Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law

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Malawi’s democratic Constitution of 1994 shifted the law in a pro-poor direction. With the judiciary emerging as a surprisingly strong institution in an otherwise weak political system, one might expect a body of pro-poor jurisprudence to develop. This has not been the case, and this article investigates why. After considering patterns of poverty and the role of law in the dynamics of economic marginalization in Malawi, we examine factors assumed to influence the use of courts by the economically marginalized, the strength of their legal voice, and the response of the courts to poor people’s social rights claims. We find an interplay between factors impeding the demand for pro-poor justice as well as its supply: lack of litigation resources; high access barriers; the pull of alternative institutions; and the nature of Malawi’s legal culture.

1. Introduction

The adoption of a democratic Constitution in Malawi in 1994 infused the law with a transformative ambition¹ and, presumably, rendered the legal system better disposed toward the poor, at least in formal terms. This came about in light of the document’s establishment of human rights and equality as core constitutional values and because of the constitutional recognition of social rights.² The Malawian judiciary, which was marginalized during Hastings Banda’s thirty years of authoritarian rule, emerged as a surprisingly strong

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¹ On differences between constitutions that reflect the status quo and transformative constitutions, see Geoff Budlender, Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa, 122 SALTJ 715, 715–716 (2005); Karl Klare, Legal Culture and Transformative Constitution, 14 SAJHR146 (1998).

² Republic of Malawi (Constitution) Act, No. 20 of 1994, hereinafter MALAWI CONST. or the Constitution.
institution in an otherwise weak political system.\textsuperscript{3} With a pro-poor Constitution and a politically astute judiciary, conditions seemed propitious for the emergence of a transformative jurisprudence that could alter structured inequalities and power relations and improve the situation for the poor and marginalized.\textsuperscript{4} In the following pages, we assess to what extent the living law reflects this constitutional promise. We aim to understand what conditions affect the use or nonuse of the courts by economically marginalized people in Malawi, what determines the strength of their legal voice, and what shapes the courts’ responses. The focus is on litigation that aims to advance the socioeconomic rights of poor people—cases that are significant from a perspective of social transformation.

We start by examining the structure of economic marginalization in Malawi and the dynamics that contribute to the production and reproduction of poverty; we will consider the role of law in these processes. Key concepts of poverty, marginalization, and vulnerability are defined and situated in the Malawian context. And before assessing how Malawian jurisprudence has developed in areas most significant to poor people, we will look at how the formal legal framework addresses poverty and marginalization, focusing on social and economic rights.

There is little trace in the existing jurisprudence of the progressive promises contained in the letter of the law. To see why this is so, we use a theoretical framework analyzing the legal process into five stages: voice, or the legal mobilization, articulation, and lodging of claims; the responsiveness of the courts; the capability of the judges to give effect to the rights of the poor; and the implementation and systemic change resulting from the judgment and from the litigation process itself. For each phase a number of factors combine to determine the outcome. Given the scarcity of pro-poor jurisprudence in Malawi, we concentrate on the first two stages—on factors that affect poor people’s legal voice and on the courts’ response to claims voiced by or on behalf of economically marginalized people.

The Supreme Court of Appeal and the High Court are the courts of record in Malawi and the only courts with jurisdiction to interpret constitutional rights. The Supreme Court, headed by the chief justice, is the highest appellate court and ultimate judicial authority.\textsuperscript{5} The High Court, immediately below, has


\textsuperscript{5} The Malawi Supreme Court of Appeal (MSCA) was established by \textit{MALAWI CONST. §§ 104 & 105.}
unlimited original civil and criminal jurisdiction. It sits as a three-member panel in constitutional cases and hears appeals from subordinate courts—magistrates’ courts and the Industrial Relations Court. The Constitution also provides for the establishment of traditional local courts.

2. Poverty and marginalization in Malawi

In Malawi, the need for pro-poor social change is immense. This landlocked country in southern Africa is one of the world’s least developed. Its 94,080 square kilometers of land and 24,400 square kilometers of fresh water is home to approximately 12 million people, the majority of whom are poor, poor in the sense that their conditions prevent them from living a long, healthy, and creative life and preclude the enjoyment of a decent life worthy of self-respect and the respect of others. This understanding, drawing on Amartya Sen’s conception of poverty as capability deprivation, is the basis for the annual Human Development Report produced by the United Nations Development Program (UNDP), and it resonates with how Malawians understand poverty—“as a state of continuous deprivation or a lack of the basics of life.” The average household income in Malawi is around 50,000 Malawi Kwacha (US$400) per year, but this figure conceals large inequalities. The median per capita income of the richest 10 percent of the population is eight times greater than that of the poorest 10 percent. Fifty-two percent of the population is poor, with 22 percent being unable to meet the minimum standard for the daily recommended food requirement. International measures of poverty

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6 The High Court of Malawi (MHC) was established by MALAWI CONST. § 108.
7 Republic of Malawi Courts (Amendment) Act, No. 2 of 2004, § 9(2).
8 MALAWI CONST. § 108(2).
9 MALAWI CONST. § 110.
14 Integrated Household Survey, supra note 10, at 73.
15 Id. at 139.
and development confirm the picture. UNDP’s 2006 Human Poverty Index for Least Developed Countries ranks Malawi at 83 out of 102 developing countries, and the 2006 Human Development Index places it at 166 out of 177 countries.\(^{16}\)

While poverty in Malawi is “widespread, deep and severe,”\(^{17}\) some groups are disproportionately affected, due to the dynamics of marginalization and vulnerability. Marginalization is the deliberate location of a political, economic, or social group at the periphery of material advantage or power by those with political or legal resources, while vulnerability is the degree of resilience against shock, or “the likelihood that a shock will result in a decline in well-being.”\(^{18}\) Vulnerability may arise from an individual’s inherent natural characteristics, such as youth or disability, but it may also be the result of marginalization and stigmatization.\(^{19}\) To understand the role that the law and the judiciary can and do play for the poor, it is necessary to appreciate the location of particular social groups in relation to the center of political power and material resources; the comparative susceptibility of groups to shocks and risks; and the patterns of social and economic exclusion.

In Malawi, political and economic marginalization is pegged to gender and geographical location (urban/rural, region), class, and race. Historically, women, rural communities, peasant farmers, and workers have been susceptible to exploitation and have been shunted to the periphery of political and economic power by laws and policies that promoted the interests of men, urban elites, and colonial and postcolonial landowners and employers. Women, children, and rural peasants are particularly affected by poverty. The average yearly income for male-headed households is US$415 and that of female-headed households is US$250. Ninety percent of poor people live in the rural areas. Households in urban areas have an income almost three times higher than rural households and, while 25 percent of urban dwellers live in poverty.


\(^{17}\) Malawi Poverty Reduction, supra note 13, at 5.


\(^{19}\) Stigmatization occurs when an individual or social group is negatively evaluated and perceived to possess a characteristic constituting a basis for avoiding or excluding them from certain types of social interaction. Such exclusion produces and reproduces marginalization, which in turn increases vulnerability. Robert Kurzban & Mark Leary, Evolutionary Origins of Stigmatization: The Functions of Social Exclusion, 127 Psychol. Bull. 187 (2001).
56 percent in the rural population are considered impoverished. There are similar differences regarding literacy and formal education, which is significant, since illiteracy locates people at the periphery of economic and political activity, and education is used as a qualification for political office and participation in most economic and political decision-making processes. The literacy rate of women is 50 percent against 76 percent for men. In urban areas, 86 percent of the population is literate, compared with 61 percent of rural dwellers.

Regional patterns are interesting, given the significance of region as a political identity marker in Malawi. Poverty is most prevalent in the populous southern region (60 percent), followed by the sparsely populated and politically marginal northern region (54 percent). The central region, home to the capital, Lilongwe, has the lowest proportion of poor people (44 percent). Here, literacy does not follow income distribution: northerners are significantly more literate (80 percent) than people in the central (62 percent) and the southern (61 percent) regions.

The marginalization of women, rural peasants, and workers is both a result and a cause of their political weakness. While the involvement of these groups was critical during the campaigns for decolonialization and democratization, power was ceded to a ruling class of men whose interests coincided with those of the landowners, employers, and the emergent urban middle class. The latter’s interests displaced those of other groups, who were excluded subsequently from decisions on the distribution of resources and power. Political weakness reinforced marginalization, causing further political weakness. This malign dynamic—where marginalization is both a result and a cause of political weakness—is strong in Malawi, where the political system is the primary vehicle for social mobility. Donor dependency feeds the cycle by causing an outward orientation among the political elite, delinking it economically and politically from the poor majority. Since the transition to democratic rule in 1994, the social position of vulnerable groups has declined. Reforms have steered toward more privatization and less investment in social services, thus degrading the public mechanisms available to people who lack the means to arrange private protection against such risks and shocks as disease, food shortage, and unemployment. The quality of governance has deteriorated; corruption is rife; and the political institutions are generally unresponsive to the concerns of poor people. Symptomatic of this state of affairs, during the famine that struck Malawi in late 2005 and early 2006, infighting over positions and privilege

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20 Identity is an indicator of vulnerability in the legal political order and a basis for legal and political entitlement, which, in turn, determines marginalization and political weakness. See Harry Englund, *Introduction: Recognising Identities, Imagining Alternatives, in Rights and the Politics of Recognition in Africa* (Harry Englund & Francis Nyamjoh eds., Zed Books 2004).

21 Integrated Household Survey, supra note 10, at 19.
paralyzed Parliament and hampered the government’s ability to respond to the humanitarian challenge.22

3. The poor and the law

In Malawi, as elsewhere, law is an important element in the dynamics of economic marginalization that produce and reproduce poverty. The role of law may be positive or negative. Poor Malawians have less legal protection for their livelihoods. Being reliant on customary land, their land rights do not have the same protection that private landowners have against expropriation and land-grabbing. Private ownership rights are protected over traditional land use. Poor people are also more vulnerable to theft and other crimes. Theft of crops accounts for 17 percent of crimes in Malawi, and “the highest percentage of households to have been victimized by crop theft are very poor, that is [the 30.8 percent of the population] earning less than [5.00] a month . . . . Given the high percentages of Malawians who rely on their own produce for subsistence, theft of these crops can threaten the ability of victimized households to survive, particularly in times of food shortages.”23 Poor rural people have limited recourse to justice. Most have their property rights settled according to traditional norms, where women and children’s rights to land and property are weak, contributing to the widespread feminization of poverty.

Poor people often live their lives outside or in breach of the law—as squatters; illegal immigrants; or earning a livelihood in the informal labor market by illegal logging, poaching, or other criminalized activities. This increases their vulnerability to corruption and abuse, including that from state agencies selectively enforcing the law against them, such as when sex workers are arrested, squatters evicted,24 or, as in the recent campaign to clean up the country’s cities, street vendors are chased away, their goods looted and destroyed.25

In these law-related cycles of economic marginalization, the lack of legal protection contributes to poverty; poverty drives lawlessness, which again contributes to the (re)production of poverty. But law may also play a positive


role. The adoption of the 1994 Constitution represented the most radical reform of formal law in Malawi’s history, establishing a legal regime predicated on principles that claimed to transform society and promote the welfare of all sections of the population, particularly those hitherto marginalized. Among the central tenets of the Constitution are nondiscrimination and the recognition and protection of human rights for all; the promotion of open, accountable, and transparent government; and the requirement that all institutions and persons should uphold the rule of law.\(^\text{26}\) The Constitution also lays down the principles of national policy that should guide state priorities.\(^\text{27}\) Taken at face value, they constitute a policy commitment to reduce the country’s poverty, particularly in rural communities, with gender equality, literacy, law and order for all, and integrity and probity in public institutions as stated goals and priorities. The constitutional reform established parameters for the renovation of law and jurisprudence that would be, potentially, of great relevance to poor and marginalized Malawians. In the following, we examine the legal status of social rights, that is, the legal norms most directly aimed at reducing social injustices and marginalization.

### 3.1. The legal status of social rights

Social rights, or socioeconomic rights, “aim to ensure access by all human beings to the resources, opportunities, and services necessary for an adequate standard of living.”\(^\text{28}\) Unlike any previous constitution, the Bill of Rights in Malawi’s 1994 Constitution, entrenches the right to education, the right to development, rights to pursue a livelihood and to fair labor practices.\(^\text{29}\) The wording of the document seems favorable to litigation: section 25(1) states that “All persons are entitled to education,” without the usual internal limitations regarding resources or progressive realization. The guarantee of a right to development is rare in national constitutions.\(^\text{30}\) The provision reads:

\(^{26}\) **MALAWI CONST.** § 12.

\(^{27}\) **MALAWI CONST.** § 13.

\(^{28}\) Socio-Economic Rights in South Africa 16 (Sandra Liebenberg & Karisha Pillay eds., Community Law Centre, Univ. of Western Cape 2000).

\(^{29}\) §§25, 30 & 44, respectively. Prisoners have the right “to be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State.” § 42(1)(b).

(1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right. (2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure. (3) The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities. (4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.\textsuperscript{31}

Unlike the African Charter, which defines the right to development as a peoples’ right, the Malawian text, in referring to the right of “all persons and peoples” to development, is open to individual as well as collective claims.\textsuperscript{32} It is included as a justiciable right in the Constitution; hence, in theory, it provides a basis for marginalized groups to challenge policies and claim equal access to resources and services.\textsuperscript{33}

As in many African constitutions, a wide range of social rights is recognized in Malawi’s Constitution as a series of principles of national policy\textsuperscript{34} concerning such issues as gender equality, nutrition, health, environmental rights, education, rights of the disabled, children, the elderly, and the family. The principles are directive in nature and not directly justiciable, but “courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution.”\textsuperscript{35} An activist judiciary could thus give the directive principles significant jurisprudential force.

The right to education is recognized both in the Bill of Rights and as a directive principle. This dual commitment is positive in one sense, but it also renders

\textsuperscript{31}\textit{MALAWI Const.} § 30.

\textsuperscript{32} African Charter, art. 22, \textit{supra} note 30; cf. \textit{MALAWI Const.} § 30, cited in full above.

\textsuperscript{33} See Chirwa, \textit{supra} note 11, at 207.


\textsuperscript{35} \textit{MALAWI Const.} § 14.
unclear the parameters for its justiciability and detracts from the apparent breadth of the formulation in the Bill of Rights. Other key socioeconomic rights, such as the rights to food, water, adequate housing, social security, and a sufficient standard of living, are not expressly recognized but may, to some extent, be taken as implicit to varying degrees in the right to life, the right to development, and the directive principle on nutrition. 36

Malawi has also entered into international agreements giving rise to social rights obligations, such as the African Charter on Human and People’s Rights, 37 the International Covenant on Economic, Social and Cultural Rights, 38 the Convention for the Elimination of All Forms of Discrimination against Women, 39 and the Southern African Development Community (SADC) Charter of Fundamental Social Rights and Protocol on Health. According to section 211(1) of the Constitution, Malawi is obliged by an international agreement when it is ratified by Parliament. 40 This does not, however, automatically make it part of national law.

The two-step system of implementing international law subscribed to by Malawi implies that international law only becomes applicable once it is incorporated into the laws of the country through an Act of Parliament. 41 The most relevant treaties have yet to be domesticated through legislation and cannot be relied on directly to enforce the social rights they provide for. This is somewhat mitigated by the principle of interpretation that obliges courts to interpret laws in such a way as to avoid creating breaches with international law or international agreements. 42 Also, the 1992 case of Chihana v.

36 For a discussion, see Chirwa, supra note 11.
40 MALAWI CONST. § 211 provides that: “(1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement. (2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses. (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.”
41 On the relationship between international law and Malawi’s domestic law, see Thomas Trier Hansen, Implementation of International Human Rights Standards through the National Courts in Malawi, 46 J. Afr. L. 31 (2002).
42 MALAWI CONST. § 11(2), stating: “In interpreting the provisions of this Constitution a court of law shall. . . (c) where applicable, have regard to current norms of public international law and comparable foreign case law.”
Republic established that the Universal Declaration of Human Rights is part of Malawian law.43

Other significant aspects of the Constitution, from the perspective of marginalized people, are the prevention of discrimination, protection from the abuse of power and corruption, and protection for personal security and property rights.44 The Constitution provides a basis for challenging systematic socioeconomic exclusion. Several provisions address discriminatory practices; the equality clause (section 20) prohibits discrimination on grounds of race, color, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, or other status, while allowing for legislation addressing inequalities in society (affirmative action).

Problems of gender-based injustice are addressed at many levels, which is important given the strong gender dimension to poverty. Cultural practices placing girls and women at a disadvantage in relation to property and inheritance are widespread in Malawi, as is domestic violence. It is thus important that the Constitution—while protecting marriage and the family as a union—states that “each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.”45 This applies to “all marriages at law, custom and marriages by repute or by permanent cohabitation,” which is crucial. Women are often unable to negotiate a formalization of their relationships, and cultural norms regularly deny women rights to property and custody of children when informal marriages break up or the partner dies, placing them in a precarious situation.

Malawian law is here—on paper—more progressive than most countries in the region, where marriages must be formalized either through registration or traditional practices, such as payment of lobola (bride price), to fall under the law. Section 24 confirms the right of women to be free from discrimination, and to full and equal legal protection, including equal capacity to enter into contracts; acquire and maintain property; to have custody, guardianship, and care of children; and to hold citizenship and claim nationality. On the dissolution of marriage, women have the right to a fair disposition of property held jointly with a husband and to fair maintenance. Laws discriminating against women shall be invalid and legislation shall be enacted to eliminate discriminatory customs and practices, including deprivation of property obtained by inheritance. To eliminate gender-based discrimination is also a directive principle of national policy. On its face, the Constitution provides a solid foundation for legal challenges to improve women’s social rights.

43 Criminal Appeal No. 9 of 1992 (MSCA).
45 MALAWI CONST. § 22.
The failure to secure the property rights of poor people contributes to their marginalization. Land rights are of particular importance in rural Malawi, where 90 percent of the poor live, and land shortage is a major cause of poverty. The Constitution secures the right to property, but private land ownership is rare, and poor people depend on access to customary land for their livelihood. Customary property and land use is legally less secure than private title, and large tracts of customary land have been converted into public and private land, contributing to land shortages among the rural poor. Proponents of individualizing land titles argue that this would provide security and collateral enabling development, while critics hold that this is likely to reinforce highly unequal ownership structures and that, for the poorest, improved rights to customary land may be more favorable.

The constitutional provisions that prima facie protect poor people and that could be used to alter structured inequalities in the labor market are the rights to engage in economic activity; to nondiscriminatory, fair, and, safe labor practices, to fair remuneration, and to form and join trade unions; the protection against slavery, servitude, and forced labor; and the rights of children to be protected from economic exploitation, work, or punishment that is hazardous or harmful to their health or development. To enable poor and marginalized people to claim their rights, the Constitution provides rights of access to justice and legal remedies, to administrative justice, and to use one’s language of choice. Where does this leave us with regard to the legal basis for challenging economic marginalization in Malawi? No doubt, the legal changes in the mid-1990s made the country’s legal system more sensitive to the rights and needs of poor and marginalized people. While there are lacunae and ambiguities that

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46 Anderson, supra note 44.
48 MALAWI CONST. § 28.
49 Between 1967 and 1994 more than one million hectares of customary land was lost to private and public land. Supra note 47.
51 MALAWI CONST. § 29.
52 MALAWI CONST. § 31.
53 MALAWI CONST. § 27.
54 MALAWI CONST. § 23.
55 MALAWI CONST. §§ 41, 43 & 26, respectively.
could hamper litigation, the textual foundations for a transformative, pro-poor jurisprudence are in place. But to what extent is the potential realized?

3.2. The poor, the courts, and the living law
In Malawi, there is a striking paucity of social rights jurisprudence compared with civil and political rights cases. Among the decisions reported in the first sixteen volumes of the Malawi Law Report Series, covering the period 1923 up to 1993, none relates to social rights, save for a few employment cases. In contrast, there are numerous cases on civil and political rights. The picture is similar since the entry into force of the 1994 Constitution, despite the various forms of social rights protection enshrined in that text. Civil and political rights cases still dominate and, to the extent that litigation involves social rights, it deals with employment and education rights of non-poor litigants, rather than health, housing, water, or other social rights critical to transforming the lives of marginalized groups.

Where the courts could have developed a pro-poor jurisprudence they have generally failed to do so, as in Mchima Tea and Tung Estates Co. Ltd v. Concerned Persons. 56 The plaintiff company operated a tea plantation in southern Malawi on land acquired by its predecessors during the colonial period. The current freehold title had been acquired under the previous, racially discriminatory system of land laws. Land shortages in the early 1990s led people from surrounding villages to enter and occupy parts of the plantation. The plaintiffs, as successors in title to the original freeholder, successfully sued for the squatters’ eviction. The defendants argued that they had title to the land based on their precolonial ancestral title. In upholding the tea estates’ claim, the High Court failed even to consider whether customary land law could limit their ownership rights. A point of departure could have been the concept of aboriginal land title developed in the Australian cases of Mabo v. Queensland [No.2] 57 and Wik v. Queensland, 58 where the court found that colonial land titles did not extinguish the traditional customary titles. “It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.” 59 The court could have related the Australian concept of aboriginal land title to the nemo dat quod non habet rule in Malawi’s law of contract (that one cannot transfer a title one does not legally have), followed by a critical evaluation of capacity of the chiefs, from whom colonial settlers acquired the land, to transfer such titles. Lacking

56 Civil Cause 1665 of 1994 (HCM).
59 Brennan J. in Mabo, supra note 58. On application of this principle to establish the rights of a dispossessed ethnic group in Botswana, see Clement Ng’ong’ola, Land Rights for Marginalized Ethnic Groups in Botswana, with Special Reference to the Basarwa, 41 J. AFR. L. 1 (1997).
such a jurisprudential inquiry, the High Court relied on idealized conceptions of the parties as owners per se and trespassers per se, abstracted from the reality that their present property relations reflect the domination of one legal system over another. The High Court may have sought to avoid legitimizing land-grabbing, which could have destabilized the land market and discouraged investors. But a judicial position protecting private rights, regardless of the history of their acquisition, reinforces unfair economic inequalities, favors those with the resources to acquire property at market prices, and hinders pro-poor social transformation.\(^60\)

There is precedent for ownership rights to customary land in a 1997 judgment, *Administrator, Estate of Dr. Banda v. Attorney General*, which finds that the right to property protects ownership of the beneficial interest in customary land.\(^61\) “[This elevates] customary land to the same standard of protection as registered land. It can therefore not be expropriated by the government unless it is needed for public utility, adequate notice and compensation has been given, and there is a guarantee of appeal.”\(^62\) This establishes a precedent that could protect poor people’s customary land rights, although the ruling itself benefited one of the richest and most powerful families in the country, that of the former life president.

Despite a sound constitutional basis for advancing gender equity, Malawian courts have failed to realize this potential in their jurisprudence. This militates against the delivery of pro-poor justice and entrenches the feminization of poverty. In relation to marriage, courts reinforce gender inequality by taking a conservative view of what constitutes a marriage. Although section 22 of the Constitution recognizes marriage “by repute” and “permanent cohabitation,”\(^63\) the courts generally adopt the traditional position that no marital rights can be derived unless the partnership is formalized as marriage under the marriage


\(^61\) Civil Cause No. 1839(a) of 1997 (MHC).

\(^62\) Chirwa, supra note 11, at 222.

\(^63\) It is difficult to determine the genesis of the provision since the record of the proceedings of the National Consultative Council, the multiparty grouping that produced the first draft of the Constitution in 1994, has never been made public. In addition, the national constitutional conference held in February 1995, which brought together a cross section of Malawian society to debate the Constitution, endorsed the provision without any substantive comment. Nevertheless, the origins of the provision can probably be traced to case law going back to the 1960s, in which courts laid down the principle that a long-term relationship between a man and a woman can create rights and duties akin to those of married people notwithstanding that the relationship has not been formalized. See, for example, the 1964 cases of *Nelson v. Magombo* 1964–1966 ALR (Malawi Series) 134 and *Ali v. Mhango*, Civil Appeal No. 15 (T.C.) of 1970, discussed in 16 J. Afr. L. 176 (1972). Four percent of women and one percent of men over the age of fifteen live in such common-law marriages according to the National Statistical Office, *2004 Malawi Demographic and Health Survey* (2005) 26, available at http://www.measuredhs.com/pubs/pdf/FR175/03Chapter03.pdf.
act, or particular customary law procedures, which typically require agreement between representatives of the two parties and, sometimes, payment of lobola. Prevailing gender inequalities cause the woman to lose out, particularly with regard to property, if her relationship with a man is declared by the courts not to be a marriage. Judges have also restricted the rights of women to sexual autonomy, thus reinforcing gender inequality.64

Although some members of the judiciary have indicated to the Law Commission a willingness to uphold marriages by repute or permanent cohabitation as a means of protecting the rights of women in long-term relationships,65 the majority are likely to be dissuaded from doing this in practice for at least two reasons. The first is the need for the judiciary to maintain its legitimacy by aligning itself with prevailing social norms. To recognize such marriages would contradict the dominant social view, which is that the cohabitation of a man and a woman without the formality of marriage is not only inimical to Malawian tradition and culture—which regard marriage as a formal union of the families of the spouses and not merely a relationship between the two individuals—but is also fundamentally immoral.66 The second consideration is the current absence of legal rules and precedents that clearly define the constitutive elements of marriages by repute or permanent cohabitation. The Law Commission has implicitly acknowledged the latter problem by recommending that Parliament enact legislation that sets down, among other points, “clear guidelines on the requisite extent of repute or length of cohabitation necessary to constitute [marriages by repute or permanent cohabitation].”67

We find no social rights cases targeting structured inequalities or addressing the power relations that marginalize certain groups; nor do we find landmark judgments concerning the definition, interpretation, or application of social rights. A rare social rights–related lawsuit, decided in favor of relatively poor litigants, is a case against the Malawi Housing Corporation. Tenants,

64 In Rashid Hussein James v. Republic, High Court Criminal Case No. 12 of 1999 (unreported), the High Court held that a woman’s refusal to engage in sex should not always be taken at face value, while Supreme Court Justice Tambala, speaking at a Women and Law in Southern Africa (WILSA) conference, argued against criminalizing marital rape, stating that “there cannot be rape between spouses while their marriage subsists.” Africanews, June 2001, at http://web.peacelink.it/afrinews/63_issue/p7.html.


66 In its public consultations during the process of constitutional review in 2005, the Malawi Law Commission found such opposition, particularly among traditional leaders and youth. (Malawi Law Commission, supra note 65, at 17). This view was repeated in presentations made at a national conference on the Constitution held in April 2006. Summary of the Proceedings of the First National Conference on the Review of the Constitution 7 (2006), at http://www.lawcom.mw/docs/summproc.pdf.

assisted by the Consumers Association of Malawi, went to court over a doubling of the rent. On April 27, 1997, the High Court ruled the Housing Corporation in violation of section 7 of the Malawi Housing Act, defining it as a non-profit-making entity, and ordered it to limit the increase to 26 percent. While interesting from a pro-poor perspective, the case was not argued on the basis of social rights.

Why is it that this legal framework—clearly favorable to litigation that would advance the social rights of marginalized sections of society—has not, in twelve years, produced significant transformative jurisprudence? Is it because such litigation has not been forthcoming (what we may call a demand-side failure)? Or is it because the courts have not been willing to take the cases on or have not handled them in ways that give effect to the claims (supply-side failure)? To understand what impedes the development of pro-poor jurisprudence in Malawi, it would be useful to consider the litigation process and analyze what it takes for such a case to succeed—for the claim to be articulated and voiced, as a case before the courts, and for the case to be accepted into the legal system and result in a pro-poor judgment.

3.3. Litigation dynamics: Poor people’s legal voice and court responsiveness

Several hurdles must be overcome for litigation to advance poor and marginalized people’s social rights. Litigants must be able to identify and articulate their rights claim and mobilize the necessary resources to voice it as a legal claim before a court, or someone must do it on their behalf; judicial bodies, in turn, must be responsive and accept the claim as belonging within their domain; and the judge(s) must be capable of addressing the claim and finding effective remedies. Further, to have a social impact, a judgment must be accepted, implemented, complied with, and translated into systemic change through social policy and political practice. Figure 1 shows the various stages of the litigation process. The downward sloping arrow indicates that, even without a judgment affirming the claims (because the case was lost or never accepted by the courts), the process of legal mobilization and litigation may influence political processes and yield results on the ground. Given the absence of social rights jurisprudence in Malawi, we concentrate on the two first phases, identifying the factors that, first, obstruct the legal voice of the poor and economically marginalized and that, second, make the courts unresponsive to their social rights claims.


4. What shapes the legal voice of the poor?

People’s ability to voice rights claims is related to their opportunity situation—that is, to their resources and the formal, or systemic, and informal barriers that define them as litigants in the legal process. These are outlined in figure 2, below. Whose claims are voiced, and how effectively, depends on the resources of the individuals and the groups concerned when articulating and mobilizing their case, as well as on the interaction between marginalized groups and public interest litigators. Professional assistance is of particular significance in social rights cases, which are often legally complex and energetically contested and where there is scarce local jurisprudence on which to draw.

Figure 1 The litigation process

Figure 2 Factors affecting litigants’ voice

For litigation to materialize from marginalized groups, they must understand that the situation they are experiencing is violative of their rights and be

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aware that legal remedies exist; they must be able to identify their grievance in a way that is sufficiently explicit as to provide a basis for litigation; and must be able to identify who bears the legal responsibility. And they must be capable of mobilizing legal resources in order to transform their grievances into legal claims that the system will accept. At each stage there are barriers of various kinds—practical, motivational, and formal.

4.1. Practical barriers
At the practical level, lack of knowledge prevents people from seeing their problems and grievances as rights violations and, therefore, actionable. Insufficient information about who is to blame, how they can be held responsible, and where claims can be addressed are common obstacles. Legal literacy and legal aid programs that can help people overcome these obstacles are scarce in Malawi. For poor rural people, legal expertise is generally out of reach.

That the official court language in Malawi is English is another barrier. Eighty percent of the evidence in magistrates’ courts is given in local languages and has to be translated into English for the official record, thereby slowing the process. As the judiciary itself has concluded, “public perceptions reveal that the judiciary is not fully responsive to the needs of the public in terms of the language used in judicial proceedings, the rules of procedures followed and accessibility and affordability of litigation.”

The cost of litigation is another discouraging factor. In Malawi, the direct costs, in terms of court fees, are low. Litigants in the High Court pay approximately US$.50 to lodge an application for judicial review or to file a basic writ of summons, and even less to institute proceedings in a magistrate’s court. Still, with an average per capita income of less than US$1 per day, these are substantial costs for the poorest. Further, incidental costs often run high: travel for litigants and witnesses; alternative costs of taking time off; and costs of accessing legal assistance pose substantial hurdles. There is limited access to courts in the rural areas and “the courts which are closest to the poor are poorly resourced, poorly managed and offer a limited range of services.”

For a schema of the stages in the voicing of claims, see Anderson, supra note 44, at 17; William Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming, 15 LAW & Soc’y Rev. 631 (1981).


Id.


Scharf, supra note 73, at 15.
Malawi has 195 magistrates' courts, located mainly in urban areas and community centers. The nearest court might be forty kilometers or an eight hours’ walk, and public transport, where available, is prohibitively expensive.

The main tool for vindicating social rights against the state is through judicial review. This raises practical and financial barriers, since the interpretation and application of the Constitution is the preserve of the High Court, sitting in the urban centers of Blantyre, Lilongwe, and Mzuzu—with the Supreme Court of Appeal only in Blantyre. Since 2004, matters expressly and substantively relating to, or concerning the interpretation or application of, constitutional provisions must be heard and disposed of by a constitutional panel consisting of not less than three judges (rather than the usual one). This further strains the system’s capacity and adds to the delays. Technically complex judicial review proceedings require professional legal skills, and for this to be a channel for poor and marginalized people to claim their social rights free legal assistance is crucial.

4.2. Formal barriers

The formal barriers of the legal system—the nature of the law and operation of the courts—cannot help but affect marginalized groups’ motivation and their ability to voice social rights claims. A clear legal basis for social rights is conducive to rights-asserting litigation; similarly supportive would be the possibility of class action suits and lenient criteria for *locus standi*, thereby allowing organizations and individuals to litigate on behalf of others. We concluded above that the Malawian Constitution provides a reasonably sound legal basis for social rights; it requires the state to introduce reforms aimed at eradicating social injustices and inequalities; confirms that all individuals and groups have “a right to development and, therefore, the enjoyment of economic, social, cultural and political development”*,81 and it obliges the state to take the steps necessary to realize these goals. The principles of national policy require the state to pursue and prioritize gender equality, adequate nutrition for all, healthcare, rural life, education, and literacy. This should create a conducive environment for social rights litigation.

However, the Malawian courts maintain strict criteria for legal standing. A litigant must have a direct interest in the case, and there are no provisions for

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78 *MALAWI CONST.* § 108(2).


80 Courts (Amendment) Act, *supra* note 7, § 9(2).

81 *MALAWI CONST.* § 30(1).

82 *MALAWI CONST.* § 31(2).

83 *MALAWI CONST.* § 13.
public interest litigation. We return to this in the discussion of the courts’ responsiveness to social rights claims. For now, it suffices to note that the restrictions on standing affect organizations’ motivation to engage in litigation. It also affects the type of cases that can be litigated in Malawi, preventing test cases that could have a potentially greater transformative potential than narrow individual claims.

Legal formalities are important when it comes to poor people’s ability and motivation to take their case to court. Where access is easy and the courts aid litigants in investigating their cases, as is the arrangement in Costa Rica and India, poor litigants depend less on legal expertise than in those venues where legal procedures are complex and litigants must provide all the evidence and present arguments in a prescribed format. Malawi belongs to the common law tradition and the legal system is litigation-driven and reactive, with litigants bearing full responsibility for researching and presenting their case. The courts provide no assistance, and the legal bureaucracy is complex. Even experienced litigators may have cases thrown out of court that are not appropriately lodged or find that evidence is ruled inadmissible for not being presented in the right manner. The formalism and litigation-dominated nature of the Malawian legal system, combined with the restrictions on public interest litigation, present substantial barriers to social rights litigation by or on behalf of the poor and economically marginalized.

4.3. Motivational barriers
Poor people often view the legal system with distrust and fear, and not without reason. The law reflects the power relations in society and often has an anti-poor bias, if not formally, then in its application. As noted, many poor people live their lives in various states of illegality, subjecting them to ongoing insecurity and vulnerability and contributing to their poverty. The law offers them little protection, and the justice system is encountered mainly in a punitive capacity, often in ways perceived as arbitrary and corrupt, particularly in developing countries whose legal systems often are weak and subject to elite

85 In NDA v. Electoral Commission, MBC and TVM, Constitutional Case No. 3 of 2004 (MHC), publicized media monitoring data from the Electoral Commission, submitted as evidence of bias in election coverage, was thrown out as hearsay for not being appropriately presented. The advocate was one of Malawi’s most experienced, who months later became the Attorney General.
87 For the poverty–lawlessness dynamic, see Anderson, supra note 44.
capture.\(^8\) When the law, and the legal system, lacks legitimacy, because it is perceived as a tool of domination or is at odds with socially entrenched customary law,\(^9\) this dampens any inclination to turn to the state for support. In Malawi, research indicates that the courts generally enjoy public confidence. In spite of corruption allegations against the lower judiciary, and contrary to the judiciary’s self-critical assessments, a 2004 study found that over 80 percent of respondents believed that the courts performed their functions satisfactorily.\(^90\) It is thus unlikely that lack of legitimacy is a major factor in explaining the absence of legal mobilization.

### 4.4. Alternative arenas

We have examined factors that discourage poor people from taking social rights cases to court (push effects), but possible pull effects from alternative arenas are also relevant. Any inclination to assert social rights through legal action may well depend on the availability of other channels for social change, such as electoral mobilization, advocacy and lobbying of political bodies, strikes, demonstrations, media campaigns, or alternative courtlike institutions such as ombudsman institutions, human rights commissions, or traditional courts and tribunals. If there are more arenas in which to accommodate social rights mobilization, this may explain why marginalized groups and their organizations rarely use the courts to pursue social justice.

In Malawi, there are indeed alternative channels open to mobilization for the advancement of marginalized groups’ health, education, food, water, and social interests, and these may be used by the poor to direct their individual grievances. These options explain, to some extent, why the courts are rarely used. However, the alternative channels are also impeded by a number of well-documented factors: elections are insufficiently inclusive of the groups critical to social transformation, such as women, the rural and urban poor, and other vulnerable groups;\(^91\) representative political bodies are weak; strikes and demonstrations are often subjected to heavy-handed countermeasures by the state, whose police force has used force routinely to disperse even peaceful actions.

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\(^8\) On elite capture, see Decker et al., supra note 86.


\(^90\) Pelser et al. supra note 23, at 72; HEIKO MEINHARDT & NANDINI PATEL, MALAWI’S PROCESS OF DEMOCRATIC TRANSITION 43 (Konrad Adenauer Stiftung 2003).

assemblies,\textsuperscript{92} and by employers, who often victimize workers who participate in strikes,\textsuperscript{93} and the public media are largely biased in favor of the state while private media has limited reach.\textsuperscript{94}

Courtlike institutions—the ombudsman’s office, the Human Rights Commission, and traditional courts—provide quicker and cheaper alternative channels for social rights complaints. The office of the ombudsman has been active in the promotion and enforcement of employment and education rights but has been a victim of its own popularity and currently has a heavy backlog of cases. Further, remedies are limited. The Constitution empowers the ombudsman to direct administrative action; to order the appropriate authorities to provide for redress of future grievances; and to refer matters for prosecution.\textsuperscript{95} The ombudsman does not, however, have the power to enforce the decisions, and the High Court has refused to do so, holding that it lacks authorization.\textsuperscript{96}

The Human Rights Commission’s primary mandate is to investigate rights violations and make recommendations aimed at protecting human rights.\textsuperscript{97} It is required to submit annual reports to Parliament. In 2004 the commission reported five complaints related to violations of health and social services; sixteen pertaining to the right to education; twenty-two related to the right to development; fifty regarding children’s rights; and ninety-two complaints connected to labor rights.\textsuperscript{98} This is a substantial number, but more research is required to properly assess the complaints and the effects on litigation of this alternative arena for social rights complaints.


\textsuperscript{93} \textit{128 Trade Union Members v. NSCM Milling Division}, No. 8 of 1999 (IRC), concerns union leaders who were dismissed after organizing a strike. \textit{Mhango v. Attorney General}, Civil Case No. 980 of 1998 (MHC), concerns a union leader who mediated in a trade dispute and was attacked by police.


\textsuperscript{95} \textit{MALAWI CONST.} \textsuperscript{\textsection} 126.

\textsuperscript{96} The ombudsman found that a plaintiff had been unlawfully terminated. Two years later, the employer had not complied with the orders. The plaintiff applied to the High Court to have it enforce the ombudsman’s determination, but the court held that “once a person has opted to bring the matter to the office of the Ombudsman, the case can only come to the High Court for purposes of judicial review [and not direct enforcement].” \textit{Munthali v. Malawi Institute of Education}, Civil Case No. 84 of 2003 (MHC).

\textsuperscript{97} \textit{MALAWI CONST.} \textsuperscript{\textsection} 129; Human Rights Commission Act, No. 27 of 1998.

The traditional courts currently operating at the local level in Malawi are not part of the formal justice system. They are not allowed to adjudicate, only mediate, and are what poor people in rural areas mainly resort to for their justice needs. Their interpretation of customary law—for example, concerning land and inheritance—is of great social relevance, not least for the condition of women. But given their informal, oral, and decentralized nature, it is difficult to assess the effects of traditional courts and how their practices relate to constitutional norms on nondiscrimination and social rights. A proposed reform of the justice system includes enabling legislation to establish traditional/local courts, as provided for in section 110(3) of the Constitution. These will operate at the community level, exercise jurisdiction in matters of customary law, and decide minor criminal cases, thus filling the gap left by the unavailability of magistrates’ courts, particularly in the rural areas. It is proposed that these courts will have simplified procedures, use local languages, and address the procedural and linguistic barriers that currently limit the access of poor people to the courts.99

4.5. Litigation resources
Barriers in the formal judiciary and the availability of alternative channels for social rights claims go a long way toward explaining the absence of social rights cases in Malawi’s courts. But the alternative channels have their own limitations, and marginalized groups have lodged court cases in other contexts where the disincentives and obstacles are greater than in Malawi.100 To understand poor litigants’ legal voice, or lack thereof, it is also necessary to take into account such resources as are available and that could enable them to overcome litigation barriers and turn grievances and claims into a mainstream legal process.

From elsewhere we know that a key factor is associative capacity, that is, the ability to join forces; link up with legal expertise; form associations with the ability to mobilize around social rights issues; generate resources; and sustain collective action.101 Personal agency—the realm of personalities and leadership—is central to understanding why some marginal groups are able to articulate their concerns well enough to pave the way for a judicial process or inquiry and to sustain such. But, particularly in litigant-driven and formalistic legal systems like Malawi’s, it is crucial that there are professionals to assist in


litigation efforts or to initiate litigation on their own, either as an ad hoc effort to assist in a concrete situation or as part of a long-term strategy to build jurisprudence. Externally initiated cases bypass many of the barriers poor and marginalized people face and can be articulated with minimal input from those directly affected. But professional legal service organizations are an increasingly internationalized set of actors. Inspiration, legal strategies, and resources flow across borders, and many organizations and networks have long-term commitments to a specific cause or to the development of jurisprudence in a particular field. Where they are in the driver’s seat, their ambitions may not necessarily converge fully with the interests of their clients. Cooperation between legal professionals and the people whose social rights are most at risk—the very poor, socially outcast, people in deep rural areas without a permanent home or functioning social structure—often proves difficult. However, where there is a successful collaboration it adds strength and concreteness to the claims, and a social momentum to the process though mobilization on the ground.

In Malawi, social rights advocacy groups and nongovernmental organizations (NGOs) that focus on development and social justice, such as the Malawi Economic Justice Network, the Civil Society Coalition for Quality Basic Education, and the Malawi Health Network, have not been oriented towards litigation. Unlike civil or political rights advocacy groups, they rarely have legal professionals on their decision-making boards or among their staff; their focus has been on social mobilization. Moreover, access to legal aid is scarce for social rights cases. The public legal aid scheme barely manages to assist those who risk a death sentence for murder. The Human Rights Commission

103 Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies (Centre on Housing Rights and Evictions 2003); Haywood, supra note 101; CAUSE LAWYERING, supra note 102.
104 Typically, Malawi Health Equity Network’s campaign to improve the quality of health care focused on health rights though essay competitions; public lectures; media campaigns; training; research—but not litigation. Adamson Muulan Will Health Rights Solve Malawi’s Health Problems, 46 CROAT MED. J. 46, 853, 853 (2005).
occasionally provides legal assistance, and nongovernmental organizations, such as the Civil Liberties Committee, the Center for Advice and Research and Education in Rights, the Women Lawyers Association, and the Malawi Law Society, provide some pro bono legal services, including representation in litigation, but these have mainly focused on criminal justice and civil and political rights. The proliferation of political cases in the courts, ranging from parties’ internal conflicts to election petitions and impeachment issues, may also crowd out social rights cases. Quite apart from draining the courts’ capacity, high-profile political cases draw heavily on the scarce resources in Malawian legal community, which might otherwise have been engaged in pro-poor litigation. Geographic distance between the poor and their potential partners in litigation strategies is also a major constraint. Civil society organizations are predominantly urban-based, while most poor people live in rural areas, far from the groups with the relevant resources.

Potential partners are also limited by the underdeveloped nature of civil society in Malawi, which, besides the churches, consists chiefly of donor-funded nongovernmental organizations. That these are aversive, generally, to radical social transformation is hardly surprising given their reliance on funding from Western governments and agencies that generally do not support fundamental restructuring of current free market–based economic relations. The portion of civil society that is not part of the urban-based, donor-funded community of NGOs has limited channels and resources. The constraints that adversely affect the capacity of rural civil society organizations can, in part, be explained historically, because rural society was the economic realm most directly emasculated by colonial and postcolonial land and agrarian policies.

We see various factors combining to mute the legal voice of poor people in Malawi, preventing them from pursuing social transformation though the courts. Litigation requires resources that marginalized people in one of the world’s poorest countries pretty much lack. Civil society has only a limited capacity to assist them, and institutions with a pro-poor agenda do not prioritize litigation in their pursuit of social rights. The fact that social mobilization is directed toward seemingly less effective institutions must be understood in

106 In HRC v. Attorney General, 200 Miscellaneous Cause 1119 (MHC), the Human Rights Commission represented civil servants complaining of being discriminated against in a governmental housing scheme.

107 Gloppen & Kanyongolo, supra note 3.


light of Malawian courts’ lack of responsiveness and particularly the barriers against public interest litigation.

5. What makes courts responsive to the voice of the poor?

Legal systems vary in their willingness to accept public interest litigation and social rights cases as matters belonging within their jurisdiction. Differences are due both to formal criteria of standing and admissibility, to the formal status of the relevant rights, and to the judges’ understanding and application of the law. Figure 3 indicates how various influences affect the courts’ response to social rights claims by poor litigants.

![Figure 3 Factors conditioning courts’ responsiveness to social rights](https://academic.oup.com/icon/article-abstract/5/2/258/850104)

The response of courts to social rights claims is, partly, a function of how the claim is voiced, the merits of the case, the skill with which it is articulated, and the legal strategies employed. Again, access to quality legal services is central, and all the more so the less open a system is to social right claims. The legal system’s responsiveness, in turn, depends on two sets of factors: the formal characteristics of the legal system and the nature of the judiciary. When discussing the judiciary in Malawi, it is important to remember that this is just a handful of people—the higher judiciary (the High Court and the Supreme Court of Appeal) comprises only twenty-four judges in all—and, as an institution, it has but a short history. Colonial rule, when expatriate judges staffed the judiciary, is just four decades past. In this context, personalities matter more than in large, institutionalized judiciaries. Still, it is meaningful to consider structural and cultural factors that shape judges’ mind-sets.
6. The law and the legal system

We have discussed how certain aspects of the law are relevant to whether or not prospective litigants decide to pursue litigation. In sum, the factors that affect the legal system’s responsiveness to the social rights claims of poor people include: the status of social rights, rules of standing, legal procedure and evidence, and the legal basis for litigating collective claims and in the public interest. Provisions regulating the courts’ competence and jurisdiction also influence whether judges accept cases regarding the social rights of the poor as within their domain.

The Malawian judiciary has unusually broad constitutional latitude. It has the exclusive constitutional power to determine the scope of matters that are justiciable.110 In interpreting and applying the law, judges are directed to take into account principles of national policy that are aimed at promoting gender equality, adequate nutrition and health care, the quality of rural life, the disabled, and the elderly, a sensible balance between creation and distribution of wealth, and good governance.111 The judiciary is free to decide that a matter affecting marginalized or vulnerable groups is justiciable, and it is effectively empowered to be the ultimate arbiter in political disputes. Through judicial review it can demand responsiveness to the poor from the executive, which is responsible for initiating and executing policy. Jurisdiction is thus no obstacle to the courts’ responsiveness to poor people’s social rights claims.

Section 15 of the Malawi Constitution is the primary provision governing locus standi in relation to the enforcement of human rights. It entitles “any person or group of persons with sufficient interest” in the protection and enforcement of rights under the Constitution to seek assistance of the courts to ensure the promotion, protection, and redress of grievance with respect to those rights. Section 46(2) provides that any person claiming that a fundamental right or freedom has been infringed or threatened is entitled to apply to a competent court for its enforcement or protection. Malawian courts have interpreted these provisions both in a restrictive manner and inclusively. The most liberal interpretation was in the 2003 case of Registered Trustees of PAC v. Attorney General and Others,112 in which the High Court ruled that “sufficient interest” in section 15 should not be interpreted restrictively, particularly not in relation to the judicial review of decisions that affect human rights, allowing the PAC to litigate and also allowing the Human Rights Commission to bring its perspective to the attention of the court as amicus curiae.113 A liberal interpretation of

110 MALAWI CONST. § 103(2) reads: “The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence.”

111 MALAWI CONST. § 13.

112 PAC v. Attorney General, Civil Cause No. 1861 of 2003 (MHC). The case concerned review of a parliamentary decision to pass a constitutional amendment violating human rights.

113 An amicus, or “friend of the court,” is not party to the case but is allowed to bring relevant perspectives to the court’s attention.
sufficient interest enables third parties, such as NGOs, to apply for judicial review on behalf of victims of human rights violations, the majority of whom are likely to have limited access to the courts due to the barriers discussed earlier. A liberal approach to procedural technicalities is also found in Longwe v. Attorney General. The Court held that an application affecting a matter of great national importance, concerning individual freedoms and rights to political participation, should be decided on the basis of substance and not on a technicality.

In contrast, the Supreme Court of Appeal has taken a restrictive view on standing requirements. It has indicated disagreement with the 2003 PAC judgment discussed above, and in CILIC v. Attorney General it held that the nongovernmental organization’s interest in the matter was too remote since the only connection it could claim to the case was that it was a registered body established to promote, protect, and enforce human rights, democracy, and the rule of law. The Supreme Court adopted a similarly restrictive approach when holding that, although section 46(2) provides that “any person” can seek judicial review for an infringement of “a” (not “his or her”) human right, “this cannot mean that any person can complain about an infringement affecting another person, otherwise it would conflict with the [‘sufficient interest’] provisions of section 15(2) of the Constitution.” It also found that a person must have “a legal right or substantial interest in the matter in which he seeks a declaration... ‘sufficient interest’ is one which is over and above the general interest.” There is no provision regarding public interest litigation, and in a 1998 judgment, R v. Registrar General, ex p. CILIC, the High Court held that Malawian law does not provide for public interest litigation. All judicial action is subject to the (restrictive) rules of standing based on the requirement of sufficient interest. Interestingly, the High Court had indirectly accepted public interest litigation in some circumstances. In Kamuzu Banda and the Foundation for the Integrity of Creation, Justice and Peace, the court said that if the former president had been “voiceless, defenseless and weak” the foundation could, in the public interest, have undertaken the case on his behalf. However, the court did not agree that Banda was voiceless and defenseless and found that to permit public interest litigation under the circumstances would encourage the creation of “a class of person popularly referred to as ‘a private Attorney General.’” This restrictive position on legal standing makes the courts unresponsive toward public interest litigation and class actions, thus discouraging the types of legal claims with the greatest potential for social transformation.

114 Kanyongolo, Courts, Elections, supra note 3.
115 Miscellaneous Civil Application No. 11 of 1993, 16 (MLR) 1, 256, 261.
116 Civil Appeal No. 12 of 1999 (MSCA).
117 Attorney General v. MCP and Others, Civil Appeal No. 22 of 1996 (MSCA) 39.
118 President & Another v. Kachere & Others, Civil Appeal No. 20 of 1995 (MSCA) 10.
119 Civil Cause No. 55 of 1998 (MHC).
120 Miscellaneous Application No. 89 of 1994 (MHC).
Flexibility in the application of legal formalities would enhance the courts’ responsiveness toward poor people’s demands for enforcement of social rights, but it is not by itself sufficient. There must be a justiciable basis for the rights in the Constitution, legislation, or international conventions. While Malawian judges see that there are justiciable issues concerning evictions, employment, and education, socioeconomic rights are generally regarded as outside the judicial domain. This runs counter to our reading of the Constitution, which, despite some ambiguity, provides a textual basis for transformative social rights jurisprudence, particularly when the social rights provisions are read in combination with antidiscrimination provisions and the courts’ obligation to take account of social rights in their interpretation. Again, judges’ interpretations, not the legal texts, limit their responsiveness.

To look at this comparatively, consider the importance of interpretation for the responsiveness of courts to poor people’s social rights, as is vividly illustrated by Indian judges’ relaxation of standing rules and procedures and their inference of social rights from the right to life and dignity. In contrast, the South African Constitutional Court, with a favorable textual basis, has limited the possibility for direct access and has adopted a narrow interpretation of the justiciability of social rights, largely barring individual claims. Judges in other African and Latin American judiciaries with relatively sound constitutional bases for social rights have, as in Malawi, interpreted the law restrictively, maintaining narrow criteria for standing, dismissing public interest litigation, and declining jurisdiction on social rights.

6.1. The nature of the judiciary
How judges interpret the law determines its impact on marginalized and vulnerable groups, but what shapes judicial interpretation? Scholars differ on whether rational self-interest, norms or personal background is most decisive for how judges choose to interpret the law. The analytical framework outlined above points to three factors as particularly important for judicial interpretation and responsiveness in cases affecting poor people’s social rights: the

121 Interviews with eight judges of the High Court and the Supreme Court, in Blantyre and Lilongwe (Feb. and July 2004).
122 See COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, supra note 4.
123 Jackie Dugard, “The Court of Last Instance?': Analyzing Direct Access to South Africa’s Constitutional Court by the Poor, paper presented to the Universidad Diego Portales Workshop on “Courts and the Marginalized” (Dec. 1–2, 2005); Siri Gloppen, Social Rights Litigation as Transformation: South African Perspectives, in DEMOCRATISING DEVELOPMENT, supra note 101.
124 See COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, supra note 4.
125 The literature on judicial decision making focuses mainly on when judges challenge political authorities, rather than their responsiveness to marginalized groups. Most attention is on U.S. courts, but efforts are also made to investigate judicial behavior in developing and transitional countries. On Malawi, see Peter von Doepp, The Problem of Judicial Control in Africa’s Neopatrimonial Democracies: Malawi and Zambia, 120 POL. SCI. Q. 275 (2005).
legal culture, the sensitization of judges, and the composition of the bench. How legal norms are interpreted in a particular case is linked to the individual judge’s personal, ideological, and professional values, which combine with the legal culture to shape his or her perception of the judges’ own role, the understanding of what is the appropriate way to deal with social rights, the relationship between law and politics, and to what extent social rights are within the proper domain of the courts. How firmly judicial independence is embedded in the legal culture is also crucial. There are many reasons why “the haves come out ahead,”126 but a culture tolerating political pressure and other external influences on judicial decisions opens the system to elite capture, further disadvantaging the poor and politically marginal litigants.

Malawi’s legal culture is marked by its history as part of the British Empire and its legal tradition. The many judges and legal scholars receiving some portion of their education in Britain helps to keep the ties alive. (There are also some who are educated in the U.S., which may account for some of the divergence in constitutional interpretation discussed below.) Formalities are keenly adhered to, from the pomp and circumstance of wigs and gowns, to legal procedure. British and Commonwealth case law is frequently cited. The interpretative approach taken by Malawian judges, with some exceptions, follows the principle of parliamentary sovereignty and seeks to give effect to the intention of the legislature rather than constitutional norms. As expressed by the judge in HRC v. Attorney General: “if the language used by the law giver is ignored in favor of a general resort to ‘values’ the result is not interpretation but divination.”127 In Malawi, this approach diminishes the importance of the Constitution’s pro-poor, egalitarian norms.

The responsiveness of judges to social rights claims depends on how they understand the relationship between law and politics and the boundaries of their own role. The Constitution is ambiguous. Sections 13 and 14 require the judiciary to take into account the principles of national policy in its interpretation of the law, suggesting that judges should not delink law from politics. On the other hand, section 9 seems to require a stricter dichotomization, providing that “the judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent manner with regard only to legally relevant facts and the prescriptions of law” (emphasis added). Among Malawian judges, some emphasize the importance of separation of powers and are reluctant to take on cases perceived to fall within the political domain; others welcome opportunities for the judiciary to prove its social and political relevance.128 Sometimes political


127 Miscellaneous Cause No. 1119 of 2000 (MHC). See also Malawi Law Society v. Banda 12 MLR 29 (year); R v. Kunyambo 1 ALR (Malawi Series) 74 (year).

128 Interviews with judges of the High Court and Supreme Court of Appeal, supra note 121.
considerations form part of their legal reasoning, as in *MCP v. Attorney General*,\(^{129}\) where the Supreme Court dismissed Malawi Congress Party’s argument that while it boycotted the parliamentary proceedings Parliament lacked a quorum and could not pass legislation. The court held that to legitimize a paralysis of the legislative process would undermine democracy.\(^{130}\) The judge also took social realities into account in *Kapito v. David Whitehead and Sons*, dismissing as not credible the factory manager’s assurance that the conditions on a weaving factory floor were not injurious to health. Knowing “how difficult it is to find a job these days,” the judge reasoned that workers would not have stopped working without reason.\(^{131}\)

More often the sociopolitical content of litigation is disregarded, even when it is obvious, as in cases where the issue has been discrimination in employment and education against people from the northern region.\(^{132}\) That these cases are decided on procedural or narrow legal grounds may stem from a fear of confirming perceptions of the judiciary as dominated by northerners; however, it also reflects a wish to preserve a legal legitimacy based on technical professionalism, which militates against taking on social rights cases challenging the political-legal distinction.

Judges’ interpretation of the law, as it applies to poor and marginalized people’s social rights, is affected by their sensitivity, individually and collectively, to the poor’s concerns and conditions. Sensitivity may be built up through training and experience and enhanced through advocacy and public discourse, but it is most profoundly reflected in the composition of the bench. Who the judges are and where they come from, socially, culturally, ideologically, and in

\(^{129}\) No. 2074 of 1995 (MSCA).


\(^{131}\) 16(2) MLR 541, 543 (year).

terms of their education, shapes their perspective, professional qualities, integrity, and commitment.\textsuperscript{133}

Institutionally, the composition of the bench is a function of the system and the criteria for appointments. Inclusive and transparent appointment processes generally create more diverse and socially sensitive courts. But formal procedures do not necessarily change the responsiveness of courts to the concerns of marginalized groups—and more-responsive courts have come about without changes in the appointment procedures.

In Malawi, the process is as follows. The Malawian president appoints High Court judges and justices of appeal from a list nominated by the Judicial Service Commission. The president also appoints the chief justice, subject to parliamentary approval. Traditionally, a seniority principle is followed and the current chief justice was unanimously approved. The chief justice appoints the lower judiciary, also nominated by the Judicial Service Commission.\textsuperscript{134} The commission is composed of the chief justice, the chairman of the Civil Service Commission, a judge or justice of appeal, a magistrate, and a practicing lawyer, all appointed by the president.\textsuperscript{135} The executive’s role in judicial appointments and its influence over the nominating body is a concern, particularly since the appointment process lacks transparency. Judicial positions are publicly advertised, but deliberations are secret, as is the list of judicial nominees that the president chooses from. When the system was adopted, it was seen as exposing judges to political influence; critics wanted to maintain a depoliticized system where judges are appointed by their peers.\textsuperscript{136} From the perspective of pro-poor jurisprudence, the significance of judicial independence vis-à-vis the executive depends on the government’s ideological orientation. But even where the government has a pro-poor agenda, it is important that the judiciary be independent enough to hold the government accountable for corrupt and self-serving practices by the elite.

From the perspective of responsiveness to poor people’s social rights claims, the judges’ social background and training is arguably more important than political independence. Candidates for judicial office in Malawi must have a law degree and ten years of practice; judges come from the magistracy, the civil service, as well as private practice. The sometimes more progressive rulings in the lower courts, as compared with the Supreme Court, may be ascribed, in part, to differences in education. While sitting judges receive training on human rights and constitutional law, most underwent their basic legal training when Malawi was a one-party dictatorship and university teaching generally avoided subjects, such as human rights, that could be interpreted as critical

\textsuperscript{133} See Budlender, supra note 1; Courts and Social Transformation in New Democracies, supra note 4; Litigating Economic, Social and Cultural Rights, supra note 103.

\textsuperscript{134} \textit{Malawi Const.} § 111.

\textsuperscript{135} \textit{Malawi Const.} § 117.

of the government. In contrast, most professional magistrates underwent their training after the political transition that, made Malawi a more open and democratic state. The curriculum has been modernized to include human rights and liberal democratic constitutional law, but it focuses on governance issues rather than social rights, equality jurisprudence, and other subjects of particular importance to marginalized groups and to the development of pro-poor jurisprudence.

In Malawi, the Constitution does not require the composition of the judiciary to be representative of the population, unlike in South Africa where “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial appointments are made.”

Members of the Malawian Judicial Service Commission indicate that they nominate on the basis of merit, personal integrity, and experience, with some concern for gender balance. Still, gender imbalances are stark. Out of twenty-four justices of the High Court and Supreme Court of Appeal, only four are women. And in 2003, there were 15 women among the country’s 153 magistrates. With gender discrimination pervading the norms and practices that uphold poverty patterns in Malawi, this is a serious shortcoming and helps to explain why the constitutional norms and principles aiming at gender equality fail to shape jurisprudence. There is a perception that northernners dominate the judiciary. However, the commissioners deny taking account of regional origin when judges are appointed, and the current composition of the judiciary does not seem to reflect a regional bias.

Malawian judges are part of the elite by virtue of their position, but not necessarily in their background. The current generation of judges—and their contemporaries in the political elite—often came through the public school system or religious schools and received most of their professional training within the country. But conditions for social mobility are rapidly changing, which is likely to influence the social composition of the bench. With standards declining in Malawi’s public education system, those who can afford it send their children to private schools and to tertiary education abroad, and the elite


138 Interviews with judges of the High Court and Supreme Court of Appeal, supra note 121.

139 Statistics concerning judges origins are not available, but an assessment was done based on their names and personal knowledge about their origins.

140 Almost all judges of the High Court and Supreme Court of Malawi and all professional magistrates obtained their first degrees in law from the University of Malawi. See Malawi Justice Sector and the Rule of Law 85 (Open Society Initiative for Southern Africa 2005), at http://www.soros.org/resources/articles_publications/publications/malawi_20060912/malawi_20060912.pdf.

increasingly lacks a personal stake in the public school system. These developments increase the social distance between the poor and the elite, including the judiciary, and, therefore, the sensitivity of the elite to poor people’s concerns.

At a personal level, Malawian judges relate to the plight of poor people. But their professional identity and judicial mind-set render their interpretation of the law unresponsive to social rights claims and are an obstacle to social transformation.

7. Concluding reflections

The most immediate explanation for the lack of pro-poor social rights jurisprudence in Malawi is lack of voice—the courts do not face a demand, and, since the legal system is litigation driven, judges do not investigate cases on their own initiative. In a context where the need for social transformation is striking, and the legal basis for social rights litigation reasonably promising, the absence of legal voice needs to be explained. We have shown how a number of factors combine to discourage poor and marginalized people from voicing social rights claims, including lack of awareness, practical and psychological barriers, and the availability of alternative institutions. But the two major explanatory factors seem to be, first, the lack of litigation support and, second, the legal system’s barriers against public interest litigation. This, our analysis reveals, is due mainly to a legal culture that is predominantly formalistic, patriarchal, and conservative. Concerned to maintain a specifically legal legitimacy, most judges are reluctant to see the courts as an arena for social transformation: as a consequence, their interpretation of legal formalities and of the law itself does not actualize its pro-poor potential. The absence of women on the bench contributes to the discrepancy between the Constitution’s focus on eliminating gender inequality and the existing jurisprudence’s tendency to reinforce discriminatory practices.

More-accessible legal assistance from legal service organizations, or from the courts themselves, and relaxed criteria for legal standing are likely to stimulate social rights claims. Such reforms have had effects elsewhere and, given the conditions in Malawi, there is reason to believe that they would inspire a demand for pro-poor jurisprudence. But how desirable is this? Should social rights litigation by or on behalf of poor and marginalized people be encouraged in the circumstances?

There are different aspects to this question. One is realism. Strong voice and more responsive courts will not necessarily produce pro-poor results. If we return to figure 1, we see how the voicing of claims and their acceptance into the legal system is just the beginning. The impact of litigation depends both on

142 See Wilson, supra note 84, on Costa Rica; and COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, supra note 4, on India.
what the courts do with the claims—whether and how they give effect to social rights—and on how judgments are received and implemented.

Malawian judges can make a wide array of orders to enforce social rights. Section 16 of the Statute Law Act authorizes the High Court to issue a variety of orders, including those that merely require the state to respect a right in the negative sense of noninterference; oblige the state to protect rights against encroachment by others; require the state to facilitate the enjoyment of certain rights through development of specific policies; or issue concrete orders for state agencies to discharge duties correlative to individual claimants’ rights. However, a prohibition on injunctions against the government limits the potential for promoting social rights through the courts. The High Court has upheld the prohibition in some cases but, in others, found it to violate section 41(3) of the Constitution, granting the right to an effective legal remedy. This inconsistency reflects the structural problems militating against the development of pro-poor social rights jurisprudence in Malawi. In a context where judgments are not systematically reported or circulated, precedent has limited effect, making any incremental development of jurisprudence difficult. “Inadequate provision of fundamental legal resources, such as books, case reports, statute books and gazettes, greatly constrains the performance of the judiciary in its administration of justice.” Judges have no research assistance, and with modest remuneration compared with what good lawyers can earn, it is a challenge to recruit the best legal minds to the bench. These factors combine to render creative social rights jurisprudence unlikely.

Litigation can, to some extent, compensate for the lack of resources—material, jurisprudential, and intellectual—within the judiciary. Where the judiciary is weak, the skill with which a claim is argued is crucial, as illustrated by two cases discussed earlier. The evicted defendants in the Mchima Tea case (claiming ownership to the land based on prior customary title) had no legal representation and did not manage to bring to the court’s attention legal material that could have aided their case. In contrast, the tenants who prevailed in their claim against the Malawi Housing Corporation were assisted by the Consumers Association of Malawi. Relaxed standing rules and better litigation

143 Ch. 5:01 (1967).
144 Civil Procedure Act, ch. 6:01, §10(1) (1946).
146 Administrator, Estate of Dr Banda, supra note 61; Peter von Knipps v. Attorney General, Civil Cause No. 11 of 1998 (MHC).
148 Malawi Judiciary, Development Programme, supra note 73, at 11.
resources for marginalized groups and their organizations could aid the development of jurisprudence. Note, too, that in making it easier for the poor to voice social rights claims there may also be unintended effects. Where access barriers are low, the poorest risk being crowded out by the not-so-poor, who are in a better position to litigate.  

There is no reason to stimulate legal mobilization among poor people unless there is a reasonable chance of effecting actual changes on the ground. This requires more than pro-poor judgments; rulings must be accepted by the relevant institutions, complied with, and implemented in law, policy, and practice. This would not necessarily happen in Malawi. The Malawi Housing Corporation judgment discussed earlier did not prevent the corporation from continuing to raise rents, and the International Bar Association, surveying the legal situation in the country, found evidence of government disregard for court orders considered to be politically unpopular. Insufficient resources also hamper compliance with human rights obligations, for example, in providing prisoners with adequate nutrition and medical treatment or providing legal aid.  

Where individuals or small groups of people are discriminated against or denied their rights, including social rights, traditional legal mechanisms can go a long way in rectifying the problems. But while the courts may have suitable remedies to address pockets of poverty, other answers are needed where the pockets are larger than the trousers, as in Malawi, where the majority of the population is poor. Can social rights litigation be part of the answer in cases where individual redress seems like the arbitrary lifting of the burdens of a few while still not addressing the underlying structures of socioeconomic marginalization?  

Even in such contexts, litigation-centered strategies can be of value. Sometimes the law, as interpreted by the courts, contributes to marginalization and the production of poverty by upholding discriminatory social practices. Where the application of the law is the problem or a part of the problem, litigation-based strategies serve an important purpose. Marginalization of women is a case in point. With a close link between gender discrimination and

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149 In India, the middle class has effectively used public interest litigation to improve the environment in the cities, in many cases leaving the poor worse off, and thereby breeding skepticism toward public interest litigation. Marc Galanter & Jayanth Krishnan, “Bread for the Poor”: Access to Justice and the Rights of the Needy in India, 55 Hastings L.J. 789 (2004).


151 International Bar Association, supra note 147.

152 It is easier to affirm social rights and devise remedies where it is a matter of including new groups into existing schemes, allowing courts to rely on uncontroversial legal arguments. See Theunis Roux, Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court, in Democratization and the Judiciary: The Accountability Function of Courts in New Democracies (Siri Gloppen et al. eds., Frank Cass 2004).
poverty, and a clear constitutional mandate to eliminate discrimination against women, quality litigation can help change prevailing patriarchal and discriminatory jurisprudence.

If the focus is on policy changes rather than individual redress, social rights litigation can keep the government closer to the transformative priorities laid out in the Constitution, much as the South African Constitutional Court did in the famous Grootboom case on the right to housing,153 where it ordered the state to devise a comprehensive and workable plan to meet the needs of people in desperate need. Even without going into overall budgetary allocations, litigation addressing expenditures within sectors such as health or housing—and the share spent on services for the elite compared with services for poor people—can force the government to account for its priorities in light of its constitutional obligation to prioritize development with special regard for the most vulnerable. Combined with advocacy and other forms of mobilization, such litigation can stimulate public discourse and create political pressure for changes in social policy. The research and the systematization of facts required by the legal process are useful for advocacy purposes, and even where litigation is not successful, in terms of pro-poor judgments, court cases may function nonetheless as focal points for mobilization.