

Enough food is not enough

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**Litigation as a strategy to secure the right to food
in Guatemala**



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Abstract

This thesis aims to investigate the conditions for legal enforcement of the right to food in Guatemala. In recent years there has been an increase in the phenomenon of protecting social rights through the legal opportunity structures and public interest litigation. As the right to food is frequently being violated in Guatemala, the country has both national and international legal obligations concerning the right to food, and there has been litigation on other economic, social and cultural rights, the tools for litigation appears to be in place. Yet, food rights litigation has not taken place. The research question of this paper is therefore: *which factors and conditions would have to be present for there to arise public interest litigation on the right to food in Guatemala?*

As there has been little research conducted on food rights litigation in Guatemala, this is an explorative case study. By utilizing an analytical framework developed to study social rights litigation, the paper is strongly theory-driven. The paper relies on multiple sources of evidence: secondary literature and research, and official documents are the most important.

The thesis reveals that there are many obstacles to food rights litigation. The factors that would make public interest litigation on the right to food more likely concern both conditions influencing the formulation of food rights claims and courts' responsiveness to such social rights claims. The analysis concludes that the most crucial factors for food rights litigation to arise in Guatemala include: more information and awareness around the right to food; better legal assistance and interpreter services; more trust in, and respect for, the legal system; a stronger focus on litigation strategies by civil society and advocacy groups; less strict standing rules; reduction of legal formalities; more innovative judges; and a heightened sensitization of judges to the concerns of the hungry and malnourished. These results have implications for those who work actively in Guatemala to promote litigation on food rights.

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1.0 Introduction

“Even though we have all the means, knowledge and financial and human resources to eradicate hunger from the face of the Earth, our perception as a species and our political priorities as a society are still determined by a long period of living with hunger, which has lasted since man became aware that he is the planet’s dominant species” (Vivero 2011).

1.1 The theme of the paper

The aim of this paper is to investigate the conditions for legal enforcement of the right to food in Guatemala. The right to food is a human right protected under the International Covenant on Economic, Social and Cultural Rights. In Guatemala, it is also protected under the Constitution and in national law. Although this right can be said to be one of the most basic human rights, it is frequently violated. In Guatemala, where the number of hungry and malnourished people is high, among the highest in Latin America, the situation does not seem to improve. There are several possible strategies activists working on the promotion of the right to food, might choose to follow. Public interest litigation, taking cases to court, is one of these. It has proved to be a fruitful tool in the promotion of socio-economic rights throughout many parts of the world, not least in Latin American countries. In Guatemala, there has been some public interest litigation on other human rights but not on the right to food. As the right to food is clearly being violated - despite being formally guaranteed both in international and national law - the lack of public interest litigation is a bit of a puzzle. The paper seeks to investigate the factors that work against right-to-food litigation. This is not to argue that litigation necessarily is a good thing. However, as litigation has been used to strengthen other rights in Guatemala and to strengthen the right to food in other countries, the strategy seems potentially fruitful. Since the conditions in Guatemala seem to be favorable to litigation on the right to food, it is interesting to seek to understand why this has not taken place. By investigating the “opportunity situation” of activists working on the promotion of the right to food, the research question of this paper is therefore as follows:

Which factors and conditions would have to be present for there to arise public interest litigation on the right to food in Guatemala?

1.2 Why the right to food?

Over one billion people in the world are gravely and permanently undernourished. At the same time, the Food and Agriculture Organization of the United Nations (FAO) have calculated that world agriculture could nourish twelve billion people in its present stage (Ziegler, Golay, Mahon and Way 2011). That is almost double the current world population. This means that starvation and malnutrition is not the result of the world not being able to produce enough food, rather it is the result of poor distribution and the powerlessness of the poor to purchase it (Dower 2007:172). In 1999, the United Nations Millennium Declaration stated that the proportion of undernourished people in the world would be halved by 2015. Even though there should be more than enough food to feed the entire population of the world, a few years before the 2015 deadline, this goal is far from being met. While the proportion of people living in severe poverty decreased throughout the 1990s and beginning of the 2000s (World Bank 2010a), the number of undernourished people has increased ever since the mid-1990s, and in recent years, in the context of a food price crisis and the ongoing global economic crisis, the situation has deteriorated (Golay 2009:7). The most recent numbers from the World Bank, concerning food prices and poverty, underlines negative developments of late, adding to the already serious situation facing the world. The bank warns that rising food prices, driven in part by the rising fuel costs, are pushing millions of people into extreme poverty (BBC News 2011a). In fact, 44 million people have been pushed into poverty only since June 2010. This will necessarily affect levels of hunger and malnutrition as even today poor people spend all of their money on food. World food prices are 36 percent above levels of a year ago, driven by problems in the Middle East and North Africa, and remains volatile, the bank states (BBC News 2011a). This includes basic commodities such as wheat, maize and soya. The president of the World Bank, Robert Zoellick, has warned that the food price crisis is one of the main threats facing poorer countries (BBC News 2011b). He underscores the graveness of his argument by referring to this situation as one where countries risk losing a generation. The subject of the food crisis has also been highlighted in the latest world development report, where one of the main conclusions stresses the need to work for more citizen security, justice and jobs (BBC News 2011b). In this context, therefore, more attention to subjects of hunger and food, and how to secure the right to food, are desperately needed.

In Guatemala the situation with regard to hunger and malnutrition is very bleak, and has in many ways deteriorated during the last decade. Guatemala has the highest level of

malnutrition in the whole of Latin America, and the number of people affected by acute malnutrition has recently increased. Child malnutrition is among the highest in the world (Ziegler 2006:6). These are striking facts, and the vast consequences of hunger and malnutrition, both with regard to illnesses and death are simply too extreme to be neglected. In 2009 Guatemala was hit by the worst drought in 30 years which created severe food shortages due to destruction of staple food crops. In addition, the two hurricanes Agatha and Alex, and the volcano explosion of Pacaya, that affected Guatemala in 2010, caused extensive damages by volcanic ashes and torrential rains that destroyed much of the agricultural production and severely hit Guatemalan infrastructure (The Guatemala Times 2011). This made a bad food security situation worse. Also, there has been an increase in staple food prices, which is at its highest level ever this year, with high prices on commodities such as corn and black beans. This, in combination with high inflation rates in the country, and severe effects of climate changes like increased desertification and decrease of water availability, have a devastating effect on the nutritional status of the poorer population (The Guatemala Times 2011). As is evident, the situation with regard to the right to food in Guatemala is urgent. Influences from climate change and globalization further increase the urgency and challenges of addressing the world's food problem (Goldsmith 2007:60). The aim of this study on the right to food is to gain a better understanding of this serious issue and more knowledge of how to strengthen this right.

There are several directions promoters of the right to food can choose in their effort to heighten the protection and realization of this right. This includes social mobilization, advocacy and lobbying of political bodies, political negotiations, civil society participation, demonstrations, and media campaigns, among others. Public interest litigation is a strategy increasingly used by activists in the promotion of socio-economic rights and can function as a tool to hold governments accountable to their human rights obligations. This is not to say that litigation is necessarily the preferred option to activist, nor that it is inherently useful or will bring about desirable results. However, litigation might have interesting potential, and there is a need for more knowledge concerning how such litigation operates, and under which conditions it is likely to be engaged in and succeed. The last few decades have witnessed a dramatic increase in social rights jurisprudence all around the world. Such litigation has been used in the promotion of many different rights, such as labour rights, the right to health and

the right to land¹. Jurisprudence on the right to food is still at a developing stage, although there has been some progress the last few years, with India being the most prominent example (Vivero 2011:15; Ziegler et al. 2011:265).

By studying a “negative case” – where the violations are clear and the legal foundations seem to be in place – this paper aims to understand under which conditions public interest litigation on the right to food might arise. Guatemala is an interesting case in this regard, as hunger is a serious problem, the country has a legal framework where food security is part of the law, and some litigation has taken place on other rights. Gaining knowledge of factors that work against food litigation in Guatemala, and conditions that are necessary for public interest litigation to arise, is the aim of the paper. This could provide a better understanding of which strategies, under these circumstances, are more likely to succeed in promoting and securing the right to food, and how right-to-food litigation could be encouraged. This could also be relevant to other countries in a similar context. As there is enough food produced in the world to feed the entire population of the earth, there is a need for stronger pressure on governments to react more seriously to this problem, and there is a need to know more about strategies that could be used as a tool for this.

1.3 Scientific contributions and social relevance

By using a theoretical and analytical framework to study something that has not been studied in Guatemala before, namely food rights promoting strategies and food rights litigation, this paper will both be explorative and theory-driven. I will search for the factors and conditions that the theory argues are necessary for there to be public interest litigation. Examining whether or not, or to which degree, the presumed necessary conditions for litigation are present in Guatemala will provide a better understanding of how likely it is that food rights litigation will arise in the country. It also gives indications as to how fruitful it would be to pursue public interest litigation as a strategy to promote the right to food in this context, or whether other strategies are more promising. As this study is theory-driven in the sense that it focuses on the factors that the scholarly field of public interest litigation emphasizes, this paper will contribute in the continuous development of pinning theory of litigation to empirical research on this field.

¹ See i.e. Yepes (2006); Dugard and Roux (2006); Ziegler (2006); Gargarella, Domingo and Roux (2006).

The findings of this paper will also provide a knowledge base for those who work actively in Guatemala to promote litigation on food rights, and could possibly also have relevance for other Central American countries where conditions are similar. It is a scientific goal to focus scholarly attention on subjects and issues of social importance. Given the gravity of the situation in Guatemala, and many other places in the world, with regard to hunger, I wish to contribute to raise both the scholarly and political attention to this serious issue.

1.4 How to answer the research question

To answer the question of which factors would have to be present in Guatemala for public interest litigation to emerge and succeed, I will pursue a qualitative method that favors a deep and thorough analysis, guided by an analytical framework developed to explain what influences the prospects for social rights litigation. The framework integrates much of the theoretical field of social rights litigation and opens up for an explorative study.

Data are collected through searches in public documents and secondary literature to gain evidence of the presence or absence of the relevant factors, as stated by the theory. I will compare the factors highlighted in the framework in a structured and focused way with the actual situation in Guatemala.

1.5 Structure of the paper

The paper is structured as follows: Chapter two aims to provide the necessary theoretical tools to answer the research question. It outlines the theoretical framework and discusses theoretical perspectives of relevance to the paper. This includes an introduction to theories about social mobilization, political and legal opportunity structures, and public interest litigation and the right to food. Relevant concepts are discussed and defined as they appear. In addition, social rights jurisprudence and the justiciability of the right to food will be elaborated on. The aim is to get a thorough, yet concise, overview and discussion of the most important scholarly thinking around the issues of the right to food, strategies in the promotion of socio-economic rights and social rights jurisprudence and justiciability. The chapter will conclude with a presentation of the theoretical and analytical framework that will function as a guideline throughout the analysis of the paper.

Chapter three accounts for the scientific method that will be used in the analysis of the research question, and also discuss how the data that is being used in the paper is collected.

Chapter four presents the Guatemalan case. It starts with an overview of the historical context of the country, to provide a better starting point for understanding the case and goes on to elaborate on the state of hunger and food insecurity, the state's obligations with regard to the right to food, and the state of the judiciary and litigation in Guatemala. The aim of the chapter is to provide a knowledge-base for the subsequent analysis and a context within which the analysis should be understood.

Chapter five analyses the research question. Factors that are conducive to right-to-food litigation in Guatemala, as well as those that are either not conducive or not present, are discussed and evaluated. Based on the expectations of previous research on social rights litigation, it aims to understand what the main obstacles against right-to-food litigation in Guatemala are, and which factors it appears would have to be present for such litigation to arise.

Chapter six will sum up the findings and suggest further and broader implications of this case study.

2.0 Theoretical framework

Strategies to promote socio-economic rights, and also the right to food are subjects that have been debated and theorized on in the human rights discourse. To be able to understand which factors would have to be present in Guatemala for the right to food to be strengthened through the strategy of litigation, it is necessary to get an understanding of the nature of a human right such as the right to food. Also, it is important to understand under which conditions public interest litigation arise and which mechanisms are crucial in the litigation process. This chapter will present the central theoretical components of this thesis, and by this, provide the framework for the analysis of the research question of the paper.

2.1 Human rights

The idea of human rights has a long history, but it was with the foundation of the United Nations in 1945, and the adoption of the Universal Declaration of Human Rights in 1948, that the human rights discourse really had an international political breakthrough. It was early established that the promotion of human rights was going to be one of the main tasks of the new organization. The strong engagement with the realization of human rights, at this specific point in time, should be understood as a reaction to the Second World War and the Nazis' actions. The international community was deeply concerned that the atrocities of the war could happen again, and therefore responded with widespread support for the Universal Declaration of Human Rights. The timing for the support of this Declaration is not without importance: the brutalities of the war were still fresh in mind, and the hostile relationships of the Cold War had not fully materialized. In this situation it was possible to adopt the Declaration unanimously (Samnøy 1993:107-108). However, the subsequent working-out of the Human Rights convention was more slow-mowing and plagued with difficulties. Instead of adopting only one convention as planned, the human rights framework was split into two conventions, one for political and civil rights and one for economic, social and cultural rights. These Covenants were adopted by the United Nations in 1966, and entered into force as late as 1976. The human rights framework has since then been, and is still today, in continuous development and progress with regard to its content, application and justiciability.

2.1.1 The right to food

The right to food is part of the set of rights that can be said to compose the most basic human rights, and it is closely connected to other rights, such as the right to life and the right to health as the fulfillments of these rights to a more or less extent depends on the fulfillment of

the right to food. The right to food is part of the economic, social and cultural rights framework, and these rights have been labeled second generation human rights. This is because the idea of the first generation of human rights, the political and civil human rights, is considered to be older than the economic, social and cultural human rights. Also, the right to food has been characterized for many years, along with the other economic, social and cultural rights, as a positive human right as it has been argued that the fulfillment of these rights requires, in some form or another, substantial transfers. By this, the argument continues, these positive rights actively prescribes government activity and prioritization of scarce resources, as opposed to the civil and political human rights, in relation to which there is no similar resource shortage, and which merely acts as restraints on government action (Gargarella, Domingo and Roux 2006:258). However, this argument regarding positive versus negative human rights is strongly contested. It can be argued that all rights require a positive role by the government as the agent responsible for putting in place a system to ensure that they are respected, protected and fulfilled. Also for so-called negative rights, legal enforcement of the rights, protection of the human interest relevant for the rights, and remedies to redress the wrongs that are violative of rights, requires positive action and resources. In this way all legally enforced rights, whether what have been called first generation rights or second generation rights, are necessarily positive rights (Holmes and Sunstein 1999:43).

In the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations General Assembly in 1966, the right to food is defined as the right to be free from hunger and the right to adequate food, that is, to have sustainable access to food in a quantity and quality sufficient to satisfy one's dietary and cultural needs (Narula 2006:694). Many of the world's states have signed and ratified this covenant, and they are by this obliged to take steps to progressively achieve the full realization of the right to food for those within their territory or under their jurisdiction (Narula 2006:694). In 2000 the U.N. Millennium Summit declared that halving the proportion of people who suffer from hunger between 1990 and 2015 is a key Millennium Development Goal (Narula 2006:695). Despite efforts like these, and many others, to promote the right to food, big challenges still confronts the advocates of this human right around the world.

2.1.2 The development of the right to food

The right to food has been considered a human right since 1948, when it appeared in paragraph 1 of Article 25 of the Universal Declaration of Human Rights, defined as follows:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (United Nations 1948).

Although the right to food was explicitly mentioned in the Declaration from the very beginning, it took quite some time before this right was debated on a more concrete level. In 1996, 180 countries met at the World Food Summit in Rome, where they pledged to eradicate hunger and committed themselves to a basic target to reduce the number of undernourished people by half by the year 2015 (Ziegler et al. 2011:5). The Rome Declaration on World Food Security was adopted at the Summit, in which those attending undertook to implement, monitor and follow up the Summit Plan of Action. The Declaration reaffirmed the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger (Ziegler et al. 2011:5). Five years after the first World Food Summit, another Summit was held in Rome in June 2002 to review progress on the commitments adopted in 1996. It soon became clear that not much progress had been made. The key commitment from 1996: halving the undernourished population by 2015, had not seen significant progress, and the goal was nowhere near realization (Ziegler et al. 2011:6). The results from this second Summit were not very impressive, and there were not many new concrete solutions or plans to speed up action. Also, a debate was initiated, where some governments felt the concept of the right to food should be replaced with the concept of food security. This would have been an unfortunate development, as the concept of food security is a much narrower concept than that of the right to food. The right to food includes all the elements of food security, including availability, accessibility and utilization of food, but it also goes beyond the concept of food security because it emphasizes accountability, the legal obligations enshrined in the concept (Ziegler et al. 2011:7). However, after intense negotiations, the right to food was reaffirmed in the final Declaration, and an agreement was reached to draw up a set of voluntary guidelines on the right to food. These voluntary guidelines were going to focus on the achievement of progressive realization of the right to adequate food, and the guidelines represented at least some hope for the development of the right to food. In late 2004, the Voluntary Guidelines

were adopted by the Food and Agriculture Organization (FAO) Council and approved by all governments of the Summit (Ziegler et al. 2011:8). This meant that the governments reaffirmed a solid commitment to the right to adequate food and also, agreed on an internationally accepted definition and understanding of the right to food. The definition adopted in the Voluntary Guidelines, closely follows the definition adopted by the Committee on Economic, Social and Cultural Rights, and also follows the interpretation offered by the Committee that states are obliged to respect, protect and fulfill the right to adequate food, which has important implications for the acceptance of this framework across all economic, social and cultural rights (Ziegler et al. 2011:8). The state obligations according to international law will be discussed later in this chapter, but first it is useful to get a more precise understanding of how the right to food is defined.

2.1.3 Definition of the right to food in international law

The right to food is a human right that is protected under international human rights and humanitarian law. Ziegler et al. (2011:15) defines the right to food as:

“The right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear”.

According to this definition, the right to food includes both the right to solid food and to liquid food, that is, safe water. This means in general that the right to food embodies the idea that all people should have a decent standard of living, especially enough to eat and drink, and the concern for human dignity is a central part of this right.

The right to food is a right that is recognized in several international covenants and declarations, in addition to in many of the constitutions and laws of the nations in the world. Among the international declarations that are relevant to the right to food is the Convention on the Elimination of All Forms of Discrimination Against Women, where State Parties have agreed to take special measures to eliminate discrimination against women, including assurance of equal access by rural women to food security measures and appropriate nutrition during pregnancy and lactation (Vidar 2006:2). Also, the Convention on the Rights of the Child is connected to the right to food. According to this Convention, State Parties shall among other things, provide material assistance and support programs, particularly with

regard to nutrition, clothing and housing in case of need (Vidar 2006:2). The Convention also states that the child has the right to the highest attainable standard of health, through the provision of adequate nutritious food and clean drinking water. These conventions show that there are several international treaties that are relevant to the right to food. They also illustrate that the right to food is a multidimensional right, that is, the realization of the right to food depends on many factors as this right is linked to various other human rights (Vidar 2006:6). The right to food can be linked to as various other human rights as property rights, labour rights or the right to information and education.

In the most important treaty on the international level, the International Covenant on Economic, Social and Cultural Rights, the right to food is defined relatively explicitly. The measures that must be taken with regard to the right to food are laid out in the two paragraphs of Article 11 in the Covenant. The two essential components of the right to food: the right to be free from hunger and the right to adequate food are enshrined in these paragraphs. In paragraph 1, it is stated that States Parties recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (Ziegler et al. 2011:16). Golay argues that the normative framework on the right to adequate food encompasses three essential elements: the adequacy and the availability of food, and the permanent access to food with dignity (2009:12). According to him, adequate food requires that it be sufficient and adequate in quantity and quality. This means among other things that overall diets should include a mix of necessary nutrients, food should be healthy, free of toxins and contaminants, and food must be culturally acceptable. Food should be made available either directly from the land or other natural resources or through distribution systems capable of moving food to where it is needed. Finally, Golay emphasize that food must be accessible so that every person enjoys the right to have access to adequate and available food in ways that are sustainable and that do not interfere with the enjoyment of other human rights (2009:12). Furthermore, two components are connected to the accessibility to food, that is, economic accessibility and physical accessibility. Economic accessibility to food implies that personal or household financial costs related to the acquisition of food required for an adequate diet should be at a level that do not threaten or compromise the exercise of other human rights, such as the right to health, housing or education (Golay 2009:13). Physical accessibility to food on the other hand, implies that everyone, including physically vulnerable individuals, such as infants and young children, elderly, disabled people, the terminally ill, and persons

with persistent medical problems such as mentally ill, should be ensured access to adequate food (Golay 2009:13).

In paragraph 2, Article 11, of the International Covenant on Economic, Social and Cultural Rights, the fundamental right of everyone to be free from hunger is stated (Ziegler et al. 2011:16). It should be interpreted as the core provision protecting individuals from hunger, defined as the insufficient or inadequate intake of food and low resistance to diseases leading to death (Golay 2009:13). This means that the right to be free from hunger should be understood as the minimum content of the human right to food. As a consequence, it should at the very least be ensured for everyone access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger. More precisely, the right to be free from hunger is defined as the right to have access to the minimum essential food which is sufficient and adequate to ensure everyone is free from hunger and physical deterioration that would lead to death (Golay 2009:14).

2.1.4 State obligations

As the above section has discussed what the definition of the right to food includes more specifically, it is now time to turn to the legal obligations of the State Parties under international law. Asbjørn Eide, who has written several reports for the United Nations on the right to food, has set out three main obligations that states have (Narula 2006:707; Oshaug, Eide and Eide 1994:493-494). These obligations are the duty to respect, protect and fulfill the right to food. The three levels of obligations have been further defined by the Committee on Economic, Social and Cultural Rights in its General Comment No. 12 on the right to adequate food, and have since been accepted by the States in the Voluntary Guidelines on the Right to Food. This three-level typology of states' duties is in fact now a widely used framework for analyzing states' food rights obligations, as well as their human rights obligations more generally (Narula 2006:707).

With regard to the obligation to respect the right to food, this means that the government should not arbitrarily take away people's right to food or make it difficult for them to gain access to food (Ziegler et al. 2011:19; Oshaug et al. 1994:493). That is, this is essentially a duty of non-interference with existing access to food, and it requires State Parties to refrain from measures that prevent such access. This specific part of the state obligations with regard to the right to food is actually effectively a negative obligation, although, as discussed earlier,

in general the right to food, as other human rights, is classified as a positive right. This obligation to respect is negative in the way that it entails limits on the exercise of state power that might threaten people's existing access to food.

The obligation to protect the right to food means that the government must pass and enforce laws to prevent powerful people or organizations from violating this right (Ziegler et al. 2011:19; Oshaug et al. 1994:494). The duty to protect requires states to regulate non-state actors, such as corporations or individuals, who may threaten other people's right to food. Also, the government must establish bodies to investigate and provide effective remedies, including access to justice, if that right is violated (Ziegler et al. 2011:19). To protect the right to food, the government of the state might also have to take action if people were denied access to food on the basis of discrimination of any kind, including discrimination on the basis of gender or race. As is evident, these duties are more positive actions required of the states, than just the obligation to respect the right to food.

With regard to the obligation to fulfill the right to food, this is also an obligation of a more clearly positive nature, with regard to the required actions of the State Parties. The obligation to fulfill, or facilitate and provide, means that the government is required to take positive actions to identify vulnerable groups and to implement policies to ensure their access to adequate food by facilitating their ability to feed themselves (Ziegler et al. 2011:20; Oshaug et al. 1994:494). The further obligation to provide goes beyond the obligation to facilitate people's ability to feed themselves, but only comes into effect when people's food security is threatened for reasons beyond their control. In General Comment No. 12, this obligation is described as follows: "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfill* (provide) [the right to food] directly" (Ziegler et al. 2011:20). This means that in these cases, State Parties have to, as a last resort, offer direct assistance through such means of safety nets, as food voucher schemes or social security provisions to ensure freedom from hunger. In most cases, access to food is a question of affordability, and therefore income. This duty to fulfill the right to food imposes duties on the State Parties such as the duty to promote redistributive taxation and social security (Ziegler et al. 2011:20).

The fulfillment of the right to food, like all other economic, social and cultural rights, is qualified to the extent that it must be achieved progressively and to the maximum of available

resources (De Schutter 2010:4). This means in practice that a poor country is not required or expected immediately to ensure the full fulfillment of the economic, social and cultural rights. However, all countries are bound to ensure the highest level its resources will permit and, at the very least, a basic minimum level of economic, social and cultural rights (Ziegler et al. 2011:21). The concept of ‘progressive realization’ cannot be used simply to postpone work towards the realization of the right to food, and states are required to take immediate steps to continuously improve people’s ability to feed themselves and to eliminate hunger.

As this section has discussed the various state duties to the right to food under international law, it is clear that states faces many obligations and these obligations vary with regard to the required level of action of the State Parties. The duties to protect, respect and fulfill the right to food are all part of a well-established framework for analyzing states’ food rights obligations, and the last obligation; the obligation to fulfill, is the obligation that requires the most comprehensive action of the State Parties. Although the concept of ‘progressive realization’ means that the worst off countries are not expected to fully fulfill the right to food immediately, this does not excuse governments to take necessary immediate action to ensure the elimination of hunger. At this point, it is time to discuss more specifically which possible strategies exist for the activists working for the protection and promotion of the right to food, and to what extent these food rights obligations are, and should, in fact be justiciable.

2.2 Social mobilization

There are different strategies and ways of promoting and fighting for a human right such as the right to food. This means that activists working for the strengthening of such a right can mobilize support and attention to the case in many different ways. Social mobilization is a concept that has been used loosely and in different ways by scholars. It has to do with mobilizing collective support for a social relevant case or issue, and the term is closely connected to those of collective action and also social movements (Della Porta and Diani 2006). The concept of social movements is connected to social mobilization as these movements can be described as a process whereby “several different actors, be they individuals, informal groups and/or organizations, come to elaborate, through either joint action and/or communication, a shared definition of themselves as being part of the same side in a social conflict” (Diani 2000:156). Social movements consists of networks of informal interaction between a plurality of individuals, groups and/or organizations, engaged in a political and/or cultural conflict, on the basis of a shared collective identity. The concept of

collective action is in turn connected to social movements as the dynamic of social movements appear when single episodes of collective action are perceived as components of longer-lasting action, and those engaged in them feel linked by ties of solidarity and of ideal communion with protagonists of other analogous mobilizations (Della Porta and Diani 2006:23). The theoretic fields of social mobilization, social movements and collective action are highly complex and used in a variety of ways. It is beyond the scope of this paper to elaborate further on these debates. In this context, it is sufficient to note that these ideas form a theoretical background for the subject of the paper, before turning to a theoretic field that can help us understand the choice of strategies made by activists mobilizing around an issue.

2.3 Political opportunity structure

Political opportunity structure is a concept that has been used to explain the development of social movements and their strategy choices (Hilson 2002:242). More specifically it has been used as a method to integrate the emergency, progress and outcomes of social movements with the social context in which they operate. Political opportunity structure refers broadly to the institutional and sociocultural factors that shape social movement options and strategies, by making some strategies more feasible and/or appealing than others (Andersen 2005:6). In this way, the concept of political opportunity structure provides for a balancing of agency between the state and social movement in such studies. In this lies the idea that the political configuration of the state shapes the opportunities afforded to movements and activists; shifts in that configuration can open or close windows for action (Andersen 2005:7; Wilson and Rodríguez Cordero 2006:326). This relationship can function the other way around also: social movements can influence the political configuration of the state, and forge opportunities through their actions.

The more precise definition and content of the concept of political opportunity structures is disputed, and the specific dimensions of the concept have varied among scholars (Andersen 2005:7; Tarrow 1988:430). This discussion will not be elaborated on further here. Despite this difference in opinion on the exact content of the concept, there exists a general agreement among scholars on at least three dimensions that are valid for the concept. These dimensions relate to “*access to the formal institutional structure, availability of allies, and the configuration of power with respect to relevant issues/challengers*” (Andersen 2005:7). That is: access to political institutions, the presence or absence of allies and the configuration of power influence and shape the emergency, progress and outcomes of collective action. In

relation to these dimensions, the field of political opportunity structure has to do with factors that influence which strategies could be feasible or appealing to activists working on the promotion of certain issues, such as the right to food. These strategies focus more on the political channels of influence with regard to different issues, and on the interaction between state and activists. A central point with regard to political opportunity structure is that all of these dimensions are influenced by a certain cultural frame; a sort of underlying premise on which the claims are understood (Andersen 2005:7-8). The ability of social movements to get their voice heard depends on the availability of cultural frames. In this way, movements draw on the stock of existing cultural frames to create ideas of what is unjust or to suggest directions for change. Political opportunity structure is therefore a concept that refers to a field in which focus is on institutional and sociocultural factors that shape the options with regard to possible action of activists. In this way the concept has to do with political opportunities affecting the choice of strategies for promoting issues and influencing policies through political channels.

2.4 Legal opportunity structure

With the rejuvenation of national or supranational courts that many countries have experienced², new opportunity structures have emerged (Wilson and Rodríguez Cordero 2006:326-327). The concept of legal opportunity structure focus on activists in social movements taking legal action. The attention is directed more at judicial organs when studying opportunities to influence, with litigation being the central strategy within this field. The legal opportunity structure – including factors such as funding and internal organization – are thus relevant when accounting for the choice and form (or absence) of litigation strategies as well as for the outcome. The field of legal opportunity structure is not limited to litigation however, as this is used to explain strategies of social movements more generally (Andersen 2005:8). The central goal is to explain how socio-legal structures shape movement strategies, and how these structures in turn are shaped by movement strategies.

In the legal opportunity structure field the focus is on the same three dimensions that are central to understand political opportunity structures; access to the formal institutional structure, the configuration of power with respect to relevant issues, and the availability of allies (Andersen 2005:9). This means that access to courts shapes the emergence, progress

² This experience has frequently taken place as a result of democratization (Wilson and Rodríguez Cordero 2006:327).

and outcomes of legal action. Court action represents an alternative strategy or route to policy change, but is also characterized by its own institutional peculiarities and barriers. The mechanics of the judicial process shape access in a number of important ways, including what may be litigated, who may litigate and where such litigation may occur (Andersen 2005:9). This means that legal access requirements shape the strategic options available to activists hoping to mobilize the law on behalf of social movement goals.

Regarding the configuration of power, or the configuration of elites, this also has implications for the emergence, progress and outcomes of legal action. In the legal opportunity structure the elites are generally judges, and they can align themselves in one of three different ways when being presented with a particular legal claim (Andersen 2005:10). First of all they may in unison reject the claim, they may in unison accept the claim, or they may be divided among themselves with regard to the legal implications of the claim. Legal claims that are uniformly rejected exit the judicial process, and the same is true for claims that are uniformly accepted, as these claims are settled outside court. In those cases where judges are divided on the other hand, further litigation of the claim is encouraged or stimulated and legal ammunition is provided for both sides of the dispute. This implies that the perspectives of judges influence the progress and outcome of social movement litigation. As a result, turnover in the population of judges can lead to the opening, or closing, of windows of opportunity for legal action (Andersen 2005:10). In this way, the configuration of power; or the configuration of legal elites, can influence the strategic options available to activists.

The last dimension of the legal opportunity structure is the availability of allies. As in political opportunity structures, allies can open windows of opportunity for action for example by defraying the substantial costs of bringing a case, by providing legal assistance, or by filing *amicus curiae*; that is friend of the court, briefs (Andersen 2005:11). On the other hand, opponents of a social movement claim may work to undermine the claim by trying to prevent them from succeeding in the first place, or appealing adverse decisions. In this way, the presence or absence of allies or opponents shapes the progress and outcomes of legal action, and has implications for the strategies available for activists.

The difference between political opportunity structure and legal opportunity structure concerns the underlying frames that ground them. In the legal opportunity structure, as in the political opportunity structure, there is a focus on the argument that movements seeking to

effect change must draw on the existing cultural stock to frame their claims. However, what separates the legal opportunity structure from the political opportunity structure, is that an additional frame, the legal frame, is also influencing these claims. This means that movements seeking to effect change through the legal system are constrained not only by the availability of cultural stock, but also by the availability of legal stock. That is, “they must articulate their claims so that they fall within the categories previously established by an amalgam of constitutional, statutory, administrative, common, and case law” (Andersen 2005:12). These laws shape the progress and outcome of activist claims in important ways. Laws, for instance, shape the kind of legal claims that can be made as well as their persuasiveness, and the laws also structure the facts that are considered to be relevant, just as the facts of the case determine the legal categories that will be invoked. Shifts in legal stock can therefore have the effect of creating or foreclosing opportunities for movements to frame their claims successfully. It should be emphasized that the legal and cultural frames do not exist independently of each other, nor is there a clear hierarchy among them. Cultural and legal frames are mutually constitutive in the way that cultural symbols and discourses shape legal understandings just as legal discourses and symbols shape cultural understandings (Andersen 2005:13-14). This makes sense considering the fact that legal norms and practices have in some instances been used to promote social change, and conversely, shifting social norms have many times been followed by shifting interpretations of what the law requires.

This last section has discussed different ways of mobilizing and different kinds of activity to promote issues. While some focus on effecting change through the political channel, other strategies direct more attention to the legal channel. The debate around political and, particularly, legal opportunity structure should be kept in mind in the continuation of the paper as it has relevance for the discussion of litigation. Among the array of possible strategies, one that has been widely used to promote socio-economic rights is public interest litigation, that is, a strategy seeking to influence policy through the legal channel. As this strategy is gaining increasing attention from activists, there is a need to better understand this approach to promoting economic, social and cultural rights, and this is the focus from here on.

2.5 Public interest litigation

Since around 1970, there has been a steady increase in public interest litigation on a variety of different issues and rights (Nussbaum 1973:301; Gloppen 2008:21; Gauri 2009:1). That is, violations of rights have increasingly been taken to court and attempted solved through a

judicial body, rather than by a political organ. The spread of litigation to resolve cases where rights have been violated, often cases of a somewhat political character, has been widely discussed, and while some see this as a positive tool for promoting rights, others see the courts as an unsuitable arena for such activities. The empirical capacity of litigation to effect social reform at all, is also widely debated (Andersen 2005:14). In the following, public interest litigation will be discussed. Skeptical and positive views will be debated, along with the potential functions of litigation. But first a more precise definition of the concept of public interest litigation is needed.

2.5.1 Defining public interest litigation

A definition of public interest litigation must, as is the case with many of the terms used in the social sciences, not be too general so it loses all its value, yet it must be broad and flexible enough to be meaningful in a rapidly changing society (Nussbaum 1973:304). Because of the difficulties that can arise in trying to precisely define a concept like public interest litigation, it can be useful to instead identify the characteristics that are common to lawsuits which most people would classify as in the public interest.

The first characteristic of public interest litigation is that the issues involved are currently regarded as being of extreme importance (Nussbaum 1973:304). This may be because the issue has been the subject of legislative or public concern, because it concerns the very essence of life, or it may involve a right specifically protected in the Constitution. The second characteristic is that the final judgment affects not only the initiator of the action, but a substantial number of other individuals as well (Nussbaum 1973:304). This can be the case if the suit is brought as a class action and the decision automatically affects all class members or in cases where the decision, as a practical matter, affects all individuals whose circumstances are similar to those of the named complainant, either because of the principle of ‘stare decisis’³ or because of the case’s deterrent effect. The last characteristic of public interest litigation is that the suit is brought by a private plaintiff rather than by a governmental agency (Nussbaum 1973:304). This can be an individual, a group of individuals, or an organization, and the point is that it does not have an obligation under the law to initiate the type of lawsuit that has been brought. In sum, public interest litigation is brought by private litigators in the

³ ‘Stare decisis’ refers to the juridical principle of precedent (Knight and Epstein 1996).

hope of achieving broader results by litigating issues of extreme current importance, which when resolved will affect substantial numbers of people.

2.5.2 Skeptics and optimists

The fact that public interest litigation involves very important issues, and affects larger numbers of people, means in practice that a judicial body resolves issues of social reforms that many would regard as belonging to the political sphere. This is a development some welcome and view as positive for the promotion of rights, while others regard it as an unfortunate confusion of the political and judicial responsibilities and spheres. The question of whether or not litigation, through court-initiated reform, should be used to achieve social reform in a democracy is debated on several terms.

The critics of public interest litigation have first of all criticized this way of promoting issues and rights because they see it as improper for judges to mandate social reform in a democracy (Denvir 1976:1133). The argument is that in a democracy, it should be left to the legislature, not the judiciary, to mandate reforms of a social character. To leave such a responsibility to the judicial bodies, leads to an undermining of the democratic principles, according to the critics. The democratic principle, in which only the legislative body, those elected by the people, should be able to resolve issues of social reform, is violated if judges to a large extent are involved in resolving lawsuits of such a political character. The fear is also, that as a result of this, democratic control is threatened and the democratic institutions are weakened by rendering them irrelevant in core political matters (Gloppen 2008:24). In this argument lies also the idea of a lack of democratic legitimacy; that “courts are fundamentally elitist and non-democratic and, therefore, should always defer to the allegedly democratic legislature” (Denvir 1976:1134). A related concern has to do with the limited democratic legitimacy and technical competence of judges to decide on issues that can be both technically difficult and politically divisive (Gloppen 2008:24).

Another argument that has been proposed against public interest litigation has more to do with the nature of courts, rather than any fundamental critique of public interest litigation as such. This argument states that courts, because of institutional limitations and political vulnerability, are fated to see their reform efforts frustrated in the middle or long term (Denvir 1976:1133). In this way, public interest litigation is criticized because it will not have any long-lasting positive effects, and the results that are achieved through litigation and court-

initiated reform will only, at the very best, be short-term. This is of course an empirical and disputed question. Another concern with regards to the courts having to handle a lot of cases of public interest litigation is that the judiciary itself may be weakened (Gloppen 2008:24). This might happen if these cases crowd out other forms of judicial activity, create huge backlogs, or politicize the courts in ways that undermine their legitimacy.

Other criticism has also been voiced against court-centric approaches to promote rights and against litigation as a means to effect social change and reform. One of the concerns is that litigation might increase inequalities, since poor people are less likely to litigate, and those with more resources tend to come out ahead in court (Gloppen 2008:24). Another concern is that even when there are positive court rulings on behalf of disadvantaged groups, these might be poorly implemented and lack effect. Even in cases of success, litigation, due to its casuistic nature, is prone to privilege some groups over others, and thus reinforce inequalities (Gloppen 2008:24). Also a concern is that court-initiated social reform may undermine long-term planning and rational priority setting in the policy areas that are being litigated. The argument further states that this, while possibly strengthening the rights of individuals or parts of the population, may weaken the overall justice of the system (Gloppen 2008:24). This means that even though litigation may have positive effects for individuals or groups with regard to certain rights, the rights on a collective level may in fact be weakened.

As is evident, there are a lot of concerns regarding the use of public interest litigation in a democracy. These concerns are fundamentally grounded in the idea that the judiciary is not the place for initiating social change in a democratic society and that public interest litigation might in fact not be an effective instrument to promote rights and issues of a strongly political character. However, as the next section will demonstrate there are also those who regard litigation as a possibly fruitful instrument, and argue the positive effects of public interest litigation in the promotion of rights.

The more positive views on public interest litigation argues that litigation can contribute to hold governments accountable with respect to what can be called policy gaps and implementation gaps (Gloppen 2008:24). Therefore litigation can have a positive effect in the promotion of issues and rights. Policy gaps are discrepancies between states' legal obligations under international law and/or national constitutions on the one hand, and the laws and policies in place to respect, protect and fulfill certain rights in their population on the other. It

is argued that litigation can contribute to bridge these gaps and bring national laws and policies in line with international obligations and norms (Gloppen 2008:24). This, it is argued, would help in the promotion of rights, and therefore litigation is a positive instrument in democracies. Implementation gaps, or enforcement gaps, are discrepancies between stated policy and implemented policy. In this argument lies the assertion that litigation may serve to hold governments accountable to their laws and policies and aid implementation by empowering individuals and groups to enforce the laws more directly (Gloppen 2008:24). By this, litigation and court decisions on potentially politically or socially important issues can have the effect of bringing about real social change for the better.

There are also counter-arguments against the assertion that court-initiated reforms lack democratic legitimacy because courts as fundamentally elitist and non-democratic bodies should always defer to more democratic legislatures. This assertion, it is argued, reflects a basic misunderstanding of the actual working of the political system, and tends to overestimate the responsiveness of the political system to popular control and underestimates the very real control over the judiciary (Denvir 1976:1134). These misunderstandings lead inevitably to an unfortunate crabbed view of the legitimacy of public interest litigation. The argument for the ineffectiveness of litigation, in most cases, only takes account of formal changes resulting from litigation (Denvir 1976:1134). Other potentially positive effects of litigation are not brought into the evaluation. This, it is argued, gives a rather skewed picture of the legitimacy and effects of public interest litigation.

As this section has demonstrated, the more positive view on public interest litigation argues that such activity has, can, and should be used to promote social reform, and to promote rights, especially social and economic rights (Denvir 1976). This means that public interest litigation has the potential of being a powerful instrument and resource in the promotion of human rights and this is also the case with the human right to food. This is not to say that it is argued to be the only, or even the best, tool to promote such rights, but rather that in many cases it can contribute to a positive development in the protection of these rights. In fact, often litigation, or the potential of litigation, is the “only means available to keep large bureaucracies responsive to the legitimate demands of the public they were set up to serve” (Denvir 1976:1136). In such situations, public interest litigation, or the mere possibility of litigation or access to court, can prove to be a useful instrument. To get a better understanding

of public interest litigation and how it can contribute in the promotion of issues and rights, it is useful to turn to a brief overview of which potential functions such litigation can have.

2.5.3 Potential functions

Public interest litigation potentially has several functions in a democratic society. First of all, when it comes to promoting an issue, the very potential of a court challenge can have an effect on the decisions of a government agency. This means that in some cases, the fact that the litigants have the possibility to access a court, might affect government agencies' decisions. This function of public interest litigation, or more precisely: of the possibility of public interest litigation, can be labeled the deterrence function (Denvir 1976:1136). Bureaucracies instinctively attempt to shield themselves from monitoring from other agencies such as the courts. Once the threat of a court challenge is credible, the agency might feel a significant pressure to avoid this, and as a result reconsider their actions, also in cases where rights are being violated (Denvir 1976:1136).

Another potential function of public interest litigation is the publicity and fact-finding functions. Here, not only the specific success or failure of the case in itself is of importance. An important function of litigation is that the very filing of the action forces disclosure of facts, heightens public awareness, and creates a political dynamic with an effect far beyond that of the lawsuit itself (Denvir 1976:1137). Bureaucracies have an institutional bias toward low visibility decisions which, despite their far-reaching effects, often escape public notice. The filing of a lawsuit might constitute a newsworthy event, provoking media coverage that in turn focuses public attention on actions that may be morally and politically indefensible (Denvir 1976:1137). Such actions could include human rights violations, such as violations of the right to food.

Public interest litigation may potentially also improve the responsiveness of government agencies. Bureaucracies have a tendency to insulate themselves from public pressures, especially pressures from the public that they are designed to serve. Litigation can often improve the responsiveness of such agencies without entangling the court in myriad substantive issues. Instead, the court may merely require the government agency to accept more input from the public by creating new forums in which members of the public can present views (Denvir 1976:1138). In this way public interest litigation can contribute to

allowing those affected by violations to get their voice heard, thus promoting political action of certain issues and rights. Thus, a potential function of litigation is to create new forums.

As a fourth potential function of public interest litigation worth mention, is the possibility of working as a catalyst to legislative action. Although a lot of public interest cases have focused on overturning existing legislation, litigation in many cases acts as a catalyst to legislative reform (Denvir 1976:1139). That is, public interest litigation can have the function of getting the attention of government agencies and the legislative branch, resulting in the recognition of a need for new legislation. In this respect, litigation can have a significant role in promoting different issues and rights.

The last socially beneficial function of public interest litigation that will be discussed here can be called the function of delay. This may be crucial in permitting the public's voice to be heard for the first time (Denvir 1976:1143). Here the filing of lawsuits performs at least two socially worthwhile functions. First, it serves notice on the government agency of the intensity of the opposition to the project in question. Second, the delay resulting from a lawsuit provides a breathing space in which interested groups may be able to organize political opposition (Denvir 1976:1142). If the project in question is questionable with regard to its social benefits, the function of delay, through litigation, might leave room for the public to voice concerns about the project. If the project has consequences for certain issues and rights that are not welcome, the delay function could result in a rethinking of the project.

As this section has demonstrated, public interest litigation can have several important functions in a democracy. Also, as discussed above, public interest litigation can be used in the promotion of economic, social and cultural rights. To get a better understanding of how litigation can be used to promote such human rights, it is necessary to study jurisprudence on these rights, which will be the topic of the next section.

2.6 Social rights jurisprudence

Since the adoption of the Universal Declaration of Human Rights, both civil and political rights and economic, social and cultural rights have been recognized as universal human rights. But from the beginning, individual complaints regarding rights violations could only be made with violations of civil and political rights (Langford 2008:7). This division in jurisprudence between the two sets of rights, the first generation civil and political rights, and

the second generation economic, social and cultural rights, is mirrored throughout much of both international and national law around the world. Jurisprudence for civil and political human rights has had a quite strong position, as opposed to economic, social and cultural rights. Lately though, jurisprudence on social rights has grown. And while social rights jurisprudence still is nascent, it now cuts across common and civil law systems, developed and developing countries and regional groupings (Langford 2008:3).

2.6.1 Obstacles

The critique against the full justiciability of economic, social and cultural rights has much to do with the fact that these rights are somewhat more difficult to handle juridically, than civil and political rights. To give an example, in 1975 Vierdag argued that social rights were not imbued with legal content because they were not inherently justiciable on the basis that the implementation of the provisions in the International Covenant on Economic, Social and Cultural Rights were a political matter, not a matter of law (Langford 2008:8-9). This objection to the justiciability of socio-economic rights had to do with the fact that in many social rights cases, a court would have to engage in prioritization of resources, something Vierdag argued belonged solely to the political sphere. In a response to Vierdag, Van Hoof argued that if a social right is included in a legal instrument, whether treaty law or constitution, it is by definition legally binding and potentially capable of enforcement (Langford 2008:9). Therefore, he reasoned, the argument that social rights were not imbued with legal content should be dismissed.

Another argument against the justiciability of social rights was the common objection to the full recognition of these socio-economic rights with regard to the difficulty of crafting meaningful remedies. A received remedial tradition suggests that civil and political rights can be rather easily enforced by backwards-looking compensatory remedies, such as damages for aggrieved individuals (Langford 2008:46). Such remedies lie within the core jurisdiction of domestic courts and often are somewhat similar to the remedial process and aims of private law. In contrast, socio-economic rights may require more complex remedies such as declarations or injunctions that invite or require more positive and comprehensive governmental action. These rights also raise difficult tensions between achieving corrective justice for the individuals before the court as opposed to distributive justice for larger groups not before the court (Langford 2008:46). In addition, there are also tensions between ordering compensation for past violations and ensuring compliance in the future, with parallel tensions

between achieving instant remedies that correct discrete violations as opposed to the commencement of a more slow and uncertain process of systemic reform. In this way, the complex and uncertain enforcement process that is posited for socio-economic rights seems to be a better fit for the more political enforcement process of international than domestic law (Langford 2008:46). International law relies on persuasion and dialogue while domestic law has employed a more monological and coercive process to enforce rights, especially with negative civil and political rights. However, recognition of a more complex, contingent and dialogical remedial process narrows the gap between traditional civil and political rights and socio-economic rights, and between domestic and international enforcement of rights (Langford 2008:46). This should have a positive effect on the justiciability of economic, social and cultural rights.

2.6.2 Why social rights jurisprudence?

As the last section demonstrated, there are some clear obstacles and difficulties with regards to jurisprudence around socio-economic rights. This has contributed to a lower degree of justiciability of social rights, and by this, lower level of protection of such rights. The human rights framework after the Second World War, gave in reality short shrift to the enforcement of social rights. Although the Universal Declaration of Human Rights contained an almost exhaustive catalogue of human rights, an individual complaints mechanism only existed for violations of the rights in the International Covenant on Civil and Political Rights (Langford 2008:9). Also, in many constitutions in Western Europe, Latin America and post-colonial African and Asian countries, either social rights were not mentioned, or if they were included, they were often relegated to directive principles (Langford 2008:9). But, the post-Cold War wave of democratization and constitutionalization changed this and led to the cataloguing of many justiciable economic, social and cultural rights in many constitutions. Simultaneously, the number of avenues for social rights litigation at the regional and international level expanded with the emergence of new human rights commissions, committees and courts, working for a coherent legal vision of economic, social and cultural rights (Langford 2008:9).

Partly as a result of these developments, from the late 1980s, the volume of social rights jurisprudence has accelerated. This activity is particularly discernible in the countries that witnessed democratic revolutions at this time, as in Latin America, Eastern Europe and South Africa, as well as in countries that became directly influenced by the Indian experience, which early saw much jurisprudence on a broad range of social rights (Langford 2008:7). A number

of western countries also witnessed a stream of somewhat mixed jurisprudence on social rights. In addition, Inter-American, African, European and UN human rights treaty committees and even the International Court of Justice have now adjudicated cases concerning social rights (Langford 2008:7). All in all, the last 20-30 years have meant an explosion of the caseload regarding socio-economic rights around much of the world, both at the national and international level, and there are different factors contributing to this development. According to Langford, there are at least four factors in an intricate interplay, which have contributed to the prominence and authority of social rights (2008:9).

The first factor that has contributed to the rise of social rights jurisdiction has to do with the level and nature of social organization. A clear driver of litigation has been human rights advocates, social movements and lawyers, but their potency, focus and willingness to use litigation strategies vary from jurisdiction to jurisdiction. The last few decades have witnessed the rise of a broad but distinctive movement for economic, social and cultural rights (Langford 2008:9). This movement has not only sought to use courts, but been active in sharing information on comparative experiences. In the case of Latin America, it seems that these new social rights movements are “the result of the political left accepting the ‘stark reality of failed socialist states’ and moving towards more reformist rights-based models, which saw law as a vehicle for social change” (Langford 2008:9-10). This explanation seems to carry some weight, but leftist critique of litigation does continue. A movement from the other direction is equally noticeable. Mainstream human rights organizations have to a larger degree embraced social rights, and a number of the most important cases were actually brought by organizations that had traditionally focused their work on civil and political rights (Langford 2008:10). These new shifts in the way social organization operates, is part of the explanation for the rise in social rights jurisdiction.

The second factor that Langford identifies is the degree of the political achievement of social rights (2008:10). It is not surprising that judicial receptivity to social rights claims is usually conditioned by clear evidence of state or private failure. The rise in social rights jurisdiction can partly be explained by the fact that inhumane suffering in situations of state unwillingness to fulfill its own legislation and policy has sparked much of the groundbreaking jurisprudence. This is the case in most of the regions in the world. This can be explained by the fact that courts remain pro-majoritarian actors, and their actions narrow the gap between widely shared social beliefs and incomplete or inchoate policy preferences on the part of the

government, or between the behavior of private firms and expressed political commitments (Langford 2008:10). The groundbreaking cases where there is clear evidence of failure in the political achievement of social rights have contributed to the rise in jurisprudence regarding these rights.

Langford points to a third factor when explaining social rights jurisprudence and this has to do with the judicial culture itself and the degree of judicialisation of human rights (2008:10). By this Langford means that the establishment of a culture of litigation for human rights within a jurisdiction makes the induction of new rights much easier. This explains why social rights jurisprudence is almost always significant in those jurisdictions that already have developed strong judicial or quasi-judicial review for civil and political rights. This creates both the “underlying conditions for social rights litigation (in terms of effective court processes, freedom of expression, relative enforcement of remedies), and the acceptability of human rights legal reasoning” (Langford 2008:10). By this, a judicial culture where civil and political human rights jurisprudence is strongly incorporated into the juridical tradition can explain the occurrence of social rights jurisprudence.

The last factor that can contribute to explain social rights jurisprudence that Langford discusses has less to do with law, social and legal movements, and judicial practice itself, and more to do with the culture of a particular society (2008:11). More precisely it has to do with the way in which human rights are understood, valued and embedded within a particular society. Langford argues that the permeation of human rights ideals into a particular context is closely associated with societal repulsion at, or experience of, particular manifestations of human indignity. His point is that some cultures might be more perceptive to social rights claims, while others again may be more resistant to such claims (Langford 2008:11). In this way, culture can contribute in explaining jurisprudence in the area of socio-economic rights, as well as function as an explanation for the absence of such jurisprudence in situations where this is the case.

This section has discussed factors that can contribute to explain jurisdiction with regard to economic, social and cultural rights. As is evident by now, there is not only one reason for such jurisprudence, rather most likely these factors are closely connected in an intricate interplay. Having gotten a better understanding of social rights jurisprudence more generally,

it is time to turn to the human right that is the focus of this paper, the right to food and the justiciability of this right.

2.7 Justiciability of the right to food

Although there are several treaties, covenants and other agreements concerning the duty to respect, protect, and fulfill the right to food, the justiciability of the right in practice remains uncertain (Vivero 2011). The justiciability of a right concerns the fact that a right is only a right when it can be claimed. This means that the fundamental issue affecting the fulfillment of the right to food is having the possibility to claim against violations of this right, and the possibility of having the case taken up by a judge or a court of some sort to give a ruling. This section will discuss the justiciability of the right to food, and present views that are both of an optimistic and pessimistic character when it comes to the justiciability of this right. The section will begin with a somewhat more general discussion of the term ‘justiciability’ and justiciability in connection with all social rights.

2.7.1 Defining justiciability

Economic, social and cultural rights have been part of the international human rights regime at least since 1948 with the adoption of the Universal Declaration of Human Rights. As discussed above, considerably less effort has been made to develop a conceptual framework to give them content to construct protection mechanisms to enforce them, than in the case of civil and political rights. One of the traditionally neglected issues regarding the economic, social and cultural rights has been their justiciability. Justiciability can in the context of human rights be defined as follows: “the possibility for alleged victims of violations of rights to file a complaint before an impartial body, and request adequate remedies or redress if a violation is deemed to have occurred” (Courtis 2007:318). That is, a right is only justiciable if it can be interpreted by the courts and can be the subject of litigation. As discussed earlier, there is disagreement with regard to the issue of whether or not economic, social and cultural rights should be considered justiciable rights. According to Courtis, the idea that, due to their specific nature, social rights are not suitable subjects for judicial enforcement is a misguided idea, and does not reflect the empirical evidence accumulated against it, that is, the large body of comparative case law in which judges adjudicate situations of alleged violations of economic, social and cultural rights (2007:318). There seems to be compelling evidence that socio-economic rights are in general justiciable, but it is necessary to understand more deeply how this is with regard to the right to food specifically.

2.7.2 Problems regarding the justiciability of the right to food

Although social rights jurisprudence accelerated heavily from the 1980s, there is not a corresponding growth in food rights jurisprudence specifically (Vidar 2006:9). There are some challenges that are particular relevant to the right to food, although some of them might apply to other economic, social and cultural rights as well. The first challenge regarding the justiciability of the right to food is related to the “rule of judgment”. While the right to food has been enshrined in the International Covenant on Economic, Social and Cultural Rights for over 40 years, efforts to develop and clarify the exact content of this right are for the most part relatively recent, especially in comparison with other rights in the same Covenant (Courtis 2007:321). This lack of clarity regarding the right to food may be explained by the fact that for a long time socio-economic rights were mainly conceived as rights related only to work, under the assumption that, given that people were part of a formal workforce and, thereby, ensured a decent income, the primary allocation of this income would be oriented to the satisfaction of basic needs, such as nutrition (Courtis 2007:321-322). As it was too optimistic to count on a progressive inclusion of the whole population in the formal workforce, the political strategy to peg socio-economic rights to the position of the worker proved to be a limited one. This because it denies protection to those who have little chance to be incorporated into the formal workforce, and this group is often those that are worse off in society. These are the neediest and they should be the preferred target of the socio-economic rights. For the last 20 years, international efforts have for this reason been devoted to developing the content of socio-economic rights outside of a formal labour contract (Courtis 2007:322). However, the work of clarifying the content of the right to food started later, and has only recently started to be developed in a more systematic manner. For this reason, the legal standard regarding the content of the right to food is comparatively recent to be agreed as developed standards upon which litigation can be based, without reference to other rights. Landmarks in the process of clarification are the General Comment No. 12 on the Right to Adequate Food of the Committee on Economic, Social and Cultural Rights, adopted in May 1999, and the FAO Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security, adopted in November 2004.

Another challenge to the right to food has to do with the fact that constitutional recognition and protection of the right to food throughout the world, is generally weaker than for many other social rights, such as the right to health and to education (Courtis 2007:322). This means

that there are fewer countries in the world with an express constitutional provision of the right to food. A third problem is that statutes regarding food security and other food issues usually state public policy goals and principles, but rarely enunciate an individual or collective right to food (Courtis 2007:322). These three factors have created difficulties in the identification of a firm legal basis to take right-to-food cases to court. But this does not mean that these difficulties are inextricable.

2.7.3 The right to food and improved justiciability

Although, as the above section showed, there are issues with the right to food that may constitute obstacles for the justiciability, they are not insurmountable. Most of them are in fact, according to Courtis, effects of the lack of an interpretive tradition identifying the right to food as an autonomous right (2007:323). Courtis argues that there is no conceptual impediment to define the content, or some aspects of the content, of the right to food in a legislative statute or to include the right to food in a constitution. Direct application of international human rights instruments and standards is also a growing practice in domestic courts in different parts of the world. In addition, “the absence of case law is just a state of affairs that can change gradually, when cases start being decided by courts and therefore accumulate” (Courtis 2007:323). The right to food is a complex right, but this is a common characteristic of many human rights. Thus, nothing prevents the right to food from being turned into a fully justiciable right.

Therefore, although there have been, particularly in the past, arguments against the justiciability of socio-economic rights, many theorists argue that economic, social and cultural rights generally, and food rights specifically, are, and should be justiciable (Eide, Oshaug and Eide 1991:425; Courtis 2007; Golay 2009; Vidar 2006). There is a compelling amount of jurisprudence on these types of rights refuting arguments against their justiciability. While jurisprudence on the right to food has developed more recently, there are cases that show that this right could be made justiciable, with India and South Africa as prominent examples (Gauri 2009; Vidar 2006). In these countries the right to food has been recognized as a justiciable right, and they have experienced litigation on the right to food. In recent years, there has also been right-to-food litigation in countries such as Argentina, Colombia, Paraguay and Switzerland (De Schutter 2010b: 10). In addition to the comparative cases where the basis of judgments were the right to food, much of the experience regarding justiciability of this right have involved framing duties related to the right to food in relation

to the violation of other rights, illustrating the interdependence of human rights (Courtis 2007:328). While the content of the right to food for a long time was somewhat uncertain, with the above mentioned General Comment No. 12 on the Right to Adequate Food and the Voluntary Guidelines this is no longer the case. The right to food and the correlative obligations of states are clearly set forth in international law (Golay 2009:9-10). At the national level, in most countries the right to food is recognized to some extent, although the actual content of the right may be more uncertain than under international law (Vidar 2006:13). The justiciability of the right to food is under development, and recent years have seen much progress. Despite there being experiences of litigation on the right to food in some countries, this is still not happening in many of the countries where the right to food is being violated. To get a better understanding of why this is so, it is necessary to start by getting an understanding of the phenomenon of public interest litigation and what conditions are necessary for public interest litigation to arise. That is, what factors have to be present for public interest litigation to exist on an issue or right? The last part of this chapter will provide a framework for the study of public interest litigation and the necessary conditions that have to be present for litigation to take place. This framework is both a theoretical and analytical framework, and will be used in the analysis of this paper to get an understanding of which factors and conditions would have to be present for food rights litigation to arise in Guatemala.

2.8 Theoretical and analytical framework – Conditions for public interest litigation

The theoretical and analytical framework that will be used in this paper was developed by Gloppen (2006) and later used by Gloppen and Kanyongolo in their study of the “Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law” (2007). This framework was used to study the lack of social rights litigation in Malawi, and is a theoretical framework that enumerates which factors influence the way in which litigation cases come before the court and which factors influence how the courts respond to these cases. The theoretical framework focuses on critical junctures for legal mobilization, and can therefore be used in an analysis to get a better understanding of what influence the existence of public interest litigation. In this way, the framework can be used to guide the search for factors that are important for litigation to arise and allows for a structured and theory-driven study of the case.

Gloppen and Kanyongolo, in their study and according to the framework, separate the legal process in five different stages⁴. There are several hurdles that must be overcome for litigation to arise and succeed, and thus advance the social rights that are being litigated, such as the right to food. These five stages follow each other, and in practice, sometimes overlap, as the litigation process evolves. The first stage of the legal process concerns the voice of the marginalized groups in question (Gloppen and Kanyongolo 2007:272). 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. The next phase in the legal process concerns the judicial bodies in the way that they have to be responsive and accept the claim as belonging within their domain. Further, the judge or judges must be capable of addressing the claim and find effective remedies. Next, to have a social impact, a judgment must be accepted, implemented, complied with, and finally, it must be translated into systemic change through social policy and political practice (Gloppen and Kanyongolo 2007:272). Each stage of the litigation process is influenced by the outcome of preceding stages (Gloppen 2008:25). Dividing the litigation process into these five distinct but interrelated stages, allows for a clearer understanding of the many components and complexities involved in a litigation process.

For each of the five stages, a number of factors combine to determine the outcome of the legal process. In this way, the framework can be used to study litigation and the legal process in a specific case, by serving to identify relevant aspects of the case that should be subjected to investigation. In the case of Guatemala, this means conducting a study of which preconditions for litigation are present and which are not, in relation to the framework, and thus get an understanding of the conditions that hamper public interest litigation on the right to food. As there is no jurisprudence on the right to food in Guatemala, the focus of the analysis will be on the two first stages of the legal process. That is, on what shapes the legal voice of the marginalized group in question, and what makes courts responsive to these voices. More precisely: given the absence of food rights litigation in Guatemala, my paper will first, identify the factors that seem to obstruct the legal voice of the hungry, and second, identify the factors that make the courts unresponsive to their social rights claims.

⁴ These different stages do to some extent correlate and overlap with the four stages of the litigation process Siri Gloppen developed in the 2008 “Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health”.

2.8.1 Stage 1: Analytical framework - Voice

Following the framework, first of all it is necessary to note that people's ability to voice rights claims is related to their opportunity situation (Gloppen and Kanyongolo 2007:273). That is, it is related to their resources and the formal, or systemic, and informal barriers that define them as litigants in the legal process. 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 importance in social rights cases, which are often legally complex and energetically contested and where there is scarce local jurisprudence to draw upon (Gloppen and Kanyongolo 2007:273). For litigation to materialize from marginalized groups, they must understand that their rights are being violated and be aware that they can take their case to court as legal remedies exist. They must also be able to identify their grievance in a way that is sufficient explicit as to provide a basis for litigation, and must be able to identify who bears the legal responsibility. They must in addition be capable of mobilizing legal resources in order to transform their grievances into legal claims that the courts will accept. As is evident, there are many factors that have to work in favor of litigation for such action to succeed in bringing a case to court. In each of the phases described here, there are barriers of various kinds, formal, practical and motivational. In addition, there are other factors that have to be taken into account when studying whether there will be social rights claims, such as if there exist alternative arenas and the litigation resources that does in fact exist.

Speaking of the formal barriers, this has to do with the legal system and the nature of the law and operation of the courts because this affects marginalized groups' motivation and ability to voice claims. A clear legal basis for social rights is conducive to rights-asserting litigation, as is a possibility for class action suits and lenient criteria for 'locus standi', allowing organizations and individuals to litigate on behalf of others (Gloppen and Kanyongolo 2007:275). With regard to the practical barriers to the formulation of social rights claims, this has to do with whether there is a lack of knowledge that prevents people from seeing their problems and grievances as rights violations and, therefore, actionable (Gloppen and Kanyongolo 2007:274). This has to do with the fact that insufficient information about who is to blame, how they can be held responsible and where claims can be addressed are common obstacles. Motivational barriers has more to do with the fact that poor and marginalized people often view the legal system with distrust and fear, with good reason (Gloppen and

Kanyongolo 2007:276). The law reflects the power relations in society and often has an anti-poor bias, at least in its application. And 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, this weakens any inclination to turn to the state for support and may be a barrier to the articulation of social rights claims (Gloppen and Kanyongolo 2007:277). The three barriers discussed so far will have an influence on the legal voice of marginalized people, and can, if the opportunities are not conducive to litigation, discourage people from voicing their social rights claims and take them to court. But there are also other conditions that have to be considered in a study of factors that discourage people from voicing their claims.

One factor that can influence the legal voice of the marginalized is if there exist alternative arenas for social change. That is, any inclination to voice social rights claims through legal action may 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 court-like institutions such as ombudsman institutions, human rights commissions, or traditional courts and tribunals (Gloppen and Kanyongolo 2007:277). If there is more than one arena for marginalized groups to get their voice heard and assert their claims, this might have the effect that people are discouraged to assert their claims in a court to pursue social justice. Lastly, the analytical framework stresses the need to, in an analysis of poor litigants' legal voice, or lack thereof, take into account those litigation resources as are available and that could enable them to overcome litigation barriers and turn grievances and claims into mainstream legal process. A key factor is what can be called "associative capacity", which means, 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 (Gloppen and Kanyongolo 2007:279). Personal agency, the realm of personalities and leaderships, is central to understanding why some marginal groups are able to articulate their claims well enough to pave the way for a judicial process or inquiry. These factors, the different ways in which the marginalized groups and their supporters can join together to build expertise and generate resources, is important to investigate to be able to understand the initiating stage of a litigation process, where the litigants are formulating and voicing their claims, or the absence of such.

2.8.2 Stage 2: Analytical framework - Response

In the second step of the framework, the purpose is to investigate and understand the courts' responsiveness to the voice of the marginalized, and what determines this responsiveness, or lack thereof. The point of departure for the second step in the framework is that 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 (Gloppen and Kanyongolo 2007:282). 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. Once again it should be noted, access to quality legal services is central, and all the more so the less open a system is to social rights claims. The legal system's responsiveness, in turn, depends on two sets of factors that need to be taken into account: the formal characteristics of the legal system and the nature of the judiciary (Gloppen and Kanyongolo 2007:282).

Following the framework, the formal characteristics of the legal system has to do with how the law and the legal system are relevant to whether or not prospective litigants decide to pursue litigation. All in all, the factors that affect the legal system's responsiveness to the social rights claims of marginalized people are 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 (Gloppen and Kanyongolo 2007:283). Provisions regulating the courts' competence and jurisdiction also influence whether judges accept cases regarding the social rights of the marginalized as within their domain. To be able to understand what makes court responsive to the voice of the marginalized, it is necessary to investigate the legal system of the case in question, in relation to all these different factors in the framework. In addition, the nature of the judiciary can have an influence on the courts' responsiveness to the social rights claims. With regard to what shapes judicial interpretation, scholars differ somewhat as to whether rational self-interest, norms or personal background is seen as most decisive for how judges choose to interpret the law (Gloppen and Kanyongolo 2007:285). In accordance with the analytical framework, three factors are particularly important for judicial interpretation and responsiveness in cases affecting marginalized groups' social rights: the legal culture, the sensitization of judges, and the composition of the bench.

With regard to the legal culture, this has to do with the fact that how legal norms are interpreted in a particular case is linked to the individual judge's personal, ideological, and professional values. This combines 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 (Gloppen and Kanyongolo 2007:286). Also, how strongly judicial independence is embedded in the legal culture is important for how the judges deal with social rights claims put forth by marginalized groups. A system that tolerate political pressure and other external influences on judicial decisions open the system to elite capture, something which there is reason to believe will further disadvantage politically marginalized litigants. These factors will have to be taken into account when explaining how legal culture can affect the responsiveness of courts to social rights claims. In addition, it is important to take into account that judges' interpretation of the law, as it applies to marginalized people's social rights, is affected by their sensitivity, individually and collectively, to these people's concerns and conditions. Sensitivity may be built up through training and experience and enhanced through advocacy and public discourse (Gloppen and Kanyongolo 2007:287). Even more profoundly, sensitivity is reflected in the composition of the bench. That is, who the judges are and where they come from, socially, culturally, ideologically, and in terms of their education. All this shapes their perspectives, professional qualities, integrity, and commitment (Gloppen and Kanyongolo 2007:288). The sensitivity of the judges might therefore have an influence on the responsiveness of the courts to social rights litigants. Finally, 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 (Gloppen and Kanyongolo 2007:288). This is obviously just a general trend; formal procedures do not necessarily change the responsiveness of courts to the concerns of marginalized groups. However, the appointment procedures should be investigated as they could contribute in the explanation of the responsiveness of courts. The factors discussed in this section, the law and the legal system and the nature of the judiciary, should together be helpful in a study of what explains the responsiveness of the courts to social rights claims.

Put together, in an analysis where factors that shape the legal voice, and the social rights claims, of the marginalized are investigated together with factors that influence the responsiveness of courts to these voices, should give a rich and thorough understanding of which factors are necessary for social rights litigation to arise and be admitted by the courts.

By using the theoretical framework as a guideline in the analysis of the Guatemalan case, the goal is to be able to disclose which factors and conditions would have to be present, or put differently, which factors are lacking, for there to arise public interest litigation on the right to food. Thus, the analysis will be both theory-driven and explorative, as the unexplored field of public interest litigation on food rights in Guatemala, is analyzed in relation to a theoretical framework developed specifically for the study of public interest litigation on social rights. This chapter has given an outline of the theoretical framework of this thesis, and it is now time to turn to the methodological considerations regarding the study.

3.0 Methodological considerations

The aim of this thesis is to study conditions for public interest litigation on the right to food in one particular case: Guatemala. By definition, this is a case study. Very little research has been conducted on public interest litigation on the right to food in the Central American region; therefore my thesis will be of an explorative nature. I will use a qualitative case study method to answer the research question, and this section will give an account of the research process and the methodological considerations that apply to such a case study research.

3.1 Case study

That this thesis is of a more explorative, rather than confirmatory or theory testing, nature, favors the use of a qualitative case study method (Gerring 2004:349). As public interest litigation on the right to food in Guatemala, or the Central-American region for that matter, is not a highly developed research field, this thesis aims to explore the phenomenon and generate new knowledge with regard to the research question. This is one of the strengths of case studies; they have an advantage in research at exploratory stages (Gerring 2004:350).

Case study methods can be defined to include both within-case analysis of single cases and comparisons of a small number of cases (George and Bennett 2005:18). The focus of this paper is mainly on a within-case analysis. Overall, the main focus will be on the specific features of Guatemala that influence conditions for food rights litigation. However, there will also be a minor comparative aspect as experience of social rights litigation from other countries and regions will be used in the analysis to compare the situation in Guatemala with other cases where litigation has succeeded. Although hard generalizations are not the strength of qualitative methods, case studies aspire to cumulative and progressive generalizations about social life (George and Bennett 2005:19). That is, by studying phenomena in-depth, case studies aim to reveal generalizations across a larger set of similar cases. In this way, my case study can contribute to further the generating of implicit hypothesis of what affects social rights litigation in other, similar countries.

Yin (2009:18) defines the case study as follows: A case study is an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident. This case study explores factors that influence food rights litigation in contemporary Guatemala, and these factors and the context in which they operate are closely intertwined. This makes it

necessary to view the factors that influence food rights litigation in light of the specific contextual features of Guatemalan political, institutional and societal properties.

3.2 Data and methods of collection

The second part of Yin's definition of the case study concerns data collection and data analysis strategies. The case study inquiry copes with the technically distinctive situation in which there will be many more variables of interest than data points. This has the result that the inquiry relies on multiple sources of evidence, with data needing to converge in a triangulating fashion. Another consequence is that the inquiry benefits from the prior development of theoretical propositions to guide data collection and analysis (Yin 2009:18). To investigate the factors that are likely to influence social rights litigation, I follow the analytical framework presented in the former chapter. This allows me to benefit from previous research on factors that are known to have an effect on social rights litigation in other cases. This facilitates structured data collection and a structured data analysis strategy.

An important guideline for improving data quality is to record and report the process by which the data are generated (King, Keohane and Verba 1994:23). Only by improving the data quality can the validity of the conclusions drawn be secured. Another important guideline to improve data quality is to collect data from as many different sources as possible (King et al. 1994:24). This paper relies on multiple sources of evidence. To investigate what influences the legal voice of the hungry and malnourished people in Guatemala, and the responsiveness of the courts to these voices, I will rely on a combination of different data: existing literature and research is an important source in my paper. This is combined with other sources, mostly official documents, in particular the Guatemalan Constitution and an additional text of a statute, as well as media articles and statements in a few instances. Official, both national and international, statistical data is another source of data that is being utilized in the paper.

With regard to the existing literature and research, the data I have used have been mainly studies of Guatemalan social and political development, and the legal system, including the domestic and where relevant, international, legislative framework. In addition, I have used theoretical literature on economic, cultural and social human rights, with an emphasis on food rights; the justiciability of social rights; political and legal opportunity structure; and theoretical literature and research on the conditions important for social rights litigation. The official documents: the articles of the Constitution and the law that have been analyzed have

been selected on the basis of relevance to the themes under analysis. The media articles and statements have also been collected according to the relevance of the data to the question under analysis. The international statistical data that has been used have been collected with the aim of highlighting the social situation in the country with regard to the right to food, as well as other social indicators, while the national statistical data have been selected on the basis of their relevance to the particular issues under analysis. The main objective with regard to the collection of data and choice of methodology has been guided by the research question under investigation and the availability of data.

The existing literature and research used, has been collected mainly by searching scholarly databases and political science, human rights, and law journals. The official documents used: the Constitution and the additional text of a statute have been available in full text through Guatemalan governmental webpages. The media articles and statements that have been used, have been collected by searching the largest Guatemalan, and in a few cases international, newspapers' databases of previous published articles of particular interest to the specific subject under analysis. The national statistical data has been collected via domestic institutions' webpages and the international statistics are selected from well-established non-governmental and inter-governmental institutions.

3.3 Validity and bias

As mentioned earlier, case study methods are not very strong at yielding high external validity, that is, produce firm generalizations (Skog 2004:113). However, using these methods allows a researcher to identify and measure the indicators that best represent the theoretical concepts that is intended to be measured. Validity is about whether we are measuring what we think we are measuring (King et al. 1994:25). This means that in case study methods, with one or only a few cases, it is easier to take consideration of contextual factors and hence be more certain that one is really measuring what one is supposed to measure. And by this, the researcher is better fit to avoid what Sartori (1970) labels conceptual stretching; turning the concepts into meaningless terms. This gives case study methods an advantage in allowing the researcher to achieve high levels of conceptual validity (George and Bennett 2005:19).

When using secondary literature as the basis for data collection, one always has to carefully consider the reliability of the data. This is because in such studies one is at the mercy of the author of the literature, and it is important to be aware that this can have the result that the

literature reflects the views of the author in a biased manner. Therefore, if there is any doubt of the reliability of the data: collecting data from as many different sources as possible can reduce the risk of counting on literature that presents an issue in an excessively biased way. I have tried to do this whenever the availability of data has allowed it. However, as there has not been conducted much research on the subject in Guatemala, I have sometimes, after evaluating the reliability of the source, had to only rely on that one source of data that I have been able to collect. However, I consider the data used in this paper as not being excessively biased, as most of the literature agree on and reflect the same broad patterns with regard to the overall situation in Guatemala. The next chapter gives an overview of the Guatemalan case.

4.0 The case: Guatemala – Insecure ‘rule of law’

Guatemala is not a poor country, but it is one of the countries with the most inequitable distributions of wealth in the world, and the majority of its population is poor and hungry (...) (Ziegler 2006:6).

Guatemala, a Central American country bordering to Belize, Honduras, El Salvador, and Mexico, has an estimated population of about fourteen million people and its capital is Guatemala City. Guatemala can be said to be a case of persistent underdevelopment and it is characterized by huge differences between the rich and the poor. In fact, rates of poverty and inequality in Guatemala are among the highest in the whole of Latin America and the Caribbean (Sieder 2008:487). The majority of the population lives in rural areas, but Guatemala is becoming increasingly urbanized. Guatemala is a multi-ethnic society, with the indigenous peoples making up more than half of the country’s population (Holiday 2000:78; Ziegler 2006:5). Table 1 demonstrates many of these points and is meant to give a brief introduction to the status of some important social and economic indicators. These indicators have been collected from the World Bank, and all of them are from the year 2006 to 2009. The gross domestic product (GDP) growth indicators illustrate both total and per capita growth in percentages. Rural population concerns the proportion of the population living in rural areas. The indicators for poverty, literacy and life expectancy, as well as the Gini coefficients, only had figures from one point of time. With regard to the Gini coefficients⁵, both the coefficient for inequality in income and inequality in land ownership are showed to demonstrate the large inequalities in both income and distribution of land. Several of these indicators will be mentioned and discussed further in this chapter. Here it suffices to note that the fact that many of Guatemala’s development indicators lag far behind those of other countries in the region is surprising considering the country’s income. Despite being the largest economy in Central America, the country’s social indicators are generally much lower than those of the poorest countries in the sub-region, such as Honduras and Nicaragua (The Central American Institute for Fiscal Studies 2009).

⁵ A Gini coefficient is a measure of inequality that ranges from 0 to 1. A coefficient of 0 represents perfect equality, while a coefficient of 1 represents extreme inequality.

Table 1: Status report: Social and economic indicators

Indicator:	Year:	2006	2007	2008	2009
GDP Growth (annual %)		5,4	6,3	3,3	0,6
GDP per capita growth (annual %)		2,8	3,7	0,8	-1,9
Rural Population (%)		52	52	51	51
Poverty (%)		51			
Literacy rate, adult (%)					74
Life expectancy					71
Gini		0,54			
Gini (land ownership) *					0,85

Source: World Bank (2011c): World Development Indicators & Global Development Finance

* This indicator is collected from the 2010 World Bank Report No. 55341

To be able to understand and explain what factors would enable litigation on the right to food in Guatemala, it is essential to have a deep and comprehensive understanding of several important aspects of the country. This section will start by giving a brief historical overview of the case of Guatemala, before turning to a study of different factors and characteristics of Guatemala of direct importance for the research question of the paper. This includes a presentation of the status of the right to food, regarding hunger and food insecurity and state obligations in Guatemala, a discussion of the judiciary in the country, and also an examination of litigation on other economic, social and cultural rights.

4.1 Historical overview

Like most of Latin America, Guatemala is now formally a democracy. Still, the history of this country and the road to democracy can be said to be characterized by insecurity and instability. And even today, respect for political and human rights remains far from secure and democracy is still considered to be fragile (Sieder 2008:489).

When colonization started in the sixteenth century, the dispossession of indigenous people from their historic lands began, and this continued and accelerated during the late nineteenth century and the coffee boom (Sieder 2008:490). Repression and exploitation of the indigenous people has been a prominent feature in the history of Guatemala, and ethnic and regional inequalities still poses problems today. The economy in Guatemala has been built to

a large extent on agro-exports and based on a highly exploitative form of rural capitalism. This in turn was reflected in authoritarian and exclusive forms of politics and development. Race and class discrimination were mutually reinforcing and underpinned the economic system (Sieder 2008:490). Still today, Guatemala's economy is largely based on exports of coffee and sugar, with agriculture providing work to at least 36 percent of the population (Ziegler 2006:5-6).

For much of the twentieth century, military coups, leadership, and governments have been a dominant feature of the state of Guatemala. Between 1944 and 1954, reformist governments were elected, following a coup by junior military officers (Sieder 2008:490). But the military, being supported by the USA, again gained power as the result of a coup. And the state increasingly became dominated by the military, who also had become a powerful economic actor by the 1970s. Although regular elections took place, these were not democratic and were limited by the fact that only military officers were fielded as presidential candidates (Sieder 2008:491). Participation in the elections was low and the level of political violence and intimidation was high. The domination of the army led to several guerrilla insurgencies, something the army brutally tried to repress. In response to these guerilla challenges, the armed forces militarized the entire state and used extreme violence against the civilian population. In fact, Guatemala constitutes one of the most extreme cases of state repression in the twentieth century in Latin America, with killings, disappearances, and displacements of high scale (Sieder 2008:491). More than 200 000 women, children, and men were brutally killed during the 36 years the civil war lasted, and hundreds of thousands more were displaced or left as refugees (Davis and Warner 2007:233; Holiday 2000:78). As one can easily imagine, this part of the history of Guatemala has had significant negative consequences for the development prospects of the country.

In the middle of the 1980s, the military returned Guatemala to civilian rule, in what can be called a "guided transition to democracy designed to improve the country's standing before the international community, while perpetuating effective control by the armed forces over national affairs" (Sieder 2008:491). That is, the control and influence of the military was still strongly present, and repression of political opponents and human rights activists continued. Although Guatemala returned to elected government and adopted a new constitution in 1986, political parties remained weak and fragmented and Guatemala was far from being able to be called a democracy. These conflicts in Guatemala were not resolved until 1996 when an

United Nations-sponsored peace settlement was agreed upon, after almost ten years of negotiation and several fallbacks (Jonas 2000:11-14). This peace accord signed the end of a long-lasting conflict for Guatemala, and 36 years of civil war was over. Although this was an important achievement in itself, the accord also included a plan to reverse Guatemala's historically exclusionary pattern of development and better recognition of indigenous peoples' rights. However, the implementation of these developmental goals was in many aspects slow and uneven, not only due to the difficult history of the country, but also because of a lack of commitment by key domestic actors (Sieder 2008:493). But there were also aspects of the accord that were implemented with at least some success. More positive outcomes of the peace settlement includes that the guerillas were reincorporated into civilian life, displaced and returned refugee populations were resettled, spending on health and education did increase, and structural reforms were implemented (Holiday 2000:79; Sieder 2008:493). All in all, one can conclude that although the peace accords have had a mixed record of implementation and success, this was at least an important step in the right direction for progress and development in Guatemala.

Guatemala is today, although formally a democracy, a country still characterized by patrimonialism, clientelism, and a weak party system (Sieder 2008:493). Guatemalan political parties tend to be dominated by powerful individuals who tend to campaign on the strength of their personal, clientelist networks, rather than by programmatic coherence or the representation of different groups in society. In general, party discipline is very low, and elected deputies often switch their allegiance during their time in office (Sieder 2008:494). In addition to these weaknesses regarding party politics, the institutional reform of the armed forces has been a slow process, and commitment to this process has been low. Therefore, the influence of the military is still present in Guatemala. This can be illustrated by the fact that "serving and former military officers form part of a network of so-called 'parallel powers' which has influence within the highest spheres of government" (Sieder 2008:494). It goes without saying that this is problematic for the functioning and legitimacy of the Guatemalan democracy. Also problematic for the development of Guatemala is the fact that civil society still is comparatively weak. This can be attributed, at least in part, to the continuation of violence and intimidation against rights activists and popular awareness of the historically high costs of dissent. In spite of these adverse conditions, civil society organizations have become more vocal advocates of government transparency and accountability in recent years (Holiday 2000: 82; Sieder 2008:495). To sum up: a state characterized by patrimonialism, a

weak party system marked by clientelism, a powerful and autonomous military, and a comparatively weak civil society are key factors to the explanation of the lack of development in Guatemala.

4.2 Hunger and food insecurity

In spite of the end of the armed conflict, the human rights situation in Guatemala remains extremely gloomy. High levels of violent crime, continued impunity, and the ineffectiveness of the police and the judiciary, of which the last will be discussed further below, leads to weak civil rights protection in general (Sieder 2008:495). With regard to the human right to food, the situation is bleak. Although the protection of certain rights has improved in the recent years, this is not the case with regard to the right to food, and there is evidence of persistent violations (Ziegler 2006:17). In many ways the situation has deteriorated the last twenty years. Table 2 (following this section) shows that with regard to undernourishment the situation has deteriorated. The numbers for both the total number of undernourished and the proportion of undernourishment have increased from 1990 to 2007. Also, acute malnutrition levels have recently increased, and Guatemala has the highest level of malnutrition in Latin America (Ziegler 2006:2). Chronic child malnutrition is more than twice as high in Guatemala than in most countries of Latin America and among the highest in the world (Ziegler 2006:6). Today, almost half of Guatemalan children under the age of five are severely stunted, an indicator of chronic malnutrition (The Central American Institute for Fiscal Studies 2009). This affects far more indigenous children, 70 percent, than non-indigenous where the number is 36 percent. Every year, more than 15 000 Guatemalan children under the age of five die (Ziegler 2006:6). Acute malnutrition is for the most part concentrated in the poorest regions, particularly the northeast. However, in the wake of the crises that hit Guatemala in the beginning of the millennium, including a collapse in world coffee prices and localized droughts, acute malnutrition levels have also increased in the east, south coast, and the west (Ziegler 2006:6). Also, access to water is problematic for a large portion of the Guatemalan population. This is true both in urban areas, but particularly in rural areas, where over 65 percent of the population lack access to an improved source of fresh water or sanitation (Ziegler 2006:8). As should be evident, widespread hunger and malnutrition is a huge challenge to the development of Guatemala.

Table 2: Undernourishment in Guatemala (1990-2007)

Year:	1990-1992	1995-1997	2000-2002	2005-2007
Number of undernourished, (millions):	1,4	2,1	2,5	2,7
Undernourishment (%), total population:	15	20	22	21

Source: FAO 2010

The problem of hunger and food insecurity is not simply a question of the availability of food. Guatemala's land could theoretically feed the entire population (Ziegler 2006:6). Rather, the problem of hunger and malnutrition is more related to the inequities in the distribution of resources and access to food. The government has been accused of not using the maximum available resources to fight hunger, and Guatemala has one of the lowest levels of social spending in Latin America, at six percent of GDP in 2004 and about eight percent of GDP in 2005/2006 (De Schutter 2010:20; The Central American Institute for Fiscal Studies 2009). It has been argued that one of the main limitations has been the chronic lack of government funds, linked to the refusal by economic elites to pay higher taxes to finance an expansion in state services benefiting primarily the poor (Ziegler 2006:17). International financial institutions supporting the signing of the peace accord in 1996 insisted that the government had to commit to raising tax revenues from eight to twelve percent of GDP by the year 2000 (Pearce 1999:61). According to data, it only managed to raise the tax revenues to ten percent of GDP by 2000 (World Bank 2011a). This has been seen as a failure of getting national elites to take responsibility, through their own resources, for post-war reconstruction and political and institutional reform of the state. The distribution of wealth in Guatemala is, as mentioned before, among the most inequitable of all the countries in the world, and the concentration of wealth is extreme. This can be illustrated by the fact that in Guatemala, less than six percent of the wealthiest households control 50 percent of total income (Ziegler 2006:6). The economic growth of the country has for the most part only benefited the rich, and therefore has not reduced the very high numbers of inequality. Also, landownership is highly concentrated, and two percent of the population own as much as about 70-75 percent of agricultural land (Ziegler 2006:6). It is not difficult to see why such extreme inequality

excludes the majority of the population in Guatemala from development and poses serious problems for the country.

4.2.1 Poverty

Poverty is something that usually is closely connected to hunger and food insecurity. Guatemala is a society characterized by acute socio-economic inequality, with 51 percent of the population living below the national poverty line in 2006 (World Bank 2011b). Also, in Guatemala, two thirds of the population are too poor to feed themselves adequately, and in more than 60 percent of Guatemalan homes, spending on food does not meet minimum daily dietary requirements (Ziegler 2006:6). The statutory minimum wage is not set in relation to food costs, and food prices have increased faster than the minimum wage. Overall, more than half the population lives in poverty, and extreme poverty is highly concentrated amongst the indigenous peoples (Ziegler 2006:7). The high poverty rates illustrate the problems Guatemala face regarding the fulfillment of the right to food.

4.2.2 The indigenous peoples – A serious challenge

The hungry and malnourished people in Guatemala are predominantly indigenous people and poor peasant farmers or agricultural workers living in rural areas. The indigenous population was in a census in 2002 approximated to make up about 43 percent of the population. In reality, however, and in official circles, the figures are generally considered to be 60 percent or more (Vinding 2004:94; Jonas 2000:10; De Schutter 2010a:20). These 60 percent consists of three peoples: the Xinka, the Garífuna and the Maya, of which the latter by far is the largest. Hunger and malnutrition levels are generally closely linked to the quantity of land held, and on average, indigenous households hold less land than non-indigenous (Ziegler 2006:7). This is an illustration of one of the most problematic aspects of Guatemalan society: the continuation of severe forms of discrimination against indigenous peoples. This has the result that the indigenous peoples generally are worse off than non-indigenous people in most aspects. Persistent discrimination against indigenous peoples is reflected in an extremely high wage gap between indigenous and non-indigenous workers (Ziegler 2006:7). According to some estimates, over 90 percent of the indigenous population lives on an income that is lower than the poverty line (The Guatemala Times 2011). Also, discrimination against women, who rarely own land or other assets, is common, as well is the problem of child labour, with around half a million children working in coffee and sugar plantations (Ziegler 2006:7). Therefore, indigenous women and children are highly vulnerable groups.

4.2.3 The problem of land distribution

Guatemala has one of the most unequal land distributions in the world, given a long history of expropriation from indigenous people. With the growth of the coffee production in the 1800s, many communally-held indigenous lands were nationalized or privatized into individual holdings, with the aim of consolidating the land into large 'fincas' (estates) for commercialized coffee production (Ziegler 2006:9). Land was also expropriated for the growing of fruit many places. At this time many indigenous people were forced to relocate to other less fertile ground for subsistence farming. The very unequal distribution of land in Guatemala has in fact been identified as one of the main sources for the violent conflict that plagued the country before the signing of the peace agreement. Yet, the war exacerbated the situation as the military and landowners forcibly controlled more land. The extreme concentration of land can be illustrated by the 2003 agricultural census. According to this census, two percent of the country's farms, with an average area of 194 hectares, control 57 percent of the land, while 87 percent of all farms, with an average size of 1.2 hectares, occupy just sixteen percent of the land (Gauster and Isakson 2007:1521). Also demonstrating the high concentration of land, the Gini coefficient for land ownership is today around 0.85, which means that Guatemala has the second most unequal distribution of land in Latin America (World Bank 2010b:16; Gauster and Isakson 2007:1521).

With the signing of the peace agreement, an agrarian strategy was agreed upon in order to address the problem of gross inequalities in land distribution. The agreement's 'Accord on Socio-economic Aspects and the Agrarian Situation' that was agreed upon after tough and long-lasting negotiations, enlists a strategy known as market-assisted land reform. Drawing upon thinking at the World Bank, its basic premise is that, once distortions in land and credit markets are corrected, market forces will reallocate land from large owners to more productive small farmers, thereby advancing both efficiency and equity (Gauster and Isakson 2007:1520). It is outside the scope of this paper to discuss this reform strategy in detail, however, put simply, the basic idea is that the state gives qualified landless people a grant or a subsidized loan with which to buy land (Banerjee 1999:14). However, the adoption of the World Bank's market-assisted land redistribution strategy has met much criticism. First of all, the premise that once distortions in land and credit markets are corrected, market forces will reallocate land from large owners to smaller farmers has been criticized for neglecting the political and cultural context in which these markets operate (Gauster and Isakson

2007:1522). Other points of criticism against market-assisted land reform has been that it is not necessarily the case that this type of reform will benefit the neediest peasants, that it is unlikely to achieve the optimal level of land redistribution, and that it is an costly approach to agrarian reform (Banerjee 1999:14-15). As fifteen years have passed since the signing of the peace agreement, it is widely believed that the land reform strategy has for the most part failed (Gauster and Isakson 2007; World Bank 2010b). Among the problems mentioned with the strategy, are the fact that it has been financially unstable, fostered corruption and inefficiency, burdened many of its purported beneficiaries with debt, and redistributed only a small fraction of agricultural land (Gauster and Isakson 2007:1520). Today, land distribution remains highly unequal, and this affects indigenous people to a larger extent than non-indigenous people. As mentioned in the previous section, this is a concern also for the situation of the right to food as hunger and malnutrition levels are generally closely linked to the quantity of land held. One of Guatemala's problems therefore, is that land remains highly concentrated, and many historical land rights claims of indigenous communities and claims of refugees and people displaced by the conflict, are still not resolved (Ziegler 2006:9; De Schutter 2010a:15).

As these last sections have demonstrated, the hungry and malnourished people in Guatemala are a large group, part of a society where they keep meeting discrimination and obstacles. It seems that Guatemala's long history of economic inequality, exclusion of indigenous peoples, and social conflict, largely explain the situation today with regard to hunger and food insecurity (Ziegler 2006:9). The right to food is a human right frequently violated in Guatemala, and now the focus will shift to what obligations the state of Guatemala has regarding this right.

4.3 The right to food in Guatemala – State obligations

As discussed earlier in the paper, defining the obligations a state has regarding human rights, and especially economic, social and cultural rights, is difficult and disputed. However, in the case of Guatemala there are some laws and agreements that deal with the right to food directly, and therefore it is appropriate to discuss the more concrete state obligations the country has agreed to. Guatemala has both international and domestic obligations regarding the human right to food.

Probably the most important international obligation Guatemala has to the right to food is under the International Covenant on Economic, Social and Cultural Rights, to which it is a party. States that have ratified this covenant have recognized the right to adequate food as part of the right to an adequate standard of living, and the fundamental right to be free from hunger, under article 11. In this lies an agreement of progressivity, meaning that: “State Parties have committed themselves to progressively realizing this right, to the maximum of available resources through all appropriate means, including particular legislative measures” (Vidar 2006:2). This means that by being a State Party to this covenant, Guatemala has recognized and committed itself to all the human rights recognized therein, including the right to food. In addition, Guatemala is also party to other international instruments relevant to the human right to food. These include the International Covenant on Civil and Political Rights (art. 6), the Convention on the Rights of the Child (arts. 24 and 27), the Convention on the Elimination of All Forms of Discrimination against Women (arts. 12 and 14), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art.12) (Ziegler 2006:10). Also relevant to the right to food, because of the high proportion of indigenous peoples and the disproportionate high levels of hunger and food insecurity among these peoples, is that Guatemala is party to the International Labour Organization Indigenous and Tribal Peoples Convention (No. 169). Under this Convention, the government of Guatemala is required to respect indigenous peoples’ right to land and territories (arts. 13-17), including their collective aspects (Ziegler 2006:11). In this Convention also lies a requirement that indigenous peoples are not displaced from their lands and that their rights to natural resources on their lands are specially safeguarded. This is connected to the right to food as all of these aspects of indigenous rights, the right to land and to the natural resources, have consequences for indigenous peoples’ possibility of accessing food.

In 2008 the United Nations General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. With this optional protocol, victims of economic, social and cultural rights violations will have an international mechanism that will allow them to make effective appeals against the violation of their rights, once they have used the existing claim and grievance mechanisms of their own countries or if the use of these national mechanisms takes too long (Vivero 2011:8-9). This will also apply to the right to food. This treaty has not yet entered into force, however, Guatemala has signed it.

Table 3 lists the international treaties that are relevant to the right to food that Guatemala has either signed or ratified, or both.

Table 3: Relevant international human rights treaties - The right to food

Treaty (entry into force)	Date of signing	Date of ratification
International Convention on the Elimination of All Forms of Racial Discrimination (1969)	8. September 1967	18. January 1983
International Covenant on Economic, Social and Cultural Rights (1973)		19. May 1988
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (not yet in force)	24. September 2009	
International Covenant on Civil and Political Rights (1976)		5. May 1992
Convention on the Elimination of All Forms of Discrimination against Women (1981)	8. June 1981	12. August 1982
Convention on the Rights of the Child (1990)	26. January 1990	6. June 1990
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1999) *	17. November 1988	30. May 2000
C 169 Indigenous and Tribal Peoples Convention (1991) **		5. June 1996

Source: United Nations 2011
 * Organization of American States 2011
 ** International Labour Organization 2011

The international agreements that Guatemala has committed to, means that the country has the obligation to respect, protect, and fulfill the right to food, without discrimination (Ziegler 2006:11; De Schutter 2010a). As discussed earlier, the obligation to respect means that the government should not take actions that arbitrarily deprive people of their right to food. The obligation to protect means that the government should adopt and enforce appropriate laws to prevent third parties, including powerful people and corporations, from violating the right to food. And finally, the obligation to fulfill, or rather: facilitate and provide, means that the government should take positive actions to identify vulnerable groups and implement policies to ensure their access to adequate food by facilitating their ability to feed themselves. As a last resort, the government is required to provide adequate food to those who are not able to feed themselves, for reasons beyond their own control (Ziegler 2006:11; De Schutter 2010a:17). The right to food in these international covenants and agreements includes access to drinking water and access to the means to buy, exchange, or produce food, that is a

sufficient wage, land, credits, seeds and irrigation water necessary for subsistence agricultural production (Ziegler 2006:11). This means that the international obligations Guatemala has committed itself to are very demanding and extensive. As this section has outlined, Guatemala has several obligations regarding the right to food on the international level. But also on the domestic level, Guatemala has food rights obligations.

First of all, Guatemala has a national constitutional obligation toward the right to food, specifically for vulnerable groups of children and elderly people. Guatemala's progressive 1985 Constitution, which was also revised in 1993, includes the protection of economic, social and cultural rights without discrimination (arts. 50-51) (Ziegler 2006:11). Among other requirements, under the Constitution the government of Guatemala is required to establish an effective national food system (art. 99), ensure social assistance for all (art. 94), and adopt a national framework law on water (art. 127). The Constitution also protects the rights of indigenous peoples, including access to land and the right to maintain traditional forms of land administration (arts. 66-69) (Ziegler 2006:11). Also, and very important with regard to the justiciability of the right to food, under the Guatemalan Constitution, international human rights treaties take precedence over domestic law (art. 46) (Ziegler 2006:11). This means that all of the human rights obligations described in the above section should override any of the prescriptions in the domestic legal framework of Guatemala. More generally, this system, which is called a monistic system, means that a treaty, once ratified, becomes part of the law of the land (Vidar 2006:5). They must therefore be applied and taken into account by all organs of the government, that is: the executive, legislative, and the judiciary branches of government. With regard to the right to food in the Guatemalan Constitution, the level of protection is in fact very high. This is because there is direct mention of the right to food, applicable to the whole of the population, and also explicit protection of the right to food of specific groups, children and elderly (art. 51) (Vidar 2006:20; Constitución Política de la República de Guatemala 1985). In addition, included in the Convention is also protection of broader rights that includes the right to food: the rights of the child are constitutionally protected, the Constitution recognizes a right to social security, and there is a constitutional provision of minimum wage (Vidar 2006:20-21). To sum up: the Guatemalan Constitution contains explicit provisions relating to the right to food, and the level of constitutional protection of this human right can therefore be characterized as being high.

Guatemala has also under the domestic legislative framework certain food rights obligations, that is, both laws and government regulations that are important for the right to food. Of the most important is the relatively new Law on the National System for Food and Nutritional Security, a food security law that entered into force in 2005 (Ziegler 2006:11). This law recognizes the country's international obligations towards the right to food. The right to food is defined as "the right of every person to have physical, economic and social access at all times to food of adequate quantity and quality, in accordance with cultural preferences, preferably of national origin, and biologically adequate, in order to sustain a healthy and productive life (art. 1)" (Ziegler 2006:12). This means that in this new law, the right to food is defined in a broad and encompassing manner. In this regard, the obligations on the Guatemalan state are large and wide-ranging.

Although Guatemala has a legal framework that refers to the right to food in many important ways, there are also some limitations. The national legal framework still remains inadequate on several important issues related to the right to food, including access to land and tenure, water and mining, and gender discrimination (Ziegler 2006:12). Guatemala lacks an effective land registry system, an agrarian code, the legal recognition of indigenous forms of land ownership and administration, and of an agrarian jurisdiction to resolve land disputes (Ziegler 2006:12). In light of the country's history of land conflict and expropriations, this is a huge limitation in the legal system which has many possible negative implications on the protection of the right to food. Equally problematic and concerning is the absence of a water law. Also, in the context of mining, the law has limitations as it does not protect the rights of indigenous communities over their natural resources, and with regard to gender discrimination, rural women are still described as helpers of the male agricultural workers, rather than as workers entitled to receive their own salary (Ziegler 2006:12). All of these laws severely hamper the realization of the right to food in Guatemala, and improvements in these parts of the national legal framework would probably bring the justiciability of this right further.

This section has showed that with regard to the legal framework in Guatemala, despite some limitations, the conditions does seem to be favorable for working towards making the right to food a justiciable right. Both the international and the domestic legal framework puts relatively clear obligations on the state of Guatemala with regard to the right to food. In particularly important: the recent food security law of 2005 recognizes the obligation of the government to respect, protect and fulfill the right to food, and prohibits de jure and de facto

discrimination in access to food and to the means to obtain food (Ziegler 2006:12). Any such discrimination then, constitutes a violation of the law, which should provide an excellent basis for the justiciability of the right to food.

4.4 The judiciary in Guatemala

The legal system in Guatemala is relatively complex. It includes customary law and community courts in indigenous peoples' areas on the one hand, and state law and courts at municipal, departmental, and national levels, that is, court of appeal and Supreme Court, on the other (Ziegler 2006:13). In addition to this, the Constitutional Court also has a special mandate to protect and enforce the Constitution.

In the Guatemalan system, the different courts are distinguished according to whether they have exclusive or ordinary jurisdiction. The Judicial Branch Law establishes the principles the courts are set to follow, as well as the competence of courts with the respective appeals system (Rodríguez 2006). With regard to the appeals system, the Constitution imposes a two-tier system, not allowing more than two instances. The structure of the judiciary in Guatemala puts the Supreme Court of Justice as the highest court of the country. The Supreme Court is divided into three chambers: 'Cámara Civil', 'Cámara Penal' and 'Cámara de Amparo y Antejuicio' (Organismo Judicial de la República de Guatemala 2011). The Supreme Court consists of thirteen judges. The Court of Appeals is the second highest court. These courts are presented with the appeals cases from the first instance courts, and also hear some matters of exclusive jurisdiction (Rodríguez 2006). The first instance courts are placed under the Court of Appeals. These judge first tier cases in civil, commercial, criminal, labor, and family matters (Rodríguez 2006). The lowest ranking courts in the Guatemalan judicial system are the small court judges, or justice-of-the-peace courts (Juzgados de Paz). These are courts exercising their duties in their respective municipalities, and it also includes the Mayors who carry out the duties of 'judges of peace' in municipalities where a court do not exist (Rodríguez 2006). These are the four rankings of courts that make up the Guatemalan judiciary, in addition to the Constitutional Court. With regard to the volume of the judiciary, in the year 2003 the country had a total of 554 courts. This is made up of 22 Courts of Appeal, seventeen tribunals in the city, 51 courts in the capital city, and the remaining courts are spread throughout in the other cities or counties around the country (De Padilla 2004:40). This means that the case burden on each court and judge is quite large. Statistics indicate that a judge may have to resolve as much as over 7000 cases per year (De Padilla 2004:40). This

indicates that the Guatemalan judiciary has a very large case load compared to its capacity. It has been a goal for several years to increase the geographical coverage of the judicial service, and there has been an increase in the number of lower courts by a third since the end of the 1970s (Sieder 2007:227). In addition, in 2003 a new system was launched of travelling circuit judges to give access to justice to the rural populations who live far away from any court. In the first period after the initiation of this system that could potentially bring courts closer to parts of the population that until now has had no access to justice, the courts were not provided with the necessary funds (De Padilla 2004:41). However, in the longer run this system can perhaps increase the geographical coverage of the judicial service. Despite these advancements, however, this is at least for now, still not sufficient to ease the burden of the large case load of each court operating in Guatemala. Therefore, there is still a need to create more courts throughout the country (De Padilla 2004:40).

4.4.1 Judicial reforms

In the beginning of the 1990s several attempts were made to reform the Guatemalan state, and among this, its judiciary (Ardón 1999:39-45). This was a period of hard negotiations among the different political, military, guerilla, and civil components in Guatemala, as well as involvement from international actors present in the process. Several of the accords of the peace process dealt with the judiciary in different ways. The reform that dealt most comprehensively with reform of the judiciary was the Accord on the Strengthening of Civil Power and the Role of the Army within a Democratic Society (Ardón 1999:45). This reform was agreed upon in 1996. The proposed reforms built upon ongoing reforms of the justice system promoted by domestic pro-reform constituencies and the different programmes supported by the international donors. The donors include the World Bank, the Inter-American Development Bank, the United States Agency for International Development, and the United States Development Programme, which focused on measures to increase judicial independency and strengthen due process guaranties (Sieder 2003:142). However, it has been a critique that the reforms in reality focused too much attention on the administration of justice rather than on the more politically sensitive issue of judicial independency (Dodson and Jackson 2008:4; Carothers 1999:101). Much attention was given to reorganization of court, judicial training, the provision of modern equipment, and the improvement of salaries. These strategies might have a favorable impact on the efficiency of the courts, which of course is a serious problem, but the critique continues: they would not necessarily affect how

judges function within the existing structures of power and would not necessarily lead to the rule of law (Dodson and Jackson 2008:4; Dodson 2002:206-207).

The peace accords, as mentioned before, highlighted the need to ensure the protection of the rights, and access to justice, for the majority indigenous population. Initiatives such as increasing the number of state defenders, providing judicial interpreters, encouraging the use of indigenous customary law to resolve conflicts outside the courts, a doubling of budget allocations to the justice sector between 1995 and 2000, and a massive extension of its institutional coverage, were among the initiatives to ensure the “multiculturalizing” of the judiciary (Sieder 2003:142). The main goals were to increase judicial independency and reduce corruption, professionalize the judiciary, guarantee basic rights, and increase access to justice. It is out of the scope of this paper to give a detailed presentation of the many different reforms that were initiated⁶. However, it is necessary to underline that major institutional changes have been initiated, at all levels of the judiciary all the way down to lower ranking courts. Although these changes have improved the quality of the judiciary in several ways, many challenges still remain. The historical context, in which democracy and the rule of law has been tried to be established in Guatemala, has presented many difficulties to the task of reforming the system. The overall situation of the justice system in Guatemala can be said to be a result of a long-term emptiness of its institutions, as the government during the latter half of the 1900s abandoned or changed the different institutions and made them into instruments of war against the guerillas (De Padilla 2004:37). In such an environment it is not surprising that the work of reforming the judiciary is a long-lasting task, and that there still are problems with the efficiency and quality of the judiciary and corruption to mention some. However, the work towards reform of the justice system is a continuing priority in Guatemala today. The paper will discuss some of these reforms in the analysis chapter more in detail.

4.4.2 Access to justice

The Guatemalan Constitution guarantees free access to justice, and victims of a violation of a fundamental right can use the procedure of ‘amparo’ to claim their rights before the Supreme Court and the Constitutional Court⁷ (Ziegler 2006:13). This is a powerful provision guaranteed under the Constitution. In theory, this means that any violation of the right to food,

⁶ See Rachel Sieder (2003) for a more detailed presentation of the reforms.

⁷ Some scholars refer to this procedure as the ‘right to due process’, see Ziegler (2006:13), however others argue that the procedure of ‘amparo’ has no equivalent translation (Rodríguez 2006).

as it is an explicit right according to the Constitution, can be brought before these courts. The discussion about the procedure of ‘amparo’ will be elaborated on in the next chapter. Here it suffices to note that in practice however, access to justice for victims of violations of the right to food has been limited by several factors. Justice has been limited by the fact that international human rights treaties and conventions have not been applied by the judiciary, as discussed earlier: the lack of adequate protective national legislation, particularly with regard to land, water and mining, corruption and the lack of enforcement of existing legislation, administrative measures and judicial decisions, especially with regard to labour (Ziegler 2006:13). Particularly difficult to access justice is it for the indigenous peoples, given discrimination, the lack of legal interpreters, and the non-recognition of customary law and indigenous legal authorities (Ziegler 2006:13). All of these factors have been part of the explanation of how access to justice for victims of violations of the right to food, and also other economic, social and cultural rights, has been limited in Guatemala. In fact, these limitations have in many ways almost resulted in de facto impunity for violations of human rights (Ziegler 2006:13).

4.4.3 Legal pluralism

To get a better understanding of the judiciary in Guatemala it is necessary to understand more about the way this system is split up between an official, state order, and the more informal, local order. The reason why the Guatemalan legal system is so complex has to do with the large group of indigenous communities existing together in the rural parts of the country. Alternative normative orders have long been present within these communities as they have, in many cases for hundreds of years, in one form or another, had their own informal, customary law systems (Endy 2007:1). This legal pluralism of both national and local orders is “partly a consequence of the spatial organization of indigenous peoples in the colonial *pueblos de indios* or their post-independence equivalent, and also in part a reflection of distinct Mayan worldviews” (Sieder 1999:110). As just one of the consequences of the indigenous peoples being largely excluded from the process of nation-state construction in Guatemala, a separate, subordinate legal jurisdiction exists for many of the indigenous peoples. In this legal order, which has been the main organizational thread of indigenous life for hundreds of years, the focus is generally on principles of harmony, consensus and conciliation (Endy 2007:3). Customary law can in one sense be understood as a counter-hegemonic strategy used by indigenous communities to protect their limited and conditional autonomy from the central state. However, semiautonomous local jurisdictions have also

constituted part of the apparatus of governance since the colonial period (Sieder 1999:110). In this way, state power has long been dependent on complex negotiations with local interests.

After the signing of the 1996 peace settlement, also a series of institutional reforms was agreed upon specifically in order to better secure the rights of the indigenous peoples. How to organize the complex and parallel legal system in the country was among the issues in focus after the settlement. One solution was to incorporate local indigenous authorities and legal practices into the national politico-legal system, with the aim of democratizing the nation-state and construct pluralist practices of citizenship which include indigenous peoples within state and society on the basis of equality and respect for cultural diversity (Sieder 1999:110). Despite much work to officially ensure the protection of the right of indigenous peoples to select their own authorities and to develop and apply their own forms of law within their communities, these reforms were rejected by the electorate in 1999 (Sieder 2007:218-219). Therefore, customary law and indigenous legal authorities is still not officially recognized by the state, despite there being a de facto parallel system of customary law and community courts in indigenous peoples' areas, and state law and courts at the municipal, departmental and national levels. Also worth mentioning: although there has been a long battle in Guatemala to try to secure the right of the indigenous peoples to exercise their own forms of law, in local communities that remains divided by the legacy of violence, military imposition and fear the local norms and practices can contain highly oppressive features, and in these circumstances state law can in fact provide a resource to combat authoritarian local practices (Sieder 1999:112). Therefore it is not evident that a full acceptance of indigenous forms of law would necessarily increase the protection of these groups. However, the fact remains that the juridification of indigenous rights is very weak in Guatemala, with state law, only, being officially recognized. This is in contrast to several other Latin American countries where indigenous law was recognized via constitutional reforms during the 1980s and 1990s, such as Bolivia, Columbia, Ecuador, Mexico and Peru (Sieder 2007:219).

4.4.4 Other domestic institutions

There are a few domestic institutions working on the promotion and protection of human rights and the right to food that should be mentioned in this section. One of the most important one is the Office of the Human Rights Ombudsman, which appears to be a quite strong institution. The primary task of the ombudsman is to receive and act on complaints from citizens against public authorities, which in most cases means the different organs of

public bureaucracy at the national and local level, the police, or the judiciary (Uggla 2004:432). The ombudsman was established under the Constitution, and two of its strengths are as follows: because of its constitutional status an angry legislature is prevented from abolishing it by decree and the broad national presence it has established would make such an abolishment politically inexpedient (Dodson and Jackson 2008:13). Despite budgetary limitations and difficult working conditions for the staff of the office, the ombudsman seems to be able to maintain some autonomy vis-à-vis the political establishment. One indicator of this is the extent to which the institution has acted against the higher echelons of the state, in which the ombudsman in Guatemala has denounced high-level politicians such as former vice-president Reyes López, the speaker of the congress (and former dictator) Efraín Ríos Montt, two dozen deputies and even a Supreme Court judge (Uggla 2004:437). The Guatemalan ombudsman has the right to take juridical action, but the final decision belongs to the courts (Uggla 2004:431-432). In general, often the principal power of the ombudsman institution tends to consist in the resolutions it emits. These resolutions can be based on a specific complaint by a citizen, or initiated by the institution itself in order to address a particular situation. In Guatemala the status of these resolutions has been said to be unclear as the ombudsman may order end to violations and promote disciplinary action, however in practice this seem to have little meaning and authority (Uggla 2004:431). The mandate of this office includes the right to food, as it includes the promotion and protection of all human rights recognized in the Constitution and in international treaties ratified by Guatemala. The Office of the Human Rights Ombudsman work to protect vulnerable groups and individuals through mediation, conciliation, quasi-judicial decisions and legal assistance, as well as recording violations of rights (Ziegler 2006:13).

The Presidential Commission, for the coordination of human rights policies, plays an important role in improving respect for human rights. Also the Congress's Human Rights Commission work for the promotion of human rights. Their efforts of improving respect for human rights were highly demonstrated when these institutions were decisive in the recognition of the right to food in the elaboration of the new Law on the National System for Food and Nutritional Security (Ziegler 2006:13). Therefore, these institutions seem to have been vital in making the domestic legislative framework as strong as it is today. As this brief overview illustrates, there are domestic institutions in Guatemala working for the promotion of human rights and the right to food.

4.4.5 International judicial institutions

With regard to access to international judicial institutions, the Inter-American Court of Human Rights is the most important. The court was established in 1979, as a part of the American Convention on Human Rights (Medina 1990:448). Guatemala is a State Party to the American Convention and has accepted the court's contentious jurisdiction, which means that Guatemala has given the court the mandate settle controversies of interpretation and application of the provisions of the American Convention on Human Rights in Guatemala (Medina 1990:444-447). The state of Guatemala can therefore be brought before the Inter-American Court in situations of violations of human rights protected in the American Convention, and the judgments are binding on the country. This should serve as a motivation for the Guatemalan judiciary to settle controversies in their own courts, instead of having cases brought before the Inter-American Court, which then can rule binding decisions on Guatemala.

4.5 Public Interest Litigation on other economic, social and cultural rights

The above section has discussed the different legal applications that do exist in Guatemala, mainly through the domestic legal system, most notably through the procedure of 'amparo', but also through an international judicial institution as the Inter-American Court. In a context where human rights are frequently being violated, and there appears to be legal tools in place: to what extent are these legal applications being used? Although Guatemala has a legal system that in practice has resulted in severe limitations on the possibility of achieving justice for violations of human rights, there are cases where breaches of human rights have at least been taken to court. Although these are a somewhat different kind of economic, social and cultural rights, it is interesting to study some instances where these rights violations have been taken to court in Guatemala.

Labour rights, as part of the economic, social and cultural rights framework, are rights where there has been litigation in Guatemala. Due to violations of the Labour Code by powerful 'patrones' (employers), many hundreds of agricultural workers on large estates have tried their case before a judicial body to claim that their employers pay them their unpaid wages (Ziegler 2006:18). Many of these workers were living a precarious existence that also threatened their right to food. Most of these litigation cases have not yet been successful, and in many ways violations of labour rights have persisted with impunity (Ziegler 2006:18). In one case it was alleged that in 1997, immediately after having founded a union, 32 male and

female workers were dismissed from the farm where they worked, without compensation. After seven years of legal proceedings, and despite two final decisions of the Constitutional Court in 2000 and 2003 that ordered the reincorporation of the workers and the reimbursement of their unpaid salaries, the workers and their families are still without work (Ziegler 2006:18). This seems to indicate that court decisions and rulings in Guatemala have a problem with lacking authority and lacking implementation. However, this also shows that there have been attempts in Guatemala at labour rights litigation, although with variable degrees of success. There are also organizations, such as church organizations, that assist families to survive by providing food donations and help the workers to bring their cases of labour rights violations to local courts. Also in these cases, the workers rarely win, and even if they do, legal orders are reportedly rarely enforced (Ziegler 2006:7). But the fact that the Constitutional Court in a judgment decided in favor of the litigants, and that there have been favorable rulings in local courts, can be regarded a step in the right direction.

In another labour rights case, the trial judge in the Quetzaltenango region argued that a cleaning worker's food rights had been violated as a result of unfair dismissal (Vivero 2011:17). This is actually one of the few cases where the right to food has been mentioned in a ruling in Guatemala. As the company refused to pay the worker her salaries, she and her children suffered from hunger on several occasions during the time the trial lasted. Even though the ruling demanded that the company that had fired her should pay a fine, the case was rejected and dismissed after the company had appealed the case to the Supreme Court (Vivero 2011:17). Despite the negative outcome of the case, the fact that the trial judge argued a violation of the right to food is important because it illustrates the potential of claiming right to food violations.

Also with regards to land rights, there has been litigation. The Ixil indigenous community of 270 families in Antigua Xonka, who are occupying land they believe was expropriated from them, issued legal proceedings in a local court to claim their land back. The families live under a constant threat from the landowner who repeatedly sends private police squads to forcibly evict them and burn their crops, animals and makeshift shelters (Ziegler 2006:8). But the families continue coming back to the land, as they have nowhere else to go, and the issue remains unsolved. As mentioned earlier, the Peace Accords set out a framework, and aimed at, regularization of indigenous lands and rights. But in spite of attempts at land rights

litigation, as discussed in section 4.2.3, the issue of land rights has for the most part not yet been resolved.

There are also examples of litigation on economic, social and cultural rights that has been brought before the Inter-American Court of Human Rights. In 1999 the Inter-American Court accepted a case that was brought before the Inter-American Commission by two organizations⁸, before the Commission submitted the case to the Inter-American Court (ESCR-Net 2011). The petition was filed against the State of Guatemala, alleging the kidnapping, torture, and death of four minors, and the murder of a fifth one, in 1990 in Guatemala City. The petitioners were alleging that this was done by members of the security forces, and that the state had failed to provide adequate judicial protection to the victims' families. The Inter-American Court of Human Rights found that the state had been responsible for the death of the children and stressed in the ruling the fundamental nature of the right to life, as enshrined in the American Convention on Human Rights (ESCR-Net 2011). Among other things, the Court stated "that the right to life comprises not only the right of all persons to not being deprived of life arbitrarily, but also the right to having access to the conditions needed to live a dignified life" (ESCR-Net 2011). The State of Guatemala accepted the judgment, and complied with most of the measures ordered by the Inter-American Court. This was an influential case in many ways, but most importantly for the subject of this paper, it was important because the Court so strongly stressed the human right to life as being central in this case. Also, the Court interpreted the right to life in a very comprehensive manner, not only including the right not to be deprived of life arbitrarily, but including also in the definition of the right, the access to conditions needed to live a dignified life. The fact that the Inter-American Court of Human Rights based a ruling against the State of Guatemala on the right to life could possibly have implications for the right to food, as the right to food must be seen as part of the conditions needed to live a dignified life. These two rights, the right to life and the right food, are so closely connected that this case might make the prospects brighter for promoting food rights litigation and enhancing the justiciability of the right to food in the longer run.

This chapter has given an introduction to the state of Guatemala. As is obvious by now, this is a country struggling with high levels of hunger and food insecurity. In terms of per capita

⁸ Centro pol la Justicia y el Derecho Internacional and Casa Alianza de Nicaragua.

income, Guatemala is a comparatively rich country and that makes the persistence and level of chronic hunger even more worrisome (Ziegler 2006:19). The right to food is relatively strongly protected in the legal framework of the country, both by the Constitution and by domestic and international law. As there are experiences of litigation on other economic, social and cultural rights, such as labour rights, land rights and the right to life, it is thus a puzzle that litigation on the right to food in Guatemala is absent. Which factors or conditions then, are lacking in Guatemala for litigation on the right to food to arise?

5.0 Analysis – How are the conditions for right-to-food litigation?

After having presented and discussed the theoretical context in which to study public interest litigation on the right to food, and after having presented the case of Guatemala, it is now time to turn more directly to the research question of this paper. This chapter will give a structured analysis of the factors relevant for litigation in Guatemala, in order to better understand which factors would have to be present in the country for there to be public interest litigation on the right to food. In this way, the paper will contribute towards getting a better understanding of public interest litigation on the right to food, as well as of Guatemala as a case. As debated earlier, the analytical framework presented at the end of the theoretical chapter, will guide the analysis. The analytical framework comprises the different factors that are assumed to influence the initiating phase of a litigation process. It sums up much of the theoretical literature on litigation, thus, providing a basis for exploring the processes of social rights litigation in a specific case.

It should be mentioned that litigation on the right to food is particularly challenging since those whose rights are violated by definition are poor people lacking resources. This makes the right to food different from many other rights, also other social rights. The fact that this right is so challenging also has implication for which factors are necessary for litigation to arise on the right. In the first part of the following chapter the focus of the analysis will be on studying and understanding the factors influencing the legal voice of the hungry and malnourished in Guatemala. Secondly, the factors that influence the response of the courts in Guatemala with regard to litigation will be analyzed. These two parts of the analysis, put together, form the basis of the answers this thesis will be able to provide with regard to the research question of which factors would have to be present for public interest litigation to arise on the right to food in Guatemala.

5.1 The legal voice of the hungry and malnourished in Guatemala

As outlined in the theory chapter, there are several factors that shape and influence the legal voice of the marginalized group in question. There are formal, practical and motivational barriers that need to be considered in Guatemala, to be able to understand which factors would have to be present for there to be litigation on the right to food. These barriers can influence the legal voice of the marginalized in the way that if the opportunities are not conducive to litigation, these people can be discouraged from voicing their social rights claims and taking them to court. Also important for the understanding of the legal voice of the

hungry and malnourished, is to study if there exist alternative arenas in which to promote the right to food, as well as study which litigation resources are in fact present in the country.

5.1.1 Formal barriers

The formal barriers having an effect on the motivation and the ability of marginalized groups to voice legal claims have to do more with the legal system, the nature of the law and operation of the courts. This means that a clear legal basis for the right to food is conducive for claim-formulation and litigation. In Guatemala, as was discussed in the previous chapter, there are several national laws and international conventions and agreements protecting the right to food. Table 3 presented in the last chapter lists all of the relevant international treaties. These international agreements have, as explained before, articles mentioning the right to food directly. Also, as mentioned in the previous chapter, these international human rights treaties that the country has signed and ratified take precedence over domestic law according to article 46 of the Guatemalan Constitution (Constitución Política de la República de Guatemala 1985; Ziegler 2006:11; Rodríguez 2006), and therefore these should have a firm legal basis in the country. In addition, Guatemala has national food security laws, and the Constitution also have specific provisions on the right to food. The Guatemalan Constitution also guarantees under article 265 that victims of a violation of a fundamental right can use the procedure of ‘amparo’, which means that these victims can in practice claim their right to food before the Supreme Court and the Constitutional Court (Constitución Política de la República de Guatemala 1985; Ziegler 2006:13). Therefore, although there are problems with the justiciability of a right such as the right to food in practice, this right has a fairly clear legal basis in Guatemala, when you compare it to other countries. This also holds for countries that have experienced a lot of public interest litigation on the right to food, such as the case of India where the legal framework on the right to food was not so clear at the outset, yet judges have interpreted the right to life extensively to include the right to food (Ziegler et al. 2011:263-265). Therefore, it seems that the relatively clear legal basis regarding the right to food should be conducive for the hungry and malnourished to voice their claims. With regard to legal standing in procedures of ‘amparo’, the Guatemalan courts maintain strict criteria as a litigant must have a direct interest in the case for the case to be accepted (Rodríguez 2006). There exist instruments allowing individuals or groups to litigate on behalf of others, the provision of ‘querellantes adhesivos’ provided under the Penal Procedure Code, but this is only possible in criminal cases (Sieder 2003:143). Therefore, allowing individuals or civic groups, such as non-governmental organizations, to assume the role of co-plaintiffs is

only allowed in cases regarding the Penal Procedure Code, and not allowed under the procedure of ‘amparo’ that is relevant to the protection of the right to food. The procedure of ‘amparo’ and the standing rules will be discussed further in the section regarding courts’ responsiveness to social rights claims. However, note that these strict criteria for legal standing are not conducive for the legal voice of the hungry and malnourished, as organizations and individuals are not allowed to litigate on behalf of others and this marginalized group is often unable to take their cases to court themselves. Another barrier that should be mentioned here is the fact that from reading the literature on the Guatemalan judiciary, the impression given is that it seems that the courts do not assist the litigants in a substantial way with researching and presenting evidence. Therefore it appears that it is the litigant themselves that have the responsibility of providing this, something that is likely to be a barrier to them raising legal claims. It has also not been possible to acquire any information or provisions concerning public interest litigation, which indicates that there are not any special provisions for such litigation. This means that the conditions for class action suits do not appear to be favorable.

5.1.2 Practical barriers

The practical barriers influencing the legal voice of marginalized groups have to do with a lacking knowledge preventing them from seeing their problems as rights violations. Also, insufficient information is a problem, as this will prevent the groups from knowing who is to blame, how they can be held responsible and where claims can be addressed. In Guatemala, as discussed in the previous chapter, the indigenous populations have had to face discrimination and marginalization for long periods of times. These populations live mainly in rural areas of the country, and they are the ones worse off with regard to hunger and malnutrition. Therefore, indigenous peoples will in effect implicitly be much in focus throughout the analysis. In this way, the indigenous peoples are the ones seeing their right to food most often being violated in Guatemala. This creates many practical hurdles to them as groups seeking to better their conditions with regard to hunger and malnourishment. These hurdles, however, does to a large extent affect the smaller minority of hungry and malnourished non-indigenous people in much the same way, as these also are a marginalized group in Guatemalan society.

First of all, in the nineteenth century, the national project of the country’s then dominant civil and military elite did not include the indigenous majority as citizens with equal rights. This has to a large extent followed these groups until today, as the majority of these rural

inhabitants have had, at least until very recently, little or no conception of themselves as citizens with universal rights and obligations (Sieder 1999:109). In fact, in many ways these groups have been excluded from the workings of Guatemala as a country at large. Also, formal institutional features of citizenships, such as universal suffrage, have been no guarantee against the exclusion and acute marginalization of the majority of the Guatemalan population from political and civil society. Therefore, it seems that there has been a huge practical barrier with regard to the hungry and malnourished knowing that their grievances are rights violations. These populations have not regarded themselves as citizens with universal rights and obligations, and therefore it is likely to believe that many do not realize that their rights are being violated and, therefore, are actionable. In addition to this, as discussed in the previous chapter, in Guatemala since independency, the indigenous peoples have had a separate, subordinate legal jurisdiction (Sieder 1999:108). Although this has meant some protection for these groups, it has also in many ways isolated them from the process of nation-state construction. Also, the fact that there have existed alternative normative orders within rural communities in Guatemala has had the effect that the legal system in the country is fairly complex. Since the signing of the 1996 peace settlement the goal has been to incorporate local indigenous authorities and legal practices into the national politico-legal system. However, the legal system in Guatemala is still not uniform, and as still many indigenous peoples do not have a feeling of citizenship, there is a lack of knowledge of what their rights are and how and where they can be addressed. This is a factor that seems to be missing to a large extent in Guatemala, and this can function as a practical barriers against claims arising on the right to food.

Language is a different factor that seems likely to have been a barrier against the marginalized groups in Guatemala raising their voice in cases of violation of the right to food. This barrier is mostly affecting indigenous peoples as the majority of the indigenous people lack access to the official justice system in their own language, and very few judges or lawyers are Mayan or speak indigenous languages (Sieder 2007: 227). This is obviously a factor that hinders these people from formulating legal claims in cases where their rights have been violated. Another problematic aspect that seems to be a practical barrier against the marginalized people's voice is the fact that litigation is not permitted in indigenous languages in Guatemala, only in Spanish. This is a huge barrier considering that so many only speak their indigenous language. Although there are interpreters employed to assist these litigators when they need help raising claims toward a court, the number of interpreters are nowhere near

sufficient to meet demand (Sieder 2007:227). Therefore, either being able to litigate in other languages, or a better interpreter service seems necessary for bettering the conditions for the hungry and malnourished to raise their voice. Also, the cost of litigation is a practical barrier to the voice of the marginalized groups. The Guatemalan Constitution guarantees free access to justice, that is, article 29 guarantees that all persons shall have free access to all of the state offices and courts to be able to pursue their claims and assert their rights (Constitución Política de la República de Guatemala 1985). This means that the direct costs of litigating; the court fees, should not be a barrier to the hungry and malnourished asserting their legal claims. However, there are other costs that in practice seems to function as a barrier to litigation. Most Guatemalans lack the economic resources to defend themselves before the courts (Sieder 2007:227). This because of costs, such as for traveling, and taking time off work, to claim their rights before a court, functions as a practical barrier to litigation in a country as Guatemala. However, it should be noted that the costs of physically accessing a court have been improved as there has been an increase in the number of lower courts by a third during the last few decades⁹. These courts were also extended to predominantly indigenous regions of the country that had previously lacked any judicial presence (Sieder 2007:227). Even though there has been progress with regard to the marginalized groups being able to raise their claims with regard to physical access to courts, this is still a practical barrier in the rural part of the country (Endy 2007:3). This, and the other practical barriers left in the country therefore, has the result that most Guatemalans are unable to follow judicial proceeding, seek appropriate remedies or defend their fundamental rights because of linguistic and cultural barriers. With regard to the practical barriers to the hungry and malnourished people in Guatemala to raise their voice and turn them into legal claims, there seems to be several hurdles and factors lacking for the conditions to be favorable. These include lack of knowledge and information, and linguistic and economical barriers to food rights claims formation.

5.1.3 Motivational barriers

The motivational barriers to the articulation of social rights claims has to do with the way marginalized and poor people view the legal system. As poor people often view the legal system with distrust and fear, this can function as an impediment to the articulation of legal claims of these groups. This appears as a reasonable argument, as it seems logical that if one

⁹ There were 242 justice-of-the-peace courts in 1977 and 353 by 2003 (Sieder 2007:227).

does not trust the legal system, why bother with turning to it with ones problems. This motivational barrier does in fact seem to be a factor that work in opposition to the marginalized people voicing their food rights claims in Guatemala. An opinion poll from 1997 showed that only about twelve percent of the respondents said that the word ‘honest’ best describe the Guatemalan judicial system, while 45 percent said the word ‘corrupt’ is the best description (Dodson and Jackson 2008:18). Guatemalans tend to see the law as something that operates to the benefit of powerful individuals and groups rather than as something to which they could make effective recourse to protect their fundamental rights (Sieder 2003:141). Most of the population in rural Guatemala view state law and state institutions as arbitrary, distant and ineffective, and therefore the judicial system lacks respect among large parts of the population (De Padilla 2004:38; Handy 2004:533; Sieder 1999:110). In these circumstances, it is natural that the hungry and malnourished do not turn to the state courts to address their grievances. As discussed in the previous chapter, one of the biggest problems with the Guatemalan judiciary is that for a long time, and even today, impunity in the case of human rights violations has prevailed (Ziegler 2006:13). Given the almost complete failure of the state to ensure that human rights violations are punished, there is no doubt a lack of trust towards the legal system in Guatemala. The general inability of the state to deliver justice, and in fact, in the past, the state’s role in emitting injustices to large parts of the population, has led to a circumspect attitude toward state law. This should also be seen as a reason for why there have been demands for the recognition of alternative legal forms, that is, customary law and indigenous legal authorities. Another factor that seems likely to operate as a motivational barrier is the lacking enforcement and authority in legal decisions that were discussed under section 4.5 in the last chapter. If there is little will to implement judicial decisions and court rulings, there is not much point in litigating and this can discourage people from taking their cases to court. All in all, judicial inefficiency, impunity and corruption are all factors that prevent the full exercise of rights (Sieder 1999:110), and in such a context the motivational barriers of the hungry and malnourished to claim their food rights seem high.

5.1.4 Alternative arenas

So far, many barriers that shape the legal voice of the hungry and malnourished people in Guatemala have been analyzed. There are also other factors that can explain and influence the voice of the marginalized people in Guatemala, factors that do not necessarily operate as a barrier to litigation. The reason for analyzing if there exist alternative arenas is the assumption

that any inclination to raise food rights claims through legal channels may depend on the availability of other channels for social change. If there exist other arenas that can accommodate food rights claims and mobilization, this can explain a lack of litigation on such rights.

In Guatemala there are other possible avenues open for mobilization on an issue such as the right to food. Electoral mobilization is one such avenue, as Guatemala is formally a democracy that holds elections, although this arena has its clear limitations. As discussed in the previous chapter: Guatemalan party politics tend to be dominated by powerful individuals who tend to campaign on the strength of their personal, clientelist networks, rather than by programmatic coherence or the representation of different groups in society. This makes it hard for the electorate to have any degree of certainty as to whether what they vote for will actually have any priority once the elected official come into office and if there will be any social transformations. In general, party discipline is very low, and elected deputies often switch their allegiance during their time in office (Sieder 2008:494). In such circumstances, using electoral mobilization as a way to mobilize the advancement of food rights is at best, highly uncertain, and probably not very effective. Also important because of the high numbers of indigenous peoples having their food rights violated, is that only a very small portion of the candidates that stand for elections are indigenous (Vinding 2004:94). It is likely to believe that this also makes it harder for the indigenous peoples to voice their concerns and grievances through electoral mobilization. Another possible political channel, other than the electoral channel, is lobbying. Lobbying towards the political structures, most likely towards the legislature, seems to have provided an important alternative arena in Guatemala given the strong legislative framework on the right to food. In particularly in passing the new Law on the National System for Food and Nutritional Security it appears that lobbying towards the legislative might have played a role. As mentioned earlier, the Presidential Commission, for the coordination of human rights policies, and the Congress's Human Rights Commission were important in the recognition and passing of the right to food in the new law (Ziegler 2006:13). However, even if lobbying has been important for the passing of food laws in Guatemala: when the law is not implemented, the lobby channel has less relevance and this is where the judiciary is supposed to step in.

Another alternative arena, that also has its limitations, is protest action. There have been episodes of protests on human rights violations in Guatemala, including protests against

different companies and the government (Amnesty International 2010). However, it does seem that such activity is in some cases somewhat risky in Guatemala. There are examples of people being threatened or killed in situations of protest action. In one case, a local teacher and community leader protested against the alleged forced eviction of his local community due to the interests of a nickel mining company, where witnesses stated that they saw the company's security guards attacking and killing the community leader (Amnesty International 2010). Also, a report of threats and shooting against a trade union activist, where the threats specified that he had been targeted because of his trade union activities at a nearby hospital where he had helped expose corruption and medical negligence, was reported last year (Amnesty International 2010). Although it is difficult to say to which degree these incidents are just single occurrences, it does paint a picture of a situation where there might be a large risk in protest action in contentious political matters. Amnesty International's report from 2010 also states that there have been incidents of the police and security force taking part in executions and lynching. In such circumstances, there is reason to believe that activist might be at least reluctant to participate in protest action, although it does happen to some extent.

With regard to the possibility of using media campaigns as a means to voice their grievances, this seems also to be a relatively uncertain strategy. It is probably a fear assumption that if the media can function as a voice fighting for the interest of the hungry and malnourished people in Guatemala in any substantial way, it is necessary that the country has a free and independent press. According to Freedom House, this is only partially the case with the Guatemalan media, which is labeled "partly free" by the organization (Freedom House 2010). According to the organization, Guatemalan journalists work under difficult and dangerous conditions, and violence against the press, mostly by drug traffickers and other criminal organizations, is frequent and rarely is subject to prosecution. Therefore, the press is subject to a sort of self-censorship. Although article 35 of the Constitution ensures freedom of expression (Constitución Política de la República de Guatemala 1985), and this for the most part is respected by the government, there are serious limitations to this right in Guatemala. There are four major daily papers, however, newspaper ownership is concentrated in the hands of business elites with relatively centrist or conservative editorial stances (Freedom House 2010). Electronic news ownership is concentrated in the hands of Angel Gonzalez of Mexico, a politically connected entrepreneur who, according to Freedom House, favors conservative perspectives and controls four of Guatemala's six private television stations. This does not appear to be very conducive for the voice of marginalized hungry and

malnourished people. Yet, it must be mentioned that the media, especially daily newspapers, have increasingly understood their role of checking and balancing public abuses of power (Holiday 2000:83). Also, in 2009 a new law ensuring free access to public information took effect to promote transparency and granting citizens access to information about public institutions. Despite the new law, access to public information is still difficult to obtain for journalists working on sensitive issues (Freedom House 2010). All in all, there is reason to believe that the environment for the Guatemalan media to voice the marginalized groups on a politically contentious subject, such as the right to food and hunger, is not the best.

In Guatemala there exist institutions working for the promotion of human rights in general, including the right to food. These institutions might therefore function as alternative arenas to litigating before courts. The Office of the Human Rights Ombudsman, established under the Constitution and reformed in 1996, has a mandate to promote and protect all human rights recognized in the Constitution and in all of the international treaties ratified by Guatemala (Dodson and Jackson 2008:16; Procurador de los Derechos Humanos 2011; Ziegler 2006:13). As mentioned before, two of the strengths of this Ombudsman Office is that because of its constitutional status an angry legislature is prevented from abolishing it by decree and the broad national presence it has established would make such an abolishment politically inexpedient (Dodson and Jackson 2008:13). The new Law on the National System for Food and Nutritional Security also gives the Ombudsman Office an important new mandate. This gives the ombudsman the mandate to monitor the government's fulfillment of its obligations to respect, protect and fulfill the right to food (Ziegler 2006:13). The office has the right to initiate juridical action, which is important, but the final decision belongs to the courts (Uggla 2004:431-432). It would seem that the ombudsman in Guatemala is a quite strong human rights institution. However, the office is severely underfunded and therefore faces serious budget limitations (Ziegler 2006:13; Dodson and Jackson 2008:13). The office's budget has from its establishment stayed almost static, while its size and activities have grown. Despite these limitations, the office functions all over the country, and has five 'mobile offices' traveling in conflict zones (Dodson and Jackson 2008:14). The Ombudsman Office is working under difficult conditions, as there are regularly threats and attacks against the offices and staff. However, it is able to perform, at least to some degree, the difficult task of protecting vulnerable groups and individuals. This work is mostly done through mediation, conciliation, quasi-judicial decisions and legal assistance, as well as recording violations (Ziegler 2006:13). In the mid-2000 a special section of the office was dealing especially with

economic, cultural and social rights and another thematic section was working on land and other issues related to the right to food (Ziegler 2006:13). Therefore, in many ways it does appear that the Office of the Human Rights Ombudsman provides an alternative arena with regard to being responsive to the voice of the marginalized hungry and malnourished people in Guatemala. However, it is difficult to assess the degree to which its resolutions are complied with. There seems to be huge regional differences in this regard. To give an example: in 2001, one regional deputy ombudsman estimated a compliance rate of about a third of total resolutions, while a colleague in a neighboring district claimed that up to 90 percent of his resolutions received a favorable response (Uggla 2004:440). Also, it has been argued that it is often the primary violators of citizen's rights who are least likely to heed the resolutions from the ombudsman. In Guatemala it has been reported that it is the police and the judiciary that comply the least (Uggla 2004:441). In the office's 2010 report it is evident that the ombudsman has a huge caseload: over 20 000 complaints were filed during the year (Procurador de los Derechos Humanos 2010a). The number of cases brought before the institution every year has remained relatively constant over the last decade (Uggla 2004:438). Out of the 20 000 cases in 2010, about 32 percent concerned economic, social and cultural rights. Also, there were a few complaints filed regarding the right to food. More precisely, 61 cases were filed regarding the right to food, in some way or another (Procurador de los Derechos Humanos 2010b:44). This is not a very high number considering the extent to which the right to food is being violated. It seems likely that this has to do with the fact that the hungry and malnourished is a group with few resources, and that this also hinders them from voicing their cases to the Human Rights Ombudsman. Although it is out of the scope of this paper to closely study the exact properties of these complaints, that there are food rights claims risen before the Ombudsman's Office, does suggest that this institution, at least to some extent, really does function as an alternative arena to litigation in court in Guatemala.

Also, within the Ombudsman Office there is the Indigenous Ombudsman's Office that was created in 2002. This human rights institution receives individual complaints and decides whether the collective rights of indigenous peoples protected under Guatemalan law have been infringed (Sieder 2007:225). If the rights are found to be violated, the ombudsman issues condemnations and provides a detailed legal analysis. This office was slow to begin its operations, but could potentially in the long run provide a strong alternative arena for the indigenous people, who mainly are the marginalized group in the country, to assert their right claims. A limitation of this institution is, however, that the office can only recommend

prosecutions to the state prosecutor's office, not initiate them (Sieder 2007:225). There are in addition to these Ombudsman Offices other institutions working with human rights and the right to food. Both the Presidential Commission, for the coordination of human rights policies, and the Congress's Human Rights Commission, play important roles in improving respect for human rights as these institutions have been influential in the development of the country's legal framework (Ziegler 2006:13). Also, within the Presidential Commission, for the coordination of human rights policies, is the Defender's Office for Indigenous Women, which provides mediation, conflict resolution and legal services for indigenous women. All in all therefore, it does seem that there are some alternative arenas that can have an influence on the voice of the hungry and malnourished people in Guatemala, with the Office of the Human Rights Ombudsman probably being the most important of these institutions. These institutions can possibly partly explain the lack of litigation in court on the right to food. However, this is not necessarily the case. It is possible that the alternative arenas should work the other way around also, working as an encouragement to litigation in court and creating more awareness on the issue of food insecurity. The argument here would be that as there are alternative arenas working on the right to food, these would be part of a consciousness-raising that violations of the right to food are actionable, and by this also encourage litigation in court. This is perhaps the more likely outcome when alternative arenas working on the promotion of certain rights exist.

It should also be noted, as the indigenous peoples have alternative normative orders that are not fully recognized by the Guatemalan state, it is a possibility that these local orders function as a pull effect away from the state judiciary. The indigenous' legal order, with their own, informal customary law systems, community courts and legal authorities, is somewhat difficult to assess in this regard. It has been argued that the community customary law system in Guatemala is better than the state judiciary to find resolutions that will maintain community harmony and sort out the root cause of a problem, sometimes going beyond the individual litigants involved, because it represents the values of the people who are using it (Endy 2007:3). However, with regard to the right to food, this is not necessarily the case in issues where it is the Guatemalan state that has legal responsibilities. It is therefore difficult to assess the possible pull effect away from the official state judiciary of the indigenous' legal order with concern to the right to food.

5.1.5 Litigation resources

Following the theoretical framework outlined in the theory chapter, it is also necessary to study the litigation resources that are available to Guatemalan people, and that could enable them to overcome the litigation barriers and turn their grievances and claims into a legal process. This is also factors that can help explain the voice of marginalized people, and social rights cases or the lack thereof.

A key factor with regard to litigation resources is what has been called “associative capacity”; 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 (Gloppen and Kanyongolo 2007:279). These are all factors that influence the chances for there to arise litigation on a social right, such as the right to food. In a legal system such as the Guatemalan system, it is important for litigation that there exist professionals to assist in litigation efforts or to initiate litigation on their own. This could be 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 marginalized and poor people face and can be articulated with little input from those directly affected (Gloppen and Kanyongolo 2007:280). In Guatemala there are, as has been mentioned a few times above, different efforts to provide legal assistance to the marginalized groups of society. First of all, although the Office of the Human Rights Ombudsman is in part an alternative arena to litigation in court, the office does also provide legal assistance (Ziegler 2006:13). This can therefore provide a huge resource to potential litigants, in making them overcome the barrier of voicing their claims. This includes the barrier of knowledge, that is, in giving marginalized people legal assistance, this can help them understand that their grievances is a right violation and therefore actionable. This is also true with regard to the fact that the Ombudsman Office has a lot of experience with regard to all of the different aspects of litigation, information that the (presumably) less experienced individual litigant could not obtain on their own. This could help litigants with litigation strategies so that they would know how they best should formulate their claims to make them accepted in court.

In Guatemala, in general since the signing of the peace agreement, there have been efforts towards making state justice more accessible, both culturally and economically, to minority and marginalized groups (Sieder 2007:216). Litigation resources such as services to provide translations of judicial documents have been instituted. This to help the marginalized, mainly

indigenous people, to overcome the barrier of language, as litigation is not permitted in indigenous languages in Guatemala, only in Spanish. As many only speak their indigenous language this is a very important resource for them to be able to formulate and claim their rights. Also different services providing legal defense have been instituted to make state justice more accessible to the marginalized people (Sieder 2007:216). These various litigation resources that have been initiated, have brought the marginalized people of Guatemala closer to the legal apparatus of the state than ever before, and therefore are important resources to these people. However, the problem is generally that the provision remains acutely inadequate, and the fact that court proceedings also continue to be carried out exclusively in Spanish, is still an hindrance (Sieder 2007:216). Therefore, although there are litigation resources that do contribute to making the hungry and malnourished be able to join forces and link up with legal expertise, through such institutions as the Ombudsman Office and different legal services, these still lack sufficient resources and are too few in numbers, to provide litigants with enough assistance. In some cases though, these resources have encouraged greater recourse to the law in pursuit of individual or collective demands (Sieder 2007:216). Therefore, if these services were continued being expanded, they could in the future provide substantial more assistance to the marginalized people, and prove to be an even bigger litigation resource in the formulation and articulation of legal claims.

Rights advocacy groups, non-governmental organizations and other groups working on the promotion of human rights in general, and the right to food specifically, are present in Guatemala (Ziegler 2006:16). There are several non-governmental organizations and groups working with the right to food in the country. In addition, the United Nations system is represented through its specialized agencies, including the United Nations Development Programme, the Food and Agriculture Organization and the World Food Programme (Ziegler 2006:16). These organizations, however, do not generally seem to mainly contribute directly as litigation resources to the marginalized in Guatemala, instead the focus is often more towards getting attention to the issue of food insecurity. With regard to civil society in Guatemala, it seems that it has been somewhat strengthened in the recent years, and that there is an increasing focus on the right to food. Different institutions within the Catholic Church have for several years focused on working for the promotion of the right to food. These institutions have in general for some years now tried to incorporate the right to food framework into their political stances and in their documentation of the land conflict, of which the right to food is a part (Gaitán and Wolpold-Bosien 2007:28). Also an important

promoter of the right to food is the organization REDSSAG (La Red Nacional por la Defensa de la Seguridad y Soberanía Alimentaria Guatemala). This organization works especially towards the objective of food sovereignty in Guatemala, and this it does mainly through promoting sustainable agriculture and trade solidarity, especially through workshops and meetings among producers (Gaitán and Wolpold-Bosien 2007:28). Another organization, the TTT (La Campaña Tierra, Tortilla y Trabajo), is another civil society initiative, consisting of eleven different organizations of various kinds: producers, farmers, academics and human rights activists. It seeks to promote political processes that help overcome the causes that hinders the realization and implementation of the right to adequate food by creating forums, arranging meetings and distributing information of the status of economic, social and cultural rights (Gaitán and Wolpold-Bosien 2007:28-29). These are some of the different rights advocacy groups working with the promotion of the right to food in Guatemala, and others also exist. Although it is definitely a lot of activity with regard to the right to food, also with regard to lobbying for food legislation, it seems that there is a somewhat lack of groups focusing more specifically on litigation strategies and how this right can be made enforceable in court. The focus seems to generally have been on the political opportunities that exist rather than on the legal opportunities. Therefore, it does not seem evident that the hungry and malnourished people have a lot of potential partners directly with regard to litigation strategies, in these food rights advocacy groups.

5.1.6 Summary

As this first part of the analysis chapter has demonstrated, there are a lot of different factors that influence the legal voice, or in fact the lack thereof, of the hungry and malnourished people in Guatemala. With regard to the potential formal barriers that have been discussed in this chapter, however, these do not seem to explain the absence of food rights claims, as there is a relatively clear legal basis in Guatemala with regard to the right to food. There are nevertheless practical barriers to the voicing and formulation of legal claims, including lack of information about the fact that their grievances are rights violations and therefore actionable, linguistic barriers because most lack access to the official justice system in their own language and because of the non-recognition of litigating in other languages than Spanish, and an economical barrier as most Guatemalans lack the economic resources to defend themselves before the courts, in especial in rural areas due to such costs as travelling and taking time off work. Although there have been many improvements during the last years with regard to information spreading, interpreters and an increase in the number of courts in indigenous and

rural parts of the country, these practical barriers still seem to highly influence the lack of food rights claims among the hungry and malnourished people in Guatemala. Therefore, for there to arise litigation on the right to food, it seems that these factors, that is: more information, more interpreters services and maybe also easier access to courts, would have to be present. The motivational barriers also points to factors that can help explain the lack of food rights claims formation as most people view the legal system with distrust and see state law and state institutions as arbitrary, distant and ineffective, and therefore the judicial system lacks respect among large parts of the population.

With regard to the alternative arenas, it seems that some of these might actually be part of the explanation for why there is no right-to-food litigation, as especially the Office of the Human Rights Ombudsman, seem to provide an alternative to litigation before courts. Also, as there have been some recorded episodes of protest action, this might also seem to provide Guatemalans with an alternative arena to voice their food rights claims. The discussion of available litigation resources demonstrated that although there have been significant efforts at bettering these for the marginalized people, such as providing legal assistance and translators of judicial documents, these have been underfunded and too few in numbers to provide the marginalized Guatemalans with enough assistance. Also, with regard to rights advocacy groups, the last section showed that there seems to have been little focus on how to provide the hungry and the malnourished with litigation resources. Therefore, as is evident, there are many factors that seem to help explain the lack of food rights claims formation in Guatemala. Now, it is time to turn to the responsiveness of Guatemalan courts to food rights claims.

5.2 The responsiveness of the courts to the voice of the hungry and malnourished

Following the analytical framework of this paper, there are several factors that are expected to have an influence on the responsiveness of courts to such social rights claims as food rights claims, that is, whether the courts are willing to take such cases. These are aspects of the law, the legal system and the nature of the judiciary that is assumed to influence the legal system's willingness to accept public interest litigation and social rights cases; in this case food rights cases, as matters belonging within their jurisdiction. The response of courts to food rights claims is of course, as mentioned in the theory chapter, partly influenced by how the claim is voiced, the merits of the case, the skill with which it is articulated, and the legal strategies engaged. Again, this highlights the importance of access to quality legal services. Beyond

this, the responsiveness of the legal system depends on two sets of factors: its formal characteristics and the nature of the judiciary.

5.2.1 The law and the legal system in Guatemala

As discussed in relation to the analytical framework, the factors that affect the legal system's responsiveness to social rights claims from the hungry and malnourished are likely to include the status of social rights claims, rules of standing, legal procedure and evidence, and the legal basis for litigating collective claims and in the public interest. Also provisions regulating the courts' competence and jurisdiction influence whether judges accept cases regarding the right to food as within their domain.

Historically the judiciary in Guatemala has been extremely subordinate to executive power (Sieder 2007:224). However, the 1985 Constitution adopted provisions that have strengthened the judiciary, by explicitly stating its exclusive jurisdictional powers. Also the reforms initiated after the signing of the peace agreement aimed at strengthening the jurisdictional independency of the judiciary. Specifically the Constitution, under article 203, states that "the jurisdictional function is to be exercised, with absolute exclusivity, by the Supreme Court of Justice and by the other courts established by law" (Constitución Política de la República de Guatemala 1985). The judicial branch is clearly established within the Constitution and is entrusted with the duty and authority to render justice independently (De Padilla 2004:37). Therefore the Guatemalan judiciary should have the exclusive power to interpret and apply the law, also with regard to the laws concerning economic, cultural and social rights, such as the right to food. This is also true with the 2005 Law on the National System for Food and Nutritional Security. The Constitution also strengthened the judiciary by giving the Constitutional Court extended powers of judicial review (Sieder 2007:224). The Constitutional Court can exercise both general and concrete review, meaning that the court can set forth two types of unconstitutionality of the laws. The first type of review, general unconstitutionality, has full effects throughout the whole legislative system, whereas the second type of review, unconstitutionality for concrete cases, is only binding on the parties in the concrete case (Rodríguez 2006). These provisions of judicial reviews give the Constitutional Court strong powers, and are meant to guarantee the principle of constitutional supremacy. All in all therefore, it does seem that jurisdiction should not be an obstacle to the courts' responsiveness to food rights claims, as the Guatemalan judiciary is granted exclusive jurisdictional powers.

With regard to the standing rules in Guatemala, these are somewhat restrictive. The procedures of ‘habeas corpus’ and ‘amparo’ are procedures mainly concerned with the protection of constitutional individual rights, and are referred to in article 263 and 265 in the Constitution respectively (Constitución Política de la República de Guatemala 1985). Both procedures are similar in that they protect the rights of individuals from arbitrary acts of government. The main difference between the two is that the ‘habeas corpus’ provision mainly guarantees the right to personal freedom, or individual freedom, while the ‘amparo’ provision guarantees all fundamental rights guaranteed under the Constitution or other laws. Therefore, the provision of ‘amparo’ also includes the right to food. This means, as mentioned earlier, that victims of a violation of the right to food can in practice claim their right to food before the Supreme Court and the Constitutional Court. The provision of ‘amparo’ is a strong element in the Guatemalan legal system, and is protected both in the Constitution and in an additional, separate law (Constitución Política de la República de Guatemala 1985; Ley de Amparo, Exhibición Personal y de Constitucionalidad 1986). However, the standing rules for such procedures are somewhat restrictive as the procedure of ‘amparo’ requires a direct interest in a case in order for the case to be accepted (Rodríguez 2006). First of all, obviously a case can only be accepted if a law or act by an authority invokes a violation or a threat of a violation to individual rights that are protected under the Constitution. Secondly, a violation has occurred if a law or act, or the implementation of such, inflicts an immediate, direct and personal consequence that repeal or modifies rights legally vested in the person of the complainant (Rodríguez 2006). As is evident, only a person having a direct interest in a case of rights violation can litigate on this right. This makes it impossible, at least with regard to the procedure of ‘amparo’, for others to litigate on behalf of the hungry and malnourished in Guatemala. This can be viewed as a hindrance to such cases, as often these groups are not able to take their cases to court themselves. Also, in cases where the procedure of ‘amparo’ is invoked, the rulings are only binding on the parties in the specific trial, and the decision does not have full effect throughout the legislative system (Navia and Ríos-Figueroa 2005:211). This has significant consequences as it is a hindrance for such rulings in social rights cases to have larger social transformative effects and setting jurisprudence. This restrictive position on legal standing is likely to make the courts more unresponsive toward public interest litigation and class action suits, thus discouraging the types of legal claims with the most potential for social transformation. In general, direct popular access to judicial review through the procedure of ‘amparo’ can be argued to be not very citizen-friendly. First of all, it is

impossible to file an ‘amparo’ writ without the support of a lawyer; secondly, this procedure tends to be used more often as a delaying tactic by those attempting to evade justice than as an accessible means for the underprivileged sectors to defend their fundamental rights; and thirdly, the average duration of an ‘amparo’ appeal is over three months, even though the law expressly sets shorter time requirements (Sieder 2007:238-239). All in all, it seems that even though jurisdiction is not a hindrance to social rights cases such as the right to food in Guatemala, the mechanisms available for the judicial defense of rights in practice, have clear limitations.

5.2.2 The nature of the judiciary

The analytical framework points to three factors that are especially important for judicial interpretation and responsiveness in cases affecting marginalized people’s social rights. First of all, the legal culture in the country is a factor that influences judicial interpretation and responsiveness. Secondly, the sensitization of judges, that is, the judges’ sensitivity to marginalized people’s concerns and conditions is likely to have an effect. Thirdly, the composition of the bench can be important for the way the court and the judges interpret and respond to social rights cases.

As mentioned in the theory chapter: how legal norms are interpreted in a particular case is linked to the individual judge’s personal, ideological, and professional values. This combine with the legal culture to shape his or her perception of the judges’ own role, the understanding of what is the suitable way to deal with social rights such as the right to food, the relationship between law and politics, and to what extent social rights are within the proper domain of the courts. Also important, is how firmly judicial independency is embedded in the legal culture. In Guatemala, as mentioned earlier, the history of the legal system has been one characterized by the judiciary being subordinate to executive and, specifically, to military power. The transition to constitutional rule in the 1980s and the peace process of the 1990s introduced a number of mechanisms and reforms to increase judicial independence. However, it has been argued that in recent years the judiciary has again experienced a creeping politicization (Sieder 2007:240). When asked in an interview about the political influence in the judiciary, the president of the Guatemalan Supreme Court from 2006 to 2007, Eliú Higueros, admitted that there is such an influence in the judiciary (Prensa Libre 2006). The former president stated in the interview that the court had to invest more work in getting rid of such political influences and be able to apply the law in an objective manner. Also the Constitutional Court

has had problems with their reputation of independence. Although the Court has adopted an independent stance vis-à-vis the executive on some collective rights, as ruling certain increases in taxes or public utility charges unconstitutional, its reputation for independency suffered when it ruled to allow the presidential candidacy of former dictator Efraín Ríos Montt (Sieder 2007:224). Therefore, even though the Guatemalan judiciary is more independent than it was some decades ago, it is still facing problems of political influence. This is a problem because, as mentioned in the theory chapter, a culture tolerating political pressure and other external influences on judicial decisions opens the system to elite capture, which it is reason to believe further disadvantage the politically marginalized litigants and makes them even more distrustful towards the judiciary.

Also problematic for the responsiveness of judges and courts to social rights litigation when discussing the Guatemalan legal culture, is that a conservative, formalist ethos continues to characterize the legal profession. Judges tend to focus on applying the letter of the law, rather than on the creative interpretation of existing statutes and constitutional articles (Sieder 2007:240). It is likely to assume that this is not very conducive for the responsiveness of judges to social rights claims. In fact, it has been argued that most judges and lawyers in Guatemala are unwilling to accept abstract constitutional principles as law, arguing that implementing or secondary legislation is necessary in order to make them justiciable (Sieder 2007:240). Although there exist secondary legislation on the right to food, with the food and nutrition security law, this attitude to constitutional law is likely to have a negative effect on the judges' acceptance of social rights claims in general and possibly also food rights claims specifically, as belonging within their domain. In addition to this, it has been argued that the lower court judges are often poorly trained and little interested in jurisprudential innovations or international human rights conventions (Sieder 2007:231). This is not factors contributing to the responsiveness of courts accepting social rights claims such as the right to food.

There have also been challenges for the Guatemalan legal educational system. As a consequence of open-access admissions policies in the 1970s that made university education available to a lot more people, the national law schools ended up being severely overcrowded with students (Hendrix 2004:597-598). The resources granted the law schools did not make up for this increase in law students, and the result was that the quality of the law schools suffered. This has been a problem haunting the legal education of Guatemalan judges and lawyers to this day. Although there have been initiated reforms and ways to reduce the

number of law students, the low quality of law education is still a problem for Guatemalan judges today. From 2006 a new curriculum was fully in place in the department of law in the National University in Guatemala (Universidad de San Carlos). This curriculum had a new focus in establishing higher quality in the legal education and focused more on issues of indigenous law, legal pluralism, diversity and conflict resolution, gender analysis, human rights law, domestic violence, and other new topics (Hendrix 2004: 603). These topics were additions to the legal education that were highly needed in Guatemala, and in the longer run might prove very productive with regard to the quality of legal education and the training of judges and lawyers. However, still today most of the judges working in Guatemala have not gotten their education under this new curriculum, and it is likely that these are more poorly trained and little interested in jurisprudential innovations or international human rights conventions. All in all therefore, it seems that the legal culture in Guatemala has the effect that judges and courts are reluctant to accept social rights cases such as the right to food.

The second factor that it is assumed is important for judicial interpretation and responsiveness in cases affecting marginalized people's social rights, is the sensitization of judges. Judges' interpretation of the law is affected by their sensitivity, both individually and collectively, to the marginalized people's concerns and conditions. As discussed in the theory chapter: 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. That is: who the judges are and where they come from, socially, culturally, ideologically, and in terms of their education, will have an influence on their responsiveness to social rights claims. This brings us to the third factor that shapes the responsiveness of courts. Institutionally, the composition of the bench is a function of the system and the criteria for appointment. And the theory assumes: the more inclusive and transparent the appointments procedures, the more diverse and socially sensitive are the courts in general.

In Guatemala, as mentioned in the section above, many of the judges working in the legal system today, has been schooled under the old curriculum which had less focus on subjects such as indigenous rights and human rights in general. These are subjects that it is reason to believe are important for the judges' understanding of the concerns and conditions of the marginalized, in this case the hungry and malnourished, people, and by consequence, the acceptance of social rights claims. Therefore it is reason to believe that many judges lack this sensitivity to these concerns, at least through their education. It is also argued that the legal

profession, as much of the society at large, is pervaded with racism against the indigenous peoples (Sieder 2007:240). This might affect the judges and courts response to food rights claims, as the hungry and malnourished in Guatemala to a large extent are indigenous people. However, it should be noted that with the open-access enrollment policies of the 1970s there were at least some more students from a poor background, indigenous people and women being able to attain a legal education (Hendrix 2004:599). This it is reason to believe, would generally enhance the social sensitivity of the profession in general. It might be though, that because these judges by virtue of their position are now part of the elite, even though not necessarily in their background, there is a social distance between them and the marginalized hungry and malnourished, that lower their sensitivity to these people's concerns. Their professional identity and judicial mind-set might partly explain unresponsiveness to social rights claims such as food rights claims.

With regard to criteria of appointment, the 1985 Constitution (art. 215) established a process for selection of the Supreme Court which reduced the ability of the executive influencing the composition of the bench. Nominations to the court and appellate courts are proposed by a sixteen member commission, which includes five jurists selected by the Guatemalan Bar Association, five representatives from the appeals courts, five law professors and one university rector (Sieder 2003:146). Nominations are then subsequently confirmed by Congress. Supreme Court justices are appointed for five-year terms. In reducing the possibilities for presidents to appoint loyalist, the appointments of Supreme Court justices do not overlap with the presidential term of office. Court justices also select the Chief Justice. There are also criteria, established in article 216 of the Constitution, with regard to training and experience for those nominated to the Supreme Court. To be elected a Supreme Court Judge, the candidate have to be over 40 years old, and have served a full term as a magistrate in the appeals courts or a tribunal of comparable status, or been engaged in the legal profession for over ten years (Constitución Política de la República de Guatemala 1985). The magistrates of the Constitutional Court are selected by the Supreme Court, Congress, the executive, the national university, and the lawyers' association (Sieder 2003:146). The magistrates hold office for five years and the presidency of the court rotates between them on a yearly basis. These appointment procedures appear to be relatively inclusive and transparent, which should generally create more diverse and socially sensitive courts. In 2009 a new law was passed that provides mechanisms to make the nomination process of magistrate candidates to the Supreme Court and the appellate courts even more public and

more transparent (The Guatemala Times 2009a). As demonstrated earlier in this chapter, a problem of political influence in the judiciary persists, and political forces have been able to influence and manipulate the nomination processes as well (The Guatemala Times 2009b). The aspiration is that this law, by making these processes more open to the public, will increase the transparency and efficiency of the legal system. Among others, previous to the passing of the law, the Human Rights Ombudsman worked actively to express his support and hopes for the law (The Guatemala Times 2009a). As the law has only been in effect for two years, it is probably too early to assess the effect it will have on the transparency of the judicial system. However, it should be mentioned, as the theoretical framework also highlights: inclusive and transparent appointments procedures do not necessarily change the responsiveness of courts to the concerns of marginalized groups. With regard to the lower ranking parts of the judiciary, there also remain many problematic issues here. A law that was passed in 1999 to regulate the training of judges¹⁰, together with the creation of a Council of Judicial Training, a disciplinary body for judges and the approval of a Code of Judicial Ethics were introduced with the aim of ensuring that incompetent and corrupt judges no longer fill the lower ranks of the judiciary. Yet, despite these institutional advances, selection and appointment by merit is still not generalized practice and the tendency to make appointments on the basis of clientelism or nepotism persists (Sieder 2003:146). The criteria for appointment of judges in the lower ranks of the judiciary in Guatemala seem therefore not to be conducive for the creation of diverse and socially sensitive courts. Therefore, it seems reasonable to argue that the sensitization of judges and the composition of the bench are not factors generally contributing to the responsiveness to the marginalized hungry and malnourished people's food rights claims in Guatemala.

5.2.3 Summary

This second part of the analysis has demonstrated that there are several aspects of the law and the legal system that contribute to the unresponsiveness of courts to the food rights claims of the marginalized groups in the Guatemalan society. Despite the fact that the judiciary has exclusive jurisdictional powers and there are many provisions in both international and national law that protects the right to food, the courts seems to be unresponsive to these social rights claims. Therefore it appears to be other factors influencing the unresponsiveness of the courts. One factor that definitely seems to have an influence is the standing rules. Although

¹⁰ The law referred to is the 'Ley de Carrera Judicial' (Sieder 2003:146).

the provision of ‘amparo’ gives victims of a violation of a fundamental right such as the right to food, the possibility to claim their right to food before the Supreme Court and the Constitutional Court, this provision has rather strict rules of standing. This has the consequence that the courts are unresponsive to all claims that do not fulfill these strict procedural requirements. The restrictive position on legal standing is also likely to make the courts more unresponsive toward public interest litigation and class action suits, thus discouraging the types of legal claims with the most potential for social transformation. Because it is required that a litigant has a direct interest in the case for the case to be accepted, organizations and individuals are not allowed to litigate on behalf of others or initiate “test cases” on behalf of many.

The legal culture in Guatemala is also a factor that can contribute to the explanation of the unresponsiveness of courts to social rights claims. The fact that the judiciary is not completely independent of the other branches of government, especially the executive; the conservative, formalist ethos that continues to characterize the legal profession; and poor legal education and training, has the effect that Guatemalan judges are little interested in jurisprudential innovations or international human rights conventions. In addition, as concluded in the above section, the sensitization of judges, or rather the lack thereof can seemingly help explain the courts unresponsiveness to social rights claims. Also the political influence on the composition of the bench and the fact that nepotism continues to characterize many of the appointments, do not seem to be conducive for the courts being more adherent to the claims of the marginalized groups.

There are indeed many different factors influencing the initiating phases of a litigation process, and the factors analyzed in this chapter does contribute to the understanding of the legal voice of the hungry and malnourished, and the unresponsiveness of courts to these people’s food rights claims. Although there are many obstacles disadvantaging litigation by the marginalized hungry and malnourished, the last part of this chapter will give a review of which factors appears the most crucial, and therefore would have to be present for food rights litigation to arise in Guatemala. However first, the next section will give a presentation, based on previous research, of procedures we know are contributing to successful social rights litigation.

5.3 Procedures contributing to successful social rights litigation

The book “Courts and social transformation in new democracies: An institutional voice for the poor?” (Gargarella et al. 2006), presents a collection of different case studies that have been conducted with the aim of explaining the success or failure of social rights litigation. Based on these different case studies that have been conducted in a variety of Latin American, Eastern European, African and Asian countries, it has been possible to point to some factors that seem to be particularly important for the prospects of social rights litigation. These factors are according to the research that has been carried out, therefore, particularly decisive for whether or not social rights litigation will arise and be taken up by courts.

The case studies indicate that the availability or absence of certain legal procedures will have an influence on the prospects for social rights litigation. The following appear to be of particular importance: rules of standing, legal formalities, class actions, and judicial appointment procedures (Gargarella et al. 2006:266). These are factors that have proved to be decisive for social rights litigation in other cases, as will be demonstrated in this section.

The rules of standing have proved to play a crucial role in explaining the vigour of social rights litigation. India probably represents the most advanced example in this respect. A Supreme Court justice recognized that the existing rules of standing were the most important factor preventing poor and marginalized people from using the courts. This, the justice said, was because the traditional rules of standing insisted that “only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal rights or legally protected interests can bring an action for judicial redress” (Gargarella et al. 2006:267). Accordingly, the Indian Supreme Court began to develop creative ways of dealing with this issue, challenging the traditional approach to the rules of standing to sue. By loosening the rules and traditions related to standing, the judiciary encouraged litigation concerning the interests of the poor and marginalized (Gauri 2009:1-2).

Also a reduction in legal formalities may have a great impact on the approving of social rights litigation. Again, by using the example of the Indian Supreme Court, it seems clear that the creation, by the court, of the so-called ‘epistolary jurisdiction’ gave enormous impetus to litigation on behalf of disadvantaged groups (Gargarella et al. 2006:267). This allows every person or group the possibility to activate the Court by simply writing a letter on behalf of the poor. To give examples of similar reductions in legal formalities from Latin America, the

‘tutela’ action from Columbia and the ‘amparo’ writ used in the Constitutional Court in Costa Rica are characterized by openness and a lack of legal formalism (Gargarella et al. 2006:267). In Costa Rica the ‘amparo’ writ means that cases can be accepted “from anyone, of any citizenship, in any language, written on anything, without the need for legal council, legal knowledge, or filing fees” (Wilson, Rodríguez Cordero and Handberg 2004:522-523). This writ, therefore, imposes few formal requirements for cases to be filed, and has by this widely increased access to the Costa Rican judicial system.

Previous research has demonstrated the importance for the prospects of social rights litigation of the possibility of filing cases as class action suits. This means that it is conducive for such litigation if individuals are allowed to act in concert when they confront common grievances. It seems also to be more reasonable and efficient to organize the judicial system so as to allow these collective demands, rather than the alternative of requiring each individual to initiate a separate case, which entails a waste of social energy and a weakening in the strength of the claim (Gargarella et al. 2006:268; Scott and Macklem 1992:140-141). It has been a growing development of class actions in several countries, not least in Latin America.

The empirical evidence from the case studies also suggests that it is likely that the appointment procedures for the judges are of crucial importance for the prospects of social rights litigation. If judges who are particularly sensitive to the suffering of disadvantaged and marginalized groups are appointed, this will probably enhance the success of social rights litigation (Gargarella et al. 2006:268). In the case studies, changes in the composition of the bench to more sensitive judges were usually not the product of formal changes in the appointment procedures of judges, but rather a consequence of the “good will” of a few, powerful political actors. However, Argentina is an exception, and here the president committed himself to a more transparent procedure for selecting Supreme Court justices, including the direct participation of non-governmental organizations and social activists, and to ensuring a more socially diverse bench, especially in terms of gender and geographical background of the judges (Gargarella et al. 2006:268).

5.4 Which factors would have to be present in Guatemala?

Based on the analysis conducted in this paper, in addition to the findings of previous research reported in the above section, this last part of the chapter will present the most crucial factors that it appears would have to be present in Guatemala for food rights litigation to arise. First

of all, concerning a particularity of Guatemala, it is very clear that there still is a long way to go with regards to the indigenous peoples in Guatemala being able to take part in the Guatemalan society on equal terms as non-indigenous. A change in attitudes towards these groups is needed. This also concerns them having a feeling of Guatemalan citizenship, so that they to a larger extent feel they have certain rights (and duties) vis-à-vis the state. It seems that food advocacy groups and also the state-connected institutions working on the right to food, such as the Human Rights Ombudsman, still have a lot of work to be done regarding information spreading and knowledge of the right to food. The indigenous peoples, and also other marginalized hungry and poor, need to know that their grievances are rights violations and should be actionable. Even though there seems to be gradually more awareness of the problems with hunger and malnutrition among the Guatemalan public, the knowledge and information is still not sufficient. Hopefully, as the advocacy groups and state-connected institutions continue their work, this situation will improve. This seems necessary for litigation on the right to food to have a chance to be a reality. The same can be said with regards to the situation of language requirements, which is connected to the strict standing rules. It seems that at least one of two possible solutions would have to be present in Guatemala for litigation to arise. Either there needs to be dramatically better interpreter and translation services provided to the indigenous non-Spanish speaking litigants, meaning a dramatic increase in the resources provided such services, or these people should have the opportunity to formulate legal claims in indigenous languages. However, this would also require more resources given to the courts, as very few judges or lawyers are Mayan or speak any indigenous languages. Either way, at least one of these solutions appears necessary for food rights litigation.

In fact, probably one of the largest barriers against food rights litigation is the strict standing rules in general, with regard to the procedure of 'amaparo'. This provision guarantee, as should be familiar by now, all fundamental rights guaranteed under the Constitution or other laws, meaning that victims of a violation of the right to food can in practice claim their right to food before the Supreme Court and the Constitutional Court. However, as the strict standing rules require the litigant to have a direct interest in the case, this is a big obstacle to groups and organizations initiating litigation on behalf of the marginalized hungry and malnourished who are often not able to do so themselves. If these standing rules, as with regard to *direct interest* would be interpreted by the courts in a wider manner, this would be conducive for food rights litigation. Also for the litigants to have the possibility of filing an

‘amparo’ case without the support of a lawyer, thereby easing the legal formalities, is a factor that probably would be conducive for litigation. Therefore it seems that a looser interpretation of the standing rules of the ‘amparo’ procedure would have to be present among the Guatemalan judges for food rights litigation to arise.

Another set of crucial factors that seems necessary to be present for litigation, concerns the judges and their education, training and sensitization. First of all, the fact that judges and lawyers should be able to work without political and/or elite influences is highly important. The independency of the legal system at large and of the courts and judges specifically, is a factor that should be present to a larger extent than today. Also, better legal education and training to encourage Guatemalan judges to be more interested in jurisprudential innovations and international human rights conventions, seems crucial for litigation to arise. The judges’ ability and aspiration to use the legislative framework in new and creative ways may prove to be of crucial importance, as we have seen in other cases, such as India. Also, being innovative in the way that they are more open to class action suits would probably be favorable for food rights litigation. In addition to this, a heightening of the judges’ sensitivity to the concerns and conditions of the hungry and malnourished people of Guatemala is a factor that also would have to be present. Therefore, appointing judges that are particular sensitive to the suffering of the hungry and malnourished, or disadvantaged groups in general, should be encouraged.

The analysis conducted in this paper suggest that one of the perhaps biggest challenges for the Guatemalan judiciary is the lack of confidence and trust that prevails in large parts of the population, and with good reason. There is a pressing need for the judiciary to build up credibility in the system. Although this has been an aim for a couple of decades, and many reforms have been introduced to the legal system, this is still a big obstacle for the victims of violations of the right to food turning to the courts. How to transform the Guatemalan judiciary to ensure its independence and respect has been debated for a long time, and the process of transformation is also likely to last for quite some time. Such institutional and attitudinal changes are not quick to fix, and will therefore be an issue in the country for at least some time to come. Such changes might prove to be important for the occurrence of litigation though. Until potential food litigants see the law and the courts as something to which they can make effective recourse to protect their fundamental rights, and not as something that operates solely to the benefit of powerful individuals and groups, it is more unlikely that they will turn to the courts with their grievances.

With regard to litigation resources, which in this paper has been called “associative capacity”; 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, there is a lot of activity going on in Guatemala on the right to food today. However, with regard to legal expertise services, such as translation and interpreter services and legal advice and assistance services, these are too few and have too little resources. This is a factor that would have to change for food rights litigation to exist. Also, another factor that it appears would have to be present to a larger extent: the different advocacy groups working in Guatemala today would have to focus their attention more specifically towards litigation and litigation strategies for such actions to be a reality. It appears that these groups have focused much attention towards the political opportunities of influence that exist in country, which they have done with some success considering the strong legislative framework that has been developed. However, it seems necessary that they focus more on the legal opportunities that exist for food rights litigation to arise.

These are all factors that stand out to be crucial for food rights litigation to arise in Guatemala after having conducted the analysis and studied which factors have proven to be crucial in other cases. As is evident, there seems to be several factors that are not sufficiently present in Guatemala today, but which nevertheless appears would have to be present for litigation to be a reality.

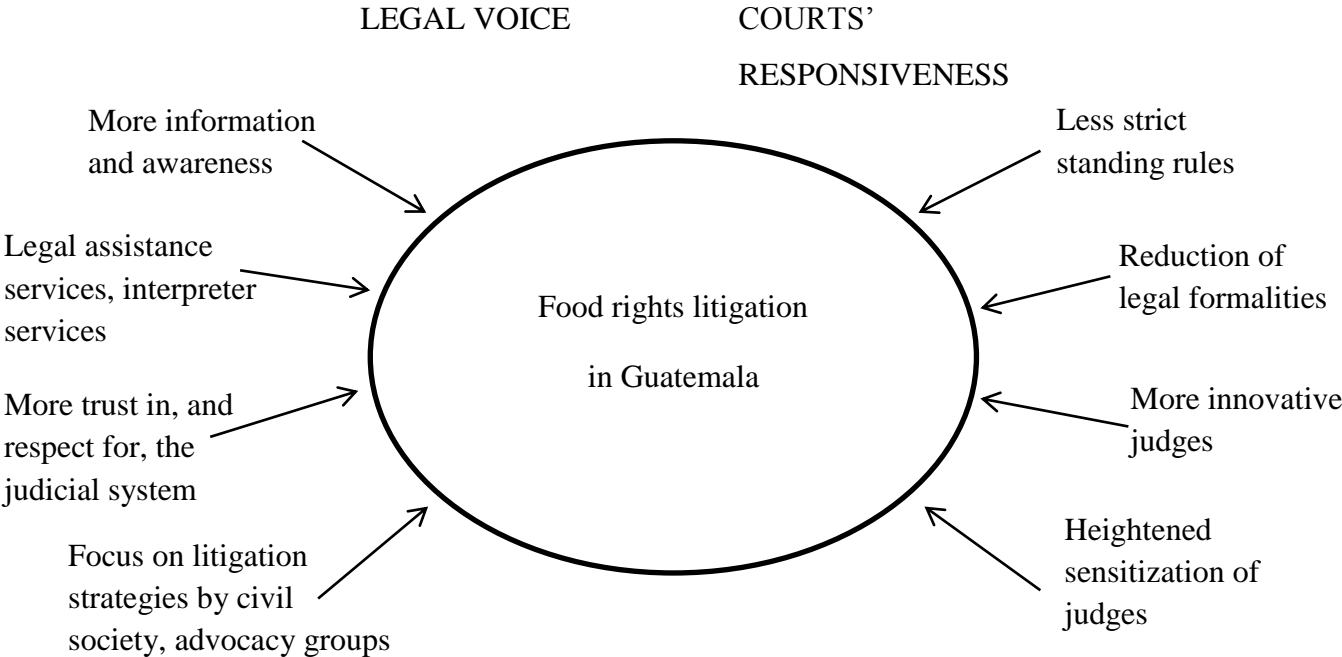
6.0 Concluding remarks – An answer to the research question

This research process started out with an apparent puzzle: As the right to food is formally protected in Guatemala - the right is part of both international and national law - and at the same time clearly being violated, the conditions seem at first glance to be favorable for food rights litigation. Yet, such litigation does for the most part not happen. The aim of the paper was therefore to study *which factors and conditions would have to be present for there to arise public interest litigation on the right to food in Guatemala*. Countless submerges into the analysis later, the puzzle does not seem so much of a puzzle anymore.

This analysis has revealed that there are many obstacles to food rights litigation in Guatemala. These obstacles relate to both the fact that violations of the right to food concern the most marginalized and poor of society, that dispose the least resources at the outset, and that the legal system in Guatemala can be characterized as not being very litigation-friendly. The food insecure people are among those with the least resources in society, and this presents them with an extra challenge with regard to being able to bring their cases to court. These people, therefore, are very dependent on assistance throughout the entire litigation process. This brings us to the formalistic legal system. As there are relatively strict standing rules and formalistic requirements to the articulation of legal claims, the hungry and the malnourished are even more dependent on support from more professional litigators. In a country where the resources provided the legal assistance services are limited, this evidently poses a challenge to potential food rights litigators. As a consequence of all this, the analysis has revealed, that for food rights litigation to arise, there is a need for more awareness and consciousness-raising around the topic of the right to food. There would also have to be more focus on litigation assistance and strategies in the advocacy groups and state-connected institutions working on the right to food. In addition to this, the legal system would have to arrange for provisions of less strict standing rules and reduce the formalities involved in articulating a legal claim, or, if not, the judges would have to take a more innovative approach and consider to which degree it is possible to widen the interpretation of the legal framework. The strict interpretation of the standing rules and the formalistic requirements are a hindrance for class action suits and, therefore, cases with the largest potential for social transformation. The judges' aspiration to be more ambitious and innovative in this regard, however, is probably partly dependent on them being more sensitive to the marginalized and poor people's concerns. It seems, therefore, that for food rights litigation to arise there must be an increase in the judges' sensitization to social rights claims in general and not least to food rights claims specifically.

This brings us to a last factor that would have to be present: more trust and credibility in the legal system is needed, and this might also improve if the judges heightened their sensitivity to the concerns of marginalized people and these people felt the system was there to protect their rights. Figure 1 summarizes the results of the analysis, and emphasizes the most crucial factors and conditions that it appears would have to be present for food rights litigation to arise in Guatemala.

Figure 1: Factors that would have to be present



6.1 What next?

Guatemala is still a relatively new democracy, and many of the issues pointed to in this paper are still under development. Such processes are long-lasting and often slow-moving. However, the fact that many of the issues discussed are under development, and possibly under improvement, does not help the situation of the millions of individuals suffering from hunger and malnutrition today. In fact, these may face even more serious problems in the foreseeable future. This because the situation in the world today, with the food price crisis, the ongoing global economic crisis and climate changes, in addition to the situation in Guatemala, after incidents of drought, hurricane and volcano explosion, all have contributed to more food insecurity. If food rights litigation is one of the means to improve their conditions, then more work to promote their ability to take their cases to court should be done. This analysis has

demonstrated that the chances for food litigation are limited at present, and it has pointed to the issues in Guatemala that need to be changed if the prospect for litigation is to improve, as showed in figure 1. However, that litigation is productive for social transformation is not a given. Neither is it necessarily a desirable way to promote social change. There are many possible strategies for effecting social change, and litigation is not necessarily the best way. Activists, advocacy groups, institutions, non-governmental organizations and others working for the promotion of the right to food should continue their diverse work of making the situation in Guatemala with regard to food security better. If litigation is to be included in the tool-kit as one of the means these groups and organizations wish to promote the right to food, it appears that several features of the Guatemalan legal system would have to change. However, this has been the case in other countries where litigation on social rights, including the right to food, has been practiced for some time.

6.2 A need for more knowledge

Research on food rights litigation in a Central American country is a recent endeavor. Although studies have been conducted on social rights litigation for quite some time, case studies focusing on the right to food in this region are rarer. This paper has only studied the factors influencing litigation in Guatemala, and therefore it is difficult to firmly generalize the results to other countries. To acquire more knowledge on the region in general, it is necessary to conduct more research on the topic in other cases.

In a newly published book, “New challenges to the right to food”, Vivero (2011) points to restrictions to the justiciability of the right to food in practice. Among the challenges Vivero highlights, is a problem of diffuse governmental responsibilities with regard to the right to food that makes it difficult to assign legal and administrative responsibilities. Vivero also points to the problem that severe acute malnutrition is not an official cause of death in many countries. If hunger is not accepted as a legal cause of death, it cannot be presented as proof in court and the utility of the extreme violation of the fundamental right to be free from hunger is weakened (Vivero 2011:26). These are policy issues that need more attention to improve the justiciability of the right to food. Therefore, more research on these particular challenges is needed to get a better understanding of the conditions for legal enforcement of the right to food.

Also, this paper does not study the effects of social rights litigation. There is indeed a need for more knowledge on the effects and consequences of litigation in general, as well as what litigation on food rights will lead to. As more and more countries adopt laws on the right to food or include it in their constitutions, courts will play an increasingly important role (De Schutter 2010). In light of the fact that Latin America can be considered to be the region that has made the most progress in terms of legal frameworks that promote and protect the right to food, with several countries that have specific laws relating to this subject and several more that have bills currently under discussion (Vivero and Monterroso 2008), there is a need for more knowledge on litigation on this right. This paper has had a focus on national legal institutions; however studies of the possibilities of accessing justice on the right to food in international legal institutions would be welcome. More knowledge of how the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights could be utilized with regard to food rights is interesting. Also, when the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights comes into force, victims of social rights will have an international mechanism that will allow them to make effective appeals against the violation of their rights, once they have exhausted the mechanisms of their own country or if these national mechanisms take too long. What effects and results the possibility of articulating food rights claims will have in the longer run, will be of much interest to social scientists, students of law, and not least to the politicians and bureaucrats having to enforce this right.

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