Litigating Health Rights

Can Courts Bring More Justice to Health?

Edited by Alicia Ely Yamin and Siri Gloppen

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Human Rights Program Series
Harvard Law School

Harvard University Press

The International Human Rights Clinic at Harvard Law School's Human Rights Program publishes a "Human Rights Program Series" of books with Harvard University Press. Books in this series are designed to further interdisciplinary scholarship and practical understanding of leading human rights issues.

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Printed in the United States of America

ISBN: 978-0-979-63955-5

Library of Congress Cataloging-in-Publication Data

Litigating health rights : can courts bring more justice to health / edited by Alicia Ely Yamin and Siri Gloppen.
p. cm. — (Human rights practice series)
Includes bibliographical references and index.
ISBN 978-0-9796395-5-5
1. Medical care—Law and legislation. 2. Right to health. 3. Health services accessibility. 4. Medical policy. 5. Right to health—Cross-cultural studies. 6. Health services accessibility—Cross-cultural studies. I. Yamin, Alicia Ely. II. Gloppen, Siri.
K3601.L57 2011
344.03'21—dc23 2011017921

Printed by Signature Book Printing, www.sbpbooks.com

Acknowledgments

This book would not have happened but for the contributions of individuals and institutions in many parts of the globe. First, we thank the Norwegian Research Council for generously funding this project through a grant from its programs for global health research (GLOBVAC) and development research (FRIMUF); this funding permitted both empirical investigations and critical opportunities to come together and share ideas. We extend special thanks to Bruce M. Wilson and Ole Frithjof Norheim for their initial ideas and contributions to the research proposal. The institutions of several of the book's contributors also provided support, including Harvard Law School, Warwick University Law School, San Andrés Law School, the Universidad Torcuato di Tella, the University of Bergen, and the project's host institution, the Chr. Michelsen Institute (CMI).

This volume was developed through fieldwork-based research and discussions from a series of workshops and panels in Bergen, Norway; Buenos Aires, Argentina; Cambridge, Massachusetts; and Chicago, Illinois. A number of people helped us develop and refine ideas by commenting on drafts at workshops and conferences or by serving as reviewers. Special thanks are due to Helena Alviar, Eduardo Appio, Daniel Brinks, Mary Clark, Christian Courtis, Javier Couso, Norman Daniels, Jackie Dugard, Leonardo Filippini, Varun Gauri, Gines González García, Aeyal Gross, Kathryn Hochstetler, Sara Hossain, Malcolm Langford, Sigrid Morales, Gustavo Ríos, Olman Rodríguez, Cesar Rodríguez Garavito, Julieta Rossi, Michelle Taylor-Robinson, Alejandro Uslenghi, Carlos Vassallo, Kurt Weyland, and our anonymous reviewers. In addition, we benefited early on from the insights of Mark Goodale, Peter Houtzager, Helena Nygren-Krug, and Kristin Sandvik.

We are also grateful to participants of The Right to Health in Resource Constrained Settings, a course at the 2010 Bergen Summer Research School on Global Development Challenges that Siri Gloppen, Alicia Ely Yamin, and Ole Frithjof Norheim jointly taught and to which other participants of this project contributed.

Thanks are also due to those who assisted behind the scenes, including arranging the workshops. In Cambridge, we would like to thank Adriana Benedict and Kaitlyn Hennigan; in Buenos Aires, we thank Lucas Arrimada and Ignacio César; and in Bergen at CMI, we thank Ingvild Hestad and Kristi Staveland-Sæther.

We deeply appreciate the tireless efforts of those who helped us prepare the manuscript for publication—most of all, our diligent and ever-efficient copy-editor, Morgan Stoffregen, who assumed responsibilities far above and beyond what could be expected. We also want to thank Catlin Rockman for her excellent work on the layout; Ståle Almenning for the cover design; AFP/Noah Seelam for the photo; Susan Holman for proofreading; Lisa Kleinholz for indexing; and of course Cara Solomon, Communications Director at the Harvard Human Rights Program, for shepherding the book through the process.

As editors, we have found this project immensely rewarding for the insights that it has provided and for the opportunity to learn from coauthors and other academics who have generously shared their time and ideas. Equally important has been the opportunity to interact with practitioners, including those dedicated judges who, aware of the potential pitfalls, nevertheless struggle to navigate the complexities of health rights litigation in ways that bring justice to health, and who are eager to learn what can be gleaned from this volume regarding how best to do so.

Alicia Ely Yamin and Siri Gloppen
August 2011
Cambridge, MA, and Bergen

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CONTENTS

Chapter 1

Introduction: Can Litigation Bring Justice to Health?

Siri Gloppen and Mindy Jane Roseman

This book sets out to explore the phenomenon of health rights litigation and its consequences. Globally, court cases regarding the right to health are on the rise, and views diverge sharply on whether this trend toward judicialization is positive or negative for the advancement of the right to health and whether it can bring more justice to health care.

In Brazil, for example, patients are turning to the courts in increasing numbers to claim medication and treatment that is not provided by the public health-care system—but to which, they argue, their constitutional right to health entitles them—and judges more often than not support the claims. Some welcome this as a positive development that protects the constitutional right to health and strengthens the public health-care system. Others fear that as more patients are encouraged to follow suit, this "epidemic of litigation" will lead health-care costs to spiral out of control and will undermine attempts to strengthen the public health-care system through health plans and rational priority setting (Ferraz in this volume). The situation in Brazil is not unique—nor is it the most dramatic. Colombia and Costa Rica were the first countries in the region to experience large numbers of individuals going to court to claim their right to health, starting in the early 1990s after constitutional reforms eased access to the courts[1] and growing exponentially since the turn of the century. In 2008, Colombian courts heard more than 140,000 health rights cases and, in a landmark judgment, the Constitutional Court ordered a radical restructuring of the health system. This has placed the Court at the center of a contentious policy process over health-care reform, the outcome of which is still to be seen (Yamin et al. in this volume). In Costa Rica, politicians, health administrators, and analysts express divergent

The authors would like to thank Alicia Ely Yamin, Paola Bergallo, Amy Senier, Sarah Sorscher, and Baker Woods for their contributions.

views on whether the role of the Constitutional Chamber of the Supreme Court, known as the "Sala IV," is positive or negative; but all agree that it has become a—if not *the*—main shaper of health policy (Wilson in this volume). Health rights litigation has also become a significant avenue for health-care demands in other parts of the region, such as Argentina, for example, where individual, collective, and structural cases are making their mark on the country's fragmented health system (Bergallo in this volume).

While the number of cases has grown most exponentially in Latin America, where it is higher than in any other region, this increase appears to be part of a global trend that, as we shall see, may be having similar impacts elsewhere. Courts are asked to act to protect and fulfill the right to health in domestic and international courts of the global North, as well as in more resource-constrained countries of the global South, which are the focus of this book. Areas where litigation has played an important role include the struggle for antiretroviral treatment for HIV/AIDS; the protection of prisoners' right to health-care services; access to affordable generic drugs; battles over reproductive rights; and efforts to secure underlying preconditions of health, such as water, food, and the right to live in a healthy environment. Developments in India and South Africa are notable in this regard. The South African Constitutional Court, in a celebrated judgment, ordered a recalcitrant government to roll out treatment to prevent HIV-positive mothers from passing the virus to their babies, a decision with wide-ranging implications, as we shall see in later chapters (in this volume, Cooper; Norheim and Gloppen). In both South Africa and India, courts have ordered their governments to institute policies to protect basic preconditions of health, including shelter for vulnerable groups; and Indian courts have also issued a number of rulings protecting the right to a healthy environment (Parmar and Wahi in this volume).

What drives this phenomenon of health rights litigation, and what are the consequences? Should people who care about the right to health applaud and encourage this development? Is litigation a vehicle for advancing the right to health in society? Does it serve to hold governments accountable for their commitments toward vulnerable groups whose right to health is at risk? Or rather does it increase inequalities in health by providing a tool for privileged groups to access expensive treatments and an unfair share of health-care spending?

These questions—and the fact that the preliminary evidence points in very different directions—motivated an interdisciplinary and international

group of researchers to join efforts to investigate the phenomenon of health rights litigation across three continents in a research project entitled "Right to Health through Litigation? Can Court-Enforced Health Rights Improve Health Policy?"[2] This book is an outcome of these efforts.

Research Question and Aim

Simply stated, our aim in this book is to explore under which circumstances health rights litigation is a good thing—and for whom. Given that the "litigation epidemic" is likely to be around for a while, and likely to grow, understanding this phenomenon is not only academically interesting but also politically and socially important. We hope that a more nuanced understanding of the dynamics of health rights litigation and its impacts can help practitioners (judges, lawyers, activists, policy makers, health administrators, and doctors) deal with the health litigation phenomenon in ways that cultivate its constructive potential and minimize aspects that are problematic from the perspective of the overall right to health in society.

As a preliminary matter, we should state clearly that our concept of "right-to-health litigation" does not include all litigation affecting health. Health rights litigation may be motivated by various concerns (e.g., common good or personal needs), but in order for it to be the basis for a lawsuit, the case must be framed in terms of a violation of a legal rule or *right*, especially to health. Most commonly, a right to health is articulated in a nation's constitution or through national health legislation and/or insurance. The right to health is also a recognized international human right. Understanding how the international right to health is framed informs our definition and criteria for case inclusion.

Internationally, this right is most firmly anchored in article 12 of the International Covenant on Economic, Social and Cultural Rights, which obliges states that have ratified the Covenant to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[3] The United Nations Committee on Economic, Social and Cultural Rights has further interpreted the right to health, noting that it is not a right to be healthy but rather a set of freedoms and entitlements, among which is "the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."[4]

Realizing the right to health also requires the realization of a range of other rights—to food; housing; work; education; human dignity; life; nondiscrimination; equality; freedom from torture; privacy; access to information; and freedom of association, assembly, and movement (see Commission on Social Determinants of Health 2008). States' obligations in this regard are progressive, understood to require resources that may be constrained. However, states do have an immediate obligation to take "deliberate, concrete and targeted" steps toward full realization and to do so in a nondiscriminatory manner. They also have a "core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights . . . including essential primary health care."[5]

For the purposes of the current study, we follow the conception of the right to health given by the Committee on Economic, Social and Cultural Rights in General Comment 14, but include only the immediate preconditions of health (rights to food, water, sanitation, safe and healthy working conditions, and a healthy environment) and not the broader social determinants (education and housing). Thus, we limit ourselves to the rights most relevant for our research question concerning the impact of litigation on health systems and health policy. We believe that this limited focus is necessary to facilitate a deeper analysis of litigation in the context of particular health systems and political environments. The right to health narrowly conceived differs from other social rights in ways that are important for understanding the dynamics that drive litigation, as well as its effects. Due to the inherently expansive nature of the right to health,[6] the ethically sensitive and technical nature of the field,[7] and the enormous economic interests involved, asymmetries of knowledge and power are particularly great when it comes to health and health litigation. The analysis must take these asymmetries into account and explore their implications, considering especially, for example, who benefits and how international actors (such as pharmaceutical companies, donors, and nongovernmental organizations) influence litigation processes. Our universe of health rights litigation thus include cases that

- make claims based on a constitutional right to health (or related right) or an internationally recognized human right to health;
- concern access to health facilities, goods, and services (including medication); or
- concern the underlying preconditions for health.

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While this operational definition of the right to health operates reasonably fairly across the cases discussed here, it is not without problems. The nature of the right-to-health claim differs between countries. Some nations articulate a right to health in their constitutions or national health-care and insurance laws, and others articulate it by ratifying an international legal treaty that contains health rights (and taking the necessary measures to give the treaty national effect). Brazil and South Africa explicitly recognize health rights as justiciable rights in their constitutions, while judges in Argentina, Colombia, Costa Rica, and India have constructed a justiciable right to health from other constitutional rights—such as the rights to life and life with dignity—while also relying on international human rights instruments (which are incorporated into domestic law to varying degrees). These differences will have an effect on where and how a right-to-health claim is pleaded.

In some legal systems (Colombia, Costa Rica, and India), basic rights violations claims—such as those regarding the rights to life or health—are granted easy access to courts and are used to vindicate a wide range of health-related concerns. Elsewhere, constitutional challenges are cumbersome and expensive, and litigants are likely to cast similar concerns in a legal language not involving constitutional rights, such as medical malpractice, in order to have access to a court. Artful though the distinction may be, such cases are excluded from our analysis unless they are framed as a rights violation by a public entity.[8] This means that there is not full symmetry in the cases included in the various country studies. For example, cases regarding denial of treatments that are included in health-care plans are considered only when they are litigated as a breach of constitutional rights (as in Argentina and Colombia, where such claims constitute a large share of the cases). When such cases are directed toward administrative bodies or framed as civil claims against private providers, they are excluded.

State of the Research

Several growing bodies of literature help provide some tentative answers to the questions that have shaped this book. While some of this literature relates to the right to health and health litigation specifically, most concerns social rights more broadly. These existing works provide not only an important foundation for the current study but also points of disagreement and engagement. In this section, we briefly outline some of the leading debates

and contributions to the field, emphasizing where this volume contributes to the discourse and—in our view—takes it forward.

Research on health litigation and its impacts is part of a broader debate on legal enforcement of economic, social, and cultural rights, which has recently shifted from focusing on judgments—with court victory as the criterion of success—to also considering the implementation of judgments, including relationships between litigation and broader social mobilization. This builds on an established (predominantly North American) body of literature examining strategic litigation more generally and its (lack of) social effects (see, e.g., Scheingold 2004; Galanter 1974; Rosenberg 1991; Bakan and Schneiderman 1992; McCann 1994; Schultz 1998; Bell 2004).[9] However, until recently, empirically based work investigating the effects of social rights litigation generally and health rights litigation in particular has been rare.[10]

We wish to situate and distinguish *Litigating Health Rights* from some of the more recent scholarship on social rights.[11]

We begin with reference to *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, edited by Roberto Gargarella, Pilar Domingo, and Theunis Roux (2006). Two members of the team behind the current volume (Gloppen and Gargarella) also played central roles in the *Courts and Social Transformation* project, which provides a theoretical and methodological point of departure for this book. *Courts and Social Transformation* identifies two trends as coinciding: an increase in democratically elected governments and new rights-rich constitutions after 1990, and an increase in social rights litigation. Its editors and contributing authors seek to flesh out the relationship between the two, theoretically and through comparative studies. Do democratic constitutions and recourse to courts for social and economic objectives mean that courts are sites for meaningful social transformation (Gargarella et al. 2006, 1)? To answer that question, *Courts and Social Transformation* explores theoretical and historical constraints to court-generated social policy making and informs those discussions through a series of empirical and country-based studies. These case studies utilize an analytic template developed by Gloppen to elaborate how courts can be relevant to the concerns of poor and marginalized individuals and communities. This framework is further developed in the current volume.

In a nutshell, *Courts and Social Transformation* finds that judiciaries—liberated from authoritarian constraints and overcoming unease with democratic division-of-powers concerns—have been enabled to act with relative autonomy within the realm of the new constitutional parameters. In responding to petitions, the courts in Hungary, for example, sought to preserve the social

rights architecture inherited from state socialism, which was being challenged by newer free-market policies. Conversely, in South Africa, this autonomy meant that the courts, and the Constitutional Court in particular, could assist in transforming the architecture inherited from the apartheid system. Courts in India and Latin America have demonstrated a similar receptiveness to entreaties to preserve or provide access to social constitutional entitlements, such as education, housing, and health.

Litigating Health Rights differs from and goes beyond *Courts and Social Transformation* in important respects. While *Courts and Social Transformation* looks broadly at all social rights litigation (e.g., housing, education, land, and environment) *Litigating Health Rights*, as discussed above, focuses more narrowly on the right to health, thus enabling a deeper and more systematic exploration and description of the litigation process and how it plays out in different contexts.

Another study, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, edited by Malcolm Langford (2008), provides a good overview of the recognition of the entire range of social rights by national, regional, and international jurisdictions. The book demonstrates the variety of social rights that have been litigated and shows that courts are competent to address breaches of these rights and establish accountability for the promotion and protection of, among other rights, health, education, and housing. We appreciate the value of *Social Rights Jurisprudence* in offering a descriptive and comprehensive compendium of court cases that recognize the justiciability and enforceability of social and economic rights. However, the book does not analyze the dynamics that bring the cases to court, nor does it address the enforcement and impact of the court decisions. Rather, it focuses simply on the fact that courts have rendered decisions. Here, we attempt to take the analysis further. Courts may well be appropriate fora for settling legal disputes over social rights entitlements—but why is this so, what enables and encourages the litigation and adjudication of health rights, and what are the effects of these decisions? Are they enforced? Do they lead to transformations in judicial output? Do they have normative impact and change governments' (or other actors') behavior? Do they transfer health resources away from the "haves" to the "have-nots"? These are some of the questions our volume addresses.

Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability, written by Christian Courtis for the International Commission of Jurists (2008b), brings to the fore rich comparative mate-

rial on economic, social, and cultural rights cases, with a broader perspective on the circumstances under which such litigation is likely to succeed in terms of implementation. However, it explores neither the dynamics of the litigation process nor the broader *impact* of such litigation in terms of social outcomes and the protection of social rights within the population.[12]

The literature that explores the impact of litigation specifically is limited. One published study suggests that social rights litigation can measurably improve the quality of the lives of vulnerable and marginalized members of society and may contribute to social transformation in particularized settings (Pieterse 2006a). There is also a small body of literature on individual lawsuits that may have public consequences in the course of seeking private relief.[13]

The most ambitious attempt yet to analyze the impact of health rights litigation is *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, edited by Varun Gauri and Daniel Brinks (2008). This is a comparative study of litigation on health and education in five countries: Brazil, India, Indonesia, Nigeria, and South Africa. The study moves beyond legal analysis and normative discussion (whether social rights are justiciable and whether they should be) to focus on the impacts of litigation. As we do in the present volume, Gauri and Brinks analyze the dynamics of litigation, identifying the legal opportunity structures and factors that enable social rights litigation; they track the impact of court decisions to see if and how social and economic resources are redistributed as a result of litigation; and finally, they offer an opinion on the relative ethics of using courts to address questions of social and economic injustice.[14]

Gauri and Brinks rely on an impressive database of cases and a metric of their own design to estimate the number of persons who directly and indirectly benefit from judicial decisions, both within each country and comparatively. To identify a comparable measure of the impact of litigation, they (i) calculate the number of cases in each country where the courts have enforced these rights (controlled for population size) and (ii) estimate the degree to which the decisions have been implemented. They add a standard multiplier for cases that aim to change policy—such as test cases with precedent-setting effect, which are typical of common-law countries—as it makes little sense to compare these cases directly with typical civil-law system cases, which focus narrowly on individual remedies.[15] *Courting Social Justice* thus draws attention to the importance of systemic enforcement of social rights. Enforcement resulting

in policy change—if implemented—can easily outweigh the impact of thousands of individual cases where courts enforce individual rights but refrain from generalizing the remedy. To take one example, in its famous judgment on vehicle pollution in Delhi, the Indian Supreme Court demanded a shift toward cleaner fuel in Delhi's public transport system, affecting millions of people and advancing their right to live in a healthy environment.

In contrast with the well-known position of Upendra Baxi (1988), who finds that social rights litigation offers little transformative benefit to the underclass and that Indian public interest litigation is driven by elites (lawyers detached from social movements) for their own aggrandizement, Gauri and Brinks (2008, 303) conclude that, on balance, the effects of social rights litigation are positive. Social goods, they argue, are redistributed to those who need them; the poor are at least as likely to benefit as the better-off; the privileged are neither monopolizing the issues nor capturing the revenues of the state; and the courts are not undermining democracy or separation of powers. However, their analysis shows that while those who use the courts and benefit from their judgments are, in general, not the elites (who need not rely on public services), they are also not the most vulnerable and excluded (who, by definition, do not access public services); rather, the beneficiaries are the relatively enfranchised middle and lower-middle classes. We question their conclusion that litigation has a favorable social justice effect when lower-middle classes have improved access to health services, particularly in light of the inequality and massive poverty within these societies. Still, Gauri and Brinks's findings in *Courting Social Justice* are interesting. Their quantitative analysis corrects for the normative overreach of some courts' rhetoric, showing instead more modest direct and indirect effects of court decisions (325). They find that court decisions have not (yet) had demonstrable macroeconomic consequences (344), but worry that there will be a backlash as costs mount (319–20).

The analytical approach and empirical descriptions in *Courting Social Justice* have provided important input for the present study. We seek to build on Gauri and Brinks's work and take their analysis of litigation dynamics and impacts even further. While *Courting Social Justice* looks at litigants' opportunity structures, it does not consider how litigation responds to problems and opportunities in the health system. Nor does it systematically consider the political dynamics of litigation. To address these concerns, *Litigating Health Rights* develops a new taxonomy regarding the analysis of the adjudication

process, distinguishing, among other things, between how courts deal with the legal basis for the claims and what factual arguments are presented. And while *Courting Social Justice* tells us something about *how many* people are influenced by court decisions, and tries to analyze *who* the litigants and beneficiaries are, it does not tell us *how* (or how much) they are affected or how litigation affects the overall right to health (or education) in society. In this volume, we address these aspects of impact and add to their analysis by exploring not just how many people, and whom, (certain forms of) health litigation affects—but how. In our analysis of the litigation process, we also examine how differences in health systems and policies influence litigation patterns and the social effects of litigation. Furthermore, *Litigating Health Rights* includes more recent developments and analyzes other countries that have witnessed important health rights litigation (Argentina, Colombia, and Costa Rica). These examples, we believe, reveal dynamics different from those analyzed in *Courting Social Justice.*

Beyond the literature on social rights litigation, scholarship on legal opportunity structures deeply informs our discussion in this volume. Cases are litigated because they can be litigated and because other avenues are closed or comparatively more difficult or costly—or more effective when combined with litigation.[16] In his influential study of the "rights revolution" in the United States (1961–75), Charles Epp argues that the revolution's success was contingent on the advocacy of well-organized rights actors (1998). Other scholars have pointed to a range of factors that coalesce to make social rights litigation possible: adequately funded rights advocates (or cause lawyers) (Sarat and Scheingold 1998; Scheingold and Sarat 2004), constitution-centered litigation, judicial willingness, liberal standing rules, and/or waivers of the legal representation requirement (Byrne 2007; Centre on Housing Rights and Evictions 2003; Hogerzeil et al. 2006). Yet others have pointed to the importance of rights consciousness for transforming the felt needs of individuals or groups into rights violations that can form the basis of a legal claim.[17]

Litigating Health Rights addresses a set of questions concerning courts' effectiveness and legitimacy in making social policy. These questions have both normative and empirical dimensions. Normative questions concern, most centrally, the role of courts in a democratic society and courts' accountability to the tax-paying public, which is affected by decisions on social expenditures. There is a substantial normative literature in political theory

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