

Can litigation clean rivers?

Assessing the policy impact of “the Mendoza case” in Argentina



People living by the Matanza-Riachuelo river basin are suffering from diarrhea, respiratory problems, skin-diseases, cancer, allergies and anemia.

Photo: Greenpeace Argentina

The people of the Matanza-Riachuelo river basin in Argentina live in one of the most polluted places on earth. They suffer from severe health problems, and claim it is because of the polluted air, water and soil. After a public interest litigation process, the authorities were sentenced to clean the river in 2008. Almost four years later, the river is still contaminated, but the litigation process has led to important changes. This brief enquires into the policy consequences of the Mendoza case, and argues that litigation can contribute to solve complex environmental cases.

LITIGATION AS A STRATEGY TO IMPLEMENT RIGHTS

Throughout the world, litigation is increasingly used as a strategy to hold governments accountable for violations of rights and legal obligations, such as violations of social rights and environmental law. Public interest litigation aims to change the situation not just for individual litigants, but also for people who find themselves in the same situation. In certain countries, where conditions allow, public interest litigation has become a strategy pursued by – or on behalf of - the poor and marginalized sectors of the society. Argentina is one of the countries where a combination of favourable legal support structures and legal rules allowing litigation for public interests,

has led NGOs to use litigation as a strategy for holding governments accountable for implementing rights.

HEALTH PROBLEMS

The Matanza-Riachuelo river basin represents both an environmental and a social catastrophe. It has an estimated population of 4.9 million people, of which many live in squatter settlements lacking basic services such as potable water, sewage services, satisfactory health care services, and decent housing. The environmental pollution is caused by different sources of contamination, such as waste-fills in open air, sewage from illegal sewage pipes and toxic spills from the industries. Many of the squatter settlements are flooded with polluted

water from the river. Many of the industrial establishments have out-dated technology and lack commitment or means to comply with current standards. Dangerous levels of arsenic, chrome, mercury and lead are found in the river basin. People suffer from diarrhea, respiratory problems, skin-diseases, cancer, allergies and anemia. Blood samples from some of the inhabitants show alarmingly high levels of lead. There has not been a systematic health study to prove a causal link between the residents' health problems and the pollution. Many of the residents' health problems could be related to poverty and poor infrastructure.

The Matanza-Riachuelo river basin covers an area of 2.238 km² spanning 17 jurisdictions at different levels of government: the National Government, the Province of Buenos Aires, the City of Buenos Aires and 14 municipalities. Before the Supreme Court accepted the *Mendoza* case, the pollution problem was locked in a tangle within different jurisdictions.

LITIGATING THE RIGHT TO A HEALTHY ENVIRONMENT

In 2004, Beatriz Mendoza and a group of neighbours in Villa Inflammable, one of the worst polluted shanty towns in the river basin, filed a case to the Supreme Court of the Nation on health damages caused by the environmental contamination of the Matanza-Riachuelo river basin.

The Supreme Court rejected the individual claims, but accepted a collective environmental case, because it addressed an inter-jurisdictional pollution problem that violated the

constitutional right to a healthy environment.

On 8 July 2008, the Supreme Court issued an historic judgement. The National Government, the Province of Buenos Aires and the City of Buenos Aires were sentenced not only to clean the river basin, but also to prevent future environmental harm and remove the industrial pollution, clean up the landfills, clean the riverbanks, expand the potable water networks, make proper storm drainage and sewage sanitation systems, put together an emergency health plan and inform the public about measures taken.

Almost four years later, the river basin authority has started to clean the river, but time is running out. They will not be able to comply with the Supreme Court judgement. There is an environmental management plan, but not much has been done, and the river is still contaminated. "There has been a lot of progress, but we should have advanced more, faster and with more efficiency", said Alfredo Alberti, president of the Boca Neighbourhood Association, one of the NGOs in the lawsuit. The Supreme Court has issued several follow-up judgements as a response to the lack of compliance. Judicial control of the implementation of the judgement seems to have been important to ensure compliance with the judgement.

To understand the full impact of the litigation process in a case like *Mendoza*, it is important to assess not only the outcome in Court or whether the river is clean, but also to look into the broader policy impact of the litigation process.

Box 1: The litigation process in the Mendoza case

2004

Beatriz Mendoza and a group of neighbours presented to the Supreme Court of the Nation, a case against the National Government, the Province of Buenos Aires, the Autonomous City of Buenos Aires and 44 companies regarding health damages suffered because of the environmental contamination of the Matanza-Riachuelo river basin. The litigants were assisted by lawyers from a private law firm.

2006

In its first judgement, the Supreme Court of the Nation decided to accept the collective environmental case, and ordered the defendants to submit an environmental management plan on how they would clean the river and establish a river authority. ACUMAR, a special river basin authority emerged responsible for coordinating the project to clean the river

2006/2007

The Supreme Court accepted requests from the Ombudsman's office and five NGOs to be accepted as third parties to the case

2006/2007

The Supreme Court ordered a series of public hearings, in which all the parties to the case could express their views on the claims and on the authorities' plan to clean the river

2008

The Supreme Court of the Nation handed down a landmark judgment in which it declared the legal responsibility of the National Government, the Province of Buenos Aires and the City of Buenos Aires to improve the quality of life for the inhabitants of the Matanza-Riachuelo river basin, to clean the river, and to prevent future environmental damage in the river basin. No settlement was issued regarding the 44 private companies involved. The Supreme Court set up several control mechanisms to ensure compliance with its judgment.

A PROMISING APPROACH TO ASSESS IMPACT

Recent literature on social rights litigation argues that it is important to assess both *direct and indirect policy impact*. *Direct impact* refers to changes in public policies, institutional changes, changes in the policy making process, changes in how the responsible authorities respond to demands, changes in budgetary allocations, more transparency and changes in terms of access to information. *Indirect effects* are changes in rights awareness, acknowledgements of rights, effects on legal and social mobilization, changes in media attention and public discourse on the subject in question. There are also material and symbolic effects of judicial decisions. Whereas *material effects* focus on changes in the behaviour of groups or individuals, *symbolic effects* also include changes in ideas, perceptions and collective social constructs that relates to the situation for the litigants. Yet, in assessing impact of a litigation process, it is important to be aware that the observed indirect and symbolic policy impact also could be a result of parallel processes such as more media attention and other forms of social mobilization.

FORCING THE RESPONSIBLE AUTHORITIES TO CLEAN THE RIVER

Putting the Mendoza case on the agenda and creating political space for addressing the problem is perhaps the most important direct impact of the litigation process. "Given the lack of an executive branch that takes charge of the problem once and for all, the Court's proposal is very promising," said Alfredo Alberti, who lives in one of the affected neighbourhoods. The litigation process forced the responsible authorities to develop public policies meeting the requirements of the judgement.

Several institutional changes took place. A special inter-jurisdictional river basin authority in charge of the environmental management plan, was established. A new coalition of NGOs and the Ombudsman was formed when the Supreme Court ordered the establishment of a monitoring committee/collegiate body to monitor compliance with the judgement. The Supreme Court ordered the environmental management plan to be discussed in public hearings. NGOs, the Ombudsman office and others were invited to present their views and demand action from the responsible authorities. A new space was thus opened for public debate, and new actors were given the possibility to influence the decisions in the public hearings.

Even if the monitoring committee has expressed its concern regarding the lack of interest by the river basin authority to implement mechanisms for citizen participation in the decision making process, the litigation process has undoubtedly changed the policymaking process. It has changed the dispute settlement procedures and changed how the responsible authorities respond to demands. A full range of NGOs and several universities based within the basin area were allowed to join the debate.

After the Supreme Court judgement in 2008, Argentina has been granted the largest loan to a Latin American country for environmental cleanup. The federal government received a World Bank loan of 840 million USD to finance some of the large infrastructure projects in the Matanza-Riachuelo river basin. Prior to the court case, the Inter-American Development Bank (IDB) awarded a 250 million dollar loan to clean the river in the 1990s, but the money was mainly spent elsewhere. The control mechanisms set up after the Supreme Court ruling, establishing a special judge to deal with all issues emerging from judgement supervision, make it less likely that this will happen again.

CONTROLLING INDUSTRIAL POLLUTION

Controlling industrial pollution is one of the key challenges to solve the environmental crisis. According to the Environment and Natural Resources Foundation in Argentina (FARN), 21 988 industries are registered in the Matanza-Riachuelo river basin. These industries range from large multinational companies like Shell to small family run leather production industries. Forcing the political authorities to make a plan to control and regulate the industries in the river basin, represents progress compared to the lack of effective control of industries throughout Argentina's environmental history. Even though the river basin authority has started to carry out inspections of the industrial establishments, FARN has repeatedly demanded more effectiveness and higher quality in such inspections. As a result of the ineffective inspections, the control of the industries is limited, and there is not much change in private companies' conduct. Nevertheless, federal courts, NGOs and the media keep reporting on what the government does to regulate the industries, thereby obliging the authorities to speed up the process of inspecting the polluting industries.

MORE ENVIRONMENTAL JUSTICE

The litigation process in the Mendoza case has had significant impact on access to justice for people suffering from environmental contamination. The response by the Supreme Court acknowledged the right to a healthy environment. "For environmental justice in Argentina and Latin America, this is a leading case", says Aida Kemelmajer, a judge from the Supreme Court of Mendoza.

Matanza-Riachuelo is not the only case of river basin pollution in Argentina. More legal mobilization on environmental rights has been seen throughout Argentina after the Supreme Court accepted the Mendoza case. Other organizations or groups of neighbours from polluted rivers in Argentina have now started to present twin cases or similar kind of cases directly to the Supreme Court, hoping to get the same response and publicity as the Mendoza case.

The Mendoza case has also been important for developing jurisprudence on environmental rights. The decision by the Supreme Court of the

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Nation caused a buzz at the Latin American conference on environmental law and policy held in Buenos Aires in 2006, with officials from legal systems across the region. "It's a landmark; an excellent ruling. It incorporates future generations as subjects of law and sets guidelines to follow in future cases," says Enrique Peretti, a judge on the Supreme Court of Santa Cruz province.

BROADENING THE PUBLIC DEBATE

There are several indirect effects of the litigation process. After the litigation process, there has been more public deliberation and media attention focusing on the environment. National media and large international news agencies such as BBC Mundo, Spanish

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CNN, Deutsche Welle, Inter Press Service and Al Jazeera have reported both on the environmental crisis in the Matanza-Riachuelo river basin and the lawsuit. The Supreme Court's Centre for Juridical Information in Argentina continuously publishes on the process. Moreover, activists and NGOs frequently inform the public about what is going on in the implementation process through blogs and websites. They actively use the media to report on accomplishments and lack of compliance. Although the monitoring committee questions the quality of the system for public information provided by the river authority, there is by and large more transparency on what the responsible authorities do to clean the river.

There also seems to have been a change in the public opinion regarding the urgency and gravity of the pollution problem. An

ethnographic study of environmental sufferings in the litigants' neighbourhood observed changes in the people's ideas and perceptions of environmental suffering. These changes began when doctors, lawyers and journalists came to the litigants' neighbourhood, and is not only a result of the lawsuit.

CONCLUDING REMARKS

This brief argues that although the river is still not clean, the litigants' fight for the Matanza-Riachuelo river has mattered in a number of ways. There has been both direct, indirect, material and symbolic policy consequences of the litigation process. What was an ignored environmental crisis is now publicly debated. People have realised that they have a legal right to live in a healthy environment. There are now public policies to clean the river and to improve the lives of the people who live in squatter settlements through relocation projects and through extended public infrastructure. New institutional arrangements have been set up to better coordinate the clean-up project and to ensure compliance with the Mendoza judgement. Controlling industrial pollution is now on the government's agenda. The Mendoza case clearly sets the tone for litigation as a strategy to solve environmental disasters.

FURTHER READING

Auyero, Javier, and Débora Alejandra Swistun. 2009. *Flammable: environmental suffering in an Argentine shantytown*. Oxford; New York: Oxford University Press.

FARN, Fundación Ambiente y Recursos Naturales. 2012. Archivo por Categoría. Riachuelo. Available from: <http://www.farn.org.ar/newsite/archives/category/riachuelo>

Inter Press Service (IPS). <http://www.ipsnews.net>