Public Interest Litigation, Social Rights and Social Policy

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Success of public interest litigation

- Do cases aimed at improving social rights succeed in the courts?

- Are progressive social rights judgments complied with and implemented?

- Has litigation a systemic impact in the sense of shaping social discourse and social policy?
THE ANATOMY OF THE LITIGATION PROCESS

Marginalized groups’ VOICE (a) → Court RESPONSIVENESS (b) → Judges’ CAPABILITY (c) → Authorities’ COMPLIANCE/IMPLEMENTATION (d) → SYSTEMIC CHANGE Social policy (d) →
FACTORS INFLUENCING MARGINALISED GROUPS
VOICE ON SOCIAL RIGHTS CLAIMS

Marginalized groups’ resources to articulate and mobilize

- Associate capacity, cohesion, awareness, legal literacy, economic resources, media

Practical barriers to access
- Costs, distance, no permanent home, language, lack of information

Motivation barriers
- (Dis)trust, fear, social and cultural distance, past experience, and perceptions of the legal system (performance, relevance, corruption)

Public interest litigators -
- Accessibility, quality -
Legal service organisations, pro-bono litigation, specialized 'back-stop' organisations (national/international)
Public legal aid and litigation institutions

Formal Barriers
Nature of the law and the legal system
- Structure (plural vs. unitary legal system)
- Rules of standing, formalism, bureaucracy, courts' jurisdiction, capacity formal position of social rights

FACTORS AFFECTING THE RESPONSIVENESS OF THE COURTS

Legal culture
Judges’ norms of appropriateness, perceptions of
- own role on social rights (law v politics),
- justiciability of (international) human rights
norms

Sensitisation to social rights issues
Training, curriculum development

Media
Public opinion - discourse on social rights

Composition of the bench
Social background of judges
(gender, socio-econ, ethnicity etc)
Professional background

The Law and
Nature of the legal system
Standing rules
Structure, formalism,
bureaucracy,
Courts’ jurisdiction
legal framework
– formal position of social rights

VOICE
(a)

Courts’ RESPONSIVENESS

(b)
FACTORS INFLUENCING THE JUDGES’ CAPABILITY

Sensitisation to social rights issues
Education, training, curriculum development; Media, public opinion, social rights discourse

The Law and the legal system
Structure, legal sources, formal position of social rights, courts' jurisdiction and formal competence

Legal culture

Jurisprudential resources
Access to legal material, training
Research capacity
Professional forums

Resources
Capacity, budgets, infrastructure

Judicial independence
- from government influence and dominant social interests
- internally in the judicial hierarchy
Tenure and conditions
Legal culture

Composition of the bench
Professional quality social background

VOICE
(a) (b) (c)

Political context

BEYOND THE COURTROOM
– A NEW LOOK AT THE LITIGATION PROCESS

Marginalized groups’ VOICE (a) Court RESPONSIVENESS (b) Judges’ CAPABILITY (c) Authorities’ COMPLIANCE/IMPLEMENTATION (d) SYSTEMIC CHANGE Social policy

Social mobilisation

Lost cases
FACTORS AFFECTING THE COMPLIANCE WITH JUDGEMENTS

Political context
- Balance of power
- Dominant social forces
- Ideological priority
- Political will

Judgement authority

Compliance

Implementation

Political culture
- Legalism

Social mobilization
- Media
- Public opinion - discourse on social rights

Policy mobilization

Voice

Capability

Independence
- Tenure and conditions
- Professional forums
- Legal culture

Support in political society/significant constituencies’ legitimacy

(a) (b) (c) (d)
LITIGATION AND SOCIAL POLICY - ROUTES OF INFLUENCE

VOICE (a) (b) (c) → COMPLIANCE (d) → SYSTEMIC CHANGE

Social policy

Litigation

Advocacy / lobbying

Media

Social mobilisation
Demonstrations, political pressure
Legal literacy, consciousness
Discourse on issues as social rights violations