

BACKGROUND PAPER TO THE 2018 WORLD DEVELOPMENT REPORT

# Using Courts to Realize Education Rights

Reflections from India and Indonesia

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## Abstract

This paper examines the role of courts in promoting fulfillment of the right to education in developing countries, focusing on India and Indonesia—two countries that have experienced increased education rights litigation in recent years. It argues that this litigation has been part of broader struggles over education policy, inequality, and the capture of educational institutions by political and bureaucratic forces; and that the extent to which litigation has been used

and led to policy changes has depended significantly on the nature of, and access to, the court system; the presence of support structures for legal mobilization; the ideology of the courts and judges; and the roles and the willingness of litigants to pursue redress. Broadly, litigation has served the interests of the poor and marginalized, though gains have largely come through better access to education while issues of improving quality have been less prominent.

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## **Using Courts to Realize Education Rights: Reflections from India and Indonesia**

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Courts have become increasingly important forums for struggles over socioeconomic rights in developing countries. A wide array of such rights—to health, education, housing, water, and food, among other things—have been the subject of court cases in these countries in which the nature, interpretation, and implementation of the law has been at issue (Gauri and Brinks 2008; Yamin and Gloppen 2011; Hertel 2015). Among socioeconomic rights, the right to education is the most widely recognized in national law, being present in 80 percent of the world’s constitutions (Jung and others 2014, p. 1053). Accordingly, there has been a significant increase in education rights litigation, particularly in many parts of the developing world, including Brazil, Colombia, India, Indonesia, and South Africa (Hoffmann and Bentes 2008; Shankar and Mehta 2008; Susanti 2008; Byrne 2013; Rosser 2015a; Skelton 2017).<sup>2</sup>

For proponents of rights-based approaches to development, this increase in education rights litigation is a positive development. Litigation, they have argued, can be an effective way for ordinary citizens to promote the fulfillment of human rights because it enables them to hold governments accountable for policies or bureaucratic decisions that breach their rights (Khan 2009; Khan and Petrasek 2014; Legal Resources Centre 2015; Skelton 2017).

Yet several legal scholars have long questioned the ability of rights-based litigation to realize rights, particularly for poor people (de Souza Santos 2002; Hunt 1993; McCann 1994). Many constraints exist for litigants: the ability to build cases, get legal representation, receive redress that is enforced, and to have a broader impact on the claims of others by setting precedent. In addition, constraints such as the ideological biases of legal institutions, restrictions on legal standing, conservative judges, and a lack of legal aid make going to court a strategy with remote chances of success. Overall, laws are more likely to preserve the status quo and benefit the better off. As Morton Horowitz (quoted in Brinks and Gauri 2014, p. 375) put it, the rule of law “creates formal equality...but it promotes substantive inequality...By promoting procedural justice it enables the shrewd, the calculating and the wealthy to manipulate its forms to their advantage.”

Such problems are particularly acute in relation to socioeconomic rights because, in contrast to civil and political rights, they have direct implications for the allocation of resources within society. For instance, a number of recent studies of health rights litigation in Latin America have found that such litigation has had regressive effects in distributional terms, particularly when it has taken the form of individualized claims for access to expensive medication or health services at public expense (see, for instance, Ferraz 2009, 2011; Bergallo 2011; Young and Lemaitre 2013; Flood and Gross 2014). This is because middle-class individuals—sometimes with the backing of pharmaceutical companies seeking to shift costs from individual clients onto the public purse—have been better able than poor people to engage in such litigation, given the costs involved. This in turn has skewed public health spending in these countries in favor of the middle class and led to broader fiscal problems that have constrained government capacity to fund programs in other sectors that do target the poor. Such findings indicate that the effects of rights-based litigation depend very much on who uses these rights, through what mechanisms, and for what purposes.

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<sup>2</sup>Talbot and Sacco (2013: 50) argue that it has been ‘under-litigated’ in Africa. But even there, there have been a number of important cases (Langford and Brown 2013).

The purpose of this paper is to explore the trend towards the judicialization of the right to education, review the evidence on its drivers, dynamics, and effects, and assess the implications for efforts to promote better education outcomes in developing countries. We ask:

- Who has litigated for education rights, through what legal mechanisms, and to what ends?
- What kinds of education issues have they raised through litigation?
- What barriers have they faced in conducting litigation, and how have these been overcome?
- And most important, what has been the impact of education rights litigation on citizens' access to and the quality of education?

With regards to the latter, we further ask: Has this litigation primarily served middle-class interests because they have easier access to the court system due to the costs involved? Or has it primarily helped the poor and marginalized? What factors have influenced the extent to which the poor and marginalized have benefited from education rights litigation? Finally, we ask, what are the implications of the answers to the questions above for efforts to promote improved education outcomes in developing countries—especially in terms of learning? In other words, can changes to the legal landscape make the right to education more effective by enabling poor people to hold states accountable for their rights?

To address these questions, we examine the experiences of two developing countries that have experienced an increase in education rights litigation in recent years, India and Indonesia.<sup>3</sup> Education rights litigation in both countries has been part of broader political and social struggles over the nature of education policy and its implementation, not simply an attempt on the part of individual justice-seekers to seek redress for breaches of their individual rights. Specifically, it has been a useful way for ordinary citizens and their allies in the NGO movement to contest neoliberal education policy reforms, challenge the capture of educational institutions by predatory political, bureaucratic, and market forces, hold governments accountable for rights-based commitments, and in general promote a more progressive vision of education. In Indonesia education rights litigation has taken an explicitly policy-related form—for instance, requests for superior courts to conduct judicial reviews of laws or regulations—reflecting the absence of effective legal mechanisms for citizens to make individualized claims for education services at public expense. But even where litigation has ostensibly focused on individualized claims, as has typically been the case in India, it has often aimed at precipitating policy change.

In both cases this policy-oriented litigation has principally served the interests of the poor and marginalized rather than the middle class (even though some sections of the middle class have been centrally involved in much of the litigation) to the extent that it has protected or enhanced the former's access to education. The implications in terms of learning outcomes have been less clear because little litigation has been directly related to issues of education quality, and victories for equitable access have in some cases affected the quality of education for the

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<sup>3</sup> We chose these countries for pragmatic reasons. Given time and resource constraints, we were unable to carry out extensive fieldwork and had to rely largely on secondary material and previous research. India and Indonesia are contexts with which we are familiar and for which we could quickly assemble the required empirical material on education rights litigation. For Indonesia we relied primarily on Rosser's previous work on education rights litigation. For India we used a small, focused sample because of the large number of cases. The RTE Act, which came into force in 2010, alone has a database of 41,000 cases, of which 2,477 have been heard in the Supreme Court.

middle classes. But the fact that courts have produced pro-poor judgments in the small number of cases that have explicitly addressed education quality suggests that they may play an increasingly significant role in this respect in the future, particularly as battles over access are won and contestation over education policy turns more to matters of quality. Finally, we argue that the ability of ordinary citizens to use education rights litigation effectively has been contingent on:

- Support from key sections of the judiciary.
- Access to support structures for legal mobilization in the form of funding and expertise from NGOs.
- Wider political mobilization that has been supportive of their aims.

Accordingly, we conclude that efforts to promote improved education outcomes through the courts in developing countries need to include measures addressing these preconditions for effective legal mobilization.

In presenting this argument, we begin by outlining a conceptual framework for understanding the origins, nature, and impact of human rights litigation in developing countries that builds on existing scholarship on this topic. We then examine the Indonesian and Indian experiences with education rights litigation. In the final section, we conclude by examining the implications of our analysis for efforts to promote improved education—including learning—outcomes in developing countries.

## **Definitions**

Before beginning this analysis, it is necessary to define two key terms as they are used in this paper: *the right to education* and *education rights litigation*. The International Covenant on Economic, Social and Cultural Rights (ICESCR), the principal foundation of the right to education in international law, does not provide an explicit definition of the right to education. But the Right to Education Project (nd) notes that it constitutes universal, free, and compulsory primary education, universal availability of secondary education, and equal access to higher education as per capacity. The progressive introduction of free education at all levels is an aspirational goal for the right to education.

Importantly for our purposes, the United Nations Committee on Economic, Social, and Cultural Rights (1999), the UN body responsible for monitoring implementation of the ICESCR, has stated that, “The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide” (Article 46). The latter obliges States parties to provide education “when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal” (Article 47).

The right to education further implies that the resultant access to education will have the characteristics of:

- *Universality*—that everyone has a right to the service, and no one will be discriminated against on the basis of gender, disability, ethnicity, or religion.
- *Physical accessibility*—that physical barriers such as geographic distance, transport, or time costs will not be a barrier to people accessing services.

- *Affordability*—that the poorest will be able to access services without paying fees.
- *Acceptability*—that the services offered are socially and culturally appropriate for the population they are targeting.
- *Quality*—that the services are of a basic minimal quality that meet the needs of the consumer, but also provide broader public benefits.

At the same time, we recognize that litigation related to this right and these obligations may invoke domestic rather than international law and that domestic law may vary or elaborate on the right to education and associated state obligations in important ways. Accordingly, we define education rights litigation as cases that make claims based on a constitutional, legislative, or internationally recognized right to education, or associated state obligation to respect, protect, or fulfill the right to education; and seek access to educational facilities, goods, and services.<sup>4</sup> Importantly for our purposes, this definition includes litigation related to constitutional or legislative requirements for national and/or local governments to allocate minimum levels of funding to education (as have been adopted, for instance, in Indonesia and the Philippines), provide basic education for free (as in El Salvador and Indonesia), promote the formation of special education centers (as in El Salvador), provide access to all (as in India for children between 6 and 14), and maintain minimum education service standards (as in India). But it excludes litigation related to industrial issues (such as the salaries and conditions of education workers), the division of labor between different levels of government in relation to national education policy and its implementation, and civil or criminal claims against education workers (as, for instance, in cases of sexual abuse of students).

### **Understanding Human Rights Litigation in Developing Countries**

In analyzing the origins, nature, and impact of human rights litigation in developing countries, scholars have emphasized the effects of four main factors.<sup>5</sup> The first is *judicial’ attitudes, ideological commitments, and strategic choices* and the way these have shaped their and their courts’ propensity to exercise judicial activism or restraint. Judges and the courts of which they are a part, it is argued, are generally conservative and, especially in developing countries, susceptible to corruption and political interference. Hence they tend to exercise restraint in their decision-making. Rights-friendly judgments have occurred only when “heroic” judges or courts as a whole have challenged the legal and/or political status quo and sided with the poor and marginalized (Hendrianto 2016; Bhagwati 1984; Cassels 1989).

Alternatively, scholars have argued that judges in developing countries (as elsewhere) are “qualified strategic actors”—that is, actors “willing to issue challenging decisions” but “not ordinarily issue doomed ones, no matter what the law might seem to require” (Gauri and Brinks 2008, p. 320). Accordingly, judges and courts may be prepared to pass rights-friendly judgments if such decisions produce some benefit for them personally and/or the judiciary as a whole and these decisions are unlikely to trigger harmful political retaliation. For instance, Baxi (1985) has argued that “social action litigation” in India during the 1970s and 1980s was part of a calculated strategy pursued by the Indian judiciary to restore the image of the country’s Supreme Court and establish a new base of legitimacy for judicial authority following the 1975-76 Emergency.

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<sup>4</sup> Our definition of education rights litigation draws on the definition of health rights litigation advanced by Gloppen and Roseman (2011, p. 4).

<sup>5</sup> The first part of this section draws heavily on Rosser (2013) and Rosser (2015b).

The second factor is the *institutional design of legal and court systems* and the way this shapes who is able to litigate for human rights, in what ways, and on what terms. For instance, Wilson (2011) has argued that “rights revolutions” in Colombia and Costa Rica over the past two decades stemmed from the fact that these courts abandoned high levels of judicial formality, adopted broad definitions of standing, removed barriers to access, and resolved cases quickly, making it relatively easy for poor and marginalized citizens to access and use the court system to pursue their rights (see also Wilson and Cordero 2006). Similarly, a number of scholars have drawn attention to how differences in legal and court systems have yielded different forms of human rights litigation that, in turn, have had different implications in terms of potential impact.

Brinks and Gauri (2014), for instance, have argued that the impact of social rights litigation in developing countries has depended to a significant extent on the nature of litigation permitted by national court systems—specifically, whether it is collectively or individually focused. In contexts that support the expectation of collective effects (whether the litigation is collective or individual), litigation impacts can be pro-poor. When litigation is dominated by individual litigation and individualized effects, litigation can be regressive because the middle classes are better positioned to undertake such action.

Finally, scholars such as Ginsburg (2003), Rotman (2004) and Mietzner (2010) have argued that judges’ remuneration and appointment processes and the extent of judicial independence from the executive have heavily influenced the responsiveness of courts to rights-related causes in various Asian and African countries. Where judges have been relatively well paid, appointed in a way that reduces their dependence on vested interests, and highly independent of other arms of government, judges have faced few disincentives to support rights causes while at the same time benefiting from enhanced court legitimacy and popularity if they do so.

The third factor is *the extent of citizens’ access to support structures for legal mobilization*. As Epp (1998) notes, rights-in-law are not self-activating—that is, the incorporation of rights into law does not lead automatically or directly to their enforcement or implementation in practice. Citizens have to bring rights issues to court in the first place. According to Epp (1998), this has only happened where citizens have had access to support structures for legal mobilization consisting of three types of resources:

- *Organized group support*—that is, the presence of “repeat players” with extensive experience using the court system.
- *Financing*—including from private sources but especially from government sources such as legal aid.
- *The structure of the legal profession*—particularly its ethnic diversity and the scale of legal firms, both of which potentially influence prospective litigants’ ability to find a lawyer willing to pursue a human rights-related court case.

Epp’s analysis largely focused on developed countries but included a case study of India. Wilson (2011) has argued that support structures are not needed to facilitate legal mobilization in countries where the poor and marginalized have easy direct access to the court system, as has been the case in Colombia and Costa Rica, but in general this is not the case in the developing world (Joshi 2010; Munger 2014; Becker 2015; Elias 2015; Grenfell 2015; Curnow 2015; Rosser 2015a). More recent scholarship, however, has suggested that support structures for legal mobilization may distort the kind of justice sought by justice seekers because of the



potential for their own agendas to come into play in the process of mediating between justice-seekers and the court system (Rosser and Curnow 2014).

The fourth and final factor is *the wider political and social struggles that have underlain human rights litigation*. As scholars such as Bedner and Vel (2010) have argued, ordinary citizens in developing countries are autonomous actors who make considered choices about how they can most effectively pursue their human rights through the “legal repertoire” even if they vary in their capacity to exercise this choice effectively (see also van de Meene and van Rooij 2008, pp. 10-11). But as numerous studies have pointed out, human rights litigation is not simply about individuals seeking justice for abuses of their rights. It often forms part of wider struggles between competing groups over how resources and power are distributed between them (Scheingold 1974; Rosenberg 1991; McCann 1994; de Sousa Santos and Rodriguez-Garavito 2005; Cousins 2009; Grugel and Piper 2009; Joshi 2010). When individual citizens have mobilized rights, they have often done so as part of strategic collective endeavors involving members of the legal profession, business community, or NGO community aimed at changing policy or otherwise furthering broader agendas. Even where they have acted independently and ostensibly in pursuit of their own individual interests, their actions have sometimes amounted to a collective claim when repeated by others. Finally, in some cases individuals have been encouraged to pursue individualized claims because their claims have had a degree of wider legitimacy by virtue of their resonance with broader political agendas.

There is considerable debate among scholars who emphasize the role of wider political and social struggles in shaping human rights litigation in developing countries about whether such litigation is an effective strategy for promoting the fulfillment of human rights. Some scholars have argued that justice-seekers cannot rely on litigation to promote their interests because the court system has been captured by elements aligned with the status quo. Cousins (2009) and Grugel and Piper (2009), for instance, have argued that courts in developing countries have been heavily constrained in making decisions that favor groups claiming their social and economic rights by the political dominance of capitalist social relations and neoliberal ideology, respectively.

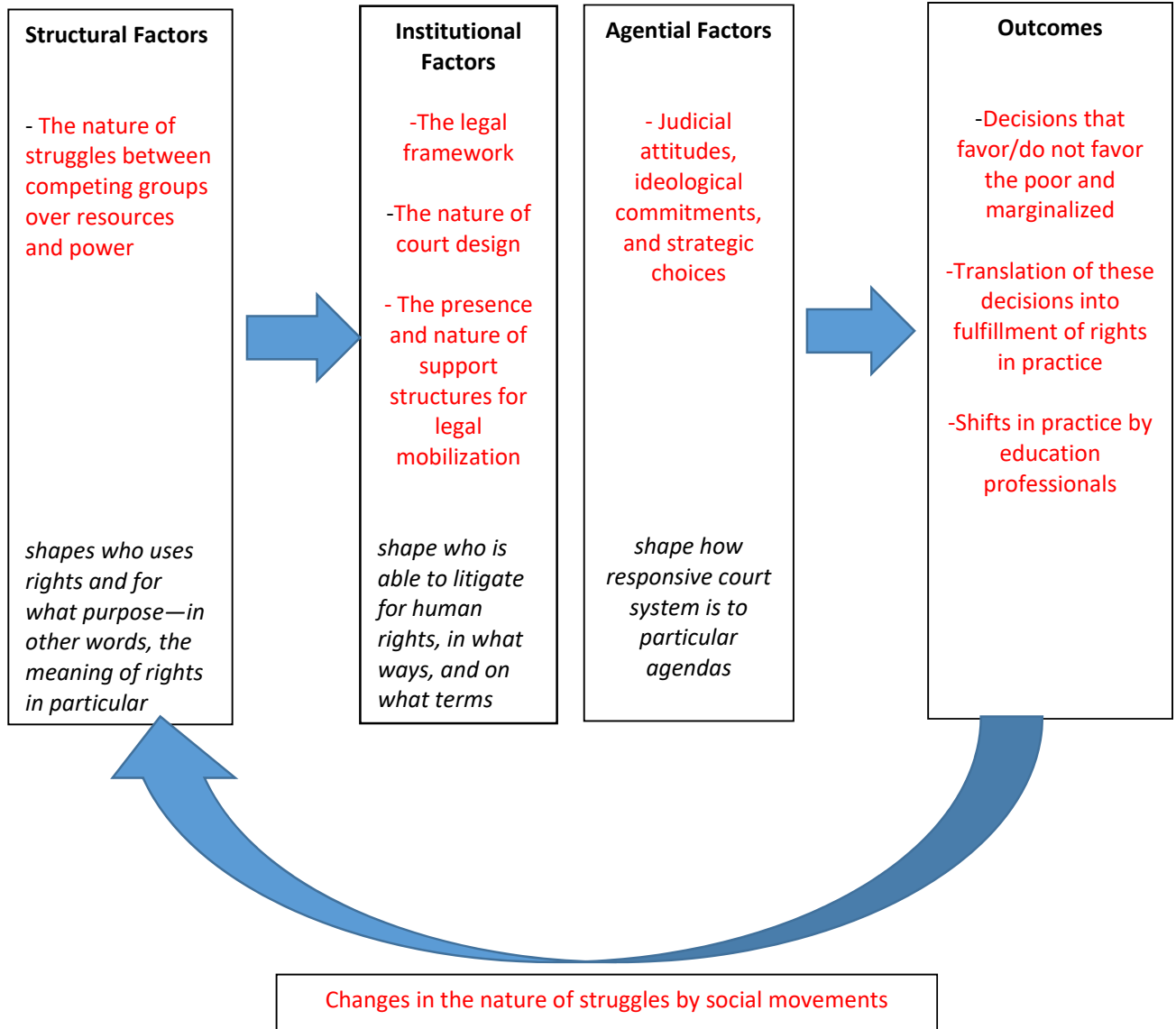
But other scholars have suggested that litigation may contribute to the formation and organization of social movements and provide them with a normative framework to inform their political activities (see, for instance, Joshi 2010). Drawing on evidence related to health rights litigation in Indonesia, Rosser (2017) has suggested that legal mobilization for rights-related causes can be effective in promoting the interests of poor and marginalized people when they gain support from sympathetic sections of the political elite, can access support structures for legal mobilization, and their legal actions go hand in hand with wider political mobilization supportive of its aims. Either way, however, both sets of scholars have situated human rights litigation within wider political and social struggles.

## **Our Approach**

We believe it is important to consider the effects of all four of these factors because they all, in one way or another, influence the origins, nature, and impact of human rights litigation. For the most part, scholars writing about human rights litigation in developing countries have so far only focused on one or two of these factors and given little attention to the others because their analyses have sought to illustrate the effects of their chosen variables rather than present a more holistic account.

By contrast, we argue for an approach that is both more holistic and more ordered. It is more holistic because it incorporates the full array of factors that have been emphasized in the literature. It also incorporates consideration of the fact that judicial decisions—even rights-friendly ones—rarely bring rights-related struggles to an end but rather simply shift them to new terrain—that is, the implementation of these decisions by government departments and agencies (Epp 2010; Langford and others 2017). It is more ordered because it proposes a hierarchical and staged analysis. Specifically, it suggests that to understand the origins, nature, and impact of human rights litigation in developing countries, we need to first understand the nature of struggles over relevant government policy and its implementation in particular contexts (structural factors) because these are ultimately what produce rights-based claims. We then need to understand how institutional and agential factors shape whether these claims lead to litigation and, if so, the form that such litigation takes and the scope for positive judicial and governmental responses. Our approach is summarized in Figure 1.

**Figure 1 Conceptual Framework for Analyzing Education Rights Litigation in Developing Countries**



This approach is based on the notion that human rights only become imbued with meaning when specific groups use them to achieve particular goals. Much analysis of human rights litigation assumes that human rights are natural and that their meaning is consequently self-evident and constant across contexts. Following the more discursive and protest traditions, we argue, by contrast, that their meaning is only apparent when linked to specific interests and agendas and seen in the context of concrete struggles in particular places and at particular moments in time (Dembour 2010). As the studies of human rights litigation mentioned above show, human rights can be used for quite distinct, even contradictory, purposes depending on who uses them, the goals they wish to achieve, and the contexts in which they operate. Rights are thus clearly malleable as to their political purpose and policy implications. This, in turn, indicates that the meaning of human rights is inevitably linked to struggles over access to resources and power as they play out in specific political, social, and historical contexts. Accordingly, we give analytical primacy to the final factor mentioned above: the wider political and social struggles that have underlain human rights litigation.

A central element of our approach is thus to identify the principal groups involved in struggles over education policy and its implementation in specific developing country contexts; decipher their respective interests, agendas, and forms of leverage over policymaking and implementation; delineate how they promote or contest human rights and associated state obligations; and, finally, understand how rights-oriented litigation promotes or challenges these interests and agendas. The other factors mentioned above—that is, those related to institutional factors (such as court design and the nature of support structures for legal mobilization) and agential factors (judges’ attitudes, ideological commitments, and strategic choices)—enter the analysis as intervening variables that influence whether groups mobilizing rights or obligations are able to access the court system, on what terms, and the extent to which this system is receptive to their causes.

There is much in common between our approach and “subaltern cosmopolitan legality,” an approach to understanding the role of law in developing countries developed by de Sousa Santos and Rodriguez-Garavito (2005). According to the authors, the nature, use, and effect of law in developing countries are primarily shaped by the interests of the transnational capitalist class and, in particular, its interest in promoting neoliberal economic and social policy reform. At the same time, though, poor and marginalized citizens can make effective use of the law—and in particular human rights—to advance demands for social justice. Subaltern cosmopolitan legality, they say, is a bottom-up perspective that focuses on:

- How poor and marginalized citizens use human rights and other aspects of the law to challenge hegemonic projects such as neoliberalism.
- The importance of political as well as legal mobilization in these efforts.
- The way that poor and marginalized groups operate across scales through alliances with transnational nongovernmental actors and the use of extra-national legal mechanisms.

Overall, it is an approach that emphasizes the progressive potential of law—and especially human rights—at the same time that it acknowledges the effects of unequal power relationships on the nature of the law and its operation.

Our approach differs from subaltern cosmopolitan legality in that it views human rights as a tool that can be used by a range of actors, not just the poor and marginalized, to advance their interests. As several scholars have pointed out, there are tensions between notions of human rights and neoliberalism (Gauri 2004; O’Connell 2007). There are also fairly obvious tensions

between notions of human rights and the predatory behavior on the part of political and bureaucratic officials that pervades many developing countries. At the same time, members of the middle class are better placed than the poor and marginalized to seek fulfillment of their human rights in the marketplace because they can purchase the goods and services they require. We would accordingly expect the poor and marginalized to mobilize human rights much more often than political, bureaucratic, and corporate elites or members of the middle class. But we are also conscious of the potential for human rights to be mobilized by such groups—particularly in light of the Latin American health-related evidence discussed above. In this respect, our approach is both bottom-up and top-down.

## **Indonesia**

### *Structural factors*

Education rights litigation in Indonesia has its origins in the nature of the country's education system as it evolved under the New Order (the authoritarian regime that ruled Indonesia from 1965 to 1998) and the struggles over education policy and its implementation that were unleashed by its collapse and the country's subsequent transition to democratic and decentralized rule.

The New Order dramatically expanded access to education by building thousands of new public schools and recruiting hundreds of thousands of new teachers to staff them, particularly between the early 1970s and the early 1980s, when the country was awash with petrodollars as a result of the international oil boom. But it failed to ensure that children, having started school, completed it, and did little to improve the quality of education. Academic standards were low, teacher quality poor, teacher absenteeism rates high, learning outcomes poor, dropout rates high, and progression rates low (World Bank 1998; Jalal and Musthafa 2001). There were also marked regional inequalities in education access, with children in remote regions typically having much lower primary completion rates and secondary enrollment rates than children in central and urban areas (World Bank 1998, pp. 51, 56).

In part, these problems were simply a reflection of the New Order's unwillingness to invest significant budgetary resources in the education system.<sup>6</sup> But they also reflected the fact that the education system under the New Order functioned more as a mechanism through which predatory officials accumulated resources, distributed patronage, mobilized political support, and exercised political control than as a mechanism for promoting education and learning (Rosser and Fahmi 2016).

Public schools and higher education institutions, which dominated the education system, were part of the larger "franchise" (McLeod 2000) structure that characterized the New Order's rule (Rosser and Joshi 2013). In accordance with this structure, regional government officials, who had control over teacher appointments, sold teacher and school principal positions to the highest bidders while incumbents in these positions extracted rents from parents and other sources. Alternatively, these officials appointed friends, family members, and political allies to such positions. At the same time, schools played an important role in mobilizing support for Golkar, the New Order's electoral vehicle, at election time. As civil servants, teachers were required to vote for Golkar and campaign on its behalf (Rosser and Fahmi 2016). Finally, public schools and higher education institutions played a crucial role in the exercise of political

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<sup>6</sup> According to World Bank (1998, p. 148), the Indonesian government spent an average of just 2.87 percent of GDP on education each year between 1986/7 and 1996/7.

control. Civil servant teachers and lecturers were required to display “mono-loyalty” to the state as members of the state civil service corps (*Korpri*). They were also required to deliver compulsory courses in the state ideology, *Pancasila* (Leigh 1998; Nugroho 2005).

After the collapse of the New Order, driven by the new spirit of *reformasi*, the country’s political elite introduced a range of constitutional and legislative changes that enhanced protection for the right to education—including by introducing minimum government spending requirements for the education sector (see below). Amid and following these changes, electorally attuned political leaders in various districts and municipalities newly empowered by decentralization began ramping up local education spending and introduced new programs of free basic education, a policy that had first been introduced at the national level in the 1970s but never properly implemented (Rosser and Sulistiyanto 2013). Political elites at the center followed suit, with the Yudhoyono government introducing a scheme of school grants (BOS) in 2005 aimed at reducing tuition and other school fees and formally reintroducing free basic education as government policy in 2009.

These moves were broadly endorsed by popular elements such as NGOs, parents groups, university student organizations, and independent teacher unions who saw them as a necessary corrective to New Order underfunding of education and the equity-related problems it had caused. They were also endorsed by the Indonesian teachers union (PGRI), an organization closely linked to the education bureaucracy at both the national and local levels, because of the opportunities that increased education spending presented in terms of teacher income and rent-seeking opportunities for education officials (Rosser and Joshi 2013; Sucipto and others 2015). Finally, they appeared to be popular with the voting public, helping—along with a variety of other new social programs—to secure Yudhoyono’s reelection as President in 2009 (on this election, see Mietzner 2009).

At the same time, however, technocratic elements in the National Development Planning Agency/Ministry (Bappenas) and the Ministry of Education and Culture, working in conjunction with the World Bank and other donors, initiated a wide-ranging program of education policy reform inspired by notions of market rationality rather than human rights or popular appeal. This included the introduction of school-based management, moves to transform schools and higher education institutions into corporate bodies, new accreditation processes for schools and higher education institutions, moves to open the higher education sector to foreign higher education institutions, changes to the country’s national exam that turned it into a “high stakes” test (meaning students could not continue their education if they did not pass), a new teacher certification program, and efforts to promote a more efficient and equitable distribution of teachers within and between districts (Chang and others 2014; Rosser 2015a; Rosser and Fahmi 2016). While supportive of increased public spending on education and free basic education in principle, technocratic elements and their donor supporters also pushed back against the minimum public spending requirement and free basic education program because of concerns about their fiscal implications (see, for instance, *Bekasinews.com* 2007; *Indopos* 2007; and World Bank 2007).

This push for market-oriented reform encountered strong opposition from the predatory elements that had dominated the education system under the New Order. The politico-business and bureaucratic elements that ran the New Order successfully reinvented themselves in the post-New Order period by forging new alliances and making use of political parties (Hadiz, 2003, p. 593, 2010). In this context, predatory elements retained control over the education system. Moves to distribute teachers more efficiently and equitably consequently foundered in

the face of deliberate inaction by regional political and bureaucratic elites; the accountability components of the teacher certification program were undermined by corrupt behavior among teachers, education agency officials, and staff at teacher education institutions;<sup>7</sup> the new accreditation processes failed to gain sufficient funding to make them effective; and the introduction of school-based management combined with the BOS program led to flowering of corruption at the school level (Rosser and Joshi 2013; Rosser and Fahmi 2016; Rosser 2016). The PGRI played a particularly crucial role in opposing teacher redistribution and the accountability components of the certification program. In the case of the latter, for instance, it successfully lobbied the national parliament (DPR) to have funding for these components withdrawn while simultaneously defending the pay raises that were meant to be tied to them (Chang and others 2014, p. 30).

More importantly for our purposes, however, the push for market-oriented reform also encountered strong opposition from popular elements such as NGOs, parent groups, university student organizations, and independent (that is, non-PGRI) teacher unions. Democratization removed key obstacles to organization by these groups and opened up opportunities for them to play a greater role in policymaking than they had under the New Order, including through the court system (see below). Though these groups supported some aspects of the reforms promoted by the technocrats and donors—for instance, teacher redistribution (Ilfiyah and others 2014)—they opposed aspects that they believed promoted the “commercialization” or “privatization” of education or otherwise undermined equality. The most problematic reform initiatives in their eyes were the moves to transform schools and higher education institutions into corporate bodies, open up the higher education sector to foreign institutions, and turn the country’s national exam into a “high stakes” test (Darmaningtyas and others 2009; Arifin 2012; Rosser 2016).

### *Institutional factors*

In the context of these struggles—and reflecting the shifts in power and influence that triggered them—the Supreme Deliberative Council (MPR), Indonesia’s highest law-making body, amended the national constitution between 1999 and 2002 to, among other things, provide citizens with “a right to obtain an education” (Articles 28C and 31 (1)), require the government to fund compulsory basic education (Article 31 (2)), and require national and regional governments to allocate at least 20 percent of their budgets to education (Article 31(4)). In addition, in the midst of and following these amendments, the national parliament passed a number of subordinate laws that reaffirmed these constitutional changes. These laws included Law 39/1999 on Human Rights, Law 23/2002 on Child Protection, Law 20/2003 on a National Education System, and Law 11/2005 on the Ratification of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Collectively, these constitutional and legislative changes dramatically enhanced formal legal protection of the right to education and, in so doing, provided a stronger legal foundation for education rights litigation.

At the same time, the post-New Order period witnessed changes in the design of Indonesia’s courts system that widened access to the judicial system and created new forms of litigation. Most important in this respect were the establishment of a Constitutional Court with the power to strike down laws on the grounds that they conflicted with the Constitution (Mietzner 2010)

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<sup>7</sup> The teacher certification program awarded teachers a generous pay rise in exchange for completing a portfolio of achievement comprising personal references, publications, certificates of attendance at in-service courses, model lesson plans, and other documents or, if their portfolio was deemed inadequate, a 90-hour training program. Neither of these accountability components worked well in practice. Teachers were soon able to buy portfolios on the street, while virtually all participants passed the 90-hour program (Rosser and Fahmi 2016, p. 34).

and the strengthening of the Supreme Court's powers to review government regulations (Butt and Parsons 2014). These changes opened up greater possibilities for ordinary citizens, NGOs, trade unions, and other groups to launch policy-oriented litigation aimed at challenging laws and regulations through the use of judicial review mechanisms. The Supreme Court's decision to permit the lodging of "citizen lawsuits"—a type of civil action allowing citizens to challenge government action or inaction that breaches the law and causes harm to members of the public or the public interest—created another prospective pathway for policy-oriented litigation (see Rosser forthcoming). At the same time, the absence of effective *amparo*-style mechanisms in Indonesia's judicial system reduced the scope for individually oriented litigation of the type that has been widely criticized in relation to Latin America's health system.<sup>8</sup>

The result was a wave of policy-oriented education rights litigation from the late 2000s that was aimed at either challenging market-oriented education policy reform or pressuring the government to meet its Constitutional obligation to increase education spending. In most cases this litigation involved alliances between individual citizens asserting that their rights had been breached by the law or regulation concerned and NGOs, with the latter providing the legal and financial resources required for the former to mobilize the law. In other words, NGOs provided the support structure for legal mobilization. In others cases the litigation involved alliances between individual citizens and the PGRI (Susanti 2008; Rosser 2015; Rosser and Curnow 2014). This wave of litigation was relatively small compared to what occurred in India in the wake of the introduction of the RTE ACT (see below), reflecting the fact that Indonesia's court system—in contrast to India's—offered no effective pathway for citizens to pursue individually focused litigation. It only offered scope for particular types of policy-oriented litigation.

#### *The litigation*

This policy-oriented education rights litigation included cases related to:

- *The national exam.* After the fall of the New Order, the government introduced a new national exam administered at the end of primary, junior secondary and senior secondary school in an effort to raise the quality of Indonesian education. In contrast to the preceding system, where final results were partly determined by school grades and partly by national exam results, students' final results under the new system—and hence their ability to continue with their education—were made dependent entirely on their national exam scores. The logic was to give students greater incentive to do well in the exam by transforming it into a high-stakes test. Before long, human rights and education activists in Jakarta began receiving complaints from parents whose children had been unable to continue with their education after failing the exam, in breach of their right to education. This was despite widespread cheating on the exam. In 2004 two Jakarta-based NGOs, the Jakarta Legal Aid Foundation and the Education Coalition, tried unsuccessfully to have the regulations providing for the national exam overturned by lodging a judicial review case at the Supreme Court. But in 2006 they returned to the courts as public attention toward the issue grew in the wake of increased media reporting. This time they lodged a citizen lawsuit at the Central Jakarta District Court,

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<sup>8</sup> According to Miguel-Stearns (2015, p. 100), *amparo* "allows citizens to bring an action in court against the government for a violation of fundamental or constitutional rights. It is meant to be restorative as opposed to compensatory, and is a means of providing relatively immediate relief in otherwise overloaded and slow judicial systems." Importantly, for our purposes, such court actions can take the form of individually as well as collectively focused litigation.



a form of litigation likely to attract media and public attention. Their submission called on the government to change various aspects of the exam and issue a public apology for failing to protect the right to education (Rosser 2015a).

- *The size of the education budget.* Following the amendment to the Constitution, the central government slowly moved toward fulfilling the requirement to allocate at least 20 percent of its budget to education. Between 2005 and 2008 a collection of parents, teachers, and students—including, in several cases, figures from the PGRI—sought to force the central government to move more quickly by challenging various laws that permitted the government to spend less than 20 percent. These included Law 20/2003 on a National Education System and a succession of budget laws. In making a case for annulment of these laws, these actors invoked the constitutional right to education as well as provisions specifically establishing the minimum spending requirements (Susanti 2008).
- *The legal status of educational institutions.* In 2009 the Indonesian government enacted legislation that changed the legal status of educational institutions to “education legal entity” (BHP), something roughly equivalent to a state-owned enterprise. Before that, public schools and universities had been units within the government bureaucracy. Parent, NGO, and university student activists strongly opposed this change in legal status, arguing that it amounted to the commercialization or privatization of public education. They said that it would lead to abrogation of the state’s responsibility for funding education and consequently higher school and university fees (Irawan, 2007; Surakhmad, 2007; Darmaningtyas and others 2009). The law was also opposed by owners of private foundations for separate reasons. Following enactment of the law, all these groups challenged the law in the Constitutional Court. In their submission to the court, the activists argued that the change in the legal status breached citizens’ constitutional rights to education and free basic education (Rosser 2015a). After they prevailed in this case, the government responded by enacting a new law on higher education that, in effect, limited the proposed change in legal status to the country’s top-ranked public universities. A subsequent Constitutional Court challenge to this law brought by university student activists was unsuccessful (Rosser 2016).
- *International standard schools.* In 2009 the Indonesian government enacted new regulations providing for “international standard” schools (SBI/RSBI), defined as schools with “certain quality superiorities that originate from OECD member countries or other developed countries” (Government of Indonesia 2009, Article 1(8)). In contrast to “regular” schools, SBI/RSBI were permitted to use international curriculums, install high-quality facilities for information and communication technology, employ foreign teachers, and use English in the classroom, among other means of enhancing quality. To support them in reaching international standards, the government allowed them to charge fees and furnished them with generous routine and additional funding. Such schools were meant to be academically selective and reserve 20 percent of places for students from poor backgrounds. But they generally failed to meet this target. The main beneficiaries (and supporters) of this policy were middle-class parents, for whom SBI/RSBI promised a better-quality education for their children, and predatory elements within the education bureaucracy, for whom SBI/RSBI opened up an array of new rent-seeking opportunities. The main opponents of the policy were parents of children excluded from SBI/RSBI for financial reasons, parents who could afford SBI/RSBI but were concerned about corrupt school management undermining educational quality, and teachers at SBI/RSBI who sympathized with either or both of these groups of parents. In 2011 three parents—all from the first group above—supported by activists from Indonesia Corruption Watch and Elsam, both Jakarta-based

NGOs, lodged a judicial review request at the Constitutional Court challenging Article 50 (3) of Law 20/2003 on a National Education System, the article that provided the legal foundation for the establishment of SBI/RSBI. In their submission to the court, they argued, among other things, that SBI/RSBI policy amounted to an abrogation of state responsibility to provide free basic education because it allowed such schools to charge fees (Rosser and Curnow 2014).

- *Textbooks.* The cost of purchasing textbooks has long been a significant financial burden for poor parents in Indonesia. This problem has been worsened by the fact that teachers have supplemented their incomes by selling textbooks to students for inflated prices. In 2008 the central government issued a new regulation on textbooks that, in the eyes of its critics, did little to resolve these problems and, in fact, made them worse by proposing that “society (such as parents and students) share responsibility for ensuring that children had access to these books. In 2008 a group of NGO activists challenged this regulation by lodging a judicial review request at the Supreme Court. Among their reasons for challenging the regulation were that it breached the principle of free basic education (Kelompok Independen Untuk Advokasi Buku nd).

#### *Agential factors and outcomes*

In almost all cases, the groups launching the litigation were successful in securing court judgments in their favor. They only lost the cases related to textbooks (the final bullet above) and top-ranking state universities’ legal status (part of the third bullet). These decisions in turn led to changes in government policy, though in some instances only partially or after considerable delay. For instance, the government ended the “international standard” schools policy, axed the high stakes element of the national exam policy, limited changes to the legal status of education institutions to the top-ranking state universities (as noted), and increased spending on education up to the 20 percent mark (albeit in part by incorporating some expenses of tangential relevance to the education system into this amount) (Susanti 2008; Rosser and Joshi 2013; Rosser 2015).

It is difficult to know for sure why the judiciary decided to back the groups that brought these cases and the government, by and large, complied with court judgments. But three factors appear to have been at work. The first is growing judicial activism on human rights issues. Under the New Order, judges were widely regarded as “gormless and corrupt functionaries who do the government’s bidding in the government’s courts” (Bourchier 1999, p. 233). Though many have remained so in the post-New Order period (see Tahyar 2012), the scope for judicial activism has widened as a result of judicial reforms combined with democratic politics. The second factor is growing state responsiveness to social policy concerns as a result of the incentives created by electoral politics and the disastrous social impact of the 1997-98 Asian economic crisis. As noted, politicians at both the national and regional levels found pro-poor education policies to be an extremely effective way of mobilizing popular support and, especially, votes at election time.

The final factor is the citizen-NGO-union strategy of blending legal and political mobilization. In most cases litigation was accompanied by wider political mobilization that drew media attention to the issue at hand and put public pressure on the government and judiciary to support change. This political mobilization took a variety of forms including demonstrations and protests (generally held outside courts, parliament, and other government buildings), press conferences, statements to the media, workshops, and the publication of opinion pieces in the media and books. Interviews with the NGO activists indicate that this was a deliberate strategy based on a calculation that courts would be unlikely to find in their favor unless public pressure

was applied. In some cases—such as those related to the change in the legal status of educational institutions—the political mobilization was on a mass scale reflecting the involvement of university student organizations in the campaign. In most cases however, the *modus operandi* was small-scale demonstrations combined with media engagement. This strategy ensured that the case for change went beyond mere legal claims to entail a political case as well.

## India

### *Structural factors*

In India's federal system, education is a concurrent subject—meaning that both the center and states make education policy and both allocate funding in budgets. At independence, India inherited a population with literacy levels of just 18 percent. The development path followed by the first Prime Minister Nehru of state-led socialism meant that resources were devoted to state-owned manufacturing enterprises and defense; government spending on education was dismally low, and remained under 2 percent of GDP until the 1980s.<sup>9</sup> In the early years, several social groups were active in education, trying to evoke the aspirations in the Indian constitution that aimed to get all children into school within 10 years. Numerous NGOs, social change groups, private institutions, and trusts invested in providing education through nonprofit organizations and innovating new approaches to learning. These efforts occurred in the context of a constitutionally accepted yet practically neglected responsibility of the government for providing education.

The 1990s saw a break from earlier protectionist policies, and the economic reforms that followed were neoliberal—including a reduction in regulations and an opening of the economy to the private sector and international investors. During this period there was a sudden increase in the number of private schools due to changes in the regulations governing opening of profit-based education institutions.<sup>10</sup> At the same time, there was active resistance from civic groups to the introduction of neoliberalism in basic services such as health and education, with heightened advocacy efforts to improve access to and the quality of education using rights-based approaches. With the election of the center-left United Progressive Alliance in 2004, India adopted a series of laws that provide socioeconomic rights to the population including rights to information, employment, forest rights, education, and food. These rights were created through a process in which grassroots groups, NGOs, progressive media, and reformists in government united in a grand coalition that worked to stimulate public debate, ensure broad civic support for these rights, and provide input into the details of the language of the law being proposed.

Such high-energy rights-based activism is not unique to India—but what was unique was the level of openness in government to societal inputs into the policy process and the judicial activism surrounding these rights. Observers have argued that social groups are more likely to drag their struggles to the courts when they have been part of shaping the relevant laws in the first place; this is certainly true of the Right to Education (RTE) in India (Pande 2014). At the same time, an activist court was interpreting social rights broadly, leading to an increased use of litigation to advance progressive agendas by civic groups.

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<sup>9</sup> Since then spending has gradually increased, yet has leveled off at under four percent.

<sup>10</sup> Some authors estimate that the number of private primary schools rose sixfold between 1970 and 2002, while government schools fell by ten percentage points (Phillipson 2008). The same developments were seen in the health sector, with a rapid increase in the number of private health care institutions.

### *Institutional factors*

The right to education—in terms of “free and compulsory education for all children until they complete the age of fourteen years”—is provided for in the Directive Principles of State Policy, which were part of Constitution of India of 1950. Article 37 of the Constitution, which sets out the distinction between the Constitution and the Directive Principles, states that the latter “shall not be enforceable in any court.”<sup>11</sup> Despite the presence of these principles, the Government of India since independence did not take adequate steps to improve access to education, and primary education in the country was neither compulsory nor free until the 2000s. The Indian literacy rate is far behind the world average—at 74 percent compared to the world average of around 86 percent. Moreover, India has the largest number of illiterate people over 16.

In the 1980s the Indian Supreme Court expanded the doctrine of “standing” to include concerned citizens, public interest advocates, and NGOs to petition on behalf of groups suffering from violations of constitutionally protected rights. As Neuborne (2003) points out, courts abandoned standing in public interest litigation (PIL) cases, relaxed rules of pleading (including accepting petitions on ordinary paper in ordinary language), were more willing to launch independent fact-finding investigations and expanded their own remedial power in PIL cases. The result: “Instead of an adversarial organ operating on the model of an ordinary lawsuit, the Supreme Court in a PIL case appears to function as a combination of constitutional ombudsman and inquisitorial examining magistrate, vested with responsibility to do justice to the poor litigant before it by aggressively searching out the facts and the law, and by taking responsibility for fully implementing its decisions,” (Neuborne 2003. p. 503).

Under this transformed court, the rulings on two PIL cases prior to the RTE Act 2009 stand out—the Jain vs. State of Karnataka, and the Unni Krishnan vs. State of Andhra Pradesh. Though both cases concerned the impact of state laws on private education, the Supreme Court took the opportunity to point out that state and central governments had not followed the Constitution’s spirit by not allocating sufficient funds for education in budgets. Further, the court held that the right to education for children up to the age of 14 in the Directive Principles (article 45) was enforceable by the courts.

These landmark rulings had several follow-on effects. They catalyzed activist organizations to increase pressure on the government to take action on primary education. In 1998 a group of people from NGOs, government, teachers associations, and the corporate sector set up the National Alliance for the Fundamental Right to Education (NAFRE), which lobbied the government to undertake reforms necessary for better education outcomes. Simultaneously, they sparked public debate on primary education in India. In response, the government set up two committees to investigate the possibility of a constitutional amendment for the right to education—leading to the 88<sup>th</sup> amendment to the Constitution in 1997. But the bill faltered because there was no consensus on the level of funding and priorities of the government as well as protests from child rights groups on the limiting of the purview of the bill for children aged 6-14, government schools, and formal schools—leaving private and informal education out of the bill’s mandate. The slow progress of the bill again triggered mass mobilization and lobbying. The most visible of these efforts was the two-month long “Siksha Yatra” (march for education) organized by the South Asian Coalition for Child Servitude with the support of over a thousand NGOs and numerous teachers associations (Devi 2002). The march was prompted by the lack of progress on the 83<sup>rd</sup> Constitutional amendment. Marchers demanded that government should provide free and compulsory education for all children up to age 18, and

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<sup>11</sup> Constitution of India, Part IV, Article 37.

that spending on education should match international levels by reducing military spending and imposing a tax on foreign investors. The march culminated in January 2001 in Kerala after passing through 15,000 kilometers and 20 Indian states. Subsequently, and Devi (2009) argues due to this pressure, following a change in government, the bill was reintroduced by the National Democratic Alliance in 2001, and was accepted as a part of the constitution in 2003, and translated operationally into the Right to Education Act. It passed in 2009 and came into effect on April 1, 2010.<sup>12</sup>

The act provides for free<sup>13</sup> and compulsory<sup>14</sup> education for all children aged 6-14.<sup>15</sup> It requires private schools to reserve 25 percent of their places for students of lower economic standing. It sets standards for pupil-teacher ratios (1:30) and requires rational deployment of teachers, with a balance between urban and rural locations. It sets criteria for teacher qualifications for appointment in schools. The Right to Education Act also sets standards for infrastructure, number of school days, and teacher working hours. It prohibits:

- Physical punishment and mental harassment.
- Screening procedures for admission of children
- Capitation fees.
- Private tuition by teachers.
- Running of schools without recognition.

Curriculums are expected to be in keeping with the values enshrined in the Constitution.

Support structures for legal mobilization are relatively well developed. There are increasingly a number of organizations and associations that specialize in education, especially primary education reforms, such as the NAFRE and the National Coalition for Education (NCE). Both are active in monitoring the implementation of the Right to Education Act, providing a platform for public debate on the quality and accessibility of education, and advocating reforms in education. The cases mentioned above represent a mix of individual and public interest petitions—but rulings on most of these have implications beyond the proximate outcomes for petitioners. In addition, there are organizations that specialize in litigation of socioeconomic rights (often in addition to human rights), such as the Human Rights Law Network (HRLN) and Social Jurists.

### *Litigation*

The first port of call in the case of complaints about the breach of the right to education is the administrative grievance redress mechanism. The right to education relies on the ombudsman role of the National and State Commissions for the Protection of Child Rights (NCPCR and SCPCR) for grievance redress (RTE Act Section 31 and 32). But by 2012 these bodies had been formed in only 14 of India's 29 states, and were seriously understaffed (for example, the NCPCR reportedly had only 2 staff members to handle complaints) (The Hindu 2012a). . By

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<sup>12</sup> Partly the catalyst for the RTE Act was that till 2009, an activist court was de facto making education policy through its judgments, investigations and implementation orders. The government thought it would be better to return the task of policymaking to government, leaving the Court the task of interpreting the law.

<sup>13</sup> Free means free from the need to pay tuition, additional fees, or capitation costs.

<sup>14</sup> In earlier drafts, parents were held responsible for their children's attendance. But after much debate, this provision was removed.

<sup>15</sup> Critics have pointed out the need to cater for children up to 6 years old.

2012 only 25 percent of the complaints had been resolved (*The Economic Times* 2012b). Although the position has improved considerably since then, concerns about capacity remain.<sup>16</sup>

The limited capacities and overburdening of the grievance redress mechanism, combined with the relative ease of access to the courts as a result of the relaxation of rules of standing, has meant that the number of cases at various levels under the right to education in the seven years since the legislation was implemented number in the thousands.<sup>17</sup> For example, one organization—Social Jurists—working largely in Delhi, has filed more than 500 cases under the right to education.<sup>18</sup> A preliminary search of the cases reveals that these cases are primarily lodged at the state High Courts and the Supreme Court because states ratify their own state education laws in keeping with the national Right to Education Act. Because petitions under the Right to Education Act are possible in the civil courts, it is possible to file cases at the lowest levels of the legal system—at the taluka and district levels. But the low levels of awareness of the Right to Education Act by people as well as officials of the Education Department has meant that such cases have not yet been lodged at the lower courts.

What are the cases about? Although most parts of the Right to Education Act have been invoked through legislation, the most cases—and the most contentious—have been about the article guaranteeing 25 percent reservation in private schools for the poorest (section 12 [1] (c)). At the outset this was challenged formally by the association of private schools, but the Supreme Court upheld the law and required the schools to accept poorer students (*The Hindu* 2012b). The core of the judgment has been upheld substantively by state courts—for example, in the *Gram Vikas Sewa Samiti vs. Govt of Uttar Pradesh*, the Allahbad High Court directed the government to formulate policy for the appropriate reimbursement of private schools for accepting such students. Lack of a policy could not be a rationale for rejecting students.<sup>19</sup>

It is clear from the public debate that simply mandating a quota does not provide access to quality education for children from poor families. In fact, most of the petitioners bringing cases on the quota issue are the better off among the poor—literate, well connected, and with the resources to pay for initial court costs.<sup>20</sup> There is high opposition to the reservations. Middle-class families do not want their children to mingle with children from poor households. Further, there is the complicated issue of social stigmatization of poor children when placed in a group of rich children. Schools themselves deny admission under the quota on the grounds of nonavailability of seats, or by using sophisticated logic to show why the Act's provisions are nonapplicable in the case (*Economic Times* 2012a). Moreover, the state-provided subsidy for seats under the quota falls well short of the tuition fees that schools charge. The Act does not

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<sup>16</sup> At present, NCPDR has a core strength of three members as against the mandated six, in addition to the chairperson. NCPDR has a separate Division dedicated to monitoring the Right to Education Act, 2009 under the leadership of Member (Education). This division has a team of 15 officials including Technical Experts and Junior Consultants. SCPCR are active in 35 states, and the chairperson of the SCPCR is responsible for RTE implementation and dealing with violations. In 2016-17 they received 392 new complaints related to violations of the RTE Act and dealt with a total of 379 including those of the previous year. 1080 complaints are still pending (Annual Report 2016-17). [These statistics have been revised from those contained in an earlier version of this working paper, thanks to new information provided by NCPDR in 2018.]

<sup>17</sup> A quick search of the case database—on [www.indiankanoon.org](http://www.indiankanoon.org)—brought up 41,343 cases since 2010 (when the Act was implemented) of which 2,477 were heard in the Supreme Court. It was not possible to do a full analysis of all these cases within the timeframe. But we did identify 24 cases that represented key judgments on the Right to Education Act by locating the most cited cases and interviews with education activists and lawyers.

<sup>18</sup> Interview, Social Jurists, Delhi, March 17, 2017.

<sup>19</sup> See <http://indianexpress.com/article/cities/lucknow/unaided-primary-schools-allahabad-high-court-orders-state-to-frame-grants-policy/>

<sup>20</sup> Interview, Social Jurists, Delhi, March 17, 2017.

make clear who will pay the additional costs such as uniforms, books, and other activities. This ambiguity means that schools have to charge higher tuition fees to cover the nonreimbursed costs, which is resisted by middle-class parents. Thus the reservation issue, which is in theory an individual one, leads to a host of questions that the courts have to rule on, which have much broader applicability than the outcome of the individual case. In addition the middle class—who will ultimately have to pay for the quota policy through increased fees—could become a powerful and politically salient opposition to the policy, though they have not played this role so far.

The second group of the bulk of the cases are where private schools have challenged the Right to Education Act in terms of teacher eligibility, norms, recognition, and the like. In a precedent-setting case (*Society for Un-Aided Private Schools of Rajasthan vs. Union of India & Anr*), the petitioners argued that the Right to Education Act was not applicable to private schools.<sup>21</sup> In a wide-ranging judgment, the Supreme Court ruled that the rights of children to free and compulsory education guaranteed under Article 21A of the Right to Education Act can be enforced against the schools defined under Section 2(n) of the Act, except unaided minority and nonminority schools not receiving any kind of aid or grants to meet their expenses from the appropriate governments or local authorities.

Teacher qualifications and standards is another area of contention that is politically salient. The Act sets minimum standards for teacher qualifications, but states can create exemptions in their hiring practices, thus affecting education quality. An important public interest writ petition brought by *Lalit Kumar and others vs. the State of Uttarakhand and others*, challenged state practices in hiring and resulted in a judgment that forbade the hiring of teachers who had not passed the mandatory Teacher Evaluation Test (TET).<sup>22</sup> While the number of cases focused on the TET is not large, it is an area that is both politically salient (teacher appointments are a significant source of political patronage, teacher unions are powerful vote banks) and begins to address issues of education quality, and ultimately learning.

Other public interest litigation has focused on infrastructure and standards including teacher qualifications. In *Social Jurists vs. NCT of Delhi*, the petitioners pointed out that there were around 10,000 unregistered private schools in the capital that were charging fees but did not have the required standards in terms of the safety and adequacy of the space provided—infrastructure including playgrounds, libraries, and the like—and were run by underpaid, unqualified teachers. Under the Right to Education Act, these schools were required to adhere to minimum standards and be recognized. The court directed the state government to carry out a survey of such schools in its territory, require them to apply for registration and carry out inspections to ensure that the schools met the requirements of infrastructure, pupil-teacher ratios, and teacher qualifications.<sup>23</sup> In *Avinash Mehrotra vs. Union of India*, the case focused on the implementation of safety standards in schools following the death of several children in a fire in Tamil Nadu. The Supreme Court directed that under Article 21A, state governments were required to implement safety norms in schools (Skelton 2017). In another public interest legislation, *Environment and Consumer Protection Foundation vs. Delhi Administration*, the petitioners sought the installation of basic facilities such as toilets in schools, and the court directed states to implement these as per the Right to Education Act in a detail set of directives (Skelton 2017). Several other such public interest litigations focusing on poor infrastructure,

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<sup>21</sup> <https://indiankanoon.org/doc/154958944/>

<sup>22</sup> <https://indiankanoon.org/doc/113304533/>

<sup>23</sup> <https://indiankanoon.org/doc/785243/>

and also facilities to accommodate disabled children were successful in pressuring government agencies to improve schools.<sup>24</sup>

Elsewhere, petitioners are taking up the issue of out of school children. In Karnataka, a PIL was taken up by the High Court, suo moto in response to media reports that nearly 50,000 children were not in school (Skelton 2017). The result was the creation of a High Powered Committee that was tasked with finding solutions to the problem and monitoring progress of reducing the number of out-of-school children.

Yet another issue of debate both in the media and the courts has been the issue of pre-primary education. The Right to Education Act is directed at children between 6 and 14. Many private schools accept children at a pre-primary stage, sometimes as young as 3, into kindergarten classes, that prepare them for regular school. These are also often the points of screening—those accepted into pre-primary are automatically enrolled in regular school, and it becomes difficult to secure places at the age of 6. One of the cases in Delhi before the Supreme Court by Social Jurists requests the court to order the government to provide clear guidelines on the treatment of primary education—and particularly points out the “(i) Failure to prevent unaided recognized private schools of Delhi from admitting children below 4 years age in formal schools. (ii) Failure to ensure that all unaided recognized private schools in Delhi have only one year of pre-primary class in formal schools where children of 4+ age are admitted directly and are not promoted from nursery / pre-school. (iii) Failure to ensure that children admitted in pre-primary classes are not burdened with bags and books. (iv) Failure to start pre-primary classes in all schools. (v) Failure to frame guidelines in regard to pre-school in terms of Clause 21 of the Recognized Schools (Admission Procedure for Pre Primary Class) Order – 2007”<sup>25</sup>

#### *Agential Factors and Outcomes*

Despite the relatively favorable rulings in the cases outlined above, the government has consistently failed in ensuring implementation of the court orders. In 2014, fed up with the lack of adherence to orders of the Supreme Court in 2012, the National Coalition for Education filed an all-encompassing writ petition that implores the Supreme Court to collectively take up issues related to the non-implementation of the Right to Education Act. It requests nine actions to be mandated by the state and central governments:

- To carry out a survey and map existence of the approximately 37.7 million out-of-school children within six months, and construct the approximately 150,000 schools according to Right to Education Act guidelines within a year
- To train the 100,000 teachers required to meet the shortfall of teachers and meet pupil-teacher ratios.
- To ask local and state governments to ensure that all the out of school children in their area are enrolled in schools compliant with the Right to Education Act.
- To upgrade facilities and infrastructure of deficient schools.
- To make permanent all temporary and contract teachers.
- To ensure that teachers are not assigned nonteaching duties, including midday meal preparation.

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<sup>24</sup> See <https://indiankanoon.org/doc/1544948/>; also <https://indiankanoon.org/doc/127208626/>

<sup>25</sup> <https://indiankanoon.org/doc/53531499/>



- That all schools have School Management Committees as per 21 (1) of the Right to Education Act.
- That schools under the national child labor project are also compliant under the Act.
- That all private, unaided schools are required to disclose the number of enrollees under the 25 percent quota.

The petition is trying to bring, under one umbrella, all the issues that have emerged out of public interest” under the Right to Education Act, and the Supreme Court asked all the relevant states and central bodies to respond.<sup>26</sup> But the court recently disposed of the petition, saying that “the remedies sought were too broad for implementation and that the petitioners should instead approach the High Courts of different states” (Skelton 2017, p. 44). The National Coalition for Education has subsequently filed the case in the High Courts of 16 states and are filing public interest litigation cases demanding the regulation of fees of private and unaided schools as well as challenging the nonteaching duties of teachers (e.g. posting them for opening bank accounts, identification cards etc.).<sup>27</sup>

One of the main challenges faced by civil society groups in engaging in litigation is the evidence.<sup>28</sup> For most class action cases, groups have to extrapolate from the census and the District Information System for Education data, and courts have not tended to consider this strong evidence. Compared to the signed and attested data of senior bureaucrats, the extrapolated data is deemed without merit. Groups like the NCE have tried to use citizen-oriented public hearings to generate credible evidence, but with limited success. Working teachers, whose testimony could be powerful in these cases, are reluctant to testify because they might be suspended. Retired teachers, who are freer, have expressed little interest in such cases. In addition, the lack of understanding and empathy for the right to education among lawyers and judges in the lower courts is a constraint—and activist groups spend time training lawyers at the state level on key issues.

Similarly, the outcomes of cases have a fundamental issue—while courts have the capacity to provide favorable judgments and order the government to undertake remedial action, the orders ultimately have to be implemented by the bureaucracy being held in breach of the law. For example, in the case of the 25 percent quota, despite the clear rulings on the obligation of private schools to accept students from poorer backgrounds, private schools continue to flout the rulings, and the state does not have the capacity to monitor violations. Repeated litigation can provide relief to individual litigants, and perhaps extend opportunities for applicants to the same school. But the expected wider impact of such rulings has yet to be seen.

For government schools, rights advocates feel that the education bureaucracy has limited understanding of the shift from the earlier government program (Sarva Shiksha Abhiyan, or SSA) and the new legal framework of rights, and therefore do not see themselves as accountable. The SSA formed in 2001, aimed at reaching the goal of universal primary education based on annual work plans with short-term goals. Though it was relatively successful in increasing enrollment and improving literacy, it was not able to stem high dropout rates. But some have argued that it bypassed traditional structures such as the State Councils on Education Research and Training and took on their traditional roles of ensuring teacher training, monitoring educational performance and curriculum development, leaving them

<sup>26</sup> See <http://www.livelaw.in/supreme-court-directs-states-union-territories-respond-plea-alleging-violation-right-education-rte-act/>

<sup>27</sup> Interview, National Convenor, National Coalition for Education, Delhi, 27 April 2017.

<sup>28</sup> Interview, National Convenor, National Coalition for Education, Delhi, 27 April 2017

weaker. The bureaucracy involved in implementing the Right to Education Act has a SSA mindset of top-down implementation of short-term plans, rather than viewing education provision as ensuring the delivery of a long-term right. Part of the problem is funding, an issue not covered under the Right to Education Act. Despite a revision of the fund-sharing formula between and the states (now 65:35 for most states) applicable initially for a period of five years from 2010 to implement the Right to Education Act, the total provision for education in the budget remains limited—in 2016-17 it was only 3.7 percent of GDP as opposed to the world average of 4.4 percent in 2012 (World Bank).

Unsurprisingly, then, given the challenges of ensuring government implementation of court judgments in India, litigation under the Right to Education Act has been relatively limited and fragmented. It is only through broader interpretation of judgments in individual cases that litigation has strategically contributed to the cause of equal, quality access to education. And the process of using litigation involves a steady war of attrition on the part of the activists, moving from courtrooms to governance and back into the courts until the spirit of the Right to Education Act penetrates the bureaucracy through a slow, incremental process. This process can only be successful when litigation is supported continuously by a strong, organized social movement. India has many vocal education advocacy groups and legal rights activists, but they have failed to generate momentum similar to the Right to Information Campaign or the Right to Food movement, both of which have gone through a similar process of legal reform, implementation, and litigation.

In sum, for the Indian case, the legal framework of the Right to Education Act has been strong, but its implementation has been weak. Despite several court victories, the battle for realizing the right lies in the socio-political struggles outside the courts. Given the long history of protests against privatization on socioeconomic rights (land, water, food, and other areas), litigation is just part of a multipronged effort by social actors to realize rights. That the courts are by ruling in favor of education rights both shows the need for a litigation strategy—establishing the legitimacy of the claims—as well as its limitations in achieving broader policy change.

## **Policy Implications**

More than 80 percent of the world's constitutions recognize the right to education, and courts have become an increasingly important arena to hold governments accountable for education policies and practices. Litigation on education is closely linked to social movements and NGOs. Litigation has sparked mobilization, and mobilization has advocated for changes in the law, and also used litigation as a strategy for change. Seen through this lens, litigation is only one part of a range of strategies used to make the right to education real—others include mobilization, protests, lobbying, use of media, advocacy, and legal empowerment.

The extent to which litigation is used as a strategy depends on the structural, institutional, and agential factors in specific contexts. Indonesia and India reflect how such factors might influence who litigates, around what issues, and with what outcomes. Both countries have seen a significant increase in education rights litigation in recent times. Cases have centered on demands to ensure equal access to education, the fulfillment of minimum service standards, and the adequacy of government spending on the education sector. For the most part, these attempts have been successful—for example, the Indian Supreme Court has consistently ruled in favor of upholding the quota for poorer children in private schools, the state High Court in

Uttarakhand required the state government to adopt minimum qualification standards for teachers, and the Indonesian government met constitutional obligations to spend at least 20 percent of its budget on education. These cases have often been brought by parents and students, but NGO activists and representatives of teacher trade unions have played an important part both as litigants (in some cases) and more commonly in mediating between the parents and the legal system, providing technical and financial resources.

An assessment of the impact of litigation of this kind in India and Indonesia found that:

- Litigation has generally been part of broader struggles over education policy, inequality, and the capture of education institutions by political and bureaucratic forces.
- The extent to which litigation has been used and led to policy changes depend significantly on the nature of, and access to the court system; presence of support structures for legal mobilization; the ideology of the courts and judges; and the roles and the willingness of litigants to pursue redress. These vary by country and shape whether litigation is about the constitutionality of a proposed law or the implementation of the law. Whether these factors come into play, however, depend on the opportunities that litigation offers in the context of the broader struggles sociopolitical struggles in society.
- In some cases litigation has taken an explicitly policy-related form—for instance, requests for superior courts to conduct judicial reviews of laws or regulations—while in other cases it has focused more on individualized claims. But even in the latter cases, it has often led to precipitating policy change.
- Policy-oriented litigation has mainly served the interests of the poor and marginalized even though sections of the middle class have been centrally involved in much of the litigation. Gains have largely come through better access to education; issues of improving quality have been less prominent.

Still, litigation as a strategy for improving education outcomes has limitations. Judgments are often enforced by the few public officials who are the objects of the lawsuits. And even when judgments are implemented, they are more often about access to education and seldom about improving education quality—let alone the trickier question of learning.

Indeed, improving education quality and student learning remains a critical challenge in developing countries. Confrontational strategies like litigation offer limited possibilities for changing attitudes and behavior of those involved in the teaching needed to improve learning outcomes. Despite these limitations, enshrining education as a right in law can help by, on the one hand, encouraging mobilization by social movements struggling to gain the rights and, on the other hand, forming the backdrop within which education professionals might over time find it harder to deliberately avoid their duty to make equal access to quality education a reality for all students.

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