

Strategic Litigation Impacts



EQUAL ACCESS TO QUALITY EDUCATION

**OPEN SOCIETY JUSTICE INITIATIVE
OPEN SOCIETY FOUNDATIONS EDUCATION SUPPORT PROGRAM**

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Open Society Justice Initiative
Open Society Foundations Education Support Program



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Table of Contents

About the Strategic Litigation Impacts Series	7
Acknowledgments	9
Methodology	11
Foreword: Why Strategic Litigation?	17
Executive Summary	21
I. Introduction	27
II. Background	29
A. Brazil	29
Constitution and Legal System	29
The Struggle for the Right to Education in Brazil	32
Right to Education Strategic Litigation in Brazil	35
B. India	37
Constitution and Legal System	37
The Struggle for The Right to Education in India	39
Right to Education Litigation in India	41

C. South Africa	45
Constitution and Legal System	45
The Struggle for the Right to Education in South Africa	46
Right to Education Litigation in South Africa	50
III. Impacts	57
A. Material Outcomes	58
For Individuals and Groups	58
Data Gathering as Aim and By-Product	61
B. Policy Changes and Jurisprudential Shifts	63
Policy Change	63
Jurisprudential Shifts	65
C. Agenda Change	67
Catalyst and Reactant: The Strategic Litigation Ecosystem	67
Innovative Tactics and Remedies	70
Expanding Democratic Space and Increasing Dialogue	72
Discourse Change and the Role of the Media	73
D. Challenges of Measuring and Attributing Impact	74
IV. Conclusion	77
Appendix: Normative Survey Questions	81
Endnotes	85

About The Strategic Litigation Impacts Series

This report is the second in a planned five-volume series looking at the effectiveness of strategic litigation. As discussed in the Foreword to this volume, strategic litigation is of keen interest to the Open Society Foundations (OSF), which both supports strategic litigation and engages in it directly—and thus has an interest in gaining an unbiased view of its promises and limitations. Strategic litigation is potentially a powerful engine of social change. Yet it is also costly, time-consuming, and uncertain. Studying its strengths, weaknesses, unintended consequences, and the conditions under which it flourishes or flounders may yield lessons that enhance its potential and improve future social change efforts.

To produce the five studies in this series, OSF is working closely with a broad array of litigators and social change agents to examine the impacts of strategic litigation in specific thematic and geographic areas.

The first of the five studies, *Strategic Litigation Impacts: Roma School Desegregation*, was published in 2016 and looks at efforts to end discrimination against Roma school children in the Czech Republic, Greece, and Hungary. It is available online at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-roma-school-desegregation>.

The forthcoming third and fourth volumes in the series will examine, respectively, strategic litigation and indigenous peoples' land rights in Kenya, Malaysia, and Paraguay; and strategic litigation against torture in custody in Argentina, Kenya, and Turkey. The fifth and final volume in the series will look to distill from the preceding four studies lessons that may inform the future work of litigators and allied activists.

Although it is certainly hoped that these studies may lead to more effective use of strategic litigation as a possible driver of social change, OSF is well aware that strategic litigation is no panacea, and that the field would benefit from more—and more rigorous—thinking. This series of studies, then, may be thought of as one small step toward developing a better understanding of the promise and pitfalls of strategic litigation.

Acknowledgments

This report was written by Ann Skelton. She holds the UNESCO Chair in Education Law in Africa at the University of Pretoria, and in 2016 was elected to the UN Committee on the Rights of the Child. The research and writing of the report was sponsored by the Open Society Justice Initiative and the Open Society Foundations' Education Support Program.

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Vitally important guidance was provided by the independent advisory panel that oversaw this study: Sylvain Aubrey, Global Initiative for Economic, Social and Cultural Rights; Hossam Bahgat, Egyptian Initiative for Personal Rights; Charles R. Epp, University of Kansas (USA); Octavio Luiz Motta Ferraz, King's College London; Sandra Fredman, University of Oxford; Sudhir Krishnaswamy, Azim Premji University and Law and Policy Research Centre (India); Janet Love, Legal Resource Centre (South Africa); Jennifer S. Martinez, Stanford University School of Law; and Salomão Ximenes, Ação Educativa (Brazil). Open Society Foundations' staff members Laura Bingham, Pete Chapman, Hugh McLean, Stella Obita, Chidi Odinkalu, and Rupert Skilbeck provided peer inputs. Special thanks to those members who provided written comments on the drafts of the report. Eeshan Chadurvedi and fellow students at the Stanford Law School Human Rights Center contributed background research at the conceptual stage of the Justice Initiative's thinking, in 2014–2015, under the supervision of Professor Jennifer S. Martinez.

The opportunity to meet and reflect on the litigation at the outset of the study was a significant impetus. Thanks to all those who participated in the two-day peer consultation held on September 15-16, 2015 in New Delhi, India.

The report was edited by the Open Society Justice Initiative's executive director James A. Goldston; senior officer for research and the project's manager, Erika Dailley; David Berry, senior communications officer; and by the OSF Education Support Program's executive director, Hugh McLean. The opinions expressed are those of the author. The Open Society Justice Initiative bears sole responsibility for any errors or misrepresentations.

Methodology

This comparative, qualitative study examines strategic litigation of the right to equal access to quality education in pre-primary, primary, and secondary education in Brazil, India, and South Africa. It does not consider cases concerning vocational training, tertiary education, or adult education, where the justiciability of the right is less clear.

To the greatest extent possible, the inquiry seeks to adhere to principles of impartiality, even-handedness, intellectual integrity, and rigor. To be sure, the study's sponsor, the Open Society Foundations (OSF), advocates for, funds, and uses strategic litigation as a vehicle for realizing human rights. The Open Society Justice Initiative itself both litigates and provides instruction in using strategic litigation. And the Open Society Foundations' Education Support Program, along with many other parts of OSF, financially supports grassroots efforts to litigate for education justice around the world. Some might infer that the inquiry is therefore inherently biased toward conclusions favorable to the sponsors' views on its value.

This study was therefore structured to mitigate such possible biases and misperceptions. It was researched and written by independent experts, rather than OSF staff; informed by hundreds of individuals; and overseen from its conception by a nine-person advisory group whose members are unaffiliated with OSF.¹ In addition, the research process was designed to garner input from the widest possible spectrum of stakeholders and observers, including those who have been publicly skeptical or critical of using strategic litigation to achieve education justice. This inquiry is born of an authentic desire to understand the complexities and risks of—rather than platitudes

about—the use of strategic litigation to advance social justice. A lack of impartiality would only thwart that goal.

The inquiry draws on legal research, literature reviews, and original analysis. But principally, it draws on qualitative methodologies, including scores of semi-structured in-country interviews with diverse stakeholders in the three focus countries. Those interviews were done by attorney-activists Thiago Amparo in Brazil, Aparna Ravi in India, and Cameron McConnachie in South Africa, between June 2015 and January 2016. Respondents included lawyers, education officials, social movement actors, NGO leaders, clients, government officials, teachers, parents, school administrators, academics, journalists, and members of the non-target population. Some of the interviewees were directly involved in the litigation and provide insights into behind-the-scenes aspects of strategic litigation. The interview questions can be found in the appendix of this report.

To test hypotheses about the impacts of strategic litigation in education and catalyze trans-national research and reflection, the Justice Initiative and the Education Support Program co-hosted a peer consultation in New Delhi, India, in September of 2015 and in São Paulo, Brazil, the following month—both roughly mid-way through the interviewing and fact-finding processes. Some 35 experts and stakeholders from diverse backgrounds challenged the preliminary findings and helped sharpen and enrich the study. The proceedings from these consultations are publicly available.

The three countries examined were selected based on four criteria: the countries were the sites of significant attempts to bring about change through litigation, the cases in question were settled or adjudicated at least five years prior to commencement of the research, the cases have been decided in final instance by a domestic court, and are, on the whole, geographically representative.

Since the objective is to surface the complexities of strategic litigation in its broader context, rather than just highlight landmark rulings, the focus countries were selected to maximize the benefits of comparative learning.

While at first glance Brazil, India, and South Africa may not seem like obvious comparators, they in fact have much in common. They are large-population democracies,² and have been the site of increasing activism and strategic litigation around the right to education in recent years. All are emerging economic powers, influential in their regions and on the world stage.³ They also have multi-ethnic, multi-lingual populations, histories of colonial oppression, and are characterized by deep inequality and high levels of poverty. All three countries have strong and relatively new constitutional systems in which the right to education is justiciable, and all three can declare laws to be unconstitutional and can fashion creative remedies. Brazil, India, and South Africa are also signatories to international human rights conventions related to the right to education, including the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

In addition, the differences among them make for interesting comparative learning. India is a common law system whose legal system has inherited much from the English system. South Africa has a hybrid legal heritage, comprising Roman Dutch law for many of its civil law principles, but it too has a common law tradition in some aspects of the law, notably in relation to the setting of precedents. Brazil, on the other hand, has a civil law system, and features public legal bodies that can and do get involved in litigation against the state. The Background section of this report contains a detailed description of the constitutional and governance systems in each country, the state of education in the countries, and an overview of public interest litigation that has aimed to promote the right to equal access to quality education.

Below are answers to significant questions about this study.

- **What do we mean by “strategic litigation”?**

Strategic litigation, also referred to as public interest litigation, impact litigation, or cause lawyering, can be understood in different ways. But for the purposes of this inquiry the term is used to refer to bringing a case before a court with the explicit aim of positively affecting persons beyond the individual complainants before the court.

In this context, strategic litigation is viewed as just one of many possible social change tools. Other social change tools—including mass mobilization, public protests, advocacy, lobbying, and legal aid—are commonly used in concert with, and sometimes as a prerequisite for, strategic litigation. To properly examine strategic litigation, it is important to understand it as one part of a broader effort; it cannot be fully understood in isolation.

- **What do we mean by “quality education”?**

The right to equal access to education is enshrined in international human rights law through the right to education and anti-discrimination protections. But the legal canon has nothing to say about “quality education” per se. The innovation of this study is that it enquires whether the litigation undertaken has addressed not just access to education, but access to “quality education.”

That in turn requires an understanding of what is meant by that phrase. In 2012 the Special Rapporteur on the Right to Education, Kishore Singh, issued a report entitled “Normative action for quality education.” The report acknowledges widespread concern with the low quality of education in many regions of the world, including Latin America, the Asia-Pacific region and southern Africa. The Special Rapporteur points out that concerns about quality often focus on low levels of

student achievement in gaining knowledge, skills, and competencies. He affirms that while student gains in these areas are undoubtedly important, meeting such a basic threshold does not necessarily meet the definition of “quality.” To focus purely on competencies risks overlooking the importance of other critical elements of education, including having well-trained, motivated teachers and properly-resourced classrooms. The Special Rapporteur argues for a holistic approach to quality—an approach that this study also takes. As the Special Rapporteur has noted, “quality education cannot be successfully imparted without adequate infrastructure and facilities and a school environment in which teachers, parents and communities are all active participants in a school.”⁴

The Special Rapporteur’s report sets out the main elements that should be addressed by national norms and standards. The list of elements starts with practical matters, such as physical environment, class size, and pupil-teacher ratio. Other elements include: frameworks for the teaching profession, curriculum content, evaluation of achievement, participatory management, and, finally, monitoring and inspecting of schools. The Special Rapporteur’s report flags a challenge which is especially pertinent to this study: the link between quality and equality. The overall socio-economic inequalities in a society are often manifested in disparities in the quality of education that different children receive. Thus, equal access to quality education is unlikely to be achieved while discrimination and marginalization spill over from the general social environment into education systems. The Special Rapporteur’s framework for understanding “quality education” is used to guide this study’s efforts to measure the impact of strategic litigation.

- **What do we mean by “impacts,” and how do we measure them?**

Trying to define the impacts of strategic litigation is a somewhat subjective exercise. An assessment of the impacts must include the effort of bringing the case to court, the judgment or settlement itself, and the monitoring and implementation of the judgment or settlement. The definition must also take into account the relationship between the litigation and its perceived impact, and if there is a correlation or even causation.

The research conducted for this report illustrated how difficult it is to measure the successes and shortcomings of strategic litigation. Firstly, respondents contested whether outcomes can be attributed to litigation alone. Governments tend to deny the success of litigation, claiming that they would have made the changes anyway. Moreover, since the reasoning behind an individual judicial or policy decision often remains private—and since different legal, social, and political

dynamics may work together to effect change—it may be impossible to demonstrate definitively that a ruling or a change in a government’s policy was the direct result of strategic litigation. There are practical challenges in measuring success too, including an absence of baseline data, failure to collect statistics, and lack of data analysis.

These challenges may present barriers to fully understanding the impacts of strategic litigation, but they are no excuse not to try. In fact, this study was designed to surmount those barriers and provide some answers, however qualified, about the impact of strategic litigation on equal access to quality education.

Foreword: Why Strategic Litigation?

It is fair to say that the Open Society Foundations (OSF) began as an effort to advance equal access to quality education. OSF's founder, George Soros, made his first grant, in 1979, to black South African students to enable them to attend the University of Cape Town despite decades of apartheid-era prohibitions. That foundational foray into the field of education has since mushroomed into broad funding and programmatic support for students, activists, litigators, and other civil society actors in many human rights areas around the world. For the last ten years, OSF's human rights law center, the Open Society Justice Initiative, has used the courts to seek remedies for racial, ethnic, and religious discrimination in the education sphere, principally in Africa and Europe, both in its own name and together with partners.

Glaring inequality persists in South Africa, with black children still suffering from disproportionately low literacy rates and inferior and separate educational opportunities. But the country has also become a lodestar for advancement of the right to education and other fundamental rights. We have much to learn from South Africa's experience, especially regarding the efforts that catalyzed those changes and what role, if any, strategic litigation—often referred to as impact litigation or human rights litigation—has played.

This study is about the impacts of strategic litigation on equal access to quality education in Brazil, India, and South Africa. It is intended to look beyond strategic litigation solely as a means to ensure equal access to education, and to examine the use and effectiveness of strategic litigation in advancing education *quality* once access is won. This study is the second in a series of four thematic studies undertaken by the

Open Society Justice Initiative and independent experts in 2014-2016 to interrogate the impacts of strategic litigation as a catalyst for social change. The first study, by Adriána Zimová, explores efforts to seek desegregation for Roma students in European schools. The third and fourth thematic studies will address strategic litigation impacts on indigenous peoples' land rights and custodial torture. A fifth volume will seek to extract from the preceding four studies lessons that may inform the future work of litigators and allied activists.

OSF, like several other international donor organizations, has invested significantly in strategic litigation for social change. This inquiry is animated by the theory that greater understanding of strategic litigation globally can expedite advancements in the field and the ever more skillful and effective use of strategic litigation as a social change tool.

It is precisely because OSF both litigates and funds strategic litigation that the inquiry does not seek to serve as propaganda for one position or one practice over another. Nor would OSF have any interest in taking a binary stance favoring or opposing strategic litigation per se. Rather, the inquiry seeks to challenge our assumptions and indeed our own experience about the value of strategic litigation. For that reason, the research was conducted predominantly by external researchers and an oversight advisory panel. (Please see the Methodology section for more on how the research was conducted.)

The legal cases chosen for study here are understood, at least within their national contexts, as significant attempts to bring about change through litigation, whether or not they were successful. The cases studied were settled or adjudicated at least five years prior to commencement of the research, to allow for their impact, or lack thereof, to become apparent. The cases have been decided in the final instance by a domestic court, and are, on the whole, geographically representative. The entire inquiry understands "impacts" in three broad categories: material impacts (quantifiable or tangible), policy and jurisprudential impacts, and non-material impacts such as changes in behaviors and attitudes, which this report refers to as "agenda change."

This inquiry focuses less on the question of what impacts strategic litigation generates and more on the question of what contributions to social, political, and legal change has strategic litigation made on particular issues in particular places? What were the conditions, circumstances, and manner in which litigation was pursued (in conjunction with other tools) which enhanced its contribution(s) or diminished them? To what extent are any insights from those particular experiences of use to advocates for change working on other issues and in other places?

This study reflects a unique coming together of education activism and informed human rights lawyering. It is hoped that social activists, strategic litigators, civil society

groups, academics, and students will benefit from the study. Those already undertaking strategic litigation to promote equal access to quality education may gain new insights which improve the impact of their work. Those considering such work may be empowered to take their first steps towards using litigation to promote the right to education. We invite you to reflect on lessons learned, share your own insights and innovations, and add to the global body of good practice on using strategic litigation to catalyze social change.

James A. Goldston and Hugh McLean,
Open Society Foundations
New York City
April, 2017

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.⁵

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,”⁶ and Article 28 of the UN Convention on the Rights of the Child.⁷ 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.⁸

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.”⁹ 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.

I. Introduction

The right of equal access to quality education is arguably one of the most important socio-economic rights. It directly affects all of the world's children, and its execution or lack thereof will shape our planet's future. In theory, the right is well protected through international norms and treaties, regional covenants, and national legal obligations. Yet in practice, millions of children lack access to education, or are prevented from going to school by economics or discrimination, or are trapped in substandard schools where they have few genuine learning opportunities. Poor children, ethnic minorities, girls, and children with disabilities are among those most often affected by these problems.

This study looks at impacts of strategic litigation for access to quality education. It takes a hybrid approach, employing both quantitative and qualitative indicators, examined according to three categories, which sometimes overlap. The first broad category is material, quantifiable outputs, such as the increase in the number of students attending school, or the number of textbooks available per child, or improvement in the teacher-student ratio in a given classroom. The second type of impact relates to policies and jurisprudence created or amended as a result of the litigation and/or judgment. This could include the introduction of policies that ensure school curricula are relevant to minority students as well as those in the majority. The third indicator of impact is intangible, or non-material, results, such as changes in the attitudes and behaviors of the government, education policy-makers, school administrators, teachers, learners, or the general public.

The interviews conducted in Brazil and South Africa for this study strongly indicate that improvements in equal access to quality education have both caused and resulted from strategic litigation. In India, the right remains surprisingly under-litigated

and even unknown relative to the immense size of the country's school-age population, substantial civil society, and fairly activist judiciary.

Strategic litigation—especially when combined with other advocacy tools—can help increase access to quality education, as the experiences of Brazil, India, and South Africa show. This study looks at those experiences and the impacts that have resulted from strategic litigation in the three countries. It begins by examining the background conditions in Brazil, India, and South Africa, including each country's constitution and legal system, history of the struggle for educational rights, and litigation for those rights. The report then assesses the impacts of litigation, using three measures: material outcomes, changes in policy and jurisprudence, and less tangible impacts (grouped under the umbrella term “agenda change”), such as changes in attitudes and media portrayals.

II. Background

A. Brazil

Brazil is the largest country in Latin America and the fifth largest in the world,¹⁰ with a population of over 210 million.¹¹ Approximately 30% of the population is under 19 years of age,¹² and Brazil has the seventh largest youth population in the world.¹³ As a federation, Brazil is divided into 26 states, one Federal District, and 5,570 municipalities.¹⁴ Forty-three percent of Brazilians identify themselves as *pardos* (mixed race), 7.6% of the population is black, 47.7% white, 1.1% Asian, and .4% indigenous.¹⁵ Brazil's annual per capita GDP was US \$11,159 in 2016¹⁶—by far the highest of the three countries studied in this report.¹⁷ Brazil has a civil law system, unlike India and South Africa which use a common law system.

Like India and South Africa, Brazil has struggled with severe socio-economic inequality and its impact on peoples' lives. Yet in the last decade the country has experienced a breakthrough in poverty reduction due to economic growth and policies such as *Bolsa Família* (Family Grant),¹⁸ a social assistance program established in 2003, as well as a policy of progressively raising the minimum wage.¹⁹

Constitution and Legal System

Social rights are a key element of the Brazilian legal system. The Federal Constitution, adopted in 1988, marks the end of a military dictatorship that lasted from 1964 through 1985. As a result of the political and social forces that emerged during the country's

democratization process, Brazil's Constitution incorporates a generous bill of rights, recognizing both civil and political rights as well as economic, social, cultural, consumers', and environmental rights.

Strategic litigation has a long tradition in Brazil, dating back to the abolitionist movement during the mid-19th century, when anti-slavery lawyers used legal means to free slaves.²⁰ The country's Constitution and legal system contain certain features that create a positive environment for strategic litigation, despite the challenges discussed later in this report.

First, the Constitution establishes a strong human rights system. All fundamental rights and guarantees articulated in the Constitution are "immediately applicable," and thus generally understood as having normative force regardless of the adoption of statutory provisions detailing their content.²¹ It is also understood that the law shall not prevent the judiciary from examining any threat to or violation of a fundamental right.²² Since a 2004 constitutional amendment, human rights treaties which are adopted by a qualified majority in the Brazilian Parliament have formal constitutional status.

Second, the country's legal system provides civil society organizations with a plethora of legal instruments to challenge rights violations, including the right to education, before lower courts. Among those legal instruments, two have been particularly popular among civil society groups: *mandado de segurança* and *ação civil pública*. The *mandado de segurança* is an exceptional, speedy mechanism designed to protect a clearly identifiable right (i.e. one that does not require the production of evidence before courts), as long as other legal instruments are not available.²³ Importantly, the Constitution allows for the filling of *mandado de segurança* for the protection of collective rights, including by civil society groups.²⁴ Meanwhile, the *ação civil pública* has served as a general instrument for advancing collective and individual rights, although it is a less speedy procedure than the *mandado de segurança*.²⁵ As this study will show, the use of those legal instruments before lower courts makes up most of the strategic litigation work done by civil society groups regarding the right to education in Brazil.

Third, Brazil has a peculiar system of state-funded lawyers and public prosecutors, many of whom have played a key role in advancing rights. Two institutions are particularly relevant: the *Ministério Público* and the *Defensoria Pública*. While the *Ministério Público* (or public prosecutors' office) is traditionally associated with criminal prosecution in most countries, in Brazil it also has responsibility for protecting vulnerable groups such as minors and indigenous people. Importantly, the Constitution makes presenting public interest litigation one of the institutional functions of the *Ministério Público*, in particular via *ação civil pública*. In certain states, including São Paulo and Ceará, the *Ministério Público* has a special unit on the right to education, along with the more traditional units on children's rights and rights of persons with disabilities. The

Ministério Público has also made use of extrajudicial mechanisms such as civil inquiry procedures and agreements with public authorities (so-called *Termo de Ajustamento de Conduta*, or TAC²⁶) to advance rights.

The *Defensoria Pública* has the primary institutional task of providing legal assistance to poor individuals.²⁷ It is a state-level institution and the Constitution guarantees its functional and administrative autonomy. While it is mainly occupied with cases of individuals seeking access to justice (for example, individuals seeking a place for their children in primary education), in recent years the *Defensoria Pública* in several states has invested significantly in public interest litigation. One of those cases was an *ação civil pública* proposed in 2012 by the *Defensoria Pública* of the State of São Paulo, along with several NGOs, seeking to guarantee the right to education for female prisoners.²⁸ In another case, the Supreme Court in November 2015 confirmed that the *Defensoria Pública* has standing to present an *ação civil pública* for the protection of collective and diffuse rights, in addition to its primary task of providing access to justice for individuals.²⁹ Like the *Ministério Público*, the *Defensoria Pública* in several states has also created special units on certain rights—including the right to education and children’s rights—in order to improve its work on those issues.

With the adoption of the 1988 Constitution, the list of parties with the standing to directly approach the Supreme Court expanded beyond the attorney general to include other high-level officials including the president, state governors, political parties, and even confederations of labor unions.³⁰ An example of this took place in August 2015, when a confederation of private schools presented a case challenging the constitutionality of the obligation—set to enter into force in 2016³¹—to accommodate students with disabilities in regular classes without increasing school fees.³² Although a final ruling was still pending at the time this report was written, one of the Supreme Court justices issued an interim decision denying the suspension of the effects of the law in question, using arguments drawn from the International Convention on the Rights of Persons with Disabilities and its clause on inclusive education (Article 24).³³

Although the list of parties that can approach the Supreme Court directly is fairly expansive, civil society’s access to the Supreme Court in Brazil is constrained. As a result, civil society organizations engage the Supreme Court primarily through presenting *amici curiae* briefs in relevant constitutional cases,³⁴ participating in public hearings convened by the court in order to discuss an important case,³⁵ or prevailing upon one of the parties that does have standing to directly present a constitutional challenge on their behalf.³⁶ It is against this background that the struggle for access to education has unfolded.

The Struggle for the Right to Education in Brazil

Historically, Brazil's education system has been highly stratified, with people of European or Hispanic heritage having greater access to quality education than those descended from Brazil's substantial African slave population or those of mixed descent. The country's education system has also been marked by disparities in quality between urban and rural populations, which persist to this day. However, by 2000, literacy rates in Brazil had reached 90%, and today almost all children attended school. Part of this advancement is due to the drive to empower and equalize society following 20 years of military dictatorship (1964-1985), part is due to the economic advancements of the 1980s, and part was driven by strategic litigation.

The adoption of the Constitution in 1988 opened unprecedented opportunities to advance education rights in Brazil. Indeed, the Constitution has more provisions covering education than any other social right.³⁷ The core provisions on education (Articles 205-214) include a list of guiding principles. These include the "guarantee of standards of quality"—a key article outlining the state's duties deriving from the right to education—as well as a provision assigning different mandates in education to each level (federal, state, or municipal) of Brazil's federal system. Specifically, municipalities are assigned primary responsibility for basic education. Importantly, the Constitution also establishes certain percentages of tax revenue that should be allocated to education: at least 18% of federal tax revenue should go toward education, as should 25% of states' and municipalities' tax revenue.

Constitutional amendments adopted in 2009 further strengthened education rights, particularly for pre-school children.³⁸ Notably, compulsory education was extended to cover ages 4 to 17, with the state now bound to provide it "free of charge for every individual."³⁹ While not explicitly qualifying it as compulsory, the Constitution also stipulates that one of the state's duties is to provide "infant education to children of up to five years of age in day-care centers and pre-schools."⁴⁰ Brazil's basic education system is divided between early childhood education in day-care centers or *creches* (from birth to three years old) and pre-schools or *pré-escolas* (from four to five years old); elementary education or *ensino fundamental* (from six to 14 years old) and high school or *ensino médio* (15-17 years old). In the last decade, major legal developments have reinforced states' obligations around education. In two judgments from 2005, the Supreme Court expressly recognized that the Constitution requires municipalities to provide early childhood education for children below age six.⁴¹

The jurisprudential impact of these decisions cannot be overstated. From 2006 onwards, state-level courts of appeal aligned their position with the Supreme Court judgments and started to order municipalities to provide vacancies in early childhood facilities.

Two subsequent constitutional amendments further expanded the right to early childhood education in Brazil. In 2006, Constitutional Amendment Number 53 replaced the previous fund for education with a new system called Fund for the Maintenance and Development of Basic Education and Enhancement of Education Professionals (hereafter, Fundeb).⁴² This measure increased financial support to the whole system of early childhood education.⁴³ Additionally, in 2009, Constitutional Amendment Number 59 was adopted, lowering the starting age of compulsory education to all children from five to four years old, to be progressively implemented by 2016.⁴⁴

Such legal developments have placed the issue of early childhood education at the center of public and legal debates and fostered strategic litigation throughout the country to reinforce this right, with a special focus on holding municipalities accountable. Currently, official data (from 2014, the latest available)⁴⁵ show that 82.7% of children between four and five years old (a total of 4.5 million children) attend pre-school. Perhaps more importantly, 42,000 more children enrolled in early childhood education in 2014 than did in 2013; according to education experts, this increase was largely driven by the legal developments mentioned above.⁴⁶

Other important laws have been enacted in the realm of basic education in Brazil. The two foundational legal instruments regarding the rights of the child are the 1990 Child and Adolescent Statute⁴⁷ and the National Education Guidelines and Framework Law (*Lei de Diretrizes e Bases de Educação*).⁴⁸ The latter includes important qualitative educational standards (including that curricula in primary and secondary education are to have a common national basis), increased number of teaching days as well as evaluation mechanisms for courses and institutions.

Municipalities and states are the primary levels of government responsible for basic education in Brazil. Civil society representatives interviewed for this study highlighted the difficulty of designing a nationwide litigation strategy on the right to quality basic education in Brazil, given that municipalities are primarily responsible for education. Because of this municipal-level responsibility, educational policies vary greatly from one place to another. It is also the reason why legal battles on the right to education in Brazil are generally played out at the local level.

Litigation strategies for access to quality education in Brazil have been shaped not only by the Constitution and federal governance structure, but also by several ongoing social challenges.

First is growing private education sector infringements on the right to quality education. Based on data from the 2014 national education census, since 2008 the overall number of enrollments in public basic education—ranging from early childhood to high schools—has declined by 6.5%, while the private sector has witnessed a 28% increase in enrollments.⁴⁹ In response, civil society groups have pushed for more public investment in basic education. In its October 2015 review of Brazil, the UN Committee on the Rights

of the Child expressed specific concern about the increased involvement of the private sector in education, and reiterated the importance of public investment in education.⁵⁰

The second challenge to Brazil's provision of equal access to quality education is its population growth, which has increased demand for equal access to childcare facilities in particular. In a 2014 alternative report to the UN Committee on the Rights of the Child, civil society organizations including *Ação Educativa* and *Campanha Nacional pelo Direito à Educação* argued that "the Brazilian State has been unable to include in school historically excluded sectors, especially of the population aged from zero to 5 years old and those between 15–17 years old. While the attendance rate in 2013 in the range 6–14 years old (primary school) was 98.2%, only 21.2% of children between 0 and 3 were enrolled in nursery schools."⁵¹ A separate civil society organization reached the identical finding: only 21.2% of children ages 0 to 3 attended educational institutions.⁵²

As examined in greater detail later in this report, the lack of vacancies in early childhood education has been a major focus of litigation, both by civil society organizations and by the *Defensoria Pública* on behalf of individual applicants without financial resources to hire a private lawyer. It is important to note that the 10-year National Education Plan⁵³ adopted in 2014 established as its first goal to "make universal, by 2016, early childhood education in preschool for children of 4 to 5 years of age and expand the supply of early childhood education in daycare facilities to meet at least 50% of children up to 3 years until the end of the term of this National Plan." Other local education plans went even further.

A third development is the need to adapt the school curriculum to reflect demographic changes in the country. In 2010, the majority population tipped from "white" to African and mixed descent.⁵⁴ Yet school curricula commonly overlook Afro-Brazilian history.

A fourth challenge is Brazil's regional disparities, which exacerbate inequalities in the enjoyment of the right to quality education. The data on infrastructure alone make clear the stark difference in resources between the poorer regions of the north and northeast and those in the relatively better off south and southeast. In 2014, for example, 77.1% of schools in the south had a library or reading room, compared with only 25.3% of schools in the north. Similar disparities can be found regarding internet access, computer labs, access for children with disabilities, and sports grounds.⁵⁵

Finally, Brazil's burgeoning disability rights movement has increased demands for inclusive education. In 2008, Brazil ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) and adopted a National Policy on Special Education that emphasizes inclusive education.⁵⁶ In a 2015 report, civil society groups argued that "Despite the efforts, in the vast majority of schools, what is being done is still not inclusive education compliant with CRPD. ... No monitoring of inclusive schools or evaluation of the progress of the students is being made."⁵⁷

Brazil's Constitution, federal structure, education funding system, and commitment to equal access to quality education—including for children from birth to age three—combine to create intriguing conditions for strategic litigation. How that litigation has unfolded is the focus of the next section.

Right to Education Strategic Litigation in Brazil

There have been two main types of strategic litigation for access to quality education in Brazil. The first group of cases, litigated primarily from the late 1990s to mid-2000s, focused on individual applicants seeking increased access to schools and improvements in school infrastructure. These cases sought to address issues such as transportation to schools, physical accessibility of schools for students with disabilities, and guaranteed school meals for children. Although these cases were often launched on behalf of individuals, they may be considered strategic in that litigators and civil society groups had to engage in research and advocacy in order to first document the extent of the problems. For example, the NGO *CEDECA Ceará* partnered with local community leaders to estimate how many children were unable to attend school due to a lack of spaces. Litigators subsequently used this research in a series of legal cases seeking placements in schools.⁵⁸ However, the individualized nature of these cases limited the scope of their impact.

More recently, a second type of strategic litigation has taken shape in which lawyers working with civil society organizations have sought to use litigation to foster large-scale structural changes in public policies on education. While social actors still make use of litigation on behalf of individual schools or students, there has been a shift towards collective cases which have the potential to reach a wide spectrum of beneficiaries.⁵⁹

For example, rather than litigating individual cases concerning the lack of spaces in a particular school, the NGO *Ação Educativa* brought collective cases to tackle the lack of vacancies in primary schools throughout an entire municipality.⁶⁰ In a similar manner, *CEDECA Ceará* launched collective cases to address structural problems such as the lack of government planning to meet growing demand for places in early childhood education programs (defined in Brazil as from birth to age five).

Efforts to expand early childhood education in the municipality of São Paulo provide another example of this second type of strategic litigation—although the litigation itself actually came relatively late in the process. The drive to expand childcare institutions and pre-schools began as a social movement. Beginning in 2008, a coalition of civil society groups, operating under the name *Movimento Creche para Todos* (Childcare for All Movement) sought to induce the government to increase the number of early

childhood spaces through protests, petition drives, community organizing, and other non-litigation methods of advocacy. When those yielded little progress, the *Movimento* engaged in modest strategic litigation to gain access to government-held information on the number of spaces that would have to be created in order to meet demand. Eventually, armed with that information, the *Movimento* embarked on large-scale strategic litigation to expand the availability of early childhood education throughout São Paulo.

In December 2013, the *Tribunal de Justiça do Estado de São Paulo* (Court of Appeals of the State of São Paulo, hereafter TJ/SP)⁶¹ ruled partly in favor of the *Movimento*, issuing a three-part remedy.⁶² The first ordered the municipality of São Paulo to create, between 2014 and 2016, at least 150,000 new vacancies in childcare institutions (covering from birth to age three) and pre-schools (ages four and five), 50% of which had to be created within the first 18 months. The second obliged the municipality of São Paulo to present, within 60 days, its plan for this expansion, including the building of new schools. The third ordered the municipality to present a detailed report every six months on the remedial measures taken to date. Ultimately, this case is the most outstanding example of strategic litigation for access to quality education in Brazil: coordinated, collective lawsuits to address structural problems in the field.

Another case illustrating the potential of strategic litigation in Brazil concerns the teaching of Afro-Brazilian history and culture in schools. Federal Law 10.639, adopted in 2003, requires primary and secondary schools, both private and public, to teach Afro-Brazilian history and culture.⁶³ Civil society groups approached the *Ministério Público* to open an administrative investigation regarding how municipalities have been implementing the law. Inspired by this action, a lawyer replicated this request in the city of São Carlos. Brazilian law provides a mechanism for government to partner with civil society to monitor the implementation of reforms through agreements called *Termo de Ajustamento de Conduta* (Agreement of Adjustment of Conduct, TAC). As a result of civil society pressure, in May 2011, the Centre for Afro-Brazilian Studies of the São Carlos Federal University and the *Ministério Público* reached a TAC with 11 municipalities in the state of São Paulo clarifying guidelines for Afro-Brazilian studies in schools and establishing a monitoring unit within each of those municipalities to assess the execution of the guidelines. This case reveals ways in which civil society organizations have used non-litigation mechanisms to influence complex issues of public policy in the realm of education.

The fight for access to quality education in Brazil is notable for litigation that emerged from a social movement for increased early childhood education places (in the case of the *Movimento*), and for the use of non-litigation measures to promote and monitor reforms (in the case of the Afro-Brazilian education TAC). Although those strategies have been used less in India, the drive to reduce the number of out-of-school children is the same, as can be seen in the next section.

B. India

India is the second most populous country in the world, with a population of about 1.34 billion.⁶⁴ India has the largest youth population in the world,⁶⁵ and young people below age 20 comprise 41% of the population.⁶⁶ India's territory is divided into 30 states and 7 union territories, with the states being divided largely on linguistic lines. While Hindi and English are the official languages of the Union government, there are hundreds of other languages and dialects spoken in different parts of the country, 22 of which are considered official languages. India is a constitutionally secular state and home to a religiously diverse population: 79.8% of the population is Hindu, with the other major religions being Islam (14.3%), Christianity (2.3%), and Sikhism (1.72%). Children below the age of 14 comprise almost 29% of the total population. The per capita GDP as of 2014 was US \$1,581.⁶⁷

Constitution and Legal System

India gained independence from British colonial rule in 1947 and adopted its Constitution in 1950. The Indian Constitution provides for a parliamentary democracy and the Indian legal system is based on the British common law system. However, the Constitution includes a number of unique features such as special protections for linguistic and religious minorities as well as affirmative action for certain historically disadvantaged caste groups.

India has a federalist structure of governance with legislative powers over the education sector divided between the national and state legislatures. In the event of a conflict between state and Union laws, the Union law would typically prevail, subject to some limited exceptions.

The Constitution of India distinguishes between fundamental rights (which initially consisted mostly of civil and political rights) and Directive Principles of State Policy (or DPSPs, which mostly cover socio-economic rights). The fundamental rights are justiciable and any person whose fundamental rights have been violated can approach the courts. The DPSPs, by contrast, are not enforceable in court and are intended as aspirational goals for the state to progressively realize.⁶⁸ The Supreme Court of India has given the right to education the status of a fundamental right by interpreting it as an integral part of the fundamental right to life under Article 21 of the Constitution. In 2002, an amendment to the Constitution recodified the right to education from a DPSP to a fundamental right.

Specifically, Article 21A of the Constitution reads: "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

To provide a statutory framework for the realization of the right to education under Article 21A, Parliament passed the Right of Children to Free and Compulsory Education Act (the “RTE Act”) in 2009. The RTE Act guarantees every child between the ages of 6 and 14 a statutory right to elementary education and obligates the state to satisfy that right. The act regulates schools and establishes norms and standards that all schools are required to meet. These include requirements regarding student-teacher ratios, libraries, toilets, midday meals, playgrounds, and drinking water. The RTE Act also prohibits corporal punishment, does not allow for children to be held back a year until the completion of elementary education in the eighth grade, and prohibits any sort of screening procedure for admissions.

Strategic litigation—commonly referred to in India as Public Interest Litigations, or PILs—is considerably easier to bring in India than in most countries. The court may introduce a case for consideration *suo motu*, without the need for a complainant. Scholars of India’s legal system have identified four procedural innovations that have expanded opportunities to use public interest litigation in India: (a) relaxing traditional rules of *locus standi* to enable disadvantaged groups to approach the courts by merely sending a postcard (epistolary) or allowing others to represent them on their behalf; (b) monitoring and attempting to make changes to public administration by keeping cases pending for long periods of time and issuing interim mandamus orders; (c) appointing socio-legal commissions to conduct inquiries and to assist the court in devising solutions; and (d) evolving new remedies.⁶⁹

Strategic litigation began in India in earnest in the 1980s. Demands for state accountability for widespread human rights violations during the country’s 1975-77 state of emergency soared after the directive was lifted. During this period, the Indian Supreme Court earned a reputation for judicial activism in protecting the rights of marginalized groups, including children.

The role of the judiciary in bringing about progressive social change continues to be important. However, the focus of litigation has changed in recent years from relying on activist judges to including other stakeholders, such as grassroots organizations and members of the disadvantaged communities themselves. Lawyers are increasingly engaging with such groups on strategic litigation. India’s recent Right to Food case provides an example of activists forming a powerful social movement and bottom-up campaign incorporating litigation.

Given these conditions, it is surprising that public interest cases in general, and education-related cases in particular, remain dramatically under-litigated in India. One empirical study found that PILs currently constitute only a small percentage of the Supreme Court’s docket.⁷⁰ A separate study, by the World Bank, estimated that only 0.4% of the cases before the Supreme Court between 1997 and 2007 were public interest cases.⁷¹ The relative lack of strategic litigation related to education is particularly notable given India’s long struggle for educational equality.

The Struggle for the Right to Education in India

Historically, access to basic education in India has been determined largely by caste, wealth, region, and gender. In the first few decades following independence, India devoted little attention or resources to schools and education. Public expenditure on education constituted less than one percent of total GDP between 1951 and 1955, at which point India's literacy rate was at a low of 18.3%. Even as recently as 1976, the percentage of GDP spent on education was under two percent.⁷²

With the introduction of public interest litigation in the late 1970s and early 1980s, the Indian Supreme Court began to recognize a number of aspirational principles in the DPSPs as fundamental rights. It was the court, not the legislature, that recodified the right to education from a DPSP to a justiciable fundamental right. In the case of *Mohini Jain v. State of Karnataka*⁷³ (1992) the court held for the first time that the right to education was a fundamental right stemming from the right to life under Article 21. In *Mohini Jain*, a candidate for admission to a medical college challenged the constitutionality of a private medical college charging significantly higher fees for some seats than for others. The Supreme Court held that there was a fundamental right to education and that the fees in question were a blatant violation of this right. The right to life, the court stated, included the right to live a life with dignity and education was necessary for such a life. The court, however, did not go into the details of what, exactly, the right entailed. A year later, in *Unnikrishnan v. State of Andhra Pradesh*,⁷⁴ a case brought by a group of private medical and engineering colleges asking the court to review its judgment in *Mohini Jain*, the Supreme Court clarified the scope of the fundamental right to education. The court held that the fundamental right to free and compulsory education extended up to the time that a child reached 14 years of age, after which the right to any further education was subject to the capacity and resource constraints of the state.

Mohini Jain and *Unnikrishnan* (1993) both dealt with higher education and were brought by private litigants unaffiliated with any education movement. Yet, both cases are best known for the pathbreaking pronouncements that the Supreme Court made on school education. The aftermath of the *Unnikrishnan* judgment saw several social movement groups using the impetus of the judgment to demand that the fundamental right to education be codified in the Constitution through a constitutional amendment.⁷⁵ The most well-known of these groups was the National Alliance for the Fundamental Right to Education, which included thousands of grassroots organizations and developed a powerful campaign for a constitutional amendment.⁷⁶ Interviews with some of the activists involved in this movement suggest that there was a concern that the Supreme Court might subsequently dilute its own holding in *Unnikrishnan* and it was, therefore, imperative that the right be codified in the Constitution.⁷⁷

The RTE Act, guaranteeing education to every child between the ages of six and 14, was passed in 2009 and came into force on April 1, 2010. One of the most controversial provisions of the RTE Act is Section 12(1)(c). This provision mandates that unaided private schools (and other schools specified in the act) must fill 25% of their student population with children from disadvantaged sections of society, who are not to be charged a fee. The schools are then to be compensated by the government at the level of the state's cost per child (not the private school's cost per child).

Under the RTE Act, states were given deadlines for complying with various provisions of the act. Most of the requirements were to be fulfilled by March 2013, although states were given until March 2015 to meet requirements regarding teacher training and teacher qualifications. However, despite the passing of the final deadline for compliance, the promise of the RTE Act remains unfulfilled in many respects. An assessment published in March 2015 states: "the Government's own figures indicate that less than 10% schools comply with RTE norms, there is a crisis in teacher education and deployment, pupil teacher ratios continue to be high, unrecognized private schools continue to exist and grow, and tens of thousands of children remain out of school."⁷⁸ Further, the National Commission for the Protection of Child Rights, a statutory authority that was established to monitor the implementation of the RTE Act, has struggled for effectiveness and only received a chairperson in September 2015.⁷⁹

The implementation of the RTE Act in private schools also remains a challenge. One audit by the Comptroller and Auditor General (CAG) in the southern state of Tamil Nadu exposed the following results: "Out of 1,866 un-aided non-minority schools... 801 schools didn't provide 25% reservation in admission, and in 69 test-checked schools, as against 929 children to be admitted under the Act, only 407 children were admitted."⁸⁰ The CAG audit also found that children were admitted under the 25% reservation without ensuring their eligibility for such admission.

Clearly, problems in implementing the RTE Act persist. And despite *Mohini Jain*, *Unnikrishnan*, and the RTE Act, the actual number of Indian children, especially girls, still out of school is substantial. The United Nation's Global Education First Initiative estimates that 8.1 million Indian children in the 6-13 age groups are out of school, and 41% of school-going children drop out by the time they reach grade eight.⁸¹ Similarly, the quality of education—as measured by the presence of basic amenities such as clean drinking water and separate toilets for girls and boys—has been questioned.⁸²

Another important element of equal access to quality education is access for children with disabilities. India ratified the UN Convention on the Rights of Persons with Disabilities in 2007 and the RTE Act envisages an education system that is accessible to marginalized groups, including children with disabilities. However, the participation of children with disabilities in schools remains very low. According to the 2011 Census, there were 6.57 million children with disabilities in the 5 to 19 age group.⁸³ Yet, only

2.5 million children with disabilities are enrolled in government schools.⁸⁴ Despite the scale of the problem, strategic litigation has yet to play a significant part in the struggle for this aspect of equal access to quality education in India.

A complex question hovering over this process is whether these efforts to boost enrollment rates have translated into improved learning outcomes for those attending school. According to official government data, India's literacy rate for the 7–14 age group⁸⁵ increased to 73% in 2011 from 64.8% in 2001.⁸⁶ However, the 2014 Annual Status of Education Report found that almost half of all grade 5 students were unable to read a text written at a grade 2 level. Furthermore, 30% of grade 2 children enrolled in government schools were not even able to recognize letters of the alphabet.⁸⁷

These statistics on literacy rates and learning outcomes need to be understood against the backdrop of what has historically been, and continues to be, a deeply divided school system. In addition to schools run and funded by state governments and municipal corporations that provide education free of charge, there are a large and growing number of private schools in India that vary significantly in the quality of education they provide and in the fees they charge. Though the costs of private schooling for a family are, on average, almost five times more expensive than public schooling, a survey by the National Council for Applied Economic Research shows that the percentage of students enrolled in private institutions has gone up from 28% in 2004–05 to 36% in 2011–12.⁸⁸ In urban areas, this percentage is even higher, with a nationally representative sample from 2005 showing that 58% of children in urban India attended private schools.⁸⁹

India's history, openness to strategic litigation, and current education dynamics all suggest that it is ripe for strategic litigation for access to quality education. Yet, as seen in the next section, this is not the case.

Right to Education Litigation in India

There have not been many significant examples of strategic litigation in the context of the right to education in India, and the few litigation efforts to date have been ad hoc and uncoordinated. Some of the activists interviewed for this report argued that this is due to insufficient funding for strategic litigation.⁹⁰ Further, in the aftermath of the RTE Act, the education litigation that has taken place has focused largely on the Act's application to private schools. Private schools have been both at the forefront of challenges to the RTE Act and respondents in a growing number of cases brought on behalf of students from disadvantaged backgrounds who were denied admission or have otherwise been discriminated against. Some NGOs working to further equal access to quality education have intervened to help the government defend the Act against challenges from private schools.

Unlike in Brazil and South Africa, strategic litigation can claim little credit for advancing the right to equal access to quality education in India. Rather, advances in India have largely been the result of legal interpretations of judgments in non-strategic (private) cases that affected the right to basic education only coincidentally. Once education was codified as a fundamental right under Article 21A, and even more so after the passing of the RTE Act, there has been significant litigation around the right to free and compulsory primary education. However, as the discussion below suggests, these litigation efforts have largely been uncoordinated and would not fit into the typical definition of strategic litigation.

The most prominent litigation regarding the RTE Act has involved its applicability to private schools. In these cases, strategic litigation was used by civil society groups (private schools and school associations) that were opposed to the application of the act to private schools. *Society for Unaided Schools of Rajasthan v. Union of India*⁹¹ involved a group of private schools challenging the constitutionality of the 25% reservation requirement on the basis that it infringed upon their constitutional right to carry on an occupation, trade, or business. Some of the petitioners who were minority schools also alleged that the requirement violated the rights granted to them as minorities under Articles 29 and 30 of the Constitution.⁹² A three-judge bench of the Supreme Court upheld the constitutionality of the RTE Act, including the 25% reservation requirement for private schools. However, the court carved out an exception for minority schools, finding that requiring such schools to comply with the 25% requirement would violate their minority character.

Less than two years after *Society for Unaided Schools*, the Supreme Court delivered yet another judgment on the constitutionality of the RTE Act in *Pramati Educational and Cultural Trust v. Union of India & Ors.*⁹³ This time the petition was brought by non-minority private schools and minority schools that received grant-in-aid from the state. They contended that the RTE Act violated the basic structure doctrine of the Constitution, as well the right to equality by making an unreasonable distinction between aided and unaided minority schools. The court once again upheld the constitutionality of the RTE Act, but assented to yet another exception, finding that all minority schools, including those that received grant-in-aid from the state, were exempt from the provisions of the RTE Act.

Society for Unaided Schools and *Pramati* are both landmark judgments that have together had a significant impact on the right to education discourse in the country, but have also generated some unintended consequences. Their impact is discussed in detail in the next chapter, but it is notable that the two cases have only heightened the focus on the rights and obligations of private schools. Indian media commonly reduce the RTE Act to only its 25% reservation requirement in private schools. Other provisions in the act regarding access and quality education in all schools, particularly public schools, are seldom discussed.

While schools have been the key litigants in opposing the applicability of the RTE Act to themselves, there has also been litigation by or on behalf of students and parent groups seeking to use the RTE Act to gain admission to private schools. In Delhi, an NGO called Social Jurist has been very active in obtaining admission to private schools for students from disadvantaged backgrounds.⁹⁴ Social Jurist has also led the fight to apply the RTE Act to nursery sections and pre-schools operated by primary schools.⁹⁵ Other litigation has been filed by parent groups against excessive fees charged by private schools, including fees for admission.⁹⁶ Some states, including Tamil Nadu, have passed laws placing a ceiling on the fees that private schools can charge.⁹⁷

Outside of the context of private schools, litigation on the right to education and the RTE Act has been quite limited. *Avinash Merhotra v. Union of India*⁹⁸ and *Environment and Consumer Protection Foundation v. Delhi Administration*⁹⁹ are two among a very small number of Supreme Court cases that dealt with infrastructure and norms and standards in all schools. *Avinash Merhotra* was a public interest petition filed in the aftermath of a fire in a school in Tamil Nadu that killed 93 children. The petitioner argued that uniform safety standards should to be adopted in schools all over the country. The Supreme Court held that the right to education under Article 21A included the right to receive education in safe schools and issued a detailed set of directions requiring all state governments to implement safety norms in schools. These included installing fire extinguishing equipment in all schools, periodic inspections of schools to ensure compliance with building safety codes, and fire safety training for students and staff.

Environment and Consumer Protection Foundation was a public interest petition filed by the NGO of the same name, seeking the installation of basic facilities in all schools. The petition was filed prior to the enactment of the RTE Act, which came into effect during the course of this litigation. The Supreme Court first called upon all state governments to file affidavits on the compliance of schools in their states with the norms and standards in the RTE Act. The court then directed all states to implement the norms and standards of the RTE Act within a six month period. The *Environment and Consumer Protection Foundation* judgment focused specifically on schools' provision of usable toilets, including separate toilets for boys and girls. The judgment noted in particular that a lack of functioning toilets was often a reason for girls dropping out of school upon reaching puberty. Despite the *Environment and Consumer Protection Foundation* judgment, a 2015 study showed that 13% of all Indian primary schools still don't have girls' toilet facilities.¹⁰⁰

While both *Avinash Merhotra* and *Environment and Consumer Protection Foundation* saw the Supreme Court giving broad orders that could have been very useful in advancing the right to education by improving infrastructure in schools, neither of these cases attracted much media attention or were supported by strong social movements, and implementation of the orders has been weak.

More recently, there has been new strategic litigation dealing with access to education and the implementation of other provisions of the RTE Act, mostly in state high courts. Many of these cases are ongoing or have been disposed very recently, making it difficult to judge their impact. One effort meriting further study is *Registrar (Judicial) of High Court of Karnataka v. State of Karnataka & Ors*,¹⁰¹ a public interest petition that was taken up *suo moto* by the Karnataka High Court in response to a newspaper article¹⁰² that stated that nearly 50,000 children were out of school in the state. On the directive of the High Court, a survey was conducted in November 2013 which revealed that the actual number of out-of-school children was 170,000. The High Court appointed *amici curiae*, allowed various civil society groups to file intervention applications, and directed the formation of a High Powered Committee comprised of various state government departments, NGOs, and lawyers involved in the litigation. The committee is required to meet periodically to discuss ways of getting out-of-school children into the classroom and the litigation has led to progress in getting some of these children back to school.

NGOs and other groups working on education have also begun to bring petitions seeking the implementation of the norms and standards articulated in the RTE Act. One such petition, brought by the National Coalition for Education, sought comprehensive directions for the full implementation of the RTE Act for all state governments.¹⁰³ The implementation directions being sought would address issues such as the severe shortage of qualified teachers in many states as well as the provision of basic infrastructure in all schools. The Supreme Court recently disposed this petition, stating that the remedies sought were too broad for implementation and that the petitioners should instead approach the High Courts of different states.

It appears that strategic litigation for access to quality education is still in a nascent stage in India. There have been some pathbreaking decisions, such as *Unnikrishnan*, *Avinash Merhotra* and *Environment and Consumer Protection Foundation*, but it is inaccurate to attribute these to strategic litigation. And while *Unnikrishnan* has given rise to a modest social movement pushing for implementation of the right to education, the actual number of Indian children—especially girls—who are out of school remains painfully high. Both *Avinash Merhotra* and *Environment and Consumer Protection Foundation* led to broad orders from the Supreme Court for schools to improve their infrastructure, but they have not led to a meaningful social movement, and actual implementation still lags. There are some reasons for hope in more recent litigation that is still unfolding, but overall the pace of change is slow—particularly in contrast with the situation in South Africa.

C. South Africa

South Africa is a medium-sized country, with a population of over 56 million people.¹⁰⁴ According to the country's 2011 census, the population is approximately 80.2% black African, 8.8% coloured (or multiracial), 8.4% white, and 2.5% Indian/Asian.¹⁰⁵ The country has a large youth population: in 2013 there were 18.6 million children (below 18), who made up 35% of the population. Just over 10 million children (54.3% of the youth population) live in poverty.¹⁰⁶ The per capita GDP in 2015 was US \$5,874.¹⁰⁷ The legal system is a hybrid one, based on British common law and Roman-Dutch civil law. African customary law is recognized, provided it accords with the country's Bill of Rights. Procedurally, the law takes a largely common law approach, incorporating the rule of *stare decisis*, meaning that, as in India, the law is developed through precedents set by case law.

Constitution and Legal System

The area that is today the Republic of South Africa was colonized and ruled by the East India Company and then the British, starting in the 17th century. Between 1948 and 1991, the principle of segregation by race was enshrined in apartheid laws that systematically discriminated against non-white populations. In particular, apartheid excluded the majority black Africans from equal access to quality education. Throughout the 1970s and 1980s, the struggle for educational equality took a back seat to the larger effort to fight apartheid. South Africa finally emerged from apartheid with the first democratic elections and establishment of a constitutional democracy in 1994. Today, South Africa's Constitution contains one of the most progressive bills of rights in the world. All constitutional rights, including the right to education, are justiciable, and any law or conduct inconsistent with them may be declared invalid by the superior courts. The High Court has seats in each province, appeals from these go to the Supreme Court of Appeal, and the Constitutional Court is the apex court.

South Africa's first democratic, interim Constitution of 1994 contained generous provisions for socio-economic rights including healthcare, housing, food and water, social security, and education. While these rights were diluted somewhat in the final version of the Constitution that was adopted in 1996, sections 29(1)(a) and (b) of the Constitution established a universal right to education: "(1) Everyone has the right— (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."¹⁰⁸

Unlike many of the other constitutionally protected socio-economic rights, and unlike the case in Brazil and India, the right to education in South Africa is not subject to “available resources,” “progressive realization,” or “reasonable legislative measures.” Rather, it is an immediately realizable right.¹⁰⁹ In practice, processes to improve the country’s education system have been shown to take time. Legal remedies have had to be developed to deal with delays and shortcomings, while holding government to account for gaps between the lofty ambitions of the Constitution and the reality on the ground.

There are certain features of the South African Constitution that create a positive environment for strategic litigation. The South African Constitution takes a broad approach to the question of who may bring cases before the courts. Section 38 of the Constitution, which applies where a right in the Bill of Rights has been or may be infringed, establishes a broad approach to standing.

A matter may be brought by: (i) persons acting in their own interest; (ii) persons acting on behalf of other persons; (iii) persons acting on behalf of a group or class of persons; (iv) persons acting in the public interest; or (v) associations acting in the interests of their members. The system also allows for any interested party to enter a case as an *amicus curiae* which, with the leave of the court, may make written and oral submissions that can influence case outcomes. These openings for *amici* interventions offer an important opportunity for civil society organizations and those with expertise to contribute to the development of South Africa’s social rights jurisprudence.¹¹⁰

Another factor supporting strategic litigation is the courts’ approach to costs in constitutional litigation. Where litigation raises genuine constitutional issues against a state respondent, the applicants are not at risk of a costs order against them, even if they are unsuccessful. Yet if the applicants are successful, they are entitled to costs.¹¹¹

The South African Constitutional Court will rarely sit as a court of first instance; where litigants have attempted to go directly to the Constitutional Court they have almost invariably been referred back to start their case in the High Court.¹¹² This is in contrast to the Indian Supreme Court, which can be approached as a court of first instance, and which also has *suo moto* jurisdiction under which a court can itself initiate a case.

The Struggle for the Right to Education in South Africa

South Africa has a history of public interest litigation seeking to address a range of human rights violations. This form of activism dates back to the apartheid era, during which organizations such as the Legal Resources Centres, the Centre for Applied Legal Studies, and Lawyers for Human Rights brought cases before the courts to constrain

the apartheid system, particularly in relation to civil and political rights.¹¹³ This strategy has also been used during the post-apartheid era to hold the new government accountable on a range of rights issues, including socio-economic rights. Litigation has been necessary (alongside other social movement efforts)¹¹⁴ because despite the positive legal and governance framework, South Africa's transition to democracy has not resulted in an effective redistribution of resources. Two decades after the Mandela government was voted into power, income inequality has increased, unemployment (particularly youth unemployment) has risen, and access to goods and services such health care and housing has worsened.¹¹⁵ The country remains among the world's most unequal,¹¹⁶ with the overwhelming majority being poor and black.

South Africa's inequality has a significant impact on education because there is no right to free education in the Constitution. However, the government has developed a funding system that includes "fee free" schools. At least in theory, no child can be turned away from a public school due to the inability to pay fees—though lack of transport and other barriers remain. The question of what is meant by "basic education," as established in Section 29 of the Constitution, has also been the subject of some debate.¹¹⁷ The Constitutional Court has suggested (without making a finding) that it correlates with the legislated "compulsory" period of education: from grade one to the end of the year in which the child turns 15 years old. In practice however, the government's Department of Basic Education¹¹⁸ is responsible for all school education, starting from a compulsory early childhood development year preceding grade one (referred to as grade R), through to grade 12. Others argue that basic education is not about the number of years but about the quality of the education.¹¹⁹

Section 39 of the South African Constitution provides that international law must be considered when interpreting the Bill of Rights. This introduces a plethora of obligations when interpreting a right. Thus, sources such as the Committee on the Rights of the Child and the United Nations Committee on Economic, Social and Cultural Rights (ICESCR) must be considered when they confirm education as a human right which should be respected, protected, and fulfilled by the state. South African ratified the ICESCR in 2015 after a long delay following signature, and included a statement that the right to education will be progressively realized. This statement was met with consternation by education litigation organizations, which decried it as contrary to the Constitution.¹²⁰

While the constitutional and legislative provisions promoting access to education provide an encouraging platform for the attainment of quality education in South Africa, political and historical factors also must be considered in understanding the barriers that continue to impede access to quality education. A sharp divide remains between the small number of high quality, formerly white state schools, and the many under-resourced schools that were intended solely for blacks. Almost all of the educa-

tion litigation since the advent of democracy in South Africa can broadly be seen as an attempt to either: (1) grapple with school admission policies that have served to limit access to the country's well-functioning, well-resourced, formerly white state schools that make up just 10% of the country's schools; or (2) challenge the slow pace of improving conditions at underperforming, poor schools that often lack basic resources such as buildings, teachers, or textbooks, and which make up the majority of the country's schools.¹²¹

Many of the problems which still exist in South Africa's education system are a result of centuries of racial discrimination, and particularly the apartheid regime's use of education as a means of oppression.

In 1970, black learners received on average 3.6 years less education than white learners, and by 1980, 2.3 years less.¹²² In 1982, the apartheid government of South Africa spent an average of almost ten times more on the education of each white pupil than it did on each black student (R1,211 for each white child, compared to R146 for each black child). It is not surprising that just prior to the advent of democracy in 1993, black literacy rates were approximately one-half of white literacy rates, and black numeracy rates were less than one-half of white rates.¹²³

During apartheid, "Bantustans" or "homelands" were established by the government as areas where blacks were moved to ensure segregation. These homelands were ostensibly established in order to give the black population the responsibility for running their own independent governments and developing separate but equal states. This gave the impression of decolonization, but in effect it denied people citizenship and deprived them of the rights they would have had in South Africa, including educational rights.¹²⁴

Education suffered particularly in the homelands, due to a severe lack of funding. Coupled with this underspending was a complex system of administering education that used 19 departments of education that were divided according to race, ethnicity, and region.¹²⁵ It is perhaps not surprising that much of the post-apartheid litigation for access to quality education has been in the Eastern Cape, a province that contained two of the former homelands.

Racial segregation resulted in schools for white children being far better resourced than those for black, Indian, or coloured children. The apartheid state even developed a separate curriculum for black children (called "Bantu Education") that critics say was designed "as a weapon to ensure a cheap labour force with no rights."¹²⁶

Trying to repair the deep-rooted damage done to South Africa's education system by the apartheid government has proven extremely difficult. Although apartheid policies are no longer law, their long lasting effects are still reflected in thousands of disadvantaged rural and township schools across South Africa that are poorly resourced, often badly managed, and continue to produce education test results which place South Africa at the bottom of pile¹²⁷ in comparison to other countries in southern Africa.

For example, South Africa's literacy rate for grade six children is lower than those of Botswana, Mozambique, and Namibia.¹²⁸

Although there has been some progress, the dire state of many schools highlights the state's failure to create an education system that provides quality education to all. Efforts to reform the system have not reaped the desired results.¹²⁹ Appalling school infrastructure, the absence of school transportation, lack of school supplies, and vacant teacher posts are especially common in the former homeland areas, where the quality of education remains the worst. While inferior education is not limited to these provinces, they have been the site of a disproportionately large number of education court cases.

Today, just under 94% of South Africa's 25,000 schools are state funded public schools (these are government schools; hereafter referred to as "public schools") where 12 million children are enrolled. All South African public schools are organized into five groups, called quintiles, according to their financial allocation. Quintile 1 is the poorest, while Quintile 5 is the "least poor." The poverty rankings are determined nationally according to the poverty of the community around the school. Quintiles 1 through 3 are no-fee schools, while quintiles 4 and 5 are fee paying. Nationally, approximately 71% of public schools fall within Quintiles 1-3.¹³⁰ Wealthier provinces such as the Western Cape and Gauteng have a much higher percentage of fee paying schools (59.7% and 53.3% respectively)¹³¹ than provinces such as the Eastern Cape and Limpopo (28.4% and 22.9% respectively).¹³² Private (or independent) schools make up only six percent of the schooling system in South Africa. These schools range from highly elite, expensive schools, to low fee independent schools. The Constitution allows for the establishment of independent schools. These schools must be registered with the Department of Basic Education and may be subsidized by the government. Despite the disparities between public and private schools, there has been very little litigation in this sphere in South Africa.¹³³

Although South Africa put in place White Paper 6 (1996) which sets out an ambitious plan towards inclusive education, many of its targets have not been met.¹³⁴ A 2015 report by the Department of Basic Education estimated that 597,953 school-age children with disabilities are not in school. Given the severity of this problem, it is surprising that there has been only one case dealing with access to education for children with disabilities: the 2011 High Court case of *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa*,¹³⁵ in which the High Court directed the Department of Basic Education to take steps to ensure that children with severe intellectual disabilities have access to education. The department was given 12 months to develop and put into place measures to ensure this access. Yet despite this ruling, substantial barriers exist for disabled children seeking access to quality education.¹³⁶

South Africa has had slightly more success in providing full access to early childhood education, making significant efforts to provide access to a pre-school year (known

as grade R). But even where there has been progress in increasing access to pre-school, the quality of the actual schooling has lagged. A government report published in 2013 found that although the number of children in grade R had dramatically increased from 242,000 in 2001 to 768,000 in 2012, there was minimal impact on learning outcomes—with the least impact in the poorest schools.¹³⁷ The increase in numbers accessing early childhood education is perhaps the reason why this has not been a site of strategic litigation, but the quality problems persist and perhaps litigation may arise in this sphere in the future.

Right to Education Litigation in South Africa

Post-apartheid South Africa has a significant record of successful strategic litigation on equal access to quality education. Ironically, this record begins with efforts to preserve white privilege. The early years of education litigation in South Africa were dominated by issues of language and admissions. The litigators were mostly school governing bodies from formerly all-white schools seeking to preserve smaller class sizes and the use of Afrikaans as a language of instruction. These initial, reactionary efforts at strategic litigation were in opposition to the progressive social movement for equal access to education in South Africa. These cases were not well coordinated, but they did result in a number of small wins regarding the relative powers of the school governing bodies versus government departmental heads, with the schools governing bodies generally favored.

These modest successes gave school governing bodies courage to bring bigger cases, one of which, *Head of Department, Mpumalanga Department of Education v. Hoërskool Ermelo*¹³⁸ reached the Constitutional Court. The case concerned the language policy of the school. Although the school governing body won that case, the Constitutional Court took the opportunity to make some profound statements about the need to transform the country's education system and move beyond the apartheid past. The judgment provides striking passages on South Africa's historic inequality in education, and the need for schools to look beyond the needs of their own school community and consider the large number of poor children in over-crowded schools.

Two other cases from this early period illustrate the struggle of progressive strategic litigators to catch up to their more conservative counterparts, and even to the courts themselves. In *Christian Education SA v. Minister of Education*, a conservative religious organization which represented 196 independent Christian schools sought to declare the law that banned corporal punishment in schools unconstitutional on the ground that it was an unjustifiable limitation of religious freedom. The court found that although the law did infringe the parents' right to freedom of religion, it was a

reasonable and justifiable limitation based on children's right to freedom and security of the person. Notably, there was a complete absence of progressive voices in this case, and the court reached its decision without input from any more liberal litigators representing the interests of the students themselves. Similarly, *MEC for Education, KZN v. Pillay*³⁹ focused on the intersection of student rights and school regulations, with the student arguing that the school's "no jewelry" policy prevented the expression of her Hindu culture through wearing a nose stud. Once again the court found in favor of student rights but noted the absence of student voices. In these two cases therefore, the court appeared to be calling for broader participation in litigation, for different and new voices to be heard. The court did a significant amount of the work in carving out the reasonable accommodation boundaries in this matter, but without input from progressive strategic litigators.⁴⁰

It was thus relatively late that progressive social activists and litigators awakened to the enormous potential of the courts to achieve children's right to basic education. But beginning around 2010, South African civil society, including school children themselves, began mobilizing, sharpening their demands, and turning to the courts, starting with a spate of strategic cases focusing on setting norms and standards and improving school infrastructure. Since that year, all the major cases relating to education have involved civil society organizations which have either brought the cases or entered as *amici curiae*.

The recent strides that South Africa has made in the area of education are in no small part due to a shared strategy among litigators and activists. Students, parents, teachers, and education activists created Equal Education (EE), a grassroots organization to represent the social movement demanding better education for all. The founding of EE in 2008 and its work since represent clear examples of the measurable progress that can be made in the realization of economic and social rights when a vociferous, well organized, and tenacious grassroots movement uses strategic litigation to advance its objectives.

In the years since the founding of EE, a group of unaffiliated but like-minded public-interest litigators has collaborated to advance education justice, in some cases filing individually, in some cases together. These organizations include the Legal Resource Centre (LRC), the Centre for Child Law at the University of Pretoria (CCL), and Section 27 (S27). Equal Education itself gave birth to a powerful newcomer, the Equal Education Law Centre (EELC), which largely serves as the movement's litigation arm.

One early line of attack from these strategic litigators was litigation against schools that excluded pregnant learners. In *Head of Department, Department of Education, Free State Province v. Welkom High School and Another* and *Head of Department, Department of Education, Free State Province v. Harmony High School and Another*⁴¹ the Constitutional Court acknowledged that the schools' pregnancy policies constituted a

prima facie infringement of the constitutional rights of pregnant learners, including the rights to human dignity, privacy, bodily integrity, freedom from unfair discrimination, and basic education. The schools were ordered to review their policies in light of the Constitution and the Schools Act and to meaningfully engage with the Head of Department on possible reforms.

School admission policy has been another important focus of strategic litigation. One especially notable case focused on Rivonia Primary School, an “elite” (i.e., formerly white) public school—but in a hallmark of strategic litigation, the impact of the case goes well beyond that particular school. A black child seeking admission was turned away because the school declared itself to be full to capacity. The Head of Department over-rode the school governing body, and enrolled the child in the school. The school objected, and in 2013, *MEC for Education in the Gauteng Province and Others v. Governing Body of the Rivonia Primary School and Others* reached the Constitutional Court.¹⁴² CCL and EE entered jointly as *amici curiae*. Although the *Rivonia* judgment, like the pregnant learner cases, stresses the autonomy of school governing bodies and their power to make policy, it ultimately found in favor of the Head of Department having the last say regarding admissions, given his or her responsibility to place every child in a school in the province. The court, as in the *Welkom* pregnancy case, stressed the need for the public schooling system to be run as a partnership between government and the school governing bodies.

Another significant case involving school governance and access to education was *Governing Body of Juma Masjid Primary School v. Essay N.O. and Others*¹⁴³ (2011), which concerned the eviction of a public school from a private property. The case was not successful for the applicants, as it ultimately did not prevent the eviction, but the efforts of litigators did at least ensure a proper process of finding alternative places for the children. The case was built strategically by LRC, which represented the school, while CCL and the Socio-Economic Rights Institute (SERI) collaborated to file joint *amici curiae* submissions with the Constitutional Court. The main impact of the case was jurisprudential: the case became the first in which the Constitutional Court clearly articulated the legal principle that basic education is an immediately realizable right, and is not subject to progressive realization. So although this example of strategic litigation suffered a setback on the immediate issue of the school’s eviction, it did set an important precedent that could be useful in future strategic litigation efforts.

While these cases focused on access to education, there were also initiatives seeking improvements in the quality of education. The social movement to support and promote the right to basic education began to focus intensively on infrastructure cases in 2010. Some of the early infrastructure cases were brought by the LRC and the CCL. The “mud schools” case was the first significant school infrastructure case. Dilapidated school infrastructure is a problem that affects the rights of learners and educators across

South Africa and the problem is particularly acute in the Eastern Cape, where the majority of the mud schools (quite literally, schools built of mud) are located.¹⁴⁴ In 2010, the LRC, on behalf of the CCL and the Infrastructure Crisis Committees of seven schools in the Eastern Cape, launched proceedings in the Bhisho High Court.¹⁴⁵ The litigation was launched after it became apparent that all building programs to replace unsafe buildings in the province had come to a halt and large portions of the budget earmarked for the building of schools was not being spent.

A settlement was reached among the parties in February 2011, so there was no judicial determination regarding the importance of school infrastructure as an element of the right to quality education. The settlement agreement, however, constituted a significant success as the government committed to providing temporary and permanent infrastructure relief to the seven schools by specified dates.¹⁴⁶ More importantly, the government committed to eradicate approximately 445 “inappropriate school structures” within three years, including a financial commitment of over R 8 billion and a plan of action. This program is now known as the Accelerated Schools Infrastructure Development Initiative, and it exists at least in part because of the involvement of strategic litigators who sought to broaden the impact of the case beyond the seven schools immediately at issue. The CCL joined the case “in the public interest,” acting “on behalf of all children similarly situated.” This helped generate a broader settlement that included the refurbishment of all mud schools.

Of course, quality education means more than just school buildings, and other cases have looked within the classroom at additional elements of education infrastructure. In many public schools in poor provinces, particularly the Eastern Cape, children are forced to sit on the floor or on makeshift furniture (for example paint tins or bricks) due to a lack of proper desks and chairs. According to one audit, out of 5,700 schools in the Eastern Cape, nearly a quarter of them (1,300 schools) were in need of furniture, which affected 605,163 learners in the province.¹⁴⁷ In *Madzodzo and Others v. Minister of Basic Education and Others*¹⁴⁸ the LRC in November 2012 represented three schools and the CCL in an action against the National Minister and the Eastern Cape Department of Education (ECDOE). The application sought four remedies: a declaration from the court that the respondents had breached the learners’ constitutional right to education, the provision of appropriate furniture to the named schools within two months, an audit of the furniture needs of all schools in the province, and provision of furniture to schools identified through the audit. Again, the inclusion of an institutional client together with individual schools was a strategic tactic that paid dividends in both the immediate ruling and the broader implications of the jurisprudence. The case was a success in material terms, as the court made an order for the provision and delivery of school furniture, and also in jurisprudential terms, because the judgment describes desks and chairs as part of the immediately realizable right to basic education.

The fight for norms and standards for school infrastructure was spearheaded by EE. In March 2012, the LRC launched litigation on behalf of EE to compel the Minister for Basic Education to publish norms and standards for school infrastructure. EE believed that establishing binding standards would provide the government with a clear legal standard and a mechanism to meet constitutional obligations, provide schools and communities with an indication of what they are entitled to, and set a mechanism for top-down accountability. In the settlement agreement, dated November 19, 2012, the ministry agreed to publish draft Minimum Norms and Standards for School Infrastructure, which it did on January 15, 2013.

School textbooks were the focus of a campaign by S27 that drew massive media and public attention to the issue. Following media reports of textbook shortages in several schools in Limpopo province, S27 demanded delivery of additional books by May 2, 2012. When the government failed to meet the deadline, an urgent application was launched to compel delivery. The applicants sought an order declaring that the failure to deliver textbooks was a violation of the learners' rights to basic education, equality, and dignity. They also sought the delivery of textbooks on an urgent basis by May 31, 2012, and they asked for a supervisory order to monitor the implementation of the relief sought. The High Court's judgment of May 17, 2012 not only granted all aspects of the relief sought by the applicants, but also confirmed that children have an immediately realizable right to basic education and that textbooks are an essential component of quality education.¹⁴⁹ Due to non-compliance, the case went through a further iteration, where S27 (this time representing a civil society organization, Basic Education for All) returned to court. The case eventually reached the Supreme Court of Appeal, which issued a resounding judgment confirming that the right to education includes the right of each learner to have a textbook for each subject being taught.

Besides physical infrastructure and goods, the provision of teachers is an essential ingredient of the right to education. The LRC has had some success using strategic litigation to ensure that there was an appropriately qualified teacher in each classroom. In *Centre for Child Law and Others v. Minister for Education and Others*¹⁵⁰ the LRC launched an application requesting that the Department of Basic Education or the ECDOE be required to fill all vacant teaching posts within a three month period, that the salaries of all the educators who were appointed be paid from the date upon which they assumed duty, and that a supervisory order be granted requiring the ECDOE to report to the court on its progress. Although terms of the application were accepted by the government, a litany of compliance failures forced the LRC back to court. This time they constructed their case as an opt-in class action, initially representing 33 schools, under the case name *Linkside and Others v. Minister of Basic Education and Others*.¹⁵¹ The class action was "certified," meaning that any school could join the class action, and the case eventually grew to include 90 schools. The outcome was successful for the LRC and the schools it

represented in terms of material outcomes and creative remedies ordered by the court; those outcomes and remedies are discussed further in the next chapter.¹⁵²

Strategic litigation for access to quality education in South Africa has delivered important results on school buildings, teaching and non-teaching staff,¹⁵³ desks and chairs,¹⁵⁴ as well as textbooks¹⁵⁵ and transport¹⁵⁶ and the meaning of “the right to a basic education.” The next chapter looks in greater detail at the impacts of strategic litigation on education in Brazil, India, and South Africa, considering not just material gains but also changes in policy, jurisprudence, and attitudes.

III. Impacts

The effects of strategic litigation can be assessed in different ways. Strategic litigation successes can be measured through the material goods and services they deliver to the litigants, the rights protections and norms clarifications articulated by courts or government agencies, and related improvements that only become visible over time, such as improved learning outcomes. Other material outcomes include the effects that litigation has on law and policy. These may take the form of legal precedents, new policies, or changes to extant statutes as a result of the cases.

Less quantifiable, but equally important, are changes in the interactions between members of social movements and litigators, including changes in litigants' views of their own agency and views of the uses of litigation. Social mobilization may generate litigation, or the use of litigation and the demonstration of its effectiveness can spark social mobilization. Although these effects are more difficult to measure, interviews with litigators, social activists, litigants, education officials, and education experts suggest they should not be overlooked. In fact, understanding these more ineffable changes is central to evaluating what is referred to here as "agenda change." This includes changes in discourse and the expansion of democratic space.⁵⁷ Understanding these dynamics is important to evaluating whether and to what extent strategic litigation has been successful in promoting equal access to basic education in the three focal countries.

This chapter first examines the material impacts of strategic litigation, then considers impacts on policies and jurisprudence, before looking at less quantifiable impacts such as changes in attitudes and discourse.

A. Material Outcomes

The quest for concrete improvements to people's lives is often at the heart of strategic litigation. Although litigators and activists may aspire to winning broader changes in policy or jurisprudence—or even changes in attitudes and perceptions—most strategic litigation initiatives begin with the drive for material impacts. This section studies the material outcomes of strategic litigation for individuals and groups before assessing the importance of data gathering as both a direct aim of strategic litigation and an ancillary benefit.

For Individuals and Groups

The litigation reviewed in this study has garnered significant, measurable outcomes for children in Brazil, India, and South Africa. These impacts can be seen in specific cases in the three countries that resulted in concrete gains. However, these gains have in some cases been accompanied by unintended consequences that must also be taken into account.

In Brazil, enrollment in early childhood education increased considerably both in urban and rural areas following strategic litigation. Daycare facilities (for children from birth to age three) witnessed an overall growth of 60.7% in enrollment between 2008 and 2014.¹⁵⁸

These enrollment gains can be traced directly to strategic litigation. The Court of Appeals of the State of São Paulo (hereafter TJ/SP)¹⁵⁹ ruled partly in favor of civil society groups gathered under the coalition *Movimento Creche para Todos* (Childcare for All Movement).¹⁶⁰ The TJ/SP ordered the Municipality of São Paulo to create, between 2014 and 2016, at least 150,000 new vacancies in childcare institutions and pre-schools, of which 105,000 vacancies should be in full-time childcare facilities for children between birth and three years old. Further, the court required that the quality of education provided at these institutions must meet national and municipal standards, and that the Municipality of São Paulo report on progress every six months. The court order is still under implementation but so far the impacts have been considerable. One of the reasons for the progress is the appointment by the court of a monitoring committee, which will be discussed later (in the Agenda Change section of this chapter) as a development in litigation strategy. The number of children who have benefited from the litigation is significant. Following the TJ/SP decision, 66,135 new vacancies were created, mostly in childcare facilities. According to education experts¹⁶¹ the improvements were largely influenced by the litigation, although attributing these benefits solely to litigation is difficult, as will be discussed below.

Other measurable impacts of strategic litigation in Brazil include increased funding for education¹⁶² and improved school curricula that now include Afro-Brazilian history and culture.¹⁶³

In India, the best example of material impacts in the cases reviewed in this study is *Registrar (Judicial) of High Court of Karnataka v. State of Karnataka & Ors* (also known as the Karnataka out-of-school children case),¹⁶⁴ which was initiated by a High Court judge. The court appointed *amici curiae*, allowed various civil society groups to file intervention applications, and—to aid implementation—directed the formation of a High Powered Committee comprising representatives of various state government departments, NGOs, and lawyers involved in the litigation.

The case has already had an impact: the number of out-of-school children has come down from nearly 170,000 when the first comprehensive survey was conducted in November 2013, to about 15,000 children by March 2015. Looking beyond the numbers, this litigation appears to have had a significant impact on the way in which India's education bureaucracy functions.¹⁶⁵

At the same time, NGOs and education activists working on the ground caution that the focus of the High Court and those involved in the case has been primarily on the numbers. There have been few efforts to date to monitor whether the children who have been brought into schools are actually learning. Bridging courses are provided by the NGO Sarva Shiksha Abhiyan (SSA) to allow children who have never previously attended school to join age appropriate classes, but the effect of these courses has not been evaluated. Some teachers in government schools in the districts in North Eastern Karnataka, which in recent years has seen a surge of previously out-of-school children joining school, complained that it was challenging to teach large numbers of children who had never been to school before.¹⁶⁶ These teachers expressed concerns that they were not equipped to teach these children, who were at a very different level from the rest of the class and that the government had provided them with little support in this regard.

In South Africa, following the settlement of the mud schools case,¹⁶⁷ the government committed R 8.2 billion to eradicate 445 “inappropriate,” dilapidated school buildings, many of which lacked sanitation. Although progress was initially very slow, the pace has improved, and by March 2016, 138 schools had been built, 100 of which were in the Eastern Cape.¹⁶⁸ As the approximately 30,000 children who have benefited or will benefit are all extremely poor, this case has certainly improved equal access to quality education, at least as a first step by providing a decent and conducive environment for learning. The principal of a newly rebuilt former mud school who was interviewed for this study said that the improved conditions had been conducive to learning, and that improved learning outcomes are already evident.¹⁶⁹

Another measurable impact of South African strategic litigation can be seen in the provision of school furniture.¹⁷⁰ An audit of furniture needs done in 2011 found that of

the 5,700 schools in the Eastern Cape, 1,300 were lacking furniture, affecting 605,162 children. The litigation resulted in the allocation of R 300 million between 2013 and 2016, and although there have been problems with compliance necessitating further litigation, over 200,000 items of furniture have been delivered since the case started. The schools receiving furniture are among the poorest in the province.

Similarly, South Africa's textbooks cases have undoubtedly had material impacts, although again there have been difficulties with implementation of the court order. Although these cases have been lauded for generating a groundswell of activism, some of those interviewed for this study were critical of the way that infrastructure cases skewed the distribution of education resources. A senior Department of Basic Education official said of the textbooks case, "We spent almost all of our time and money for 18 months just fighting fires. Yes it was important, but I'm not convinced it was a good use of our resources."¹⁷¹ The South African education economist Nic Spaull makes the point that outcomes delivered under pressure come at an extra cost: "Hypothetically, if it costs R 1 billion to deliver 99.5% of textbooks and R 2 billion to deliver 100%, are we willing to pay the extra 1 billion?" Thus, while such cases clearly have an impact, that impact can be a nuanced mix of good and bad. Spaull notes that "In response to the textbooks case ...the national department took a 'drop whatever you are doing and just make sure that every child has a textbook' approach, as if that was the most important thing in the entire realm of education, which it isn't."¹⁷²

The final case study from South Africa which sheds light on material outcomes is the story of the *Linkside* cases.¹⁷³ The Eastern Cape had a serious problem with vacant teaching posts,¹⁷⁴ which had risen to 8,479 in January 2012. Some of the more affluent schools managed to keep posts filled by using school fees to pay teachers. Poorer schools, however, could not afford to do so, and therefore thousands of classrooms were without teachers. An "opt-in" class action was successful, and a court order was obtained requiring the state to reimburse schools for the money they had paid out to teachers from school fee reserves, in addition to filling the posts and paying the salaries of the appointed permanent teachers. A total of R 109 million was paid out to the 123 schools over the two phases of the case, and 145 teachers were permanently appointed. Sarah Sephton, the LRC attorney in this matter, said that the case had a "massive impact at the micro-level." However, Sephton acknowledged that most of the schools that joined the class action were not poor. She noted that even if more poor schools had joined, they may have had difficulty proving their claims due to lack of paperwork, because such schools rarely have administrative support, due to lack of funds. "It's a vicious circle," according to Sephton.¹⁷⁵ This demonstrates the challenges of the "opt-in" mechanism, and of including the most impoverished schools in education-related strategic litigation. On the other hand, the mud schools case provided major benefits to a large number of very poor schools. These schools' participation was possible because they did not have

to opt in to claim their rights—they were represented in a proxy manner by the Centre for Child Law.

Thus, the material impacts of strategic litigation in Brazil, India, and South Africa can be seen as significant, but not always an unalloyed benefit. As with any litigation, winning can foment a backlash, and losing can sow disillusionment. It can be difficult for poor litigants to join strategic litigation efforts, and even where cases are won, there may be unanticipated outcomes. In South Africa, successful strategic litigation around the provision of textbooks forced the diversion of funds from other parts of the education budget in order to meet the court's judgment. Similarly, the sharp rise in formerly out-of-school children attending Karnataka schools, but without sufficient preparation or increased resources, illuminates the way strategic litigation can at times produce unintended consequences. One of the measurable, if unintended, consequences of strategic litigation is the possible diversion of resources when a winning case moves state funds away from planned allocations, thus skewing the state's budget in favor of the litigants. Even the most well-intentioned strategic litigation may generate unforeseen results. One possible means for generating more positive outcomes from strategic litigation—and fewer unintended consequences—is to focus on making better use of data. The next section considers data gathering as both a direct goal and an ancillary benefit of strategic litigation.

Data Gathering as Aim and By-product

Litigation has been used to obtain information about education in all three countries. In some instances, gaining access to government-held information was an explicit goal of the litigation, while in others the disclosure of information was an ancillary benefit—albeit one that strategic litigators then utilized in follow-up litigation.

In Brazil, gaining access to information has been included in the design of strategic litigation, and requests for information have been used as a litigation tool. In 2008, civil society actors used strategic litigation to push for the implementation of Municipal Law 14.127,¹⁷⁶ which orders São Paulo's Municipal Secretariat for Education to disclose information on enrollment in and demand for early childhood education in the city. The law obliges the city to disclose this information online every three months. The government's resistance to collecting and publicizing this information was due in part to its fear of disclosing the shortage of spaces in São Paulo's early childhood education system. Efforts to gain access to information were undertaken by members of the *Movimento Creche para Todos* as part of their overall litigation strategy. Understanding the size of the problem was a key initial step toward the larger goal of fighting for access to quality early childhood education. As Ester Rizzi, a law professor and expert on strategic

litigation in Brazil, noted: “The dispute for access to information had a fundamental impact on the public debate on the topic, because it uncovered the actual magnitude of the problem of access to education.”¹⁷⁷

The *Movimento*’s access to information litigation in Brazil shows not only the importance of data, but also the importance of using the media as part of a strategic litigation campaign. It illustrates how just filing a case—and publicizing the filing—can catalyze change, regardless of the court’s judgment. The *Movimento* filed two writs of mandamus, one in June and the other in October 2008, seeking government-held information on the scope of shortages in early childhood education slots.¹⁷⁸ One week after first *mandado de segurança* was filed, the Secretariat for Education published the information requested. Yet the government’s prompt response was not the result of a court ruling, but rather of media attention that the *Movimento* generated around the filing. As one lawyer involved in the case explained, “Once we informed the media about the filing of the case, the journalists called the Secretariat of Education in the City of São Paulo, and the data were made available on the following day. Thus, there was a clear impact of the mere filing of the case.”¹⁷⁹ In court, the lawsuit was declared inadmissible because the requested information had already been made available. The second *mandado de segurança* was filed because the information released in response to the first was incomplete. Once again, the mere filing of the case caused the administration to release the requested information on early childhood education. And again, the actual *mandado* was rejected in court because the information has already been obtained—information that would prove critical to future strategic litigation.

In the India and South Africa, obtaining access to information was, at least initially, incidental to the cases. But as the organizations involved in strategic litigation have gained information, they have also gained a sense of its power, and have increasingly used this data in follow-up cases and monitoring efforts. In fact, the monitoring processes themselves have data collection and analysis as a key component.

In India, monitoring by the High Powered Committee on the Karnataka out-of-school children case has brought significant amounts of data into the public domain by ensuring that the government first conducted a more comprehensive survey of out-of-school children and then engaged in ongoing monitoring of the size of the problem. Although the judiciary started the case *suo moto* based of a media report stating there were approximately 58,000 children out of school in the state, the survey conducted by the government shortly thereafter revealed that there were actually nearly 170,000 children out of school. It can be argued that this single data point is at the core of the Karnataka strategic litigation. And while complex questions remain concerning the best ways to track out-of-school children and meet their needs, the data generated by the case is clearly of essential and ongoing importance in addressing the problem.

In South Africa, copious amounts of important data were gained through government responses in the mud schools, furniture, and textbook cases. This information provided strategic litigators with important insights about how government plans (or fails to plan), how it budgets, and what its procurement and delivery of services processes are—all of which could potentially enrich future litigation. Of course, data can be useful not only for litigators and other activists, but for government itself. At least partially in response to the mud schools case, the government established the Accelerated Schools Infrastructure Development Initiative in 2011, which provides regular online updates about government’s school building and provision of electricity, water, and sanitation.¹⁸⁰ This information provides both government and government-watchers with quantitative data on progress in providing access to quality education.

Data, then, can play a variety of roles in strategic litigation. Gaining access to data can be a direct goal of litigation, or a by-product. It can be used in follow-on litigation, or to encourage media coverage, or as a direct spur to judicial action. And it can be a tool for both activists and government to ensure implementation and measure its effectiveness. As a senior South African government official interviewed for this study remarked in relation to the textbook cases, “The lack of [data] systems we found on the ground ... made us realize where we have serious functional issues that we hadn’t paid attention to, and made us accountable.”

B. Policy Change and Jurisprudential Shifts

Material impacts that provide measureable improvements to people’s lives may be the first goal of strategic litigation. But strategic litigation often aims at a larger goal that can produce improvements on a much greater scale: changes in policy and jurisprudence. Such changes can be seen in response to strategic litigation for access to quality education in Brazil, India, and South Africa. Specific cases from each country illustrate how changes in policy and jurisprudence can have far-reaching ramifications.

Policy Change

Prior to the *Movimento*’s strategic litigation on the early childhood case in Brazil, the policy of São Paulo’s municipal government was that education was only compulsory from the age of six. In 2005, the Supreme Court recognized a constitutional right to early childhood education and a Constitutional Amendment was adopted in 2009 lowering the age of mandatory schooling from six to four years old.¹⁸¹ Between 2007 and

2008, civil society groups used non-litigation strategies to push for increased access to early childhood education, including meetings with officials, petition drives, protests, public hearings, and debates.¹⁸² Adding a litigation component involving small collective cases did not change the overall dynamic. Then, in 2010, a new, bolder attempt was made, seeking a change in policy: the *Movimento* presented a lawsuit seeking the provision of early childhood education for “all children below five years and eleven months old that request vacancies,”¹⁸³ as well as the provision of a plan for the expansion of early childhood education for the whole city. The success of this litigation led not only to concrete action by the government to benefit the plaintiffs, but also to a larger shift in policy that stands to benefit all families in the municipality.

The Karnataka out-of-school children case in India led to various policy changes and amendments to the Karnataka State right-to-education rules, all of which were designed to keep closer track of children attending school. Most importantly, these policy changes included altering the definition of dropping out of school from absent for 60 consecutive school days to absent for seven consecutive school days. Education department officials and NGO representatives interviewed in this study believe this was a crucial change: waiting 60 days before taking any action meant that drop-outs were unlikely to return, whereas notifying the students and their families after seven days made their return more likely.

Another important change in Karnataka’s education policy was the introduction of an “attendance authority” on each block.¹⁸⁴ When a child is absent for seven consecutive days, his teachers are to inform the attendance authority, who then contacts the child’s parents. The NGO Sarva Shiksha Abhiyan now has a digitalized database where attendance authorities are required to submit monthly reports of their work and the number of children, if any, to whom notices have been sent. The experience in most blocks has been that children typically come back to school after the first notice.¹⁸⁵ According to Karnataka education authorities, these new policies and mechanisms have definitely improved attendance.¹⁸⁶

In South Africa, the NGO Equal Education (EE) believed that establishing binding standards for school infrastructure would provide the government with a clear legal requirement and a mechanism to meet its constitutional obligations regarding education; provide schools and communities with an indication of what they are entitled to; and set a mechanism for top-down accountability. EE pursued these policy changes through litigation in *Equal Education and Others v. Minister of Basic Education and Others*.¹⁸⁷ The case settled at the last minute when the minister agreed to provide draft norms and standards for comment. After several delays and threats to return to the court, the final norms and standards were promulgated on November 29, 2013. The new, binding standards provide that all schools must have access to sufficient water,

electricity, sanitation, safe classrooms with a maximum of 40 learners, security, internet, libraries, computer and science laboratories, and recreational facilities. Importantly, provincial education departments are also required to report annually on progress in implementing the new norms and standards.

The establishment of legally binding minimum norms and standards for school infrastructure provides a legal accountability mechanism if the government fails to meet its obligations. The norms and standards provide clear content to the right to education and give communities and courts a definite standard by which to measure government's performance. However, they also provide an example of unintended consequences stemming from strategic litigation. Tim Gordon, chairperson of the Governing Body Foundation, a service organization that seeks to improve school governance, observed that while norms and standards promote government accountability, the problem is that "officialdom has seized on the minimum standards and elevated them to the required standards."¹⁸⁸ Nonetheless, the norms and standards represent an important policy change that now reaches far beyond the single case that led to their promulgation.

Jurisprudential Shifts

The goal of changing jurisprudence is a common aspiration in strategic litigation. The cases reviewed in this study provide numerous examples of important jurisprudential shifts won through strategic litigation. Some of those shifts relate to different ways of bringing cases or new kinds of remedies granted, and will be discussed in the next section ("Agenda Change"), as they are closely linked with the constitutional and remedial experimentalism that strategic law has been forging. This section will examine jurisprudential changes to the law or interpretations of the law that the cases have brought about.

In Brazil, the process that led to early childhood education being understood as an immediately realizable right was built through a series of cases, of which the 2010 São Paulo case was the culmination. This process allowed the jurisprudence on access to quality education to evolve slowly before taking a more dramatic leap with the São Paulo case. The process of change began with decisions of the *Supremo Tribunal Federal* in cases where the court found that state inaction was a constitutional violation, and that concerns about costs did not shield the state from fulfilling its obligation to provide access to basic education.¹⁸⁹ Brazilian education expert Isabela Rahal, in an interview for this study, described the earlier cases as "decided in a very abstract way."¹⁹⁰ The jurisprudence in the 2010 São Paulo case is very different because it not only recognized education as a fundamental right, but also crafted an order to make the right real.

In India, *Society for Unaided Schools* provided landmark jurisprudence on the RTE Act. That jurisprudence has been cited in numerous subsequent judgments relating to education. Using the court's jurisprudence in *Society for Unaided Schools*, parents and parent groups have approached courts when their children have been denied admission to private schools under Section 12(1)(c) of the RTE Act.¹⁹¹ Groups have also relied on the *Society for Unaided Schools* judgment to argue that other provisions of the RTE Act apply to private schools. For example, the Delhi High Court cited *Society for Unaided Schools* in finding that private schools must provide special learning aids to cater to students with disabilities.¹⁹² In another example, the Kerala High Court, also citing *Society for Unaided Schools*, held that a private school's decision to hold back a child because of unsatisfactory performance was a violation of the RTE Act.¹⁹³

The South African case that is probably the most profound from a jurisprudential point of view is *Governing Body of the Juma Musjid Primary School and Others v. Essay N.O. and Others*.¹⁹⁴ This judgment constitutes one of the most significant contributions to date to the meaning of the "right to education" in South African jurisprudence. Firstly, the judgment clarified that the right to education is indeed immediately realizable. Secondly, the court confirmed the right enjoys negative protection where there is a failure to respect the existing protection of the right by taking measures that diminish that protection.¹⁹⁵ Thirdly, the court stressed the importance of basic education for the promotion and development of a child's personality, talents, and mental and physical abilities, and found that access to schools is a necessary component for achieving this right.¹⁹⁶

Ironically, this powerful jurisprudence emerged from a judgement that the litigants found to be disappointing. The Juma Musjid Trust was the private owner of the land on which the state-run Juma Musjid School operated. The Trust applied to court to have the school evicted and eventually, after the court was satisfied that the learners' rights had been protected by their placement at other schools, the eviction was permitted.

However, the fact that the case was a jurisprudential success was no accident. The matter had been brought as a strategic litigation case by the Legal Resources Centre, with the goal of promoting an "immediately realizable" interpretation of the constitutional right to education. And the jurisprudence in the *Juma Musjid* case has set the stage for other important jurisprudential shifts regarding education in South Africa. The High Courts, and more recently the Supreme Court of Appeal, have begun to spell out, in case after case, what makes up the right to education. In *Centre for Child Law and Others v. Minister for Education and Others*,¹⁹⁷ which was a pre-cursor to the *Linkside* cases, the court found that teachers and non-educator staff at schools were an essential ingredient of the right to education. In *Madzodzo and Others v. Minister of Basic Education and Others*¹⁹⁸ the court confirmed that education was immediately realizable,

regardless of budgetary constraints. The *Madzodzo* judgment was significant in confirming that the Constitutional right to education was not confined to making places available at schools, but necessarily required the provision of a range of resources, including schools, classrooms, teachers, teaching materials, and appropriate facilities for learners.¹⁹⁹

Strategic litigation for access to quality education has resulted in pathbreaking jurisprudence in Brazil, India, and South Africa. This jurisprudence has led to early childhood education being understood as an immediately realizable right in Brazil, to an expansive interpretation of the RTE Act in India, and to the classification of education as an immediately realizable right in South Africa. Furthermore, this jurisprudence paved the way for further efforts by strategic litigators and courts to expand access to quality education. While these decisions have resulted in important material and jurisprudential gains, they may also have helped to change attitudes and group dynamics, as considered in the next section.

C. Agenda Change

Strategic litigation can produce multiple impacts, from material improvements, to changes in government policy and court jurisprudence, to unintended consequences. But there is another category of change attendant to strategic litigation that also must be considered: what this report calls “agenda change.” These are the less quantifiable impacts which can be seen in changes in attitudes and inter-group dynamics, for example when activism leads to strategic litigation, which may in turn lead to greater activism. These hard-to-measure impacts may also include the way strategic litigation can influence future litigation tactics and generate innovative remedies, and the way it can expand democratic space and increase dialogue. Finally, in assessing strategic litigation as a driver of agenda change, it is necessary to consider changes in discourse and the role of the media.

Catalyst and Reactant: The Strategic Litigation Ecosystem

By definition, strategic litigation is one part of a dynamic, complex ecosystem that includes not just litigators and plaintiffs, but other social activists and even potential plaintiffs, all of whom engage in constantly evolving, mutually-reinforcing relationships. Strategic litigation, at its best, produces ripple effects in which, for example, social activism leads to greater rights awareness, which leads to strategic litigation, which contributes to increased mobilization, which may in turn produce additional litigation.

In Brazil, the *Movimento* which brought the early childhood education case actually started as a social movement, and worked for years on the issue before ever going to court. Initially there was a lack of awareness among people about their rights, and the *Movimento* focused on advocacy, including meetings with government officials, petition drives, and mass protests.²⁰⁰ The *Movimento* worked slowly and deliberately toward litigation: in anticipation of filing its first case in 2008, the *Movimento* conducted a registration process for those families whose children did not have access to early childhood education due to lack of spaces. Through their network and on the streets, they managed to register more than 1,000 children via this informal process.²⁰¹

When the *Movimento* did begin litigation, it was on a small scale and intended to generate information. The access to information cases have been identified as an important stage in the movement's growth, because it was at this stage that the public became aware of the magnitude of the problem, and this provided public support for further litigation. The increasing demand in recent years for early childhood education is partly the result of increased public awareness around this issue, because the official assessment of demand for school spaces is based on the number of parents who actively go to a nearby school seeking to enroll their children.²⁰²

Despite several attempts at dialogue between the *Movimento* and municipal officials in 2009-2010, no progress was made. Then, in 2010, the *Movimento* took a new, bolder step, filing a lawsuit seeking the provision of early childhood education for all children below six years old as well as the provision of a plan for the expansion of early childhood education to other localities.²⁰³

The experience that the *Movimento* gained through their activism and modest litigation for access to information clearly informed the decision to file the 2010 lawsuit. The *Movimento* litigators conducted a comprehensive risk analysis before proceeding with the major judicial action, including considering what kind of judgment and remedies would be sought.²⁰⁴

The story of the *Movimento* is one that is rooted in social activism: civil society organizations working collectively and drawing on the interest and support of the public. After non-litigation strategies failed to result in significant change, a partnership with litigation organizations gave rise to litigation. The early attempts at litigation having failed, the movement worked together with strategic litigators to plan a more effective litigation strategy, and ultimately, the case had positive outcomes. The civil society organizations have continued to be involved in monitoring the orders of the court.

The Indian cases discussed in this report were not initiated by social movements, but some parents' groups did get involved following the litigation. The *Society for Unaided Schools* case, for example, was brought by private interest parties.

But following the *Society for Unaided Schools* judgment, a number of NGOs have come out in support of Section 12(1)(c) of the RTE and have been actively involved

in “monitoring, supporting and overseeing its implementation.”²⁰⁵ Parents’ groups have also become strong advocates of this provision and have been demanding a more transparent and efficient admissions process for poor students.²⁰⁶ In particular, two NGOs that have been very active in mobilizing parent groups around Section 12(1)(c) are Social Jurist in Delhi and the Child Rights Trust’s RTE Task Force in Karnataka. While Social Jurist has litigation at the center of its strategy, the Child Rights Trust works more closely with the government and primarily seeks to supplement the government’s efforts in achieving better implementation of the RTE Act.²⁰⁷ So while the *Society for Unaided Schools* case did not emanate from a social movement, the existence of the judgment has helped to engage parents’ groups, which have in turn helped ensure implementation of the judgment—and that process of implementation monitoring has given rise to new NGOs organized around the judgment.

The Indian litigation also shows the importance of news media to the strategic litigation ecosystem. The Karnataka out-of-school litigation actually started with a news report that led to judicial action. The case has since catalyzed significant activity both in government and civil society, as well as cooperation between the two. And their efforts have led to greater involvement by parents. For example, while the NGO Sarva Shiksha Abhiyan (SSA) had always held annual enrollment drives just prior to the start of each academic year, in 2014 they held four enrolment drives in order to meet demand. Further, the case led SSA to collect data on absences more regularly, which in turn led to closer monitoring of the situation of out-of-school children.

One hallmark of strategic litigation is that it can beget further litigation as people become more aware of their rights and the power of the courts. Many of the Indian NGOs, parents’ groups, and civil society organizations interviewed for this study believed that litigation had the potential to achieve significant change. They saw courts as the only institution of government that was worthy of their trust and responsive to their needs. In addition, many activists and group representatives interviewed admitted that litigation received more media coverage than other advocacy efforts and, in this way, was a useful tool for generating attention that the government could not ignore.

In South Africa, as in India, the early cases were not brought by social activists. In fact, the earliest strategic litigation related to education was brought to preserve white privilege.

All that changed in 2009 as civil society groups such as CCL Law and SERI started to get involved as *amici curiae* in cases. Around the same time, the LRC began to bring carefully crafted strategic cases on infrastructure and provisioning in the Eastern Cape. Equal Education (EE) was also established around that time,²⁰⁸ as a movement of learners, parents, teachers, and community members working for quality and equality in South African education. Section 27 (S27) was launched in May 2010, and makes an explicit link between litigation and social movements, describing itself as a “catalyst

for social change.” All of these groups have the capacity to litigate. They also all work with networks of NGOs and community based organizations as part of their daily work.

Although the education litigation in South Africa is highly strategic and well organized, and the organizations bringing the litigation are linked to social movements, it would be inaccurate to view these cases as bubbling up from the ground. LRC, which brought the mud schools application, itself identified the mud schools problem and played a major role in establishing the school “crisis committees” that brought the application. In other words, LRC did not engage in litigation as the outgrowth of a social movement; rather, it identified the problem of inadequate school buildings, then initiated litigation, then engaged in community organizing around its litigation on the issue.²⁰⁹

Similarly, the South African textbook case did not emerge from a social movement. In fact, like the Karnataka out-of-school legislation, it began with media reports. The media’s attention to textbook shortages led to the involvement of S27 and the Centre for Applied Legal Studies, which led the litigation. The media then played an important role in following the progress of the litigation and its outcome. South African experts interviewed for this study described the strategic litigation as having raised the expectation and rights awareness of teachers, parents, and students. There is a general feeling that the textbook litigation has empowered teachers and learners to insist on quality education, and they are now more willing to demand that other shortages be addressed as well. Increased rights awareness and increased willingness to demand the fulfillment of those rights can be seen as indicators of successful strategic litigation.

Innovative Tactics and Remedies

Brazil, India, and South Africa have compelling stories to tell about litigation tactics and innovative remedies. These are included under the label of agenda change because, as the previous section suggests, litigation strategies and judicial remedies are increasingly inclusive, and thus begin to overlap with social movements for change. In particular, the use of innovative remedies both reflects successful strategic litigation and can prompt further litigation.

In Brazil, the litigation strategy of the *Ministério Público* in São Paulo has changed in recent years toward greater use of extrajudicial mechanisms. Since 1990, the *Ministério Público* has presented cases concerning the right to education, in particular regarding expanding the number of spaces available to children.²¹⁰ More recently, the *Ministério Público* has expanded the tools at its disposal. Firstly, there are the extrajudicial agreements called TACs (*Termo de Ajustamento de Conduta*), through which the *Ministério Público* enters into an agreement with the relevant authority on how to remedy a rights

violation in a given time frame. Secondly, civil investigations, which often have an immediate deterrent and remedial effect, can be deployed, and may obviate the need for a lawsuit. These tools are helpful in and of themselves, and also because they create more dialogue among the *Ministério*, civil society groups, and education officials.

Of course, remedies—whether innovative or traditional—are not cost-free, and there is a related, ongoing debate in Brazil about individual versus collective cases. *Defensoria Pública* lawyers present a considerable portion of individual cases seeking vacancies in early childhood schools, but questions are being raised about the impact of those cases on the agenda of the policymakers and litigators in this area. For the government officials from the Secretariat for Education, individual cases have a disruptive effect on public policy. They contend that when the judiciary grants vacancies in schools in individual cases, it results in queue jumping which can affect other policy imperatives, such as prioritizing children with disabilities.

An important counter argument raised by the *Defensoria Pública* is that while this disruptive effect might occur, it is their institutional mandate to provide legal service to the poor, and this service cannot be denied. Furthermore, the *Defensoria Pública* argues that the individual cases have influenced the public agenda, since they have shown the magnitude of the problem.²¹¹ Finally, *Defensoria Pública* in São Paulo has become increasingly involved in collective cases, which may be seen as an impact of civil society litigation on the agenda of the *Defensoria*. Whether of the use of collective cases by the *Defensoria* will influence strategic litigation in Brazil regarding the right to education is yet to be seen. Certainly, the strategic litigation sector is favoring collective cases, which can assist more children at once and which can be structured to avoid the disruption that some officials are concerned about.

A unique feature of the remedy in the São Paulo early childhood education case is the monitoring committee that was established by the court, which is comprised of representatives of selected civil society groups, the *Defensoria Pública* and *Ministério Público*, as well as the judge of the case. The committee receives reports every two months from the municipality on progress toward fulfillment of the court order. One difficulty, highlighted by a representative of the *Ministério Público*,²¹² is that the committee members rely on official information, since both the *Ministério Público* and the *Defensoria Pública* lack sufficient technical staff to conduct site visits to verify the expansion of vacancies and their conditions.

In India, the Karnataka out-of-school children case resulted in an innovative remedy very similar to that in the Brazil early education case. The consultative nature of the litigation and the fact that the High Court directed the government to form a High Powered Committee that was required to meet on a regular basis resulted in significant input from civil society groups as well as from other arms of the state government, such as the Department of Labour and the Department of Women and Child Development.

The commissioner of public instructions at the time when the Karnataka litigation was initiated said that the participation of civil society groups and other government departments was essential to comprehensively addressing the issue of out-of-school children.²¹³

The *Linkside* case in South Africa illustrates the potential for strategic litigation to generate innovative tactics. *Linkside* was the first certified opt-in class action in South Africa. The class action meant that relief could be granted not only to those schools in the initial application, but to all schools wishing to join. This is significant for future litigation, especially in the field of socio-economic rights. Nevertheless, there are problems with the inability of poor and marginalized people to become aware of such a class action, or to get involved with it. In *Linkside*, the government did not circulate the terms of the order. It is clear that opt-in class actions require the dissemination of information and assistance to potential litigants. When dealing with very poor, uneducated potential litigants, additional strategic support may be required. Without this, opt-in class actions may remain beyond the reach of the very people who would most benefit from them.

In the South African cases there is a reoccurring theme of government's non-compliance with court orders. This often results in litigants having to return to court more than once to ensure relief, wasting time and resources. The *Linkside* cases provide an example of innovative ways in which the consequences of non-compliance can be addressed and limited. The inventive way in which the LRC drafted the court order meant that an alternative remedy was readily available in the form of the attachment of the department's assets. This ensured that the litigants did not have to return to court if the government defaulted, and it placed added pressure on the department to pay the schools.

Expanding Democratic Space and Increasing Dialogue

The litigation strategies and remedies in the field of equal access to quality education have expanded democratic space, however fitfully or unevenly. In an interview for this study, one member of the São Paulo Monitoring Committee stated that: "The Committee has been functioning... It has worked as a space for accountability and transparency, which is already worthy in itself."²¹⁴ Interviewees described the committee as a pioneering initiative that provides a framework within which dialogue between public officials and civil society is fostered. However, some interviewees pointed out that the meetings of the court-ordered Monitoring Committee are closed to the public because the original lawsuit was conducted in a closed court in order to protect the identity of the children involved. Interviewees felt this is contrary to the very transparency that strategic litigation seeks to foster, and a balance could have been sought to respect the identity of the

minor applicants while still allowing an open debate. Civil society actors are continuing to discuss how they can play a more direct role in monitoring the case, and they have not ruled out further litigation.

As discussed above, the Karnataka out-of-school case court-appointed High Powered Committee plays a similar role in India as the Brazil early education committee plays in expanding democratic space and encouraging dialogue. The consultative nature of the committee has allowed the Department of Public Instructions to get input from civil society groups as well as from other arms of government, and this has clearly had a positive impact on the success of the case.

In South Africa, strategic litigation has led to increased dialogue through settlement talks generated by the litigation. These have at least led to a better understanding of the difficulties that the government faces in delivering services, although their fundamentally adversarial nature means that, while space has been created for increased dialogue, that dialogue is not always constructive.

Discourse Change and the Role of the Media

One way to view the effectiveness of strategic litigation is to note related changes in public discourse and media portrayals. Changes in the way an issue or a group of people are described can be a significant indicator of progress. In some instances, litigation has changed the discourse on important educational matters. A good example from Brazil is the recent change in how the Municipality of São Paulo classifies school demand: It has changed the term from “vacancy” to “enrollment.” This change arose from dialogue at the Monitoring Committee and is intended to be more transparent, since “vacancy” referred to any opening throughout the system, whereas “enrollment” denotes a specific space occupied by (or available to) a specific child.²¹⁵

Another example of the impact of strategic litigation on discourse is the redefining of what it means to be “out-of-school” in India. In South Africa, the *Welkom* case is credited with changing the discourse around pregnant students. In fostering greater accommodation of pregnant students, the litigation made clear that pregnancy is not a disciplinary issue—and as a result, more students are returning to school after giving birth.²¹⁶

Changes in discourse are closely related to changes in media coverage. Generally, the media played an important role in highlighting problems at the heart of the litigation in this study. The Karnataka out-of-school children case and the South African textbooks case were sparked by media reports.²¹⁷ And once litigation starts, the media can be a powerful ally in raising public awareness. The 25% reservation of school spaces for poor children in India, for example, has been repeatedly raised by the media.

Similarly, the media coverage following the São Paulo case informed people about the right of children to obtain spaces in early childhood education.²¹⁸ In both cases, media attention has both driven public support for the litigation and focused attention on the implementation of judgments. In all three focal countries, social movements and strategic litigators appear to have been effective in utilizing the media to strengthen public support in favor of their positions.

D. Challenges of Measuring and Attributing Impact

This study has sought to examine strategic litigation for access to quality education in Brazil, India, and South Africa, including an assessment of its impacts. But no forthright study of impacts would be complete without acknowledging the challenges of measuring and attributing them. As noted in the previous section, some impacts—such as changes in discourse—are especially challenging to measure. Other impacts may be more easily measured, but still difficult to attribute to a particular strategy.

Yet the measurement of outcomes is important if we are to answer the question of how successful the litigation in question has been. This study found that, in some instances, there are gaps in litigators' abilities to do so. The Indian study, in particular, lacked sufficient data to assess impact. In Brazil, assessment has proved to be difficult when the outcomes are happening at the local level; it is simply beyond the scope of this study to track what is happening across different localities with millions of people. The Brazil study also illustrates how difficult it is to measure impact of an achievement which may have come about as a result of multiple forces, of which litigation was just one.

One difficulty is that some litigators do not see follow-up as part of their task. In India, for example, where many small cases are taken by individual lawyers, it is easy to see why they cannot dedicate time to such tasks. In instances where strategic lawyers are not positioned to do this kind of work, having the support of civil society organizations that can assist with monitoring impact and doing the follow up work is invaluable, and more could be done to forge alliances with organizations that are better placed to undertake such tasks. However, funding for such activities is not always available.

Furthermore, the skills needed to measure impact may be different from the skills that the average public interest law organization would have, and lawyers tend to have limited knowledge about monitoring and evaluation. Following the South African mud schools case, the litigators took responsibility for monitoring compliance with the settlement, but they commissioned experts to assist, including a surveyor to check the progress and quality of school construction, and economists to examine budget allocation and spending patterns.²¹⁹ Strategic litigators that view their work as part of

a broader social movement for change are more likely to take on the responsibility of monitoring. They have a long term aim and are more invested in how each step of their litigation strategy plays out.

It is important to keep in mind that quantifiable impacts—how many places in classrooms, how many textbooks delivered—while important in themselves, are not the only significant impacts that strategic litigation delivers. Legal and policy impacts, social agenda impacts, institutional change, shifts in discourse, and creating democratic space have all been identified as impacts from public interest litigation, and are all equally important to capture. Finally, counting success is important, but acknowledging failure is equally important as a means of learning.

Of course, even when the impacts of strategic litigation can be measured, they can be difficult to attribute. As discussed earlier, strategic litigation, at its best, is a complex ecosystem marked by ongoing interchange among individuals, NGOs, litigators, and judges, among others. Given this complexity, crediting impacts to a specific action or actor is inherently fraught.

In Brazil, the government has asserted that it would have expanded vacancies for early childhood education even without the intervention of litigators. High-level government officials from the São Paulo Municipal Secretariat for Education interviewed for this study contend that the court ruling had minimal impact because there was already a political commitment to the creation of new vacancies in early childhood education prior to the judgment.²²⁰ Civil society actors insist, however, that the legal obligation was essential.²²¹

India's difficulty with attributing outcomes lies in the absence of baseline data to enable a before and after comparison. For example, measuring whether the *Environment and Consumer Protection Foundation* case hastened implementation of the RTE Act's norms and standards is nearly impossible. Although the Supreme Court ordered implementation, some states began their implementation before the order was given. So while the number of schools that comply with the Act's norms and standards has gone up over the years, it is difficult to attribute this increase to the Supreme Court judgment. Second, it has been alleged by some lawyers and civil society groups that the affidavits filed by states in 2012 regarding the status of school infrastructure were inaccurate.²²² Therefore, the baseline upon which to measure implementation itself is unclear.

In South Africa, a hard-hitting report commissioned by the CCL on the government's poor implementation of the mud-school case was denied by the government.²²³ The government also claimed it would have acted on the issue, even without the litigation.²²⁴ This seems doubtful, however, as the government had deferred building for 10 years prior to the litigation, and also initially opposed the court application.

It is clear therefore that having good information at the outset of the study, and counting the successes or failures carefully thereafter, is important for litigators and

civil society partners who take on the task of demonstrating impact. Obtaining information can be (and perhaps should be) a deliberate part of litigation strategy, and where litigation produces information as a by-product, litigators and their partners can use this information profitably in various ways. Such information can help to reveal where the systemic failures are, which in turn assists in determining how to find solutions. Data can also be used to identify further issues that require action (including litigation), and to hold government to account on its service delivery promises.

IV. Conclusion

The study revealed remarkable commonalities in the strategic litigation brought for equal access to quality education in Brazil, India, and South Africa. For example, all three countries have dealt with infrastructure and norms and standards cases. Making places available in schools for previously excluded children has also been a theme: striking examples include the early childhood education case in Brazil, the out-of-school children's case in India, and the pregnancy exclusion case in South Africa. All three countries have seen significant outcomes as a result of strategic litigation, including new school buildings, new policies and jurisprudence, and even changes in attitudes and discourse.

Strategic litigation has generated positive material outcomes for individuals and groups of children in the three countries, although it is difficult to establish a precise causal link between litigation and outcome. Material gains stemming from strategic litigation include:

- In Brazil, 66,135 new vacancies in childcare institutions and pre-schools have been created, and 42,000 more children entered the early childhood education system in 2014 than in the year before.
- In India, the number of out-of-school children has been reduced from 170,000 in November 2013 to 15,000 in March 2015.
- In South Africa, over 200,000 items of furniture have been delivered, 138 new schools were built to replace mud structures, and 145 teachers permanently appointed.

Numbers are not everything, though, and the study revealed many challenges related to measuring and attributing these successes. Attributing positive change is inherently difficult in the complex ecosystem that is strategic litigation. Similarly, while measuring success is acknowledged by all as being important, there were limits to litigators' ability to do so. Litigation organizations that have more successfully managed to count their own successes are those that view their work as part of a broader social change movement and are more concerned about how each stage of the work is progressing toward a long term goal.

An interesting finding of the study is that data gathering is itself an outcome of litigation. This is sometimes built in as a conscious part of the strategy from the beginning, or is sometimes a by-product of the litigation. Once gathered, the data can be very useful for monitoring and evaluation, and for identifying areas needing further action.

Interviewees in all three countries pointed out that as important as data is, data alone cannot give a complete answer to the question of how successful the litigation has been in achieving equal access to basic education. Counting how many out-of-school children are back in schools is one thing, measuring whether they are learning is another. Those interviewed for this study were certainly aware of this, particularly in Brazil where there has been a conscious effort to build a quality component into the early childhood education cases.

Significant jurisprudential shifts are evident in all three countries, too. In Brazil, there is now recognition that early childhood education is an immediately realizable right. In India, the requirement to provide access to education for the poorest children is now understood as an obligation that reaches beyond the government. And in South Africa, the right to basic education as established in the Constitution is (unlike other socio-economic rights) now recognized as immediately realizable.

Movements can give rise to cases, and litigation can catalyze movements. This is confirmed by the study, but the picture is different in each country. Brazil provides the only clear example of a movement that, after trying advocacy, campaigning, and dialogue with government, teamed up with litigators who brought a case to force government to comprehensively provide for early childhood education. What is more, the movement learned from its early attempts at litigation and the litigators undertook a careful risk analysis before embarking on their bigger case. The movement and its lawyers also brought access to information cases that provided them with more ammunition for their campaign, and raised awareness, which drew more public support for the movement. While the movement is still largely NGO driven, parental awareness and demand for services has been an increasingly important feature of the campaign.

None of the Indian cases considered in this study were brought by a social justice movement. Yet the cases that have been brought resulted in increased awareness and social action on the ground, particularly around the requirement that 25% of school

places be reserved for poor students. The out-of-school children case has also sparked civil society engagement which, if sustained, will be useful in ensuring that the new policies are adhered to and that the quality of the education is of an appropriate standard.

The South African cases show how litigation can catalyze social movements, such as Section 27's textbooks case giving birth to Basic Education for All. There is an obvious interplay among the cases drawing attention to the issues, which is likely to lead to more demand for social change, which in turn may lead back to the courts.

Litigation, especially when undertaken as part of a broader strategy for social change, can help change how people talk about—and hence, think about—an issue. In Brazil, there was a marked shift from talking about early education “vacancies” to early education “enrollments.” In India's Karnataka state, the definition of dropping out of school has shifted dramatically from out of school for 60 consecutive days to out of school for seven consecutive days. In South Africa, there is some evidence of a modest discourse change—from exclusive to inclusive—around students who are pregnant.

In short, the study provides evidence that the strategic litigators in the countries under review are making progress towards the goal of equal access to quality education.

Clearly, litigating for equal access to quality education is an ambitious task. The approach in all three countries has been to take smaller cases that build up incrementally toward the final goal. There is no single, perfect case that can solve all the woes in an education system. Instead, it has been the deliberate, determined work of strategic litigators and their allies that has led to important improvements—and may well lead to further improvements in the future.

Appendix:

Normative Survey Questions

1. Impacts on clients (school-aged children, parents and schools)

- a) Legal redress for the client(s) (whether in form of monetary compensation, authoritative judicial finding, overturning a wrongful lower court decision, etc.) What did they get from the court?
- b) What has happened to the children on whose behalf the cases were brought? to their school communities? To their broad socio-economic and/or racial or ethnic cohorts? How do they think their education changed, if at all? How did they perceive their life possibilities to have changed, if at all?
- c) How did the parents or caregivers perceive their education and/or life possibilities had changed, if at all?
- d) What did clients expect from the litigation? How do clients today perceive the litigation? What impact has it had subjectively on them? How do they view the rule of law and/or judicial remedies and their impacts?

2. Impacts on the affected communities (poor rural and township communities)

- a) Awareness of rights violation and the role of the courts in providing redress
- b) Awareness of the judgments
- c) Awareness of rights to non-discrimination in access to education for children

- d) Awareness of rights to quality education for children
- e) Actions taken to enforce those rights
- f) To what extent have the decisions prompted mobilization/organization among communities?
- g) Interaction with the clients—to what extent and through what means have the clients been involved in the litigation process?
- h) How has access to and the quality of education changed since the judgments/settlements?
- i) Extent of access as reflected in numerical proportions of majority/non-majority, (indigenous/non-indigenous), disabled/abled children in certain schools and in certain regions (poor/less poor/well-off areas)
- j) Quality of education for all children

3. Impacts on strategic litigators

- a) On those who brought the case(s)
- b) On the broader cohort of strategic litigators or the Bar

4. Impacts on policymakers

- a) Interview national officials (legislators, ministers) and regional officials (at the Inter-American Commission, the African Commission on Peoples' and Humans' Rights) to explore their perceptions of the cases and how they have or have not impacted their understanding, decisions and actions with regard to equal access to quality education
- b) How did the national governments and, as relevant, municipalities, interpret the cases and their impacts, such as in speeches, public reporting, media interviews, etc.?
- c) What changes in policy emerged from the court proceedings, judgments and implementation or lack thereof?
- d) Rules issued by Ministries of Education

5. Impacts on the judiciary and the law

- a) Education of the judiciary about issues at stake and/or about their own role/responsibility to act—Domestic jurisprudence—to what extent have domestic courts been impacted

- b) Number of references to any of the relevant judgments
- c) Number of cases decided at domestic level on issue of equal access to education and quality education
- d) Interview national judges and judges at the regional courts = what is their perception of the impacts of these cases to date?
- d) What changes in legislation/regulations governing access to quality education since the litigation at issue was launched?

6. Impacts on media coverage

- a) To what extent were these cases covered in local and national media at all? When mentioned, what were the principle messages conveyed?
- b) Interview media – what are media perceptions of the cases and of the broader issue of equal access to quality education the cases addressed?

7. Impacts on education officials

- a) Ministry of education
- b) School administration
- c) Teachers

8. Impacts on organized civil society

- a) Teachers
- b) Education-oriented research and advocacy organizations
- c) Human rights NGOs
- d) The bar

9. Impact on lawyers who represented the clients

- a) What did they learn?
- b) How did they apply the learning in their work?
- c) What would they have changed in their approach in retrospect?

Endnotes

1. OSF staff members Emily Martinez, program director of the Human Rights Initiative, and Borislav Petranov, division director at the Human Rights Initiative, have contributed to the framing and substance of the inquiry since its inception.
2. According to 2016 data, Brazil's population is around 209 million, India's is around 1.3 billion, and South Africa's is about 55 million.
3. They are all members of BRICS, an association between Brazil, Russia, India, China, and South Africa.
4. See: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21_en.pdf.
5. See: <http://data.unicef.org/topic/education/literacy/>.
6. Article 13.2 states that "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education."
7. Article 28.1 states that "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need."
8. South Africa ratified the CESCR only in January 2015.
9. UNESCO Institute for Statistics, Literacy Data Release 6/7/2016, available at <http://www.uis.unesco.org/literacy/Pages/literacy-data-release-2016.aspx>.

10. See: http://www.ibge.gov.br/home/geociencias/cartografia/default_territ_area.shtm.
11. See: <http://www.worldometers.info/world-population/brazil-population/>.
12. See: <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html>.
13. See: https://www.unfpa.org/sites/default/files/pub-pdf/EN-SWOP14-Report_FINAL-web.pdf.
14. See: https://en.wikipedia.org/wiki/Municipalities_of_Brazil.
15. See: https://en.wikipedia.org/wiki/Demographics_of_Brazil#Racial_composition.
16. See: <http://www.tradingeconomics.com/brazil/gdp-per-capita>.
17. By contrast, India's annual per capita GDP is US \$1,581 and South Africa's is \$5,874.
18. Law Number 10.836/2004, available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/lei/110.836.htm.
19. Law Number 13.152/2015, available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13152.htm.
20. Oscar Vilhena Vieira, "Public Interest Law: A Brazilian Perspective," *UCLA Journal of International Law and Foreign Affairs* 13 (2008): 219.
21. Article 5, Paragraph 1—*The provisions defining fundamental rights and guarantees are immediately applicable.*
22. Article 5, XXXV—*The law shall not exclude any injury or threat to a right from the consideration of the Judicial Power.*
23. Article 5, LXIX—*a writ of mandamus shall be issued to protect a clear and perfect right, not covered by habeas corpus or habeas data, whenever the party responsible for the illegal actions or abuse of power is a public official or an agent of a corporate legal entity exercising duties of the Government.*
24. Article 5, LXX—a collective writ of mandamus may be led by:
 - a) a political party represented in the National Congress;
 - b) a union, a professional association or an association legally constituted and in operation for at least one year, to defend the interests of its members or associates;
25. "*Mandado de segurança* is a general remedy created in the fifties to protect against infringements on all rights not protected by *Habeas Corpus*. It bears some similarities with the *juízo de amparo*, found in other Latin American countries. The major novelty brought by the 1988 formulation is the possibility of using this instrument in cases involving collective interests. *Ação Civil Pública* was created in 1985, but strengthened by the new Constitution. The purpose of *Ação Civil Pública* was to establish a class action instrument to protect the environment, consumer rights, and historical and cultural heritage. Over time the *Ação Civil Pública* became widely used to protect public interests, or fundamental rights of discrete groups including children, native Brazilians and others. The *Ministério Público* has been the main actor utilizing this remedy, but civil society organizations also employ this instrument in their daily work." (Vieira, "Public Interest Law: A Brazilian Perspective," p. 234.)
26. In the description provided by the Federal *Ministério Público* on their website: "The terms of adjustment of conduct or TACs are documents signed by parties to undertake, before the prosecutors, to fulfil certain conditions in order to solve the problem that they are causing or to compensate

for damages already caused. The TACs anticipate the resolution of problems in a much faster and more efficient way than if the case had gone to court. Fast, because a lawsuit usually takes years to get to the final judgment due to the numerous existing appeals; and effective because the rights protected in field of collective *amparo*, by their very nature, require quick solutions, otherwise the damage become permanent and irreparable. Of course, in some cases, if the respondent does not comply with the agreement, the MPF will be forced to take the case to court. The difference between TAC and a judicial agreement is that the later are signed in the course of a judicial case action already filed, and therefore must be approved by the federal judge presiding over the trial of the case. But both the TAC and the judicial agreement have the same goal: to shorten the process, with the signing of a commitment with the party, agreeing with what is proposed by the prosecutor. If they violate the agreement, not complying with the obligations assumed, the state prosecutor may petition for execution case, for the judge to force them to comply.” See in Portuguese here: <http://www.prba.mpf.br/paraocidadao/pecas-juridicas/termos-de-ajustamento-de-conduta>.

27. Article 134, CF/88. The Public Legal Defense is an essential institution to the jurisdictional function of the State and is responsible for the judicial guidance and the defense, in all levels, of the needy, under the terms of article 5, IXXIV (CA no. 45, 2004)

Paragraph 1. A supplementary law shall organize the Public Legal Defense of the union, of the federal district and the territories and shall prescribe general rules for its organization in the states, into career offices filled, in the initial class, by means of a civil service entrance examination of tests and presentation of academic and professional credentials, with the guarantee of irremovability being ensured to its members and the practice of the legal profession beyond the institutional attributions being forbidden.

Paragraph 2. The public legal defense of each state shall be ensured of functional and administrative autonomy, as well as the prerogative to present its budget proposal within the limits set forth in the law of budgetary directives and in due compliance with the provisions of article 99, paragraph 2.

28. *Ação Educativa, Ação Civil Pública exige oferta de educação noturna em presídio de SP* [Ação Civil Pública requires nighttime provision of education in SP prison], available at: <http://www.acaoeducativa.org.br/index.php/todas-noticias/10004387-acao-civil-publica-tentam-garantir-oferta-de-educacao-noturna-em-penitenciaria-paulista>.

29. STF, *Defensoria pode propor ação civil pública na defesa de interesses difusos* [Defensoria is allowed to file ação civil pública in defense of diffuse interests], available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=303258>.

30. Article 103. The following may file direct actions of unconstitutionality and declaratory actions of constitutionality: (CA No. 3, 1993; CA No. 45, 2004) : I—the President of the Republic; II—the directing board of the Federal Senate; III—the directing board of the Chamber of Deputies; IV—the directing board of a state legislative assembly or of the federal District Legislative Chamber; V—a State Governor or the Federal District Governor; VI—the Attorney-General of the Republic; VII—the Federal Council of the Brazilian Bar Association; VIII—a political party represented in the National Congress; IX—a confederation of labor unions or a professional association of a nationwide nature.

31. *Estatuto da Pessoa com Deficiência [Statute of Persons with Disability]*, Law 13,146/2015, full text available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13146.htm.

32. Supremo Tribunal Federal, *Escolas particulares acionam STF contra dispositivos do Estatuto da Pessoa Deficiente* [Private schools files lawsuit before the STF against provisions of the Statute of Persons with Disability], August 12, 2015, available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=297473>.

33. Supremo Tribunal Federal, *Mantidas obrigações a escolas particulares previstas no Estatuto da Pessoa com Deficiência* [Obligations of private schools established in the Statute of the Persons with Disability are maintained], Nov. 19, 2015, available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=304439>.

34. Eloísa Machado de Almeida, “Sociedade Civil E Democracia: A Participação Da Sociedade Civil Como Amicus Curiae No Supremo Tribunal Federal [Civil Society and Democracy: Civil Society Participation as Amicus Curiae in the Supreme Court]” (PUC/SP, 2006). For example, as in the case about minimum salaries for professors, see *Ação Education et al., Amicus Curiae na ação direta de inconstitucionalidade 4167*, available at: <http://www.acaoeducativa.org.br/images/stories/pdfs/1.%20peticaoamicuscuriaeadi4167.pdf>.

35. As in the case of religious teaching in schools, see JOTA, *Audiência pública termina com maioria contra ensino religioso confessional* [Public hearing ends with majority against confessional religious teaching], June 15, 2015, available at: <http://jota.info/audiencia-publica-termina-com-maioria-contra-ensino-religioso-confessional>.

36. STF, *Entidade de ensino contesta valores do Fundef repassados pelo governo federal* [Educational entity contests Fundef the amounts transferred by the federal government], available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=64724>.

37. Luiza Andrade Corrêa, “A Judicialização Da Política Pública de Educação Infantil No Tribunal de Justiça de São Paulo [The Judicialization of the Public Policy for Early Childhood Education in São Paulo’s Court of Justice]” (University of São Paulo, 2014), 34; Nina Beatriz Stocco Ranieri, “States and the Right to Education in the 1988 Constitution: Comments on Federal Supreme Court Jurisprudence,” in *Right to Education: Constitutional Aspects*, ed. Sabine; Righetti and Nina Beatriz Stocco Ranieri (São Paulo: Edusp, 2009), <http://unesdoc.unesco.org/images/0018/001879/187916e.pdf>.

38. Article 208. The duty of the State towards education shall be fulfilled by ensuring the following: (CA No. 14, 1996; CA No. 53, 2006; CA No. 59, 2009).

I—mandatory basic education, free of charge, for every individual from the age of 4 (four) through the age of 17 (seventeen), including the assurance of its free offer to all those who did not have access to it at the proper age; (...) IV—infant education to children of up to 5 (five) years of age in day-care centers and pre-schools.

39. Article 208, I, CF/88.

40. Article 208, IV, CF/88.

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42. Constitutional Amendment Number 53, from December 19, 2006, full text available at: http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc53.htm#arti.

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44. Constitutional Amendment Number 59, from November 11, 2009, full text available at: http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc59.htm#art6.
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51. Ação Educativa and Campanha Nacional pelo Direito à Educação, *Privatization of Education and Rights Violations in Brazil: Notes for the Committee on the Rights of the Child* (São Paulo, 2014), para. 7, available at: http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Report_Privatisation_of_Education_And_Rights_Violations_In_Brazil_Notes_For_CRC_2014.pdf.
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53. Plano Nacional de Educação (National Education Plan), Law 13.005, June 25, 2014, available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l13005.htm.
54. *The Guardian*, “Brazil census shows African-Brazilians in the majority for the first time,” November 17, 2011, <https://www.theguardian.com/world/2011/nov/17/brazil-census-african-brazilians-majority>.
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56. Available at: <http://portal.mec.gov.br/arquivos/pdf/politicaeducespecial.pdf>.
57. Associação Brasileira para Ação por Direitos das Pessoas com Autismo (Abraça) et al., *1st Joint Submission to the Committee on the Convention on the Rights of Persons with Disabilities: An Overview from the Brazilian Civil Society*, 2015.

58. CEDECA Ceará, *Justiciabilidade do direito à educação: a experiência do Centro de Defesa da Criança e do Adolescente do Ceará (CEDECA Ceará)*, forthcoming [on file with the field researcher].

59. For an overview, see: Carlos Roberto Jamil Cury and Luiz Antonio Miguel Ferreira, “Justiciabilidade No Campo Da Educação [Justiciability in the Field of Education],” *Revista Brasileira de Política E Administração Da Educação* 26, no. 1 (2010): 75–103.

60. NGO Ação Educativa held a workshop with partner organizations on the 14th October, 2015, on the NGO’s justiciability project. The field researcher for Brazil attended the workshop at the invitation of the NGO Ação Educativa. Notes on file with the author.

61. BRAZIL, *Tribunal de Justiça do Estado de São Paulo* [Court of Appeals of the State of São Paulo or TJ/SP], *Apelação [Appeal] nº 0150735-64.2008.8.26.0002, Movimento Creche para Todos [Movement Childcare for All] vs. the Municipality of São Paulo*. Full decision can be found here: http://www.acaoeducativa.org/images/stories/pdfs/decisao_tjsp_educacao_infantil.pdf.

62. Since the *Movimento Creche para Todos* is an informal group of different NGOs and grassroots organizations, launched publicly in 2008 (although conversations among its members date before it), formally the case had as appellant the individual member organizations, not the *Movimento* itself. Those organizations include: Ação Educativa Assessoria Pesquisa e Informação, Instituto de Cidadania Padre Josimo Tavares, Casa dos Meninos, Centro de Direitos Humanos e Educação Popular de Campo Limpo—CDHEP e Associação Internacional Interesses à Humanidade Jd. Emílio Carlos e Irene. For more on the formation of the *Movimento Creche para Todos*, see: Ação Educativa, *Movimento Creche para Todos é lançado na Câmara Municipal de São Paulo* [Movement Childcare for All is launched at the São Paulo Legislative Chamber], Jun. 18, 2008, available at: <http://www.acaoeducativa.org.br/index.php/component/content/1238?task=view>.

63. BRASIL, Law 10.639, adopted on January 9, 2003, available at: http://www.planalto.gov.br/ccivil_03/leis/2003/L10.639.htm.

64. See: <http://www.worldometers.info/world-population/india-population/>.

65. See: https://www.unfpa.org/sites/default/files/pub-pdf/EN-SWOP14-Report_FINAL-web.pdf.

66. See: <http://www.firstpost.com/india/latest-census-data-shows-youth-surge-nearly-41-of-indias-population-is-below-the-age-of-20-2581730.html>.

67. World Bank data, available at <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

68. Article 37 of the Indian Constitution states that while Directive Principles are “fundamental to the governance of the country,” they “shall not be enforced in any court.”

69. Arun K. Thiruvengadam, “Revisiting the Role of the Judiciary in Plural Societies (1987)” in Khilnani, Raghavan and Thiruvengadam eds. *Comparative Constitutionalism in South Asia* (2013), p. 350.

70. Nick Robinson, “A Quantitative Analysis of the Indian Supreme Court’s Workload,” *Journal of Empirical Legal Studies*, Vol. 10, Issue 3, p. 570–601, September 2013.

71. Varun Gauri, “Public Interest Litigation in India: Overreaching or Underachieving?” World Bank Policy Research Working Paper Series, No. WPS 5109, November 1, 2009.

72. Sripathi and Thiruvengadam, 2004. "Constitutional Amendment making Right to Education a Fundamental Right," *International Journal of Constitutional Law*, 2004 pp. 148–158).
73. (1992) 3 SCC 666.
74. (1993) 1 SCC 645.
75. Some of the activists involved in this movement believe that while there were debates and discussion on making the right to education a fundamental right, the *Unnikrishnan* judgment was a catalyst that brought together many civil society groups and mobilized them to seek the constitutional amendment. [Interview with Mr. Ambarish Rai, RTE Forum]. There is, however, debate around the role of the *Unnikrishnan* judgment as opposed to other factors in providing momentum for the right to education to be codified as a fundamental right.
76. Sripathi and Thiruvengadam, 2004. "Constitutional Amendment making Right to Education a Fundamental Right," *International Journal of Constitutional Law*, 2004, pp. 148–158.
77. Interview with Niranjana Aradhya, Centre for Child and the Law.
78. Report by the RTE Forum, 2015 Status of Implementation of the Right of Children to Free and Compulsory Education Act, 2009: Year 5: 2014–2015. The Report of the RTE Forum is based on a sample study of data collected from 10 Indian states in different parts of the country, spanning about 500 schools.
79. "Stuti Narain Kacker Appointed NCPCR Chairperson," *Economics Times*, September 23, 2015, available at: http://articles.economictimes.indiatimes.com/2015-09-23/news/66822767_1_child-rights-child-development-ministry-central-adoption-resource-authority.
80. See: <http://indiatogether.org/cag-reports-for-tn-schools-education>.
81. United Nations in India. 2014. "Global Education First Initiative" <http://in.one.un.org/task-teams/global-education-first-initiative>.
82. For example, while official data says that 96% have drinking water facilities, a study conducted by MV Foundation and Joint Action for Water in 2012 found that only 40% of schools in the city of Hyderabad had useable drinking water facilities.
83. Fourth Annual Report: The Status of Inclusive Education of Children with Disabilities under the Right to Education Act 2009 (2014–15), p. 14, available at http://www.eenet.org.uk/resources/docs/right%20to%20education_in.pdf.
84. Fourth Annual Report: The Status of Inclusive Education of Children with Disabilities under the Right to Education Act 2009 (2014–15), p. 16, available at http://www.eenet.org.uk/resources/docs/right%20to%20education_in.pdf.
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86. MHRD (Ministry of Human Resources Development) Bureau of Planning, Monitoring, Statistics. 2014. "Education Statistics at a Glance." Available at http://mhrd.gov.in/sites/upload_files/mhrd/files/statistics/EAG2014.pdf.
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88. NCAER (National Council for Applied Economic Research), 2011-12. "Indian Human Development Survey—II," available at <http://www.icpsr.umich.edu/icpsrweb/DSDR/studies/36151>.
89. Desai, S., Dubey, A., Vanneman, R., & Banerji, R. 2009, "Private Schooling in India: A New Educational Landscape," India Human Development Survey, available at http://www.ihds.umd.edu/IHDS_papers/private%20schooling%20ipf%202009.pdf.
90. Interview with Archana Mehendale, Tata Institute for Social Science Research.
91. (2012) 6 SCC 1; *P.A. Inamdar v. State of Maharashtra*, (2005) 6 SCC 537.
92. The Indian Constitution guarantees special protections for ethnic and religious minority communities, including the right to conserve their language, script, or culture (Article 29) and the right to "establish and administer educational institutions of their choice."
93. (2014) 8 SCC 1.
94. S. Perapaddan, Bindu. 2012. "Legal Helplines to Facilitate Admission of Poor Children" January 3, available at <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/legal-helplines-to-facilitate-admission-of-poor-children/article2770202>.
95. See, for e.g., *Social Jurist v. Govt of NCT of Delhi*, AIR 2013 Delhi 52; where the Delhi High Court held that Section 13 of the RTE Act that did not permit screening procedures for admission would be rendered meaningless if it did not apply to admissions to the nursery classes of private schools. See also, *Social Jurist v. Union of India & Ors.*, (2007) 95 DRJ 222; *Social Jurist v. NCT of Delhi*, decided on 19.02.2013, AIR 2013 Delhi 52.
96. *Delhi Abhivak Mahasangh v. Union of India & Ors.*, AIR 1999 Delhi 124; *Delhi Abhivak Mahasangh v. Union of India & Ors.* ILR(2011)Supp.(4) Delhi 247.
97. Tamil Nadu (Regulation of Fees) Act, 2009.
98. (2009) 6 SCC 398.
99. *Environment and Consumer Protection Foundation v. Delhi Administration and Ors.*, AIR 2013 SC 1111.
100. NUEPA (National University of Educational Planning and Administration), 2015. "School Education in India: U-DISE 2014-15". DISE, available at <http://www.dise.in/Downloads/Publications/Documents/U-DISE-SchoolEducationInIndia-2014-15.pdf>.
101. *Registrar (Judicial) of High Court of Karnataka v. State of Karnataka & Ors.*, W.P. 15768 of 2013 (case ongoing)
102. "Glitches that Dog RTE Implementation," *The Hindu*, March 31, 2013.
103. *National Coalition for Education v. Union of India & Ors.*, WP (C) No. 267 of 2014.
104. See: https://en.wikipedia.org/wiki/Demographics_of_South_Africa.
105. See: https://en.wikipedia.org/wiki/Demographics_of_South_Africa.
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108. S29 of the South African Constitution 1996.
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111. *Biowatch v. Registrar Genetic Resources (Centre for Child Law & Others as Amici Curiae)*, 2009 (6) SA 232 (CC).
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113. Budlender, S., Marcus, G., and Ferreira, N. *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (2014) 6.
114. Madlingozi, T. “Post-Apartheid Social Movements and the Quest for the Elusive ‘New’ South Africa,” (2007) 34(1) *Journal of Law and Society*, 77–98.
115. Dugard, J., Madlingozi, T., and Tissington, K. “Rights-compromised or rights-savvy? The use of rights-based strategies to advance socio economic struggles by Abahlali base Mjondolo, the South African shack-dwellers movement,” in Alviar Garcia, H., Klare, K., and Williams, L.A. (eds) *Social and economic rights in theory and practice: Critical inquiries* (2015).
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119. Berger, J. (2003), *Columbia Law Review* 614 at 625; Woolman and Fleisch *The Constitution in the Classroom*, p. 127.
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121. These figures are derived from G Bloch, *The toxic mix*, at 59. He says that “a small band of at most 20% produces the great majority of graduates and success. About 10% or so are the formerly white or model-C schools, and another 10% made up of well performing black schools.”
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123. 1993 Statistics for Living Standards and Development Household Survey, available at <http://web.worldbank.org/archive/website00002/WEB/ZA94DO-2.HTM#top>.
124. Sparks, A. *The Mind of South Africa* (1990), p. 193.
125. Jansen, J. and Taylor, N. *Educational Change in South Africa 1994–2003: Case Studies in Large-Scale Education Reform* (Country Studies, October 2003).

126. Bloch, G. *The Toxic Mix* (2009).
127. For a full list of the issues raised, see Budlender, S., Gilbert Marcus SC, Ferreira, N. *Public Interest Litigation and Social Change in South Africa; Strategies, Tactics and Lessons*, (October 2014), p. 78.
128. Spaul, N., *South African Education; unequal, inefficient and underperforming*, (Presented at UNISA seminar on July 12, 2012), available at: <http://www.unisa.ac.za/cedu/news/index.php/2012/07/cedu-microwave-presentation-south-african-education-unequal-inefficient-and-underperforming/>.
129. See Jansen, Jonathan and Taylor, Nick, “*Educational Change in South Africa 1994—2003: Case Studies in Large-Scale Education Reform* (Country Studies, October 2003), p. 15. They discuss how fiscal measures in 1994 were intended to achieve the goal of equity in education. The mechanisms to achieve this included:
- Increasing overall education expenditure
 - Weighted funding plans which privileged poor provinces
 - Special funding programs such as nutrition and transport
 - Legislation (contained in South African Schools Act) to exempt poor parents from school fees
 - Pro-poor funding of schools placed on a resource targeting list (called the “Norms and Standards for School Funding”)
 - Reviews of alternatives for reducing the indirect costs of schooling.
130. Minister of Basic Education Budget Speech (2016), available at: www.education.gov.za.
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132. *Ibid.*
133. For contemporary debates about public versus private schooling in South Africa, see Salim Vally and Enver Motala, “Privatisation of schools versus the public good,” available at <http://mg.co.za/article/2013-10-01-privatisation-vs-the-public-good>; Ann Bernstein and Jane Hofmeyr, “Myths and facts about low fee schools,” available at <http://mg.co.za/article/2015-05-28-myths-and-facts-about-low-fee-schools>.
134. Studies in Poverty and Inequality Institute, *Realising the Right to a Basic Education in South Africa* (2015), p. 26.
135. 2011 (5) SA 87 (WCC).
136. South African Alternative Report Coalition, “Alternative report to the UN Committee on the Rights of the Child in response to South Africa’s Combined 2nd, 3rd, and 4th Periodic Country Report on the UN Convention on the Rights of the Child,” para 274.
137. Van den Bergh, S. et al., *The Impact of the Introduction of Grade R on Learning Outcomes*.
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140. The case has its supporters and its critics. See P Lenta ‘Religious and Cultural Accommodations to School Uniform Regulations’ (2008) 1 *Constitutional Court Review* 259; O. Ampofo-Anti and

M. Bishop 'On the limits of cultural accommodation: *KwaZulu-Natal MEC for Education v. Pillay*' 2015 *Acta Juridica* 456

141. 2014 (2) SA 228 (CC).

142. (2013) 6 SA 582 (CC).

143. 2011 (8) BCLR 761 (CC)

144. Abdoll, C and Berberton, C, *Mud to bricks: A review of school infrastructure spending and delivery*, Centre for Child Law, Pretoria University Law Press, 2014, p. 1.

145. *Centre for Child Law v. Government of the Eastern Cape Province* Eastern Cape High Court, Bhisho, case no. 504/10.

146. Interview with Sarah Sephton, December 1, 2015.

147. The results of this audit were reported by the former Superintendent-General of the Eastern Cape Department of Education in answering papers in the matter *Save our Schools and Communities and Others v. President of the Republic of South Africa and Four Others* case no 50/2012 (Bhisho High Court).

148. (2014) 2 All SA 339 (ECM).

149. *Section 27 v. Minister of Education* 2013 (3) SA 40 (GNP).

150. 2013 (3) SA 183 (ECG).

151. *Linkside and Others v. Minister of Basic Education and Others*, [2014] ZAECGHC 111 (Dec. 17, 2014) (Linkside I).

152. *Linkside and Others v. Minister of Basic Education and Others*, [2015] ZAECGHC 36 (January 26, 2015) (Linkside II).

153. *Centre for Child Law and Others v. Minister for Education and Others*, 2013 (3) SA 183 (ECG); Linkside I; Linkside II.

154. *Madzodzo and Others v. Minister of Basic Education and Others*, [2014] 2 All SA 339 (ECM).

155. *Section 27 v. Minister of Education* 2013 (3) SA 40 (GNP); *Basic Education for All v. Minister of Basic Education*, [2014] 3 All SA 56 (GNP).

156. *Tripartite Steering Committee and Another v. Minister of Basic Education and Others* (1830/2015) [2015] 3 All SA 718 (ECG).

157. SERI Report 57.

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159. BRAZIL, *Tribunal de Justiça do Estado de São Paulo* [Court of Appeals of the State of São Paulo or TJ/SP], *Apelação* [Appeal] n° 0150735-64.2008.8.26.0002, *Movimento Creche para Todos* [Movement Childcare for All] vs. *the Municipality of São Paulo*. Full decision can be found here: http://www.acaoeducativa.org/images/stories/pdfs/decisao_tjsp_educacao_infantil.pdf. For an accessible account of the case in English, see Oscar Vikhena Viera's article on the Oxford Human Hub at <http://ohrh.law.ox.ac.uk/judicial-experimentation-and-policy-a-new-approach-to-the-right-to-education-in-brazil>.

160. Since the *Movimento Creche para Todos* is an informal group of different NGOs and grass-roots organizations, launched publicly in 2008 (although conversations among its members date before it), formally the case here described had as appellant the individual member organizations, not the *Movimento* itself, including: Ação Educativa Assessoria Pesquisa e Informação, Instituto de Cidadania Padre Josimo Tavares, Casa dos Meninos, Centro de Direitos Humanos e Educação Popular de Campo Limpo—CDHEP e Associação Internacional Interesses à Humanidade Jd. Emílio Carlos e Irene. For more on the formation of the *Movimento Creche para Todos*, see: Ação Educativa, *Movimento Creche para Todos é lançado na Câmara Municipal de São Paulo* [Movement Childcare for All is launched at the São Paulo Legislative Chamber], Jun. 18, 2008, available at: <http://www.acaoeducativa.org.br/index.php/component/content/1238?task=view>.

161. *O Globo*, “Avanço na educação infantil está ameaçado por crise econômica e ajuste fiscal,” available at: <http://oglobo.globo.com/economia/avanco-na-educacao-infantil-esta-ameacado-por-crise-economica-ajuste-fiscal-18049456>.

162. Consultation with Brazilian experts, São Paulo, October 20, 2016.

163. Valter Silvério, *Desafios da implementação da lei 10.639/03: um estudo de caso de municípios do Estado de São Paulo*, forthcoming, on file with the author. Also, interview with Valter Silvério, São Carlos Federal University (UFSCAr/NEAB), December 8, 2015.

164. *Registrar (Judicial) of High Court of Karnataka v. State of Karnataka and Others*, WP 15768 (case ongoing).

165. Interview with Mr. Maruti, Senior Programme Officer, Sarva Shiksha Abhiyan, Karnataka, October 29, 2015.

166. Interview with Umakanth Periodi, Azim Premji Foundation, Gulbarga, Karnataka, December 19, 2015.

167. *Centre for Child Law v. Government of the Eastern Cape Province* Eastern Cape High Court, Bhisho, case no. 504/10.

168. Department of Basic Education ASIDI website, which is regularly updated <http://www.education.gov.za/Home/ASIDI/tabid/613/Default.aspx>.

169. Interviewed on Aug. 6, 2015 and Aug. 11, 2015.

170. *Madzodzo and Others v. Minister of Basic Education and Others* (2014) 2 All SA 339 (ECM).

171. Interviewed November 11, 2015.

172. Interviewed November 11, 2015.

173. *Linkside I* [2014] ZAECGHC 111 (17 December 2014); *Linkside II* [2015] ZAECGHC 36 (January 26, 2015).

174. Prior to *Linkside* there had been a litigation effort to deal with post provisioning (*Centre for Child Law and Others v. Minister for Education and Others* 2013 (3) SA 183 (ECG) which resulted in a good judgment but did not deliver significant concrete results. The *Linkside* cases built on this.

175. Interview with Sarah Sephton, December 1, 2015.

176. 14.127, adopted on January 5, 2006.

177. Consultation with Brazilian Experts, São Paulo, October 20, 2015.

178. A detailed account of the access to information litigation can be found at: Ester Rizzi and Salomão Barros Ximenes, “Litigância Estratégica Para a Promoção de Políticas Públicas: As Ações Em Defesa Do Direito à Educação Infantil Em São Paulo [Strategic Litigation to Promote Public Policies: The Actions in Defense of the Right to Basic Education in São Paulo],” in *Justiça E Direitos Humanos: Experiências de Assessoria Jurídica Popular.*, ed. Fernando Prioste Darci Frigo and Antônio Sérgio Escrivão Filho (Curitiba: Terra de Direitos, 2010), 114–118.

179. Consultation with Brazilian Experts, São Paulo, October 20, 2015.

180. The ASIDI results are available at <http://www.education.gov.za/Home/ASIDI/tabid/613/Default.aspx>.

181. The case built on the prior decisions of the *Supremo Tribunal Federal* (STF) in cases 410.715 and 436.996, where the court found that state inaction was a constitutional violation, and that concerns as to costs did not shield the state from fulfilling its obligation to provide access to basic education. For more information on the STF jurisprudence regarding the right to education, see, e.g.: Roberto Del Conte Viecelli, “A Efetividade Do Direito à Educação E a Justiciabilidade Das Políticas Públicas Na Jurisprudência Do STF: 1988-2011 [The Right to Education Enforcement and the Justiciability of the Public Policies in the Jurisprudence of the STF (1988–2011),” *Revista de Direito Educacional* 3, no. 5 (2012): 211–43.

182. Ester Rizzi and Salomão Barros Ximenes, “Litígio Estratégico Para a Mudança Do Padrão Decisório Em Direitos Sociais: Ações Coletivas Sobre Educação Infantil Em São Paulo [Strategic Litigation to Change the Judicial Decision-Making Standard on Social Rights: Collective Action on Child Education I],” in *ANDHEP—Políticas Públicas Para a Segurança Pública E Direitos Humanos*, 2014.

183. *Ibid.*

184. Government of Karnataka Notification ED 38 MAHITI 2013, dated 15.03.2014 introduced an amendment to the Karnataka Right of Children to Free and Compulsory Education Rules, 2012, to introduce the concept and role of attendance authorities through the insertion of Rules 6A, 6B, 6C and 6D.

185. Interview with Mr. Maruti, Senior Programme Officer, Sarva Shiksha Abhiyan, Karnataka, October 29, 2015.

186. Interview with Mr. Mohamed Mohsin, Former Commissioner for Public Instructions, Karnataka, October 29, 2015.

187. Not reported as there was no judgment.

188. Interviewed on November 1, 2015.

189. Case numbers 410.715 and 436.996.

190. Interviewed on October 20, 2015.

191. See for example, *Priyanka Rajkumar v. Bharatiya Vidya Bhavan and Ors*, W.P.No.13330/2012; decided on July 11, 2012 (Madras High Court). In this case, however, the court held that the petitioners’ salary was over Rs. 3 lakhs per annum and they were, therefore, not eligible for the admissions pursuant to the RTE Act. See, also, *St Johns Senior Secondary v. Union of India*, W.P. No.7367/2012; decided on May 15, 2012 (Madhya Pradesh High Court).

192. *Social Jurist v. NCT of Delhi* W.P. No. 4618/2011, decided on September 5, 2012.
193. *Kitty Sanil v. State of Kerala*, W.P. No. 13198/2015, decided on May 25, 2015.
194. (2011) 8 BCLR 761 (CC).
195. Para 58.
196. Para 43.
197. 2013 (3) SA 183 (ECG).
198. (2014) 2 All SA 339 (ECM).
199. *Madzozo v. Minister of Education*, para 20.
200. Ester Rizzi and Salomão Barros Ximenes, “Litígio Estratégico Para a Mudança Do Padrão Decisório Em Direitos Sociais: Ações Coletivas Sobre Educação Infantil Em São Paulo [Strategic Litigation to Change the Judicial Decision-Making Standard on Social Rights: Collective Action on Child Education I,” in *ANDHEP—Políticas Públicas Para a Segurança Pública E Direitos Humanos*, 2014.
201. Luiza Andrade Corrêa, “A Judicialização Da Política Pública de Educação Infantil No Tribunal de Justiça de São Paulo [The Judicialization of the Public Policy for Early Childhood Education in São Paulo’s Court of Justice]” (University of São Paulo, 2014), 73.
202. Rizzi and Ximenes, “Litígio Estratégico Para a Mudança Do Padrão Decisório Em Direitos Sociais: Ações Coletivas Sobre Educação Infantil Em São Paulo [Strategic Litigation to Change the Judicial Decision-Making Standard on Social Rights: Collective Action on Child Education I.”
203. *Ibid.*
204. The risk analysis was conducted in a 56-page legal opinion written in 2012 by the NGO Ação Educativa and the private law firm Rubens Naves, Santos Jr. Advogados. Both institutions composed what was soon thereafter called the *Grupo de Trabalho Interinstitucional sobre Educação Infantil* (GTIEI, the Inter-Institutional Working Group on Early Childhood Education) an informal coalition launched in 2012 which comprises state institutions such as Defensoria Pública and Ministério Público as well as the civil society organization Rede Nossa São Paulo.
205. Juneja, Nalini, “India’s New Mandate Against Economic Apartheid in Schools,” CICE Hiroshima University, *Journal of International Cooperation in Education*, Vol. 16, No. 2 (2014) pp. 55–70, p. 65.
206. Juneja, Nalini, “India’s New Mandate Against Economic Apartheid in Schools,” CICE Hiroshima University, *Journal of International Cooperation in Education*, Vol. 16, No. 2 (2014) pp. 55–70, p. 65.
207. Interview with Archana Mehendale, Tata Institute of Social Science Research.
208. Equal Education was established in 2008 and the Equal Education Law Centre in 2012.
209. LRC *Fighting to learn: A legal resource for realising the right to education* (2015).
210. Interview with João Paulo Faustinoni e Silva, from the special group on right to education (*Grupo de Atuação Especial de Educação—GEDUC*), of the Ministério Público, September 21. For more information, see also: Corrêa, “A Judicialização Da Política Pública de Educação Infantil No

Tribunal de Justiça de São Paulo [The Judicialization of the Public Policy for Early Childhood Education in São Paulo's Court of Justice],” 71–72.

211. Interview with Luiz Rascovski of the *Defensoria Pública*, December 20, 2015.

212. Interview with João Paulo Faustini e Silva, from the special group on right to education (*Grupo de Atuação Especial de Educação—GEDUC*), of the *Ministério Público*, September 21, 2015.

213. Interview with Mr. Mohamed Mohsin, Former Commissioner for Public Instructions Karnataka, October 29, 2015.

214. Interview with Salomão Ximenes, Professor at UFABC and former head of litigation at NGO Ação Educativa, Consultation with Brazilian Experts, October 20, 2015.

215. Interview with Marcos Rogério de Souza, Chief of Staff of the Municipal Secretariat for Education in São Paulo City and Luiz Guilherme da Cunha Mello, head of legal team of the same municipal body, December 7, 2015.

216. Interview with Tim Gordon, Chairperson of the Governing Body Foundation, November 28, 2015.

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218. Interview with Paulo Saldaña, journalist focused on education at *Estadão* newspaper, January 5, 2016.

219. Ann Skelton, “Leveraging funds for school infrastructure: The South African Mud Schools Case Study,” (2014) *International Journal of Educational Development*, pp. 59–63.

220. Interview with Marcos Rogério de Souza, Chief of Staff of the Municipal Secretariat for Education in São Paulo City and Luiz Guilherme da Cunha Mello, head of legal team of the same municipal body, December 7, 2015.

221. See São Paulo, Emenda 30 à Lei Orgânica do Município [30th Amendment to the São Paulo City By-laws), available at: http://www2.camara.sp.gov.br/dce/EMENDA_Nº30_A_LEI_ORGÂNICA_DO_MUNICÍPIO_DE_SÃO_PAULO.pdf.

222. Interview with Mr. Ambarish Rai, Convenor, RTE Forum, Karnataka, October 30, 2015.

223. Carmen Abdoll and Conrad Barberton *Mud to bricks: A review of school infrastructure spending and delivery* (2014) commissioned by the Centre for Child Law.

224. “Mud schools report dismissed as misleading,” available at <http://www.bizcommunity.com/Article/196/524/117932.html>.

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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.



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