of Argentina, Colombia and India conclude that courts’ responsiveness to social rights is significantly favoured by the appointment of judges who are particularly sensitive to the suffering of disadvantaged groups (Gargarella, Domingo and Roux, forthcoming). Institutionally, the composition of the bench is a function of the system and criteria for appointment of judges. A more inclusive and transparent system of judicial appointments may produce changes in the composition of the bench, creating more diverse and socially sensitive courts. However, formal procedures do not necessarily change the responsiveness of the courts to the concerns of the poor – and in many cases more responsive courts have come about without changes in the appointment procedures.

To sum up the factors affecting the responsiveness on the courts to social rights claims in the sense of accepting these cases as belonging within their domain: *Voice* clearly matters. Whether or not courts accept social rights claims depend on how strong the cases are in material terms and how skilfully the claims are articulated. The *law* as it relates to social rights, legal standing and procedure, is also relevant, but only in the form that it is given in the judges’ *interpretation*. And the judges’ interpretation of the relevant legal norms in turn

\(^{37}\) Public interest litigators often underscore how important it is that the judges identify with the situation of the victims (COHRE 2003, own interviews). This is also the rationale behind the sensitivity training of judges in equality matters that are undertaken a.o. in South Africa, and for having diversity on the bench. (Gloppen 2000).
depends on the judges’ integrity, the legal culture and norms of appropriateness in the judiciary, and the judges’ sensitivity to the plight of the marginalised. The judges’ perception of their own role and sensitivity to social transformation concerns seem to be of particular significance.

Before going on to the next stage, it should be noted that even if a case is rejected by the courts it does not necessarily mean that it cannot have an impact at the level of social policy. We will return to this later, but for now, we stick with the direct impact of litigation, through winning court cases. For social rights litigation to succeed in court, it is not sufficient that the judges are responsive in the sense that they accept the case – they must also be capable of giving the claims legal effect.

Judges’ capability to give effect to social rights claims

The third stage of the litigation process regards the judges’ ability to handle social rights issues. As indicated in figure 4, court performance in the sense of finding effective legal remedies for violations of social rights, is influenced by the way in which the claims are voiced, but also by a number of other factors, including the law and the legal culture, judges’ professional qualities, independence and access to jurisprudential resources, the material conditions within which they operate, and by the political context, including their anticipated reactions to social rights rulings.

Figure 4: Factors Affecting Judges’ Capability

(a) social rights cases brought; (b) cases accepted; (c) social rights judgements
The factors that influence judges’ capability to make progressive social rights judgments fall in two broad categories. One is the external incentives and constraints facing judges in the process of making their judgment, the other is their resources and professional craftsmanship.

An important source of incentives and constraints that judges face is the legal framework regulating the powers and competences of the court. Beyond its influence on decisions regarding whether to admit a particular case, it is a main factor shaping and constraining judges’ abilities to device effective remedies in cases regarding social rights violations. The legal framework sets parameters for the adjudicative process in a number of ways. In terms of the substantive legal issues at hand, the status (or absence) of social rights within the domestic legal system is important, as are laws affecting the position and rights of marginalised groups. Legal norms regulating the courts’ jurisdiction and powers of judicial review defines the area and reach of the court’s decisions, while the tools available to the court in its development of jurisprudence, shaped by rules on judicial procedure, the status of precedent and international and comparative jurisprudence, and judges’ authority to instigate independent investigations and appoint research commissions and experts.

While the legal norms are constraining, there is nevertheless scope for interpretation, and as noted above, judges’ interpretation of the law is as important as the legal norms themselves. Again, their interpretation may be influenced by external pressure; the legal culture; judges’ conceptions of their own role and what their peers will recognize as sound jurisprudence; as well as by their sensitivity to the concerns raised. Judges are usually drawn from the economic, social and cultural elite, and unless particular efforts are undertaken, their sensitivity to the plight of the marginalised and how the law may provide protection for their socio-economic rights, tend to be limited, due to the difference in life experience and values. Elite litigants may thus often be at an advantage, even without resorting to undue influence or corruption (which further adds to the disadvantages of poor litigants).

In many cases judicial decisions are influenced by political pressures, the authority exercised by higher judicial officers, or the influence of extra-institutional actors (economic elite, pressure groups, lobbies, demonstrations) (Helmke 2005). From the perspective of advancing social rights, this permeability of the judicial process to external pressure is ambiguous. In some cases it is conducive, such as when judges (seem to) respond to social mobilization and media attention accompanying litigation. Other forms of pressure, from the
state and powerful social interests may effectively bar social rights judgments, unless the judges have sufficient independence to withstand it.

At the core of the concept of judicial independence lies the notion that judges in reaching their decisions, should rely only on their understanding of the law and the case at hand. Formal guarantees and procedures making judges less dependent on the government for their appointment, tenure and salaries, may facilitate judges’ independence by insulating them from political pressure. Norms of legalism and appropriateness in the political and legal culture, may also provide incentives for independent behaviour, and professional forums may strengthen the importance of professional standards by making reputations matter. Still, neither of these can guarantee judicial independence. Ultimately, the most decisive factor is the judges’ personal values, integrity and sense of security and support.

Judges’ independence from other arms of government is never absolute, and should not be. In a reasonably well-functioning legal-political system, accountability relationships run in both directions. The judiciary collectively as well as individual judges has to carefully manage their relationship to other power-holders in order to maintain legitimacy and space for action (Gloppen 2000). Progressive social rights judgments may help build social legitimacy for courts, but unless their political position is secure, bold judgments challenging those in power may pose a risk of political backlash. Judges’ capability to deliver progressive social rights judgments seems to be greater where the judgment represents a limited political challenge – because it only marginally changes the prior situation and resource allocation, or because it (while requiring far reaching measures) is not fundamentally at odds with the government’s political orientation and ideology. It is also easier for judges to affirm social rights claims and devise remedies, where it is a matter of including new groups into excising schemes, and where the court can rely on legal arguments that are relatively uncontroversial from a professional point of view.

But even where judges are motivated to find effective remedies for social rights concerns, and have sufficient independence from the government and powerful social interests to do so, there remains the question of whether they have the means. To develop sophisticated social rights jurisprudence requires considerable legal skills, research capacity and access to a range of legal materials, including international and foreign doctrine and case

38 On judicial independence, see Larkins (1996)
39 On the accountability function of courts and strategies to build and maintain judicial independence, see Gloppen, Gargarella and Skaar (2004); Gloppen (2000).
40 For discussion of how the South African Constitutional Courts’ social rights jurisprudence can be seen as a partial critique, partial support strategy vis-à-vis political authorities, see Roux (2004).
law. Again, the quality of the voice has a considerable impact. Litigants provide judges’ not only with knowledge about the facts, but in many cases also bring forth relevant legal norms, and domestic, international and comparative jurisprudence, and provide legal arguments that the judges can draw on in their judgment and for the development of legal remedies. The importance of the litigants’ arguments is uncontroversial and for adversarial judicial processes, fundamental to their operation. But while judges and litigators alike acknowledge the importance of the legal arguments placed before them by the parties, and in some cases by amicus curiae, the ability of judges to independently assess the claims made, and thus to some extent offset inequalities in legal representation, is central to a fair hearing. In developing countries judges often lack the necessary resources to do so. Poor access to legal materials and lack of research capacity detract from the professional capabilities of courts to develop sound social rights jurisprudence, and create procedural mechanisms for dealing with social cases where these are lacking, so do limited training, and service conditions militating against recruitment of the brightest legal minds to the bench. The lack of capacity on the part of the judges is particularly consequential where the courts also have an investigative function, or where marginalised litigants lack adequate legal representation.

Another important factor affecting the quality of the jurisprudence is the courts’ case load and control over their docket. In Argentina, where the Supreme Court decides approximately 15,000 cases per year, and in India, where the Supreme Court decides more than 30,000 cases annually, the judges spread their time and resources very thinly. That they are not allowed to concentrate attention on a smaller number of significant cases detracts from their ability to give serious attention to development of jurisprudence in particular areas. This is in stark contrast with the US Supreme Court which selects which cases to take on and only hears between 70 and 90 cases annually. The South African Constitutional Court hears even fewer cases, but in contrast with the US Supreme Court, it does not have a large case

41 ‘Friend of the court’ with relevant expertise who are accepted (and in some cases invited by the court) to present argument without being party to the case.
42 Investigations into whether and why “the haves come out ahead” shows that this to a large extent comes down to differentials in legal representation (the well off, such as rich corporations, can afford better lawyers) and to the experience of ‘repeat players’ (big litigants, such as large state institutions, build expertise in engaging with the courts). (Galanter 1974; Wheeler, Cartwright et al. 1987; Kritzer and Silbey 2003).
43 Both in Malawi, Tanzania and Zambia, judges cite poor access to legal materials and lack of research assistance as important obstacles in their work, and some say they regularly borrow books and other material from the lawyers litigating in the cases (personal communication).
44 Charles Epp in his analysis of the Indian ‘rights revolution’ comments that while the large number of cases may enhance the Court’s legitimacy, this detracts from their ability to ‘focus sustained attention on particular issues’ (Epp 1998, 109)
flow, and thus has little choice but to take on whatever cases are placed before it, rather than strategically select cases in order to develop its jurisprudence.45

Resources matter, but they are not decisive. Gargarella, Domingo and Roux (forthcoming) conclude that many of the cases they have looked at show that judges who are willing to take an active role regarding social rights can manage to create new instruments or find solutions, even in the midst of poverty, inequality, and social tension. India is a case in point, where judges developed a series of new mechanisms to overcome hindrances to addressing what they held to be socially relevant cases. The epistolary jurisdiction discussed above was introduced to provide easy access to the court, special commissions of inquiry were introduce to overcome problems related to the need for establishing fact.46 When traditional legal remedies were inadequate, new were created, including monitoring agencies in charge of enforcing their orders. (Hunt 1996).47 Another case where important new procedural mechanisms and legal remedies has been developed is South Africa. Grootboom48, the landmark case on the right to housing, is as an example of how a creative court can decide social rights claims. Here, the Court ordered the state to ‘devise a comprehensive and workable plan’ to meet the needs of people in desperate need.49 Examples from Colombia similarly demonstrate the creativity of the Constitutional Court in finding new legal remedies to be applied in social rights cases (Gargarella, Domingo and Roux, forthcoming).

Remedies in social right cases, range from ‘minimal affirmation’, merely requiring the state to respect a social right in the negative sense of non-interference; via rulings requiring the state to protect social rights against encroachment by others; to judgments ordering the state to actively promote particular social rights by developing policies to this effect; or making concrete orders for state agencies to fulfil the individual claimants’ social rights. Often court orders in social rights cases are declaratory, stating that laws or actions are in breech of a social rights obligation, but leaving to the state to device a remedy, in other

45 Gargarella, Domingo and Roux, (forthcoming)
46 Through the Agra Protective Home case and the Bandhua Mukti Marcha case, the Court institutionalized the “practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant material in public interest litigation” (Bhagwati 1985, 57).
47 Critics warned that the Court began to act as a ‘parallel government’, to which Justice Bhagwati replied that the judges were ‘merely enforcing the constitutional and legal rights of the underprivileged and obligating the Government to carry out its obligations under the law. The poor cannot be allowed to be cheated out of their rights simply because those who should act do not act, act partially, or fail to monitor what they are doing’ (Bhagwati 1985, 576).
49 The court said that the state was obliged to take “reasonable legislative and other measures…to achieve the progressive realisation of the right…within available resources”, but maintained that in doing so the State could choose between a range of measures. For an analysis of the Grootboom judgment, see Roux (2004); Gloppen (2005).
cases they are mandatory, requiring specific actions to be taken. In some cases courts have also taken on a supervisory role, requiring the relevant agency to report back within a set time-frame.\(^{50}\) The choice of legal remedy depends in part on matters of substantive law (what the law says regarding the relevant rights and the courts jurisdiction), but is also a function of the judges’ (and litigators’) professional ability, individually and as a professional community, to find and develop remedies in order to repair a violation of rights (Epp 1998; Jacob 1996). While most legal orders restrict themselves to a short list of judicial remedies some introduce non-orthodox remedies to ensure the protection of rights. Legal culture is important also at this level, and in particular, the prevailing theories of judicial interpretation.\(^ {51}\)

To sum up the litigation process narrowly conceived: what does it take for social rights’ litigants to win in court? Whether or not judges, faced with a claim concerning the social rights of marginalised people, decide in its favour and are capable of finding effective remedies, is the result of a number of factors that combine to constitute the judges’ professional capabilities and the political-legal context in which they operate. The nature of the law; the norms of appropriateness in the legal community; the professionalism, integrity, independence and normative orientation of the judges; their sensitivity to the concerns of the poor, and the political resonance base for social rights, are factors that matter to varying degrees. However, also at this stage the litigants’ voice is central. The way in which a case is researched, and the quality and force of the arguments presented, is important for the nature of the judgement. With regard to the nature of the voice, judges seem more likely to rule in favour of social rights claims where a clear legal basis for the right is identified; where the case connects to existing social rights jurisprudence or relevant ‘familiar ground’ (property rights, civil rights); if the human rights violation is concrete and visual, sensitising the judges to the plight of the victims; and if the remedies are not too far-reaching. Cases regarding concrete actions\(^ {52}\) that degrade the existing situation regarding a right (as is the case with forced evictions, and cuts in social benefits),\(^ {53}\) or cases regarding extension of rights to

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\(^{50}\) Roux (2004) shows how the South African Constitutional Court in *Grootboom*, initiated its social rights jurisprudence from a low base, handing down a declaratory order that many commentators felt was weak in relation to the case made out by the complainants, while handing down a more intrusive order in the *Treatment Action Campaign* case, which occurred in the context of a mass mobilisation campaign that insulated the Court from the repercussions of its decision. (Roux 2004)

\(^{51}\) For example whether the norm is to stay close to constitution-makers/legislators’ original intent or to ‘adapt’ existing norms to new circumstances and social needs?

\(^{52}\) Through state actions or failure to protect against private transgressions.

\(^{53}\) This allows court to enforced social rights in the same way in which civil and political rights are traditionally enforced – by ordering the state to refrain from acting, thus allowing them to draw analogies from areas with
previously excluded groups (women, homosexuals, minorities), seem more likely to succeed than more ‘political’ demands for new policies or substantial budget allocations.

**Beyond the courtroom – the broader impact of social rights litigation**

A progressive social rights judgment does not in itself mean that the situation will change on the ground or that the judgment will be complied with or reflected in legislation or social policy. To understand the impact of social rights litigation in a particular context, it is necessary to look beyond the chances of winning in court. As indicated in figure 6 below, a number of factors combine to influence the impact of the litigation process, the actual compliance with the judgment as well as its broader social and political effects. What takes place in court is only one aspect of the litigation process, and the social and political implications of winning (or losing) a social rights case in court, depend as much on out-of-court mobilisation, as on the judgment itself. The processes are not separate, however, at every stage of a litigation process the legal strategies and outcomes may influence broader mobilisation and public debate around the issues. Many activists note how the process of voicing claims and researching the case, provide important impetus for social mobilisation and tools that can be used for advocacy and training (COHRE 2003). They find that social mobilisation ‘winning the case in the streets’ seem to make judges’ more inclined to rule in their favour – and inversely, the litigation process (even when not successful in narrow terms) provide an important political momentum that aid the broader cause. Cases that are not decided in favour of the claimants may still have a transformative impact. Authorities threatened with court action may settle out of court, and when courts provide a platform for voicing social rights concerns, this may generate or intensify popular debate and create a political momentum. This indirect, political effect is represented in the figure by the downwards pointing arrows. Activists also note how implementation of judgments in many cases seems to depend on social movements to monitor and follow up when compliance is lacking (COHRE 2003; Hayward 2005).

which they are more familiar. This was the approach taken by the Hungarian Constitutional Court in a case regarding the system for protection of social rights that were built during the communist regime. This was threatened by post-communist ‘austerity’ measures, and the Constitutional Court ruled some of these measures unconstitutional. (A. Sajo in Domingo, Gargarella and Roux, forthcoming).

54 Effects of court decisions can rarely be measured directly, since structural inequalities and power relations in a particular area are the combined outcomes of a host of different factors, and the impact of a court decision is difficult to isolate. Usually, a more realistic methodology for assessing the ‘transformative effect’ of particular judgments is to look qualitatively at their ‘ripple effects’. That is, investigate the steps taken to comply with and implement the judgment, whether it has lead to changes in laws, regulations and policies, or has changed the pattern of administrative/lower court decisions, and the norms applied by other institutions (for example in the monitoring standards of human rights commissions).
In the following, two avenues of social impact are distinguished, the first goes via the litigation process proper and regards the implementation of the judgment itself in the sense of compliance with the terms of the judgement. The seconds concerns the systemic influence of the litigation process broadly conceived, primarily in terms of social policy.

**Compliance and implementation of judgments**

Court judgments are not self enforcing they rely on other branches for execution and implementation. For litigation to improve the rights situation on the ground the judgments must be accepted and complied with by the relevant authorities and political action must be taken to implement the ruling. Compliance is a matter of degree, rather than either-or, and as figure 6 illustrates, it depend on a range of different factors. First of all, it is profoundly influenced by the other factors in the legal chain, as laid out above. Of most immediate importance is the authority of the judgement itself, the judges’ professionalism and capacity to devise acceptable legal remedies, and in particular whether they include enforcement mechanisms in social rights judgments, for example by relying on mandatory or supervisory orders, or issue contempt of court orders in cases of non-compliance (Dhavan, Sudarshan, and Khurshid, 1985, Swart 2005). Compliance thus to some extent depends on the courts’ themselves – the extent to which they are able to make their rulings authoritative, their independence and legitimacy in various sections of society, and their skillfulness in balancing political forces.
Compliance does, however, also depend on factors outside of the legal system. Even if courts make strong pro-transformation judgements, these may be undermined by factors beyond their control. These are related to the fundamentals of the political and economic context, the level of state formation and the government’s capacity to implement rulings, as well as their political will. The nature of the political contexts is particularly important, including the balance of power between the competing political forces, such as whether there is a dominant party that can more readily afford to ignore court decisions, or a more balanced political situation where the court has ‘protective constituencies’ rendering it potentially costly to overrule or ignoring court decisions (Widner 1999). Political culture is also a factor influencing the cost of ignoring court orders. Important in this respect is the extent to which there is a tradition of legalism, and whether the courts have a basic legitimacy in society are perceived as socially relevant.

Political elites are also more likely to ignore or overrule social rights decisions by the courts if these are at cross purposes with the government’s ideology and broader policy goals. Conversely, rulings that are in line with and articulate the broader policy direction of the government, may harness the political will to follow up and give priority to social rights issues. While political will is crucial, implementation of court rulings also to some extent depend on the state’s capacity – financial, institutional and administrative.

National or international legal service organisations have litigated quite successfully on behalf of marginalised people, and won significant jurisprudential victories with little
participation from the victims themselves. However, experienced social rights litigators note the limited effect of court victories, where cooperation with local community organisations have been lacking. This goes back to the broader social mobilisation effects of litigation discussed above, and in particular the importance of an organisational apparatus on the ground to monitor and follow up on implementation of judgments, and taking the case back to court for lack of compliance (COHRE 2003; Hayward 2005).

**Litigation and social policy**

This brings us to the broader role of litigation in the shaping of social policy. As illustrated in Figure 7, litigation may influence social policy directly, when public policies are (re)formulated as part of the process of implementing judgments. Where the court has ordered the implementation of an existing policy or development of a new policy, policy impact becomes an aspect of compliance. The government may also develop new policies in response to declaratory judgments. But litigation processes may influence social policy formation in more indirect ways too, through stimulating social mobilisation around social rights issues, creating awareness and media attention, feeding advocacy, bringing social rights issues into social and political discourse and framing marginalised peoples’ grievances in terms social rights violations.

**Leverage, shield, cover, or excuse - courts as constrained actors**

In his analysis of the political influence of US courts Rosenberg concludes that courts are constrained, and generally unable to influence policy on their own. For judicial action to be important, other actors must provide incentives for compliance, or use the decision as a “leverage or a shield, cover, or excuse” to implement social reforms (Rosenberg 1991:35, Schultz 1996). This is confirmed by analyses of courts elsewhere, and activists own experience. But it does not mean that litigation is impotent as a policy shaping instrument.

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55 See COHRE 2003.
56 This latter was the case in the South African *Grootboom* case, where the Constitutional Court, ordered the government to develop and implement a policy to meet the right to shelter for those in most dire need while in the *Treatment Action Campaign* judgment on prevention of mother to child transmission of HIV/aids, the court ordered the government to extend the coverage of existing policies.
57 See discussion of this literature in Gargarella, Domingo and Roux, (forthcoming) and perceptions of activists confirming this in COHRE (2003).
Three dynamics are particularly important to take account of: the judgements’ direct influence on political actors; their relationship between litigation and social mobilisation; and the role of litigation in shaping public discourse on social rights.

**Direct impact of judgements on policymakers**

The most direct (but not necessarily most important) way in which social rights litigation may impact on public policy is when the litigation process results in a judgment that in turn is implemented in a way that produces a policy change. But even when not directly implemented, the judgment may influence the shaping of policy. Schultz and Gottlieb holds that “the most important aspect of judicial influence [is] the power of courts to redefine structures and expectations” (1996: 66). Court judgments may have a profound impact on political actors, redefining priorities and providing leverage and arguments for actors (whether in government or opposition) supporting policy reform in line with the judgements. To have a judgment ordering or backing a policy may also depoliticise the issue, making it easier to draw support from across the political spectrum.\(^{58}\)

It should be noted, however, that a judgment that from a social rights perspective is progressive, may have adverse policy effects. In some cases judgments recognizing marginalized groups equal rights to social benefits, have resulted in an “equalizing downwards”, creating equality by taking away benefits from people who previously was benefiting (COHRE 2003). Similarly, court decisions finding that people’s rights have been violated by certain actions, such as forcible evictions, seriously deteriorating their social

\(^{58}\) Gargarella, Domingo and Roux, (forthcoming)
condition, have also backfired. Procedural protections erected by the courts to protect vulnerable groups from forced evictions have been turned into a recipe for how to effectively evict people (Roux 2005). Decisions finding steep increases in the price of basic commodities in breech of social rights have had similar adverse effects (COHRE 2003).

**Litigation, social mobilisation and political discourse**

At discussed throughout the paper, the broader impact of litigation to a large extent seems to run through social mobilisation and political discourse. The relationship between litigation and social mobilisation is multi-faceted: On the one hand, there seems to be positive feed-back cycle between litigation and the ability of marginalised people to organise around their grievances: The ability to associate is central to the voicing of claims by marginalised people, and in some contexts litigation has been a resource contributing towards broader mobilisation and the building of community spirit. From the perspective of litigation, community involvement seems to increase chances of success. And the more involved the affected communities are in driving the litigation process, the more likely they are to profit from it in terms of mobilization and consolidation around the cause.

The links between marginalised people and resourceful legal service organisations provide important tools for mobilisation. It seems, however, that for externally initiated and driven litigation to provide marginalised groups with organisational resources, some level of initial association is necessary for a positive cycle to be set in motion. The poorest or otherwise most marginalised may thus lack not only the resources to voice claims, but also the ability to contribute significantly to – or benefit from – the voicing of claims on their behalf by external litigators (COHRE 2003).

It also seems clear that litigation efforts that are part of a broader mobilisation strategy are more likely to result in a positive judgments and judgments that are implemented and cause changes in policy. Sometimes a single case may have a significant effect on jurisprudence and cause a change in public policy, but a systemic effect on social policy is more likely where there is an overall strategy, a set of cases building up jurisprudence in the field, and an organisational apparatus that is able to capitalize on the momentum caused by the legal process and sustain political pressure through mobilisation and debate.59 Today, the

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59 The Indian Supreme Court surely is among the most active courts in the world, and it also is among the most supportive of egalitarian and procedural rights. But it has been unable to develop a sustained and deep agenda on individual rights. The best explanation for that paradox is that the Indian support structure for legal mobilization – the complex of financial, legal, and organizational resources necessary for appellate litigation – remains weak and fragmented… Some lawyers regularly volunteer their services for arguing rights-based claims, but the fragmented, individualized structure of the legal profession limits the overall impact of their
need for a long-term strategy, gradually building up jurisprudence, and maintaining social mobilisation and political pressure, is widely acknowledged among experienced social rights activists. And over the past decade international networks and NGOs have built considerable expertise in various areas of law. Even when the case is successful in court, it may contribute to social mobilisation and have an impact on social policy decisions. Particularly when forming part of a broader campaign and when litigation is supplemented by effective “out of court voice”, it may provide a focal point for media attention and social mobilization, and create awareness and political pressure. The research, compilation and structuring of data for legal argument is useful also for advocacy purposes and as input in policy formation processes and the wider discourses on social rights. Similarly, progressive social rights judgments that are not conformed with and implemented may influence jurisprudence and discourses, nationally and internationally. Within the judiciary and legal community social rights litigation may contribute to ‘domesticating’ international human rights discourse and stimulate engagement with international and foreign legal norms and jurisprudence, which even if not directly admissible may have persuasive force.

Thus litigation may be worthwhile even in countries and context where conditions are such that litigation is unlikely to succeed in the narrow sense. But it is not necessarily so. Broader positive effects are less likely where litigation efforts are ad hoc and disconnected from broader, long term strategies to improve the situation. It also depends crucially on the quality of the litigation and the relevant groups/organizations’ capacity to utilize the process politically. And, lastly, there are also risks involved. Far from all lost (or even won) cases are productive, poorly argued or restrictively decided cases may create damaging set-backs.

Given that much of the impact of litigation goes via social mobilisation and political discourse, factors that are important to take into account when considering the potential of social rights litigation for influencing social policy are the political space for social movements, their freedom of expression and the state of the media.

efforts. Rights organizations exist, but their funding is inadequate to finance continuing litigation campaigns” (Epp 1998, 108-110, see also Gargarella, Domingo and Roux, forthcoming) Jules Lobel, gives three reasons for litigating when one has few chances of winning the case. First, one may choose to go to court in order to instigate political action and influence over public debate. Second, one may litigate in order to ‘keep alive an oppressed community’s vision of the law’ (1347). Third, one may initiate a case to foster a ‘culture of legal struggle’ that ‘continually informs and inspires future generations to challenge oppressive practices’ (1353). (Lobel 1995., in Gargarella, Domingo and Roux, forthcoming. See also Cover 1983).

For example the South African Constitutional Courts’ Grootboom judgment on the right to housing, has been poorly implemented, but central in shaping jurisprudence.

An example of this is the South African Treatment Action Campaign, an organization of aids activists who have used litigation as part of their broader campaign to provide treatment for HIV/aids.
In conclusion

This paper has argued that the success of public interest litigation in advancing social rights can be judged according to three standards: Firstly, whether cases aimed at improving social rights succeed in the courts. Secondly, whether social rights progressive judgments are complied with and implemented. And thirdly, whether litigation has a systemic impact - in the sense of changing the discourse on social rights in society, shaping jurisprudence, and influencing social policy.

Success in the narrow sense of winning cases in court depends on effective voicing of social rights grievances; a judicial system that is responsive to the concerns of the poor; and judges who are capable of giving legal effect to the claims that are voiced and find appropriate remedies. In order for social rights claims to be voiced effectively, the most important factors seem to be the availability of competent legal expertise, and the relationship between public interest litigators and the groups whose rights are being violated. The growth of international organisations and networks with expertise on different areas of social rights litigation, has contributed to more effective voicing of claims. The responsiveness of the legal system depends on how skilfully the claims are voiced as well as on law itself – in particular regarding the legal status of social rights and criteria for standing. But as important are the judges’ norms of appropriateness and perception of their own role, which in turn is influenced by the legal culture, the composition of the court and the training of the judges. Judges’ understanding of the law, their own role and the distinction between law and politics, also influence their capability to give effect to social rights in judgements, along with their independence, training and access to relevant legal material. How convincingly the claims are voiced, and the nature of the legal arguments provided are also important both for the responsiveness of the courts to social rights claims and for their ability to translate them into effective remedies.

Successful implementation in the sense of compliance with the terms of the judgement depends on the nature of the political-legal context: the court’s legitimacy in society and with the relevant authorities; political will; level of state formation and implementation capacity – factors that to a large extent are external to the litigation-process. But prospects for compliance also depends on the judgement itself and the nature of the remedies provided, as well as on the capacity of the litigants and their organisations to monitor and follow up the implementation process.
For litigation to have *systemic impact* on social policy, depends even more on the capabilities of the litigants and their organisations: their ability to use the litigation process for purposes of social mobilisation; draw media attention to the cause; utilise the evidence presented for purposes of advocacy, lobbying and training; as well as their ability to develop a systematic long-term strategy of incremental litigation and advocacy. Without organisations with a sustained commitment to the cause, that can capitalise on the litigation process (regardless of whether the case is won in narrow terms), and carry the momentum into other arenas, litigation seems to have little systemic effect. The political space for social movements, their freedom of expression and the state of the media, are important factors.

*A note of caution*

Although this paper has focused on the potential of social interest litigation and the various avenues through which it may exercise influence on social policy, it is important to remember that litigation in most cases is a marginal strategy for influencing social policy. When courts are used it is often as a last resort when other strategies and channels for political influence have proven dysfunctional or are not available. And while this paper has shown that it may be a useful strategy for some marginalised groups in some contexts there are reasons why we should be cautious about embracing an increasing judicialisation of politics.

As noted in the introduction, the increasing popularity with activists and donors globally of public interest litigation on social rights is somewhat surprising, in light of the academic scepticism regarding its efficacy as well as its appropriateness on normative grounds. From a system perspective social and economic rights litigation have been criticised as too political, regarding matters with great budgetary implications, at the heart of politics, and judges are regarded as institutionally poorly equipped to decide them (Fuller 1978). Also litigation is by nature casuistic – cases emerge in an uncoordinated fashion and each case is treated on its own terms and judged against a set of rights acting as ‘trumps’ (Dworkin 1978). In a setting of resource scarcity there is a tension between this decentralised decision-making and resource allocation, and the need for rational priority setting in public policy. Social rights decisions are regarded as prone to produce conflict between judiciaries and political institutions, undermining their institutional capital in other cases. While there are good reasons to dismiss a general distinction between social rights and other rights in this

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63 See note 5 above, See also Gargarella, Domingo and Roux, (forthcoming); Gloppen (2005).
respect, there is still a question about whether courts in all cases are the best forums for grievances regarding social and economic rights.

Another concern is that litigation generally is market-led. Judges respond to cases that are brought to them and the danger is that stronger litigants may crowd out the most marginalised, and in the worst cases, the elite and the ‘not so poor’ capture the legal system. Critics have shown how, in India, public interest litigation has become a means for the advancement of middle-class concerns, for example in the environmental field, on behalf of the concerns of the poorest.

A related issue here is the role of public interest litigators. One effect of the increasing specialisation and professionalism of public interest litigators is that they in many cases have become the most important drivers of social rights litigation. This is not in itself a problem, but the question is: whose interest do they represent? As noted earlier, the interests and motivations of marginalized groups and public interest litigators do not necessarily converge. For people who are marginalized and whose social rights are violated, the goal is to alter an intolerable condition and litigation just one possible means to achieve this. The perspective of public interest litigators on the other hand, is often to find a case that will bring social rights jurisprudence forward, generally or in their field of specialisation – and that will bring them professional recognition and their organisation continued funding. This makes them more concerned with framing cases that are “win-able” and fit their long term strategy, than with solving a concrete problem for particular people. So while there is a shared concern for advancing social rights, public interest litigators in many have less of a grounded commitment to specific human rights violations. However, this is not always so. Where litigation is driven by organisations with a long term involvement with a particular community or cause, and forms part of a broader strategy of advocacy and social mobilization, “win-ability” may be less of a premium and even cases that are not likely to succeed in narrow terms may be worthwhile taking to court. In these cases the litigation “voice” is more likely to reflect the concerns of the marginalized group – although not necessarily the poorest or most marginalized sections of society.

While it is important to understand the potential that social rights litigation can represent under various conditions, it is thus important not to overemphasise the importance of litigation compared to other ways of shaping social policy, its direct effect as well as its instrumentality as a means of social mobilisation. In some contexts it seems to have been of great significance, but more often the effects on the ground are limited.
Findings:

- The quality of the litigation voice is very important and competent public interest litigators are crucial to win social rights cases.

- Growth of international networks of legal services organisations and international ‘back-stop’ organisations are central to develop social rights jurisprudence, providing local partners with knowledge on international norms, precedent in other jurisdictions, and sound legal arguments.

- Inasmuch as there is a beneficial relationship between marginalised groups and professional public interest litigators taking up their cases, the aims of the two sets of actors do not necessarily coincide. Professional litigators tend to be concerned with building jurisprudence through framing ‘win-able’ cases, while marginalised people primarily want to improve their conditions by any means.

- The most effective social rights litigation in terms of winning cases is not necessarily the most effective in shaping social policy.

- Rules of standing and weak status of social rights in domestic law are obstacles that many legal systems pose to social rights litigation, but the courts’ responsiveness to such litigation seems more dependent on the judges’ conception of their own role and the relationship between law and politics.

- Whatever the outcome of the case, litigation on its own have limited prospects for changing the situation on the ground – implementation of judgments, and even more so, structural change, requires community organisations and social movements that can utilise the litigation process as part of a broader strategy of social and political mobilisation.

- If there is a ‘receptive apparatus’ on the ground, litigation can forge and strengthen social movements, develop consciousness and a sense of community, bring out and structure facts that can be used for advocacy purposes, feed into the social and political discourse and directly inform policy processes.

- The conditions of local social movements and community organisations and their political space for action are thus key factors to consider.

- The effects of litigation on social policy also depend on the political context and to what extent the government shares the general ideology underpinning social rights.
References


Domingo, P., R. Gargarella and T. Roux P. x (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Ashgate


