

Strategic Litigation Impacts

EXECUTIVE SUMMARY



EQUAL ACCESS TO QUALITY EDUCATION

OPEN SOCIETY JUSTICE INITIATIVE
OPEN SOCIETY FOUNDATIONS EDUCATION SUPPORT PROGRAM

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Equal Access to Quality Education

Open Society Justice Initiative
Open Society Foundations Education Support Program



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Executive Summary

The right to education directly affects more of the world's population than almost any other socio-economic right. Its fulfillment is crucially important to all children—especially vulnerable populations such as minorities, girls, and children with disabilities—and for global development as a whole. Globally, the youth literacy rate has been steadily increasing, from 83 percent to 91 percent over the last two decades. But about 16 percent of the world's population still cannot read, and regional and gender disparities remain stark.

Fortunately, there are few rights that are as thoroughly legally protected, regulated, and monitored. Equal access to education is enshrined in multiple international human rights norms, including Article 13 of the UN Convention on Economic, Social and Cultural Rights, which recognizes “the right of everyone to education,” and Article 28 of the UN Convention on the Rights of the Child. The fulfillment of the right to education is administered and overseen by multiple supra-national intergovernmental bodies, including UNESCO and UNICEF; and its realization quantified and made time-bound by global policy frameworks such as the fourth UN Sustainable Development Goal (“ensure inclusive and equitable quality education and promote life-long learning opportunities for all”), which in turn built on the UNESCO Education for All movement's goal to provide education for all by 2015. Brazil, India, and South Africa, which are examined in this independent, qualitative study commissioned by the Open Society Justice Initiative, are all bound by these legal obligations and participate in these global policy frameworks.

Some progress toward achieving the right to education has been made through these international norms and treaties, as well as through the adoption of binding national legal obligations such as constitutional requirements. But where those instru-

ments have failed to deliver educational justice, strategic litigation has been used increasingly often to address a wide range of education problems in all three countries, with largely positive impacts. In short, strategic litigation seems to be an effective tool for achieving material advances in education justice, though with uneven impact for *equal access* to basic education, and substantial under-litigation of *quality* education per se. Examining which tools and combined approaches are most effective helps speed the process of bridging the education gap for those who continue to be left behind.

Background

It is axiomatic that children who cannot access at least basic education do not reach their full potential. Access to quality education shapes both an individual's life-long opportunities and her society's achievements. But despite the attending legal obligations and self-evident benefits for states to fulfill their positive obligation to progressively realize this right, many countries are failing to do so, and the international community failed to meet the UN Millennium Development Goal of achieving universal primary education by 2015. Basic literacy—a fundamental indicator of equal access to quality education—has risen only incrementally in the last 15 years globally, from 87% to 91%; in Africa it rose from 70% to 74%. Currently, 758 million people age 15 years and older “still cannot read or write a simple sentence. Roughly two-thirds of them are female.” That so many adults cannot read and write means millions of children around the world have not enjoyed the right of access to quality education.

In some instances, neglect or prejudice exclude certain children from educational opportunities. In other cases, while there may in fact be adequate and equal access to education—in terms of the number of children who enroll in schools—the quality of the education that is offered may be so poor that it fails to result in the required capabilities. What value does a school house have if it lacks qualified teachers, or if some students are barred from entering because of discrimination that the state fails to prevent? Such endemic failures have mired whole generations in poverty.

Strategic litigators and other civil society actors have increasingly turned to the courts for solutions. This study examines their efforts, and in so doing reveals a willingness among litigators and allies to consider the effects of litigation, as well as an enthusiasm to learn from experience—both their own and that of others. It is hoped this report will provide them a further opportunity to do so.

Clearly, the context in which strategic litigation takes place matters, and this study includes an overview of the litigation context in each of the countries under review, including constitutional and legal frameworks and processes, as well as the socio-polit-

ical context relating to education. A brief history of the struggle for education in each country is followed by a description of the legal environment in which the strategic litigation plays out, and an outline of the education cases that have been brought. The bulk of the study examines three types of perceived impacts of the strategic litigation: material outcomes, changes in policy and law, and non-material or attitudinal change (referred to as “agenda change”).

There are specific challenges associated with winning access to quality education; this report looks at how—and how successfully—strategic litigation has tackled them. These challenges include the *availability* of education, such as a lack of spaces in schools, or low levels of student enrollment. There are also problems with *access* to education, such as children who have been excluded due to discrimination or have dropped out of school. Exclusion might also occur as a result of adaptability problems, such as children being excluded due to disability. Finally, there is a challenge beyond availability and access: the challenge of access to *quality* education. Gaining access to a seat in the classroom matters little if the seat is broken or the classroom lacks a competent teacher.

Principal Findings

- 1. Strategic litigation has been an effective tool for achieving equal access to quality education in Brazil, India, and South Africa.** The “equal access” component can be seen in the many cases examined here that promote inclusion and access to education, particularly for the poorest and most marginalized children. However, many of those interviewed for the study feel that even where litigation addresses access, it is failing to address “quality” adequately. There is no clear correlation between the litigation and literacy rates, for example, or the litigation and the number of children attending school. Although this may be due to an overly narrow approach to defining quality, it is valid for strategic litigators and the social actors with whom they collaborate to consider whether students who have gained access to education are receiving a quality education. If students are not gaining in knowledge, skills, and competencies, further litigation may be needed to address the quality of the education on offer.
- 2. Broadly speaking, in Brazil, India, and South Africa the greatest litigation successes have been in material improvements, such as to school infrastructure: fixing dilapidated buildings and providing basic sanitation, teaching materials, desks, chairs, and textbooks. More qualitative components—such as adequately trained teachers and norms that value the dignity of all students—have been litigated to varying degrees of success.** For example, litigation has been critical in

creating thousands of places in childcare institutions and pre-schools in Brazil; reducing the number of out-of-school children in India from 170,000 to 15,000 in less than two years; and building 138 new schools and securing the appointment of 145 new permanent teachers in South Africa. Increased budgetary allocations towards improvements in the education system arising from litigation have been similarly impressive. However, focus on material outcomes can skew resource allocation and draw attention away from other important aspects of equal access to quality education. This research suggests that litigators and their partners are well advised to understand the service delivery system as a whole and ensure that litigation does not distort it by emphasizing access at the expense of quality.

3. **Strategic litigation has had a positive impact on education policy and jurisprudence in all three focus countries.** These changes include the recognition of early childhood education as an immediately realizable right in Brazil, the shift in definition of a child having “dropped out” of school from 60 consecutive days out of school to only seven days in the state of Karnataka, India, and the publication of norms and standards for school infrastructure in South Africa. The litigation has also produced important jurisprudential shifts, such as clarifying the immediate realization of the right to education. In South Africa, the courts have begun to spell out the core content of this right, in contrast to their approach in other socio-economic rights cases.
4. **Social movements and strategic litigation interact in mutually-reinforcing ways.** The study finds a complex synergy between social movements and litigators in which social movements can give rise to litigation, and, under certain circumstances, litigation can catalyze movements for change. After Brazil’s *Movimento Creche para Todos* (Childcare for All Movement) tried local, non-litigation initiatives without great success, it found that a bolder strategy emphasizing litigation would better address the deficit in access to early childhood education. On the other hand, in South Africa, the need for robust execution of existing court judgments led to a movement of learners who advocated for the implementation of previously-litigated cases. In this regard, India is an outlier in the present study, having seen fewer examples of movements leading to cases or cases giving rise to social movements and, arguably, little sustainable improvement in the fulfillment of the right.
5. **The synergies between social movements and litigators have led to innovative litigation tactics and novel remedies.** The study reveals a sophisticated understanding of litigation strategy among litigators and movement leaders, as well as a willingness to try new approaches. Shifts from individual cases to collective cases in Brazil and the use of new strategies such as the “opt-in class action” in

South Africa demonstrate a pioneering approach among strategic litigators in those countries, which is less evident in India.

6. **Strategic litigators in the three countries have largely taken an incremental approach to litigating for equal access to quality education.** Of course, local context is especially significant in determining a litigator's approach, and taking incremental steps may be most appealing to an individual litigator and her client. Yet it is surprising that despite having one of the largest school-age populations in the world, India has experienced few public-interest litigation cases (commonly known as PILs in India) of any kind, and fewer still related to access to quality education.
7. **Data-gathering is itself a valuable result of strategic litigation.** Sometimes increased access to and use of data is a conscious aim of litigation, while sometimes it is a by-product. Either way, information about education outcomes and financing of education, for example, is useful for both social mobilization and follow-on litigation. According to the field research, strategic litigators and social movement partners are using it effectively.
8. **Overall, the strategies and remedies for increasing access to quality education have led to an expansion of democratic space and a movement toward increased dialogue between civil society and the state.** The remedies in all three countries are ground-breaking. The joint government/civil society committees appointed by courts in Brazil and India are good examples of experimentalist approaches focused on dialogue. South Africa's infrastructure and provisioning cases have been more adversarial, but out-of-court settlements have provided some space for engagement. Discourse change and the skillful use of media strategies have also had a positive impact on public support.

In conclusion, strategic litigation had led to significant successes in increasing access to quality education in Brazil, India, and South Africa. These successes mostly take the form of material improvements, including adding slots for pre-school students in Brazil, reducing the number of out-of-school children in India, and adding new teachers in South Africa. But there have been other important victories stemming from strategic litigation, including changes in government policies and jurisprudence. Finally, there are complex synergies between strategic litigators and social movements in which litigation can grow out of an existing social movement, or a social movement can be born in response to litigation and resulting court rulings. Strategic litigators and social movements clearly benefit from working together, and it appears that tighter coordination between litigators and change agents would lead to even greater successes both inside the courtroom and beyond it.

Children's right to education is key to unlocking global human and economic development. The right is protected by multiple human rights norms and treaties, but inadequate state spending and discrimination prevent millions from going to school, while keeping others trapped in substandard schools without textbooks, adequately trained teachers, seats, or even toilets. Poor children, ethnic minorities, girls, and children with disabilities are especially hard hit.

In response, students, teachers, parents, and education rights advocates are increasingly turning to the courts for justice. This comparative study, based on scores of interviews in Brazil, India, and South Africa, sheds light on the innovative ways that education advocates and social movements are harnessing the power of the judiciary to demand adequate basic education for all. It finds that strategic litigation has been a helpful tool, leading to material improvements in education infrastructure as well as positive changes in government policy and jurisprudence, and that it has been an effective ally for student movements and global education policy-makers alike in Brazil and South Africa. It also interrogates whether strategic litigation has been under-used in India, where one of the world's largest and fastest-growing youth populations is struggling to reach its educational potential.

This study—the second in a five-part series examining the impacts of strategic litigation—shows that strategic litigation is no panacea: it can be slow, costly, and risky. But it also finds that strategic litigation has been effective—especially when combined with other forms of advocacy—in opening schools doors that were previously closed. It suggests specific further action in Brazil and South Africa, and calls for robust experimentation with this tool to unlock stalled processes in India.

