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978-0-521-87376-5 - Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World

Edited by Varun Gauri and Daniel M. Brinks

Excerpt

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## 1 Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights

VARUN GAURI AND DANIEL M. BRINKS

A life that achieves the full promise of human dignity requires, among other things, escape from premature death, the resources to withstand debilitating disease, the ability to read and write, and, in general, opportunities and freedoms unavailable in the midst of extreme poverty and deprivation. Over the past few decades, many have adopted the view that commanding some minimal level of social and economic resources not only is constitutive of dignity, but is a basic human right to which someone *must* respond. Yet, one billion people on earth remain extremely poor, and billions of others lack necessities and essential services. The scale of global poverty makes it obvious that no one has assumed the responsibility to respond or that those who have undertaken that responsibility are failing. From the perspective of many human rights activists, then, the challenges become how best to identify those who ought to respond, how best to evaluate those who have attempted a response, and, more generally, how best to assign duties and then hold accountable those who might provide an effective response. And, many believe, it is entirely appropriate to use courts to enforce these rights. Courts are, after all, the paradigmatic institutions for identifying legal duties and responding to claims that rights have been violated.

In many countries, this process is well under way. To begin with, during and since the third wave of democratization around the world, more and more substantive rights have been enshrined in constitutions around the world:

A review conducted for this paper assessed constitutional rights to education and health care in 187 countries. Of the 165 countries with available written constitutions, 116 made reference to a right to education and 73 to a right to health care. Ninety-five, moreover, stipulated free education and 29 free health care for at least some population subgroups and services. (Gauri 2004:465)

In fact, the right to education has been featured in a majority of the world's constitutions since the beginning of the twentieth century; and more than half have included the right to health starting around mid-century.<sup>1</sup> Some constitutions, such as the recently amended constitutions of Indonesia and Brazil, include judicially reviewable targets for the share of the budget that legislatures should allocate to health, education, or social security.

<sup>1</sup> Data supplied by Zach Elkins, from his collaborative project on constitutions with Tom Ginsburg.

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Using those formal social and economic rights, courts in many countries have issued a number of prominent decisions. The *Grootboom* ruling of the South African Constitutional Court in 2000, finding a right to housing on behalf of informal settlers, raised the hopes of housing and antipoverty activists around the world. On several occasions, courts in Argentina have required the state to provide or avoid interruptions in the provision of essential medicines, including the 1998 *Vicente* case, in which a court required the state to produce a treatment for hemorrhagic fever and held the Ministers of Health, Economy and Labor, and Public Services personally responsible for doing so (Bergallo 2005). The European Commission for Social Rights ruled in 1998 that Portugal's failure to enforce its child labor legislation constituted a breach of the European Social Charter, a decision that led the country to implement a number of reforms (Arbour 2006). In Costa Rica, a recent newspaper report traced an 80 percent reduction in AIDS mortality rates to a Constitutional Court decision requiring the public health system to make antiretroviral treatment publicly available.<sup>2</sup> The Indian Supreme Court has converted what were once constitutional guiding principles into judicially enforceable rights to housing and education, and against bonded labor (Steiner and Alston 2000). Even in the United States, where the Supreme Court has firmly dismissed social and economic rights claims made on the basis of the federal constitution, rulings on the basis of state constitutions have spurred significant changes in financing for education and social assistance (Forbath 2007; Hershkoff 1999). A recent review analyzes more than two thousand social and economic rights cases from twenty-nine national and international jurisdictions (Langford 2008). Increasingly, then, constitutional rights are supporting demands for social and economic goods and services, often, but not always, through courts or other quasi-legal institutions. And courts are taking an increasingly important role in deciding the extent to which the seemingly nonnegotiable interests embodied in constitutions should be considered and protected in policy making.

With detailed studies of Brazil, India, Indonesia, Nigeria, and South Africa, this book offers empirically grounded answers to many of the questions raised by judicial involvement in the policy-making process. Are courts actually becoming more involved in economic and social policy, or is the "judicialization" phenomenon (Tate and Vallinder 1995) a mirage? Are their interventions meaningful for policy making, as a review of leading case studies suggests (COHRE 2003), and as a comparative account of "rights revolutions" indicates they can be (Epp 2003)? Or are they just so much window dressing, or even a diversion from other potentially more productive policy-making venues, a kind of "flypaper" for would-be social reformers who succumb to the lure of litigation strategies (Rosenberg 1991)? If they are becoming more important, why, and through what channels? And why does judicial intervention on social and economic rights seem so frequent and prominent in some countries and in some issue areas but not in others?

More important, will giving courts a more prominent role in economic and social policy make governments and others more accountable for responding

<sup>2</sup> Cantero, M. "Antirretrovirales reducen mortalidad de ticos con SIDA" [Antiretrovirals reduce mortality of Costa Ricans with AIDS]. *La Nación*, San José, Costa Rica, November 16, 2005.

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to extreme poverty and deprivation? Or do legal processes inevitably favor the “haves” so that more judicial involvement will benefit those who are already better off? Hirschl argues that courts represent conservative elite interests, and that they will, in interpreting constitutional rights, advance “a predominantly neo-liberal conception of rights that reflects and promotes the ideological premises of the new ‘global economic order’ – social atomism, anti-unionism, formal equality, and ‘minimal state’ policies” (Hirschl 2000: 1063). Is that right? And what of the classical objections to justiciable social and economic rights – that courts will usurp the policy-making power of more representative branches of government and lack requisite skills for policy making on complex topics? What does this new phenomenon mean for academic theories of judicial mobilization, behavior, and impact? Although we do not present definitive answers to all these questions, the case studies and comparative analyses presented in this book shed light on these and other important questions concerning social and economic rights and the place of courts in policy making.

The five countries studied in this book were chosen so as to include common law countries with records of aggressive (India and South Africa) and limited social and economic (SE) rights litigation (Nigeria), and civil law countries with aggressive (Brazil) and incipient (Indonesia) litigation. They include countries with (by global standards) recent and old constitutions, and countries with varying years of democratic experience. Judicial review is abstract and centralized in Indonesia; concrete and diffuse in India, Nigeria, and South Africa; and a blend in Brazil. The countries also vary in levels of national income and state capacity. We draw on this variation to answer questions about the social, economic, political, and institutional conditions that favor judicial involvement in, and judicial impact on, social and economic rights. Wherever possible, the country chapter authors also use within-country variation to measure and then explain the range and impact of litigation on social and economic rights, comparing, for instance, the Northeast with the South and Southeast of Brazil, and the so-called BIMARU states with other states in India.

The focus of this research is on the right to health and health care, and the right to education. These two issue areas provide within-country variation on dependent and independent variables. The country chapter authors compare the extent and nature of litigation in the two policy areas (and, in some cases, in subpolicy areas such as AIDS, medications, and tertiary education), and draw on country-specific and sector-specific characteristics to explain these observed differences. Health and education were chosen because they are almost always considered basic social and economic rights. The two policy areas also exhibit important differences, with a generally larger private sector for health care in most countries, and wider use of public-sector health facilities than of public schools on the part of the middle and upper classes. International mobilization is also higher for health concerns than for education. As much as we would have liked, it was not possible to include all social and economic rights cases in the country sampling strategies. Wherever they considered it important, however, country chapter authors examined, in addition to health care and education, court cases related to other basic rights, such as land, housing, and basic income.

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## THE MAIN ARGUMENT

To engage the normative question – the desirability of using courts to enforce social and economic rights – we first need an account of what it is that courts actually do when they get involved in policy making. In other words, and as Socrates put it in *Meno*, “If I do not know what something is, how could I know what qualities it has?” A short account explaining judicial involvement in the policy-making process follows. We develop this conceptual framework more fully later in this introduction, and the country chapter authors all use a (suitably adapted) version of it to facilitate our cross-country comparisons in the conclusion.

We argue that one can decompose the life cycle of public-policy litigation into four stages: (a) the placing of cases on the courts’ docket (we usually refer to this stage as *legal mobilization*); (b) the judicial decision; (c) a bureaucratic, political, or private-party response; and, in many cases, (d) some follow-up litigation. The product of this four-stage process is what we call the *legalization* of policy in a particular policy area. We understand policy legalization to be the extent to which courts and lawyers, including prosecutors, become relevant actors, and the language and categories of law and rights become relevant concepts, in the design and implementation of public policy. Legalization in this sense is self-evidently a continuous concept and quite often a difficult one to measure with any degree of precision, but this definition is broad enough to capture most of what is interesting about the role of law and courts in the policy arena and yet specific enough to guide our inquiry.

Later in this introduction we characterize these four key “moments” in the legalization process more fully, and we hypothesize that certain features of a country’s legal, institutional, and political landscape strongly affect the extent and form of legalization in social and economic policy. Here the crucial point is that each stage of the legalization process involves a choice by one or more strategic actors. Litigants, for instance, move to place cases on the courts’ docket (Stage 1) in anticipation of judicial receptivity (Stage 2), eventual state or corporate compliance (Stage 3), and their own capacity to conduct any necessary follow up (Stage 4). States and private parties comply with court decisions in light of the nature of the judicial order (Stage 2) and the prospect that litigants will monitor compliance (Stage 4). Most important, for present purposes, is that courts themselves are deeply implicated in this set of strategic interactions: whereas the prevailing legal superstructure affects court rulings in some important ways, judges also craft their opinions with an eye on the likelihood of compliance (Stage 3), the political reaction and its effect on the standing of the judiciary (Stage 3), and the existence of a strong litigant who can engage in follow up or bring new cases (Stages 1 and 4).

Taking these strategic interactions seriously means that although our definition of legalization continues to include the two dimensions that Tate and Vallinder (1995) identified in their definition of judicialization (i.e., both judicial involvement in policy decision making and legal argumentation in policy discussions outside the courts), it does not depend, as their definition does, on courts making final, all-or-nothing decisions, thereby usurping the functions of more representative institutions. Instead, our definition recognizes the open-ended and interactive

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Figure 1.1. The allocative logic of legislatures and courts.

nature of judicial decision making, suggests that policy-making power is not zero-sum across government branches, and does not smuggle in normative judgments about the proper province of courts. We argue here, and the conclusion will confirm, that courts more often add a relevant actor and relevant considerations than seize decision making power from other actors. Legalization is a continuous phenomenon; but because courts are deeply concerned with the reactions of other actors in the legalization process, and hence with the processes of “normal politics,” extreme legalization is the exception, not the rule.

This account of legalization weakens the popular dichotomy between judicial and legislative action. In a common view, courts follow a categorical or deontological logic, particularly when ruling on human rights. The only concerns that enter their decisions are those of the applicants before them, relevant laws and constitutional texts, and their own predispositions – a set of concerns whose narrowness gives rise to charges of judicial imperialism. Legislatures, by contrast, again in this popular view, are able to represent and aggregate the preferences of the voting or relevant public, taking into account the wider interests of the entire polity, including even the interests of future generations, not only of those on whose behalf they presently make law. But if courts are indeed, as we will argue throughout, just one actor in the deeply strategic and iterative process of legalization, they in fact incorporate a wider set of concerns than the popular conception allows. Their decision making, by responding to popular demands, reckoning infrastructural limitations, anticipating legislative and executive priorities, and engaging these other actors in an ongoing dialogue in the process of adjudication, implicitly and explicitly incorporates expenditure trade-offs and other elements of aggregative/utilitarian logic. Moreover, as legalization and rights discourse pushes legislatures toward special solicitude for rights-protected interests, their own decision making edges toward a more categorical/deontological approach.

Figure 1.1 illustrates how the popular account of judicial and legislative logic needs to be corrected. In our view, courts are anchored in more deontological forms of reasoning and valuation, but move to incorporate other logics, especially in social and economic rights adjudication. The diagram also indicates that legislatures, although rooted in an aggregative/utilitarian framework, are, in fact, involved in categorical and deontological decision making far more than the popular account admits. Although we do not make that argument in this book, one needs only to think about the political challenge of reforming entitlements in many Organisation for Economic Co-operation and Development (OECD) countries to see the point.

Legalization does not, however, merely replicate the allocative priorities of the legislative and executive branches. Rather, because legalization differs from the

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political demand channels in the kinds and amounts of resources needed to stake effective demands, the avenues of access, and the distinct relationships to coercive and persuasive power, it tends to prioritize a somewhat different set of social demands than the political process does. Some of these demands benefit the disempowered and marginalized, as advocates of making social and economic rights justiciable have argued, and as the country chapters demonstrate. On the other hand, legalization might also serve the interests of political and economic elites and the middle classes, who can “dress up” their private interests and claims as social and economic rights, as some have worried when describing public interest litigation (PIL) in India.<sup>3</sup>

In sum, this book takes the view, visible in the country chapters as well as in our introduction and conclusion, that the constitutionalization and legal enforcement of social and economic rights is neither an unalloyed boon nor an outright liability for social justice. Courts can advance social and economic rights under the right conditions precisely because they are never fully independent of political pressures. We will argue that courts can help overcome political blockages, channel important information to political and bureaucratic actors, create spaces of deliberation and compromise between competing interests, and hold states accountable for incomplete commitments. Courts have their greatest impact when policy seems unresponsive to popular demands. On the other hand, although courts can reprioritize claims in a manner that extends access to social and economic goods, the resource intensiveness of litigation sometimes prevents social and economic rights claims from benefiting the neediest, at least at first. This is not inevitable, however, and in some cases social and economic rights litigation may produce significant positive indirect effects for those who do not themselves have the resources to litigate. The final balance will be different from country to country and is open to debate even in the countries we examine. Still, our findings suggest that courts can become important actors in the policy arena while benefiting, or at least without making matters worse for, the underprivileged.

### THE SOCIAL AND ECONOMIC RIGHTS TRIANGLE

The scope of this book is somewhat narrower than the account of legalization in the previous section might have suggested. That is because there are many ways in which the legalization of policy can and does affect the availability and quality of social and economic goods, but only some of them involve social and economic rights claims. For example, the ease with which patients can press medical malpractice cases in courts or other forums, which rely on common law or contractual patient–provider relationships that are typically prior to and independent of the constitutional right to health or health care, can significantly affect the quality of

<sup>3</sup> Dembowski (2001: 196) repeats some of the rumors and charges, common in India, that environmental PIL is sometimes used to extort money from private industries or to force them to shut down. Indian observers also speak of “PIL inflation” – the cheapening of the procedure as a result of excessive reliance and abuse.

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health care in a country.<sup>4</sup> The judicially enforced right to information – not a social or economic right – has been a critical tool in civil society campaigns for health and education around the world, including the mobilization around HIV/AIDS policy in South Africa and the right to food in India, which are studied in this book. Certain first-generation rights, including due process and equality, are often used to widen access to health care and education, as the chapters on South Africa and Nigeria, in this volume, demonstrate. The same is true of the right to a “just administrative procedure,” codified in South Africa’s Constitution.

By the same token, we do not look at all of the pathways by which social and economic rights can affect the availability and quality of social and economic goods. To begin with, our focus is on *formal rights*. For us, a formal right is a written statement in which a normative claim regarding what one is due has been incorporated into the state’s legal framework. This might happen when a treaty or other international instrument is signed or ratified, when a constitutional provision or domestic statute is adopted, or when a court enters a judicial decision. Formal rights are to be contrasted with the broader sense of *rights* as nondiscretionary claims about what one is due. The basis for rights claims in this sense need not be a legal text, but the mere fact that one is a human being (in which case the claim is called a *human right*), one’s place in the natural order (a *natural right*), one’s membership in a polity of equals (the *rights of citizens*), or something else. Our focus is on formal rights, rather than on rights-based normative claims per se.

We do not, moreover, examine all of the means by which formal rights affect the availability and quality of social and economic goods, but only examine their impacts insofar as they appear in the legalization of policy. We do not systematically assess what happens, for instance, when “rights-based” civil society organizations use constitutional rights or international treaties as mobilizing tools and as vehicles to push for voice, participation, or political accountability. Constitutionally incorporated (and therefore formal) social and economic rights can also lead advocates, courts, and policy makers to reinterpret and give new urgency to certain first-generation rights, such as the right to information or the right to equality. We do not capture that subtle, hermeneutic process in any systematic way.

The present study, then, is neither an exhaustive review of how legal strategies contribute to the attainment of important economic and social goods nor a comprehensive examination of the impact of formal rights; rather, it is an account of the intersection of the two – the extent and the ways in which the use of formal rights in judicial or quasi-judicial contexts contributes to the availability and quality of social and economic goods. Some of the country chapters review the impact of key medical malpractice cases, but they do not claim to have captured all or even most of them in their case sampling strategies. Some alternative legal strategies to make economic or social rights effective, such as the use of the South African constitutional right to just administrative procedure, receive some attention; but others,

<sup>4</sup> Some argue, of course, that an increase in cost and a decrease in availability of health care accompany the quality increases associated with malpractice litigation, or that malpractice litigation has on balance a negative effect on health outcomes; we do not address these issues, either.

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such as the use of a right to information for framing political and legal strategies to obtain better government services, or the effects of anticorruption cases on expenditures in economic and social areas, are barely addressed for the simple reason that they would make the scope of the study too large. Primarily, then, the country authors focus on the intersection of formal rights and legalization, with a few sidelong glances at other areas where appropriate.

We noted earlier and will subsequently develop the argument that variation in the institutional bases for legalization significantly affects the impact of formal SE rights. We also contend that impacts depend on the ways that these varying institutional bases interact with the kinds of SE rights claims that reach the courts. To elaborate that hypothesis, we need first to develop an empirically useful categorization of SE rights claims, at least insofar as they relate to health and education. To motivate our typology, which we will call the social and economic rights triangle, consider this question. When they apply formal rights, what kinds of legally enforceable duties and liberties do courts create?

Here are some of the claims that have been invoked under the banner of the right to health in countries studied in this book: to receive medical treatment or medication at little or no cost (among many cases in Brazil, Acórdão No. 366.512–5/5–00, São Paulo); gain admission into a hospital emergency room irrespective of ability to pay or medical condition (*Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), South Africa); expand health programs for migrant workers (*Indonesia Citizens Acting for All Indonesian Citizens v. Republic of Indonesia Government* No. 28/Pdt.G/2003/PN.Jkt.pusat, Civil Court, Jakarta, Indonesia); obtain civil damages for negligent standard care (*Indian Medical Association v. V. P. Shantha* AIR (1995) 6 SC 651, India); prosecute a criminally negligent provider (*Juggankhan v. State of MP* AIR 1965 SC 831, India); be informed regarding and have the power to withhold consent for a medical procedure (*Arunachala Vadivel and Others v. Dr. N. Gopalkrishnan* CPR 548 (1992), India); keep health records confidential (*L. B. Joshi v. T. R. Godbole* SC AIR, India); limit excessive pricing for medications (*New Clicks South Africa (Pty) Limited v. Dr. Manto Tshabalala-Msimang* NO (2004), South Africa); limit the length or extent of patent protection for medications (*Pharmaceutical Manufacturers' Association of South Africa v. President of the Republic of South Africa* 2001); receive reimbursement or financing for a specific procedure under terms of a private insurance contract (among many in Brazil, Acórdão No. 2002.001.26562, Rio de Janeiro); grant bail from prison to receive medical treatment (*Ojuwe v. Federal Government of Nigeria* 3 Nig. Weekly L. Repts. 913, 2005, Nigeria); and limit pollutants in the environment (*Suo Moto v. State of Rajasthan and Others*, Rajasthan High Court 2005, AIR 92[1095], India).

Our country chapter authors also cited a diverse set of cases regarding the right to education: to require local or national government to spend more on education (Judicial Review of the 2006 State Budget Law Case Number: 026/PUU-III/2006, Indonesia); challenge whether a school has sufficient infrastructure to increase enrollment (*Dental Council of India v. Subharti K. K. B. Charitable Trust & Anr.*, 25.04.2001, India); limit the fees that schools can charge at the beginning of the



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school year (*Ankur Agrawal v. Respondent: State of Madhya Pradesh and Others*, 2000, India); challenge competency testing in a particular language on grounds that it is discriminatory (*Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), April 4, 1996, South Africa); require schools to have functioning water or electricity service (Ação Civil No. 2005.03.00135–0, Fortaleza, Brazil); open a private school that includes a religious affiliation (*Archbishop Okogie v. Attorney General of Lagos State, Nigeria*); disallow corporal punishment in an independent school (*Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC), August 18, 2000, South Africa); and require a public school to accommodate students with disabilities (Ação No. 2002.001.28421, Rio de Janeiro, Brazil).

Reviewing these cases, it is immediately clear that although social and economic rights litigated in courts have included claims for direct state provision of health care or education goods, courts have applied formal social and economic rights to a much wider set of actors, and in so doing have delineated duties and liberties for which a variety of specific actors, and not (or, in some cases, not only) the state, are legally accountable. In fact, as the country chapters in this volume demonstrate, with the exception of Brazil, legal petitions requesting direct state provision form the minority of social and economic rights cases in every country. None of these courts has, to our knowledge, presented a systematic account of the actors, duties, liberties, or relationships potentially subject to formal social and economic rights. Such an account would in any case need to be provisional as emerging technologies and social relationships give rise to new demand channels, new demands, and new rights. What follows is a simple framework for characterizing the duties, liberties, and relationships that are potentially subject to formal rights.

Broadly speaking, there are three kinds of actors involved in the production and distribution of social goods and services – the state, providers, and clients. (Clients are sometimes better described as “citizens” or “recipients.”) As analytical terms, the entities “the state” and “clients” are relatively clear in this context, but the term “providers” needs clarification. Generally speaking, providers are the groups of individuals that render essential social goods and services to clients. In health care, this group includes physicians, nurses, pharmacists, and insurers, among others;<sup>5</sup> in education, they include teachers, private school owners, university faculty, and textbook publishers. For other rights, the groups are perhaps less well-defined, but would include groups such as engineers in the case of housing rights, as well as builders, landlords, and the government agency that supervises building and manages public housing.<sup>6</sup>

It is noteworthy that even in cases where services are publicly provided and financed and where the providers are public-sector employees, the providers are,

<sup>5</sup> We include industries and other actors whose activities either support or reduce the availability of goods crucial for health, such as clean air and water.

<sup>6</sup> This account of the three types of actors overlaps with and extends the framework in the *World Development Report 2004* (World Bank 2003).

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analytically, a distinct set of actors from the state. This is so for three reasons. First, many of the providers are subject to a specific body of private law, whether in the rules of contract or in professional norms and licensing requirements. This means that when courts review an individual's claim to a formal economic or social right and look to define a legal duty to make the right more effective, the expected behaviors and duties of state employees are somewhat distinct from the expected behaviors and duties of the state organs that supervise and employ them. Second, there is almost inevitably a wide latitude of discretion in the provision of economic and social goods. Indeed, in the case of health care and education, it is hard to imagine how those rights could be made effective without granting the professionals that provide them substantial discretion in the performance of their duties (Gauri 1998; Pritchett and Woolcock 2004). That fact means that the performance of professionals in a particular case must be assessed separately from the decisions of the state organs whose task it is to establish the broad policies under which professionals work.<sup>7</sup> Third, responsibility for providing health care and education is substantially decentralized in many countries, including Brazil, India, and Nigeria, and somewhat decentralized in many other countries, such as Indonesia and South Africa, with the result that in most countries the central organs of the state are legally distinguishable from subnational public providers, as well as from, of course, private providers.

Usually, when courts apply formal rights, they modify the set of legally reviewable duties and liberties that extend from one actor toward another; in figurative terms, they work on the connection between two vertices on a triangle, depicted in 1.2, defined by the three key actors – the state, providers, and clients. In this book, we designate the class of legally reviewable duties and liberties that extend between the state and providers *regulation*. Regulation here includes duties on the part of the state to license and set standards for independent schools and private health-care providers, liberties on the part of providers to offer particular medical treatments or import particular medications, requirements that health insurers pay for specific procedures, state restrictions on the power of professional associations to sanction their own members, the state's duty to impose environmental standards on state-licensed or state-owned vehicles, the extent of the liberty of independent schools to set their fees or select students, and the criminal liability of medical practitioners and teachers who commit corporal punishment. Similarly, in this volume we call the legally reviewable duties and liberties extending between the state and clients claims for *provision or financing*. (Later, we will, for convenience, shorten this to *provision* even though these can involve claims for state financing of private provision.) These include the liberties of public schools to collect formal or informal fees; duties to make services more accessible to particular

<sup>7</sup> It is worth emphasizing that we do not think that this discretion, whose existence has underlain claims that social and economic rights cannot be enforced by courts, prevents judicial actors from specifying legally reviewable duties and liberties related to SE rights, and holding political, bureaucratic, and private actors accountable to them. Florian Hoffmann and Fernando Bentes examine this issue in Brazil, where courts are divided on the extent to which the doctrine of “administrative discretion” shields public education providers from social and economic rights litigation.