

## CONFERENCE REPORT

# The Impacts of Strategic Litigation on Equal Access to Quality Education

NEW DELHI, 16 SEPTEMBER 2015

On 16 September, leading experts met in New Delhi, India, to discuss the challenges and impacts of strategic litigation on the right to quality basic education. The objective was to enrich a study co-sponsored by the Open Society Justice Initiative and the Open Society Foundation's Education Support Program, comparing experiences in Brazil, India and South Africa. The research is led by Professor Ann Skelton, the head of the Centre for Child Law the University of Pretoria and UN Chair: Education Law in Africa.

### Introduction

1. Brazil, India and South Africa are similar in that they are highly populated, largely poor countries where some fundamental rights are still being enshrined in law and provided progressively. There has been much successful strategic litigation in Brazil and South Africa against discrimination in education, for improved educational infrastructure and for minimum budgetary allocations per student. In India, litigation has focused largely on non-discrimination and the realization of the fundamental right to education, with little strategic impact, and even then the burden falling on the parents, rather than the state.
2. The right to *quality* education in all three countries is notably under-litigated. Views ranged from all of the cases brought so far being about quality, to none.
3. The right to quality education, arguably, has not yet been litigated strategically at all at

national level in India. This appears an opportunity for join action by Indian civil society.

## Introduction

4. The [Open Society Justice Initiative](#) and the [Open Society Foundations Education Support Program](#) co-convened a meeting of some 35 litigators, activists, policy analysts and legal scholars from India, South Africa, Brazil and elsewhere to discuss ways to enhance the impact of strategic litigation that seeks to achieve equal access to quality education. The participants examined comparative examples, considered how best to understand impacts, and how to maximize the value of the impact study.
5. This consultation forms the second of a four-part inquiry by the Justice Initiative to look at the impacts of human rights litigation against police station torture, segregated education, land rights, and access to quality education, respectively. The project reviews litigation in Argentina, Brazil, the Czech Republic, Greece, Hungary, India, Kenya, South Africa, and Turkey, as well as some examples from Europe and the United States, regional human rights systems and UN treaty bodies. Researchers in each country assess whether and, if so, how litigation has brought about social change by examining the impacts of the campaign on judges, the media, the clients, political attitudes, and on the broader movement, and on the rule of law, and whether the judgment has influenced legislation, jurisprudence, practice and/or attitudes.
6. In the field of education, strategic litigation has focused on ensuring that the financially disadvantaged and vulnerable have access to education, and on the application of proper norms and standards for the physical infrastructure of schools, which inevitably improves the quality of teaching that learners receive when they have books, stationery, and desks. There has been less litigation that focuses explicitly on the outcomes. There was much debate about what constitutes “quality” education and why it has been under-litigated.

## Comparative Perspectives

7. Innovation in public interest litigation is often inspired by comparative perspectives, and by looking at tactics that have worked elsewhere. Lessons can be learnt from different struggles for equal access to quality education around the world.
8. The three countries share some similarities, in that they share relatively strong constitutional provisions for the fundamental right to education and for non-discrimination. But where social and political demands for quality education are reasonably well developed in Brazil and well developed in South Africa, they are restricted to an elite civic movement and generally the right is under-litigated.
9. In **Brazil**, local municipalities have the primary obligation to provide education. The 1988 constitution provides for the right to education as a fundamental right and as an individual right. Following civil society activism, new laws were introduced that encouraged poor families to send their children to school and which required the teaching of Afro-Brazilian culture. Public interest litigation is conducted by NGOs, but also by the distinctly Brazilian *Ministerio Público*, a governmental entity which brings cases in the public interest, such as related to the right to quality education, and the *Defensoria Pública*.
10. Another peculiarity of the Brazilian context is that there is an unusually strong legal basis, and minimum budgetary standards, for the realization of the right to education.
11. Strategic litigation has resulted in several types of innovations and advances. Part relates to improved infrastructure. In the *Access to Basic Education in São Paulo* case,

for example, NGOs brought a challenge to the failure to have sufficient places in schools, obtaining an order from the court that the municipality draft a plan within six months and to provide the spaces within two years. Litigation was used to ensure a measure of *quality* in that the legal requirement to teach Afro-Brazilian history was implemented effectively.

12. Many NGOs are based in the urban centres, whereas many of the problems in education are faced by the rural poor.
13. Brazilian courts have also played a coordinating function. The legally mandated monitoring mechanism spawned by strategic litigation brings together government, experts, educators and other stakeholders to resolve problems and jointly develop education policies. This function results in the decreased use of the courts for further remedies. The research has revealed that it is precisely such multi-stakeholder platforms that can help address the need for interdisciplinary enrichment necessary for quality education. Sometimes, there is a will to implement, but not the complex skills necessary to craft quality curricula.
14. Strategic litigation has also had an impact on the judiciary, encouraging them to develop a role to ensure the implementation of their decisions through monitoring and sensitizing judges to that role.
15. In **South Africa**, the government has faced huge, deep seated inequalities of segregation, where the apartheid government spent five times more on white learners than black learners, leaving immense challenges for the poorest children.
16. The 1996 constitution contains a clear right to education that was immediately realizable. The legal framework required parents who could pay to make a contribution, but ensured no fees for poor children. Perhaps surprisingly, given the scale of the education crisis, non-governmental organizations were slow to file strategic cases to achieve the right. The early cases – filed about 20 years after the adoption of the constitution – focused on governance issues for particular communities, such as Afrikaaners or Christian schools. language, religion, and cultural accommodation, where middle-class schools were attempting to retain their independence, but were not brought as part of a social movement. Cases have also been brought by the governing bodies of schools on issues such as admissions policies, where the courts have adopted a notably legalistic approach, emphasizing procedural correctness and leaving the government to deal with questions such as class sizes.
17. More recently, there has been a series of cases on behalf of a broader spectrum of South African society -- poor children – as part of a well-organized social movement called Equal Education. These cases have focused on achieving “acceptable environments” in educational settings, principally physical infrastructure such as proper buildings, working toilets, and school furniture. In the *Mud Schools* case, litigation highlighted the failure of the authorities to build sufficient new schools, and required a detailed plan to do so, which is being slowly implemented. In the *Norms and Standards* case, a vigorous social movement allied with litigation forced the Minister for Education to publish norms and standards for the physical infrastructure of schools around the country. Litigation was also used to successfully challenge the failure to deliver text books on time, without which effective education was impossible. There has also been litigation to require the authorities to ensure that adequate numbers of teachers are assigned to vacant posts.
18. Civil society has played a remarkably active role in monitoring the implementation of judgments, even in complicated situations such as the delivery of textbooks or furniture. Notable is the high levels of engagement of the affected constituents, the children themselves, who have protested and tweeted photos of their school toilets. South Africa now has real strategic litigation that is part of a social movement. Some issues have been tackled, and others such as equal access need to be further developed.

19. In **Europe**, legal protections and political guidelines from both the Council of Europe and the European Union provide for access to education and set some standards for the quality of education. But surprisingly few of the cases brought are of a strategic nature or have been brought in a coordinated manner. Many are instead individual cases, with individual beneficiaries. Moreover, some public-interest litigation has exposed the need to manufacture social movements around them, as they do not always have strong social backing.
20. The European Court of Human Rights can consider claims from nearly 50 countries, following domestic litigation, with political mechanisms for implementation of the decisions. But it is also overwhelmed, with a backlog of some 100,000 cases, risking justice being denied by being delayed. Litigation has led to decisions on language rights, access to schools for the minorities such as IDPs and the disabled, questions on the curriculum, home schooling, and prison education. Civil society has brought many cases on discrimination.
21. In Europe, some strategic litigation has challenged discrimination against Roma children. In some countries Roma do not attend schools at all, and in others they are segregated into separate schools, or are streamed through psychological tests and assigned to schools for children with mild mental disabilities. In the last 15 years, there have been more than 30 cases filed to the European court from seven countries, with six cases on access to education, and another 25 cases by domestic courts or administrative bodies. The cases have been complemented by standards from the European Union and the Council of Europe. In 1995 there was very little protection against racial discrimination. That has changed, with strong legal protections, but the situation of Roma has yet to improve markedly.
22. Since the 1930s strategic litigation has challenged discrimination in access to education in **the United States**, as well. Here, quality and access are related, as desegregation leads to better results and better quality of education for all children. A concerted legal campaign by the NAACP obtained legal decisions against the segregation of schools, leading to the 1954 decision of *Brown v. Board of Education*. Much has been written on the impact of this decision, and its legacy is highly contested. There was initially huge opposition to the judgment, which was only broken in the 1960s. By the late 1980s, 44% of black students attended majority white schools, with improved educational standards. Since then, increased resistance to the decision has led to increased segregation of black and Latino students, with levels of integration now back to the levels of the 1960s. This litigation has often illustrated the close relationship between access and quality.
23. These cases have had impact, however. By naming the problem as discrimination, the decisions have made it impossible for governments to continue a policy of denial, and have reinforced reforms that were underway. However, a supra-national tribunal has less authority than a national apex court such as the US Supreme Court; Strasbourg decisions simply do not have the same draw. The litigation in the United States followed decades of social activism, whereas the Roma movement is comparatively young. Courts in many civil law countries are not able to apply remedies beyond the individual claimant, as they don't have systems for group claims, or lack broad remedial powers.

## Discussion

24. In education cases, the implementation needed is sometimes overwhelming. Litigation can be used to get access to government plans and budgets, and to then to ask the courts to review those plans. But while the Brazilian courts were prepared to order the creation of 150,000 student places, the Indian Supreme Court was not prepared to

order the opening of the 100,000 additional schools required, saying that this was too much for a court to order. Thus, it was suggested, a compellingly simple remedy may actually be fueling government recalcitrance, to the detriment of the realization of education rights. Today, only 10% of Indian schools are in compliance with the Right to Education Act. Impact rarely occurs without activism. In South Africa, lawyers have worked closely with activists in litigation for education and HIV treatment, where a dialogue between the groups informed the campaign.

25. Some discussion centered on the question: Where there is not an existing social movement, can lawyers or legal groups create, encourage, or instigate one? Individual cases can lead to mobilization, as they bring attention to the problem. In large scale cases, lawyers will need to organize structures to communicate with their clients, which can also be used for activism. Lawyers have an important role to encourage the clients to organize themselves, and are in a position to catalyze social movements. They are accountable to their clients, and will fail in that duty if they do not do everything to bring about implementation. That may include trying to involve the social movement to be involved (e.g. Section 27 case in South Africa). Some social movements don't find lawyers (e.g. LGBT), and sometimes lawyers can't find social movements (e.g. policing cases), but bring the case anyway in the public interest. There may also be conflicts where the social movement makes demands that the lawyer cannot support (e.g. death penalty for rape cases).
26. Analogies can be drawn from other areas, such as environmental law, where broad remedial orders by courts allow governments to obfuscate, whereas detailed orders have more success. Similarly, the mechanisms by which the court might monitor compliance need to be carefully designed. One participant observed that it would be misguided to critique the paucity of PILS (public-interest litigation cases) in the education sphere in India, because PILs are in a crisis of legitimacy in India across the rights spectrum.
27. Court orders to follow an existing obligation will have more impact than those which create something new. Lawyers when framing cases must be careful to ask for specific remedies that can be enforced. This includes both individual remedies and systemic remedies, which can be divided between urgent needs and longer-term solutions.
28. If the same cases would have a different impact at a different time, depending on the politics, what can lawyers do about that?

## India

29. The rich tradition of PIL has had limited influence in the sphere of education. The right to education was unusual in that it was supposed to be realized within 10 years, although it was not a huge priority for the government. In *Mohini Jain v. State of Karnataka* (1992) and *Unni Krishnan* (1993) the Supreme Court recognized the right to education up to the age of 14, after which it was a qualified right. Both cases concerned higher education, but were not civil society led, although they were used strategically by social movements who were pushing for the codification of the right through a Constitutional Amendment in 2002 and an implementing statute in 2009, dealing with norms and standards and the requirement that private schools take 25% poor students in the first year.
30. The first challenges to the 2009 Act were brought by private schools challenging the 25% requirement. The Supreme Court held that the requirement could not apply to minority schools, both privately and publicly funded. While the cases were strategic for private schools, they did not involve civil society save through third party interventions. These cases had impact in that many more schools now claim to be minority schools, and private schools must comply with the Act.
31. There has been little litigation on norms and standards, although in one case the Supreme Court considered the need to enforce safety standards in schools, although



the daunting scale of implementation has limited the impact. In the Supreme Court ordered that every school in India must implement the norms and standards in the 2009 Act, although there appears to be little energy to insist on full implementation of such a vast task. The High Court seized itself of the problem of poor school attendance in Karnataka State following a newspaper report that more than 150,000 students were out of school. Civil society groups intervened to help define the measures of implementation, with the result that official figures were much improved two years later. The litigation also highlighted the particular problem of the education of children of migrant workers.

## Introduction

32. Civil society education groups have achieved impact without litigation, focusing on redress through the quasi-judicial mechanisms envisaged in the RTE Act 2009. For there to be more litigation, those groups will need to work with the legal community or activist lawyers. People often assume that when the court orders implementation it will happen, but there needs to be an understanding of how bureaucracy works, and in particular the mid-level administrators who actually implement the law. Financing is key and very hard to track.
33. Activists need to understand the role of groups such as private schools who will defend their interests, also through strategic litigation. Should civil society groups develop a strategy to pre-empt these cases, to respond to them, or to intervene strategically so as to limit their impact.
34. There have been other challenges to the application of the RTE Act. In 2009 the Delhi High Court ordered schools to hire special needs teachers to provide support to children with disabilities. It is currently considering a case that reviews the obligation to provide note books, stationery, and school uniforms to students.
35. Children often don't have representation, such as "ghost schools" where there are no teachers. Children are not a political constituency, and school education has few supporters and advocates in the political class. Social movements have not managed to find allies in political parties, or to effectively engage the media, limiting the ability to push the boundaries of public action.

## Developing the Study

36. Is it possible to do a full mapping of the education litigation in India? While it may be possible to do so from the Supreme Court, it would be difficult for the States. The impact study will need to review the scope of litigation in order to assess its impact. Where orders have been passed, the information should be available, but at the District Court this will be difficult. There are also cases at the Central Administrative Court. It may not be necessary to know the entire universe, which would be difficult. There would be a value in knowing what works, so as to demystify public interest litigation, and encourage people to use it more effectively. There is an enormous amount of teacher litigation, which is not necessarily strategic. It would be important to know if there is litigation in the State High Courts which has had a particular impact. It will be difficult to disaggregate the impact from litigation from that produced by other activities. A more complete survey would improve the quality of the litigation and of judicial decision-making. An in-depth study of one area of litigation will have lessons for other areas.
37. Is there something about education litigation that makes it different to other issues? There is a limit to what is justiciable in this field. There has been litigation to set up schools, appoint teachers, train teachers, and provide materials. Some states now test children to gauge their reading levels. Can litigation be used to improve the actual learning of children, and is it right to ask the courts to adjudicate that?

- 
38. Due to its scale, education is complex. But the same applies for social rights, prison rights, and environmental rights, each with particular problems. Education rights groups may need time to engage with litigation. The complexity also provides many opportunities for legal challenge. Perhaps it is the easiest entry point to litigation on ESC rights for those who are skeptical. Education arouses strong opinions, as everyone has a child and has to make a personal decision on their education, which can make it a very political issue, particularly amongst elites.
  39. Education litigation involves children, which makes it more difficult to study, if the victims are to be properly consulted. The size and bureaucracy that supports education is particularly complicated. Other ESC rights involve the reasonableness of plans (e.g. Housing) which makes it more complex. Where you move from litigating infrastructure questions to the quality of the education delivered, teachers will have many different opinions, and the courts are likely to limit their review to whether the policy is reasonable.
  40. What would it take to litigate more cases on whether children can reach their full potential, i.e. the quality of the education? Many infrastructure cases have a huge impact on quality, such as having fully qualified teachers, and textbooks. It might be possible to litigate issues such as the allocation of enhanced budgets to “government schools”, or budget allocations more broadly. A case brought in South Africa argues that the State has failed to provide children with adequate literacy, and to train teachers, and invites the Court to intervene until the quality has improved. There is a risk that this case is too soon, and that the blocks need to be built more cautiously. Quality is more than pure measurement (which is controversial with unions), and so it is important to do the social science research before attempting any of this litigation to inform the strategy.

## Maximizing the Value of the Study

41. The participants expressed the hope that the report will illustrate the scale of the problems relating to education in each country, identify effective remedies, and suggest what litigation can and cannot achieve, compared with other tools. The report might influence decision makers and other stake holders, if there is an advocacy plan to disseminate the findings.
42. The findings of the report will be relevant for people in government, in civil society, and for the community. Consider producing a number of side products to share the learning of the study:
  - *Country reports.* Shorter summaries for each country that can be distributed separately.
  - *Judges Report.* A short version of the report or briefing note for judges that explains the legal basis of such claims in a non-confrontational way.
  - *Activist Report.* A short version of the report or introduction for activists and social movements.
  - *Case Book.* A case book with summaries of key examples of strategic litigation of education cases (i.e. not just the judgment, but why it was strategic).
  - *Case Law Analysis.* Prepare an analysis of education case law, both national and international. Use pro bono law firms or a clinic to support this. Plan to disseminate it.
  - *Maximizing Impact.* Develop a practice note on maximizing impact.
  - *Litigating Education.* Develop a practice note or guide on litigating education cases, and the specific issues that arise, including remedies and monitoring judgments. This might include (a) policy and social science arguments that work, (b) novel legal

arguments and tactics, such as litigating the financing of litigation, (c) advocacy in support of the litigation, at regional, national, and international level, (d) placing the litigation in an activist framework, and (e) engaging the teaching profession and other professionals.

43. Increase the potential audience for the report. Consider enhancing accessibility with a strong website that has graphics and audio-visual illustrations, e.g. of interviews with people involved. It was suggested that it could be valuable to translate the report into other languages.
44. Promote the report and the side products to different people so as to educate, inform, and engage them, including activists, parents and learners, decision makers in government, and teachers. Also consider:
  - *Lawyers.* Country level meetings of lawyers/activists; use the report at existing regional meetings of human rights litigators; at other events on education or litigation.
  - *International Bodies.* Side events of international meetings; individual meetings with international experts.
  - *Academics.* Promote the report to the academic community through blogs and presentations at relevant conference.
45. Contextualize how it works with other tools. Demonstrate the gains that litigation brings in different countries, to inform policy elsewhere. Develop guidance that covers finding and developing cases in education litigation, remedies practice, working with activists and the community [see community lawyering practice note]. More guidance on client support for complex multi-client cases like this. More guidance on litigating budget allocations (“green follows white”).
46. Develop a full picture of the situation in each country, together with an analysis of the experts in the field. Use it to inform a strategy development process to build a comprehensive strategy on education. Build a network of NGOs involved in this work.
47. *India:* follow up with a detailed survey of education litigation in India. Use the report to generate a discussion on the difference between PIL and strategic litigation.
48. Involve Justice Initiative litigators in the study, so as to inform our own litigation. Invite participants to join future meetings and some of the other follow-up activities set out above.

For further information about this Expert Meeting, contact Thiago Amparo ([thiagosamparo@gmail.com](mailto:thiagosamparo@gmail.com)) or Erika Dailey, Senior Research Officer, Open Society Justice Initiative ([Erika.Dailey@opensocietyfoundations.org](mailto:Erika.Dailey@opensocietyfoundations.org)).



---

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.

---