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THE RIGHT TO BASIC EDUCATION: A COMPARATIVE STUDY OF THE UNITED STATES, INDIA AND BRAZIL

Faranaaz Veriava^a and Ann Skelton^b

^aSection 27, Braamfontein, Johannesburg, South Africa; ^bFaculty of Law, University of Pretoria, Pretoria, South Africa

Abstract

The developing South African jurisprudence on the right to basic education suggests that the courts have adopted a substantive approach to interpreting the right. The Supreme Court of Appeal in its judgment in the case of *Minister of Basic Education v Basic Education for All* held that every learner is entitled to a textbook in every subject at the commencement of the academic year. The judgment further explicitly noted that the corollary to this entitlement is the duty of the state to provide these textbooks to each and every learner. The lower courts have similarly identified other entitlements that make up the content of the right to basic education. However, while the courts appear to be firmly veering in the direction of a substantive approach to interpreting the right to basic education, no discernable test for determining the content of the right is apparent from the jurisprudence. Furthermore, many of the education provisioning cases have necessitated repeated visits to court and increasingly creative, even coercive remedies to ensure compliance with court orders. This article will, therefore, undertake a comparative study of the United States, India and Brazil. It will examine the approach of the courts in each of these jurisdictions to interpreting the right. It will examine the efficacy of some of the remedies adopted by the courts in each of these jurisdictions to realise the right, whilst simultaneously mediating the institutional concerns in respect of the doctrine of the separation of powers. It will further examine the role of civil society in education litigation in each of these jurisdictions. The aim of the article is to draw on the lessons provided by each of these comparative jurisdictions so as to strengthen public interest litigation in respect of the right to basic education in South Africa.

Keywords: Basic education, socio-economic rights, public-interest action, comparative law

1 Introduction¹

1.1 Background

Section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 guarantees everyone the right to a basic education. This right is described as an ‘unqualified’ socio-economic right because it is not subject to the qualifiers, ‘progressive realisation’, and, ‘within the state’s available resources’, that characterise the other the socio-economic rights in the Constitution. These include the rights to further education, health care, food, water and social security. The standard of review adopted by South Africa’s Constitutional Court with respect to these qualified socio-economic rights has been termed the ‘standard of reasonableness review’.²

The textual differences between the unqualified right to a basic education and the qualified socio-economic rights led to speculation, prior to any clear judicial pronouncement on the issue, as to the possible approach to be adopted by the courts in respect of the unqualified right to basic education. Some argued that the right must be interpreted as a directly enforceable right and in a substantive manner.³ This would require that a court determine the various components that make up the content of the right and then direct government to provide these components. Such an approach is in contrast to that in respect of the qualified socio-economic rights where the court merely determines whether or not a government programme is reasonably capable of facilitating the realisation of the right in question. Others predicted that such a substantive approach was less likely, and that the courts might limit it by placing the primary burden on parents, by allowing for limitation of the right in certain circumstances or through remedies that allow for extended time frames for delivery of the right.⁴

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¹ This article has relied extensively on the comparative chapter of the doctoral study of one of the authors. It also draws on research conducted for a three-country study on the right to education. See A Skelton ‘Strategic litigation impacts: Equal access to quality education’ (2017).

² For a summary of the essential elements that state programmes must exhibit for it to be reasonable see: S Liebenberg *Socio-Economic Rights – adjudication under a transformative constitution* 1st ed (2010) 152-153.

³ See for example F Veriava & F Coomans ‘The right to education’ in D Brand and C Heyns (eds) *Socio-economic rights in South Africa* (2005) 57-83; M Seleokane ‘The Right to Education: Lessons from *Grootboom*’ (2003) 7 *Law, Democracy and Development* 137 and S Liebenberg *Ibid* 244 .

⁴ See S Woolman & M Bishop ‘Education’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2ed (Original Service, 2009) 57-6 - 57-8. See too S Woolman & B Fleish *The constitution in the classroom: Law and education in South Africa 1994-2008* (2009) 120- 126. For an analysis of the different scenarios suggested by Woolman & Bishop See A Skelton ‘How far will courts go in ensuring the right to basic education?’ (2012) 27 *South African Public Law* 392.

The Constitutional Court case of *Juma Masjid Primary School v Ahmed Asruff Essay NO (Juma Masjid)*⁵ can therefore be described as watershed moment in ending such speculation. While the case was not about the positive obligations in respect of the rights to basic education, but rather the obligations of a private property owner who sought to evict a public school established on its property,⁶ the Court nevertheless seized the opportunity to distinguish the unqualified right to basic education from the qualified socio-economic rights. It also appears to have laid the foundation for a substantive approach to the interpretation of the right to basic education. Thus, the Court stated that:⁷

It is important, for the purpose of this judgment, to understand the nature of the right to a basic education under section 29(1)(a). Unlike some of the other socio-economic rights, this right is *immediately realisable*. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application, which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. This right is therefore distinct from the right to ‘further education’ provided for in section 21(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education ‘progressively available and accessible’. (Own emphasis.)

The Court then went on to identify ‘access’ as one of the ‘important’ components of the right to basic education.⁸

Prior to the *Juma Masjid* judgment, the early cases on the right to basic education had focused on access and exclusion in the better-off public schools, characterised by power battles between the government and semi-autonomous school governing bodies. Progressive civil society organisations interested in equal access to education for all children, were somewhat

⁵ 2011(8) BCLR 761 (CC).

⁶ While the eviction went ahead because the learners had been successfully placed at alternative schools, the Constitutional Court nevertheless acknowledged the principle that private entities have an obligation to respect the right to basic education of learners on their property.

⁷ *Juma Masjid* (note 5 above) para 37.

⁸ *Ibid* para 43.

slow to enter the fray. They eventually got involved as *amici curiae* in cases dealing with exclusion due to pregnancy⁹ and admission policies limiting access to relatively advantaged schools.¹⁰

Subsequent to *Juma Masjid*, a core group of civil society organisations¹¹, seemingly emboldened by the promise of judgment, initiated a string of education provisioning cases. Each application was predicated on the underlying notion that the inadequate provisioning of specific inputs, such as, school infrastructure, textbooks, teacher provisioning, furniture and transport at historically disadvantaged schools, constitute violations of the right to a basic education.

These organisations have become repeat players in the education provisioning litigation, sometimes acting collaboratively with each other, or sometimes independently of each other but within a common approach to the interpretation of the right to basic education. Thus, in each of the cases, these organisations have asserted the immediate realisation principle established in *Juma Masjid* as indicating that the right is directly enforceable. Furthermore, in each case, they have asserted that a particular entitlement is ‘essential’ to the fulfilment of the right, thereby advocating for a substantive approach to the right.

This common approach has significantly impacted on the evolving jurisprudence in incrementally defining the content of the right to basic education. In the Supreme Court of Appeal (SCA) judgment in the case *Minister of Basic Education v Basic Education for All*,¹² it was held that every learner is entitled to a textbook in every subject at the commencement of the academic year. The judgment further explicitly noted that the corollary to this entitlement is the duty of government to provide these textbooks to each and every learner.

⁹ *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2013 (9) BCLR 989 (CC). Both the Centre for Child Law (CCL) and Equal Education (EE) intervened separately as *amici* in this case.

¹⁰ In *MEC for Education in Gauteng v Governing Body of Rivonia Primary* 2013 (6) SA 582 (CC), CCL and EE intervened as a joint *amici*. In *Federation of Governing Bodies for South Africa v MEC for Education, Gauteng* 2016 (4) SA 546 (CC), EE intervened as an *amicus curiae*.

¹¹ The legal organisations and social movements constituting this core group include the Legal Resources Centre (LRC); the Centre for Child Law (CCL); Section27; Equal Education (EE) and the Equal Education Law Centre (EELC).

¹² [2016] 1 All SA 369 (SCA).

The High Courts have similarly identified other entitlements that seek to give content of the right to basic education. In the case *Madzodzo v Minister of Basic Education*,¹³ the Court held that there is an obligation on government to provide desks and chairs to learners in schools with 'immediate effect'. In the case of *Tripartite Steering Committee v Minister of Basic Education*¹⁴ the Court held that the right includes a direct entitlement to be provided with transport to-and-from school at the state's expense for those learners who live a distance from school and who cannot afford the cost of transport. Somewhat less explicitly, the courts have suggested that teaching and non-teaching posts in schools are further entitlements in respect of the right to basic education.¹⁵ There have also been cases dealing with school infrastructure that have been settled in favour of applicants that suggest that adequate school infrastructure, such as decent classrooms in properly constructed schools, with sanitation and other services, constitutes a further component of the right.¹⁶

While the South African courts appear to be firmly veering in the direction of a substantive approach to interpreting the right to basic education, no discernable test for determining the content of the right is apparent from the jurisprudence.¹⁷

Furthermore, in many of these education provisioning cases, despite court orders directing the relevant education departments to provide specific entitlements, the departments have failed to comply with court orders within the timeframes set. This apparent government recalcitrance has required persistent civil society vigilance in monitoring compliance with court orders and has, in several instances, necessitated repeated returns to court by organisations seeking remedies that have been increasingly innovative and even coercive in nature so as to ensure compliance.

¹³ 2014 (3) SA 441 (ECM).

¹⁴ 2015 (5) SA 107 (ECG).

¹⁵ See *Centre for Child Law v Minister of Basic Education* [2012] 4 All SA 35 (ECG). See too *Linkside v Minister of Basic Education* (unreported case number 3844/2013) [2015] ZAECGHC 36 (26 January 2015).

¹⁶ *Centre for Child Law v Government of the Eastern Cape Province* Eastern Cape High Court, Bhisho Case, Case No 504/10 of 2011, *Equal Education v Minister of Basic Education* Eastern Cape High Court, Bhisho Case, Case No 81/2012.

¹⁷ For a discussion of the absence of a clear test see F Veriava *The Limpopo Textbook Litigation – A Case Study into the Possibilities of a Transformative Constitutionalism* (2016) 32 *South African Journal for Human Rights* 321, 336.

The aim of this article is therefore to undertake a comparative study of appropriate jurisdictions that may assist litigation of the right to basic education in South Africa. Thus, the article examines the approach of the courts to determining whether or not there has been a violation of the right in the chosen comparators. The article then discusses the efficacy of remedies adopted by the courts in each of comparators to vindicate the rights violation. Finally, given the dominance of South African civil society in the education provisioning litigation over the last decade, the article examines the role of civil society in education litigation in each of these jurisdictions. The comparators include the United States (US), India and Brazil.

Against this backdrop, section two is a study of the right to education in United States (hereafter 'the US'), section three is a study of the right to education in India and section four is a study of the right to education in Brazil. Section five summarises the lessons that may be learnt for South African education litigation from the three comparators.

1.2 The choice of the comparators

Like South Africa, both India and Brazil have justiciable right to education guarantees in their respective national Constitutions. In the US however, while the right to education is not entrenched in the US Federal Constitution, education guarantees are entrenched in most state-based Constitutions. Thus, in each of these three countries a jurisprudence has accrued in respect of the right to education which provides a source of comparative material.

The relevance of the US as a case study is deepened by the fact that both South Africa and the US have a history of formal segregation in education. Moreover, despite the abolition of formal racial segregation in education in both countries, the legacy of unequal provisioning under apartheid, and differential funding between schooling communities within the US and within South Africa has resulted in the perpetuation of educational inequality, or educational inadequacy affecting specific race groups in both of these countries.¹⁸

¹⁸ C McConnachie & C McConnachie 'Concretising the Right to a Basic Education' *South African Law Journal* (2012) 129(3) 554, 573-574. See also D Isaacs 'Realising the Right to Education in South Africa: Lessons from the United States of America' (2010) 26 *South African Journal for Human Rights* 356, 363-368. In the US, more than two-thirds of Black and Hispanic students attend segregated schools in which most students are also

India and Brazil also serve as apposite comparators. Like South Africa, both India and Brazil are marked by severe socio-economic inequalities. Historically too, a quality education has been the preserve of a few in each of these countries. In South Africa and Brazil, while access to educational quality was largely determined by race, in India this was determined by caste, wealth and gender.¹⁹ Furthermore, South Africa, India and Brazil all form part of emerging political blocs such as the Global South and the BRICS.²⁰

2. The United States

2.1 Background

The US has accrued a vast jurisprudence on education as a result of decades long litigation for equal educational opportunities for learners. Earlier litigation culminating in the seminal case of *Brown v Board of Education*²¹ sought the end of *de jure* race-based segregation in schools.

Later litigation, beginning in the 1970s, focused on addressing inequalities in educational opportunity arising out of disparate educational provisioning, which amounted to *de facto* segregation. This litigation has primarily targeted the reform of state school finance systems that are largely reliant on local property taxes. The effect of this system has been that schools in areas of high property wealth tend to be better funded, have better resources and hence provide better educational opportunities, while schools in areas with low property wealth are under-resourced, provide inferior educational opportunities and produce poorer educational outcomes, thereby entrenching inequality.

poor. M Rebel 'Educational Adequacy, Democracy and the Courts' in T Ready, C Edley & C Snow (eds) *Achieving High Educational Standards for All: Conference Summary* (2002) 218, 220.

¹⁹ A Skelton 'Strategic litigation impacts: Equal access to quality education' (2017) 39.

²⁰ BRICS is the acronym for an association of five major emerging national economies Brazil, Russia, India, China and South Africa.

²¹(1954) 347 US 483. In this case, the US Supreme Court had to determine whether or not the segregation of children in public schools, solely on the basis of race, even though the physical and other 'tangible' factors may be equal, deprived African-American children of educational opportunities. The Supreme Court in finding that segregation created a sense of inferiority amongst African-American children held that the policy of 'separate by equal' violated the equal protection guarantee in the US Constitution. The case did not end segregation in schools but instead spurred further litigation, mobilisation and activism for the implementation of the court order and ultimately civil rights reform in the US.

Litigation aimed at addressing inequalities in educational provisioning in the US has therefore occurred along two tracks: Firstly, at Federal and state level under the equal opportunity provisions (equity cases) and secondly, at state level under various education guarantee provisions (adequacy or standards-based litigation).

In the 1970's a wave of litigation was initiated under the equal opportunity clauses of the Federal Constitution and state-based Constitutions, known as equity litigation. Such claims asserted that state funding schemes violated Federal and state equal protection guarantees. Success in these equity cases was mixed, culminating in a major defeat at the federal level in the case of *San Antonio School District v Rodriguez (Rodriguez)*.²²

In this case, the Supreme Court declined to strike down a Texas school-financing scheme reliant on local property taxes under the Federal Constitution's equal protection guarantee. The Court held that the scheme did not discriminate against the poor as a distinct class. In any event, it was held that wealth alone was never deemed a suspect classification. It held further that education was not a fundamental interest because it was neither explicitly, nor implicitly guaranteed by the Constitution. It held, therefore, the standard of strict scrutiny review was inapplicable. Rationality review was deemed to be the appropriate standard of review. The Court held that such a rational relationship to the government purpose of local control had been shown. This decision was viewed as a major setback for the campaign for educational equality.

This defeat, together with other setbacks, sparked a shift of strategy resulting in litigation under the education clauses of various state-based Constitutions. Under this approach, the state courts were asked to determine the standard of adequacy implicit in the various state education guarantees, and to ensure the sufficiency of provisioning to meet this standard. It is this litigation, known as adequacy or standards based litigation, that is the comparative focus in this article.

²² (1973) 411 US1.

2.2 The value and function of education

Before discussing the standard based litigation it is useful to note that in the US, successful claims resulting in judicial orders prescribing the reform of an education system and/or increased funding by government have often been predicated on an underlying assumption of the important role and value of public education, and the related conclusion that the education system under scrutiny is failing to fulfil these objectives.

This underlying purpose of education was first articulated in *Brown* where the Supreme Court stated:²³

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

This holding in *Brown* of the preeminent role of education would become the basis for subsequent claims for equal opportunity in education. Thus, the holding in *Brown* has been repeatedly cited²⁴, and has also been subsequently developed in the jurisprudence that followed it.

Developing *Brown* has in essence entailed articulating the skills that students would require, firstly, for effective civic participation in a democratic society, and secondly, to enable

²³ *Brown* (note 19 above) 493.

²⁴ See even *Rodriguez* (note 20 above).

individuals to compete in the job market. Moreover, as the demands of modern society have increased, so too has the standard evolved for what is deemed to be adequate.

For example, in one of the long line of cases in *Campaign for Fiscal Equity v State of New York (CFE)*²⁵ the New York Court rejected an argument from the state that an 8th or 9th grade education met the constitutional standard of adequacy. Instead the Court held that civic participation would entail being a knowledgeable voter who has the ‘intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming’ and who is capable of serving as a juror in the US legal system and being called upon to ‘determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud.’²⁶ It found further that preparation for competitive employment involves “‘higher levels of skills and knowledge’, and not preparation for ‘low level service jobs’.”²⁷ Thus, in the most recent case law constitutional requirements defining adequacy in education have been matched with contemporary needs so as to enhance opportunities rather than just provide a minimally adequate level of education.

2.3 Standards-based litigation or litigation for educational adequacy

The *Rodriquez* judgment was a major setback for the equity litigation necessitating a change in strategy.²⁸ Standards-based litigation was therefore initiated under many state constitutions throughout the US.²⁹ The fundamental difference with the standards-based litigation was that it became necessary to define a constitutionally adequate level of education provisioning before deciding the amount of money to be allocated for education.

²⁵ 719 N.Y.S.2d 475.

²⁶ Ibid 485.

²⁷ Ibid 486-487.

²⁸ Even though education finance cases continued to be litigated at state level under the equal opportunity guarantees of the various state constitutions, many states followed the precedent established in *Rodriquez*. This resulted in defeats in many cases. Moreover, even where claimants were successful, litigation under state equality guarantees remained fraught with challenges. For example, court orders tended to direct legislatures to eliminate inequalities, but provided little guidance on how to this. Thus, in some instances court orders met with legislative resistance leading to inaction or, in others, legislative reforms tended to equalise down rather than improve funding for schools in poorer areas. See M Rebel (note 16 above) 227.

²⁹ Litigation under the standards-based litigation has been initiated in 44 out of 50 states in which about two-thirds of these cases have been successful. See M Rebel Ibid.

According to one of the leading lawyers spearheading the standards-based litigation:³⁰

Instead of dealing with equal funding concepts and property tax reforms, *the adequacy approach allows courts to focus on the concrete issues of what resources are needed to provide the opportunity for an adequate education to all students and the extent to which those resources are being provided.*³¹ (Own emphasis.)

It is noteworthy that, in many states, litigation has occurred over many decades, sometimes spanning a period of 30 years.³² Cases are often remanded back to the lower courts for further evidence, or claimants have returned to court because of insufficient legislative reform following the initial court order, or because cases are appealed.

In general, standards-based litigation in many states has resulted in legislative reforms and has resulted in improved state spending on education. According to Cathy Albisa and Amanda Shanor, states with judgments that declared funding schemes unconstitutional have increased funding by 23 per cent more than states without judgments.³³ However, following the recent economic recession in the US, many of these reforms have been undermined by deficit cuts. Currently, therefore, extensive legislative reforms are now underfunded in many states due to budget cuts. This has in turn initiated a new wave of litigation, which is currently ongoing.³⁴ The discussion below focusses on some of the most well-known case studies in standards-based litigation.

³⁰M Rebel Ibid 219. See too C Albisa & A Shanor 'United States: Education rights and the parametres of the possible' in M Langford, C Rodriguez-Garavito & J Rossi (eds) *Social rights judgements and the politics of compliance: Making it stick* (2017) loc 7798.

³¹ Own emphasis.

³² See for example some of the state litigation not discussed below: The New Jersey Cases initiated in *Robinson v Cahill* 62 NJ 473, 303 A.2d 213 [1973] (*Robinson I*) to *Abbot v Burke* 172 NJ 294, 798 A2d 602 [2002] (*Abbot IX*); The Texas cases *Edgewood Indep Sch Dist v Kirby*, 777 SW 2d 391 (Tex 1989) (*Edgewood I*) to *Edgewood Indep Sch Dist*, 917 SW 2d 717 (Tex 1995) (*Edgewood IV*).

³³ C Albisa & A Shanor (note 28 above) loc 7805.

³⁴ See for example the more recent case of in the Supreme Court of Kansas in *Gannon v State of Kansas* (7 March 2014) Case No. 109 335. The case of *Gannon v State of Kansas* followed a long history of standards-based litigation that resulted in significant legislative reform and increased state spending on education. In recent years however education spending has experienced deficit cuts. The predecessor cases include *Montoy v State* 275 Kan. 145, 62 P.3d 228 (2003) (*Montoy I*); *Montoy v State* 278 Kan. 769, 120 P.3d 306 (2005) (*Montoy II*); *Montoy v. State* 279 Kan. 817, 112 P.3d 923 (2005) (*Montoy III*); and *Montoy v State*, 282 Kan. 9, 138 P.3d 755 (2006) (*Montoy IV*).

The first is the State of Kentucky. In 1989, a citizen led movement called the Pritchard Committee for Academic Excellence (Pritchard Committee) initiated the case of *Rose v Council for Better Education (Rose)*.³⁵ The Pritchard Committee has been described as a ‘reform movement’ comprising of community members outside of the education profession³⁶ In *Rose*, the Supreme Court of Kentucky upheld a trial court ruling that declared the state’s common school finance system to be unconstitutional and the system of common schools to be inefficient.

Section 183 of the Kentucky Constitution required the General Assembly to ‘provide an efficient system of common schools throughout the state’. The plaintiffs alleged that the system of school financing provided for by the legislature, despite having been reformed over the years, was inadequate. It placed too much emphasis on local school board resources, which emphasis resulted in inadequacies and did not provide equal educational opportunity.

In defining an adequate education, the Court enumerated seven learning goals. These included:³⁷

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

³⁵ 790 SW 2d 186 (Ky 1989).

³⁶ D Isaacs (note 16 above) 370.

³⁷ *Rose* (note 32 above) 76-77.

These learning goals established in *Rose* have also served as a benchmark for other courts in other states deciding similar cases ever since.³⁸

The *Rose* Court ordered the state to ‘re-create, re-establish a new system of common schools’ according to the standards of efficiency established which included meeting the seven learning goals. The Kentucky General Assembly was also ordered to provide adequate funding for such a system. The Court justified its choice of remedy as not violating the separation of powers doctrine in the following terms:³⁹

We do not instruct the General Assembly to enact any specific legislation. We do not direct the members of the General Assembly to raise taxes. It is their decision how best to achieve efficiency. We only decide the nature of the constitutional mandate. We only determine the intent of the framers. Carrying-out that intent is the duty of the General Assembly.

It is noteworthy that in Kentucky, the formulation of the goals for achieving an adequate education was based on expert testimony filed by the Pritchard Committee which, prior to the case, had provided the groundwork for the reform of the education system.⁴⁰

In 1990, in compliance with the court order in *Rose*, the legislature enacted a comprehensive package of education reforms, the Kentucky Education Reform Act (KERA). The Act sought to comply with the goals established in the case. As a result, school funding increased dramatically, and all schools adopted at least some of the innovative education reforms.⁴¹

Another noteworthy case study, is the long line of Campaign for Fiscal Equality (CFE) cases initiated in the 1990’s, which continued for more than 10 years. The cases were led by the

³⁸ See most recently the judgment in *Gannon* (note 31 above) where the Court noted that the adequacy component established in *Rose* is required both in the structure and the implementation of the legislation.

³⁹ *Rose* (note 32 above) 76.

⁴⁰ D Isaacs (note 16 above) 371.

⁴¹ M Rebel (note 16 above) 235. See also D Isaacs *Ibid* 369-373. According to Isaacs there were direct material benefits that arose as a result of reforms that followed the *Rose* litigation. Kentucky which ranked 48th in per-pupil spending, 41st in pupil-teacher ratio, and 38th in average teacher salary saw a dramatic turnaround. By 2005, the State’s national rankings for per pupil spending, pupil-teacher ratios and average teacher salary had improved dramatically to 30th, 16th and 34th respectively.

Campaign for Fiscal Equality that has been described by Albisa and Shanor as a ‘broad coalition’ with a ‘strong communications, advocacy and legal strategy’.⁴²

In the 1995 *CFE* case,⁴³ the plaintiffs alleged that the state’s educational financing scheme failed to provide school children attending public schools in the City of New York an opportunity to obtain a sound basic education, in violation of the state Constitution.

Article 11, section 1, the Education Article, mandates that, ‘the legislature shall provide for the maintenance and support of a system of free common schools, wherein all children of this state may be educated’. The New York Court of Appeals, the state’s highest court, held that the provision imposes an ‘unambiguous acknowledgement of a constitutional floor with respect to educational adequacy.’ The Court went on to say that, ‘We conclude that a duty exists and that we are responsible for adjudicating that duty.’⁴⁴

The Court then defined a sound basic education, ‘to consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving a jury.’⁴⁵ It also defined broadly the inputs that would be required to achieve a ‘sound basic education’:⁴⁶

The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

⁴² C Albisa & A Shanor (note 28 above) loc 7907.

⁴³ 86 NY 2d 307 (NY 1995).

⁴⁴ Ibid 315.

⁴⁵ Ibid 316.

⁴⁶ Ibid 317.

The plaintiff then had to establish a causal link between the funding system and the failure to provide a sound basic education. Thus, the plaintiffs supported their claim with evidence of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books. The plaintiffs also relied on tests results reflecting poor learner outcomes in standardised tests.

The Court, therefore, held that the plaintiffs' claim was a viable cause of action under the Education Article of the state Constitution and remanded the case for trial. The trial court found that the state had violated the education guarantee by failing to provide New York City children with a basic education.⁴⁷ In 2002 the Appellate Division reversed this decision, holding that all that is required for a sound basic education are eighth or ninth-grade skills.

In 2003, the Court of Appeals⁴⁸ reversed the Appellate Division decision and upheld the trial court's order, finding that a sound basic education means a 'meaningful high school education' that could not be pegged at a particular grade. The Court elaborated on the meaning of 'civic participation' in the modern day to mean the ability to vote and serve on a jury 'capably and knowledgeably,' and that a sound basic education must also prepare students to compete for jobs that would enable them to support themselves.⁴⁹

The Court found that the plaintiffs had established a *prima facie* case of a violation of the education guarantee by showing a causal link between the funding of New York City schools and students' educational opportunities. This was measured based on evidence at the trial looking at educational inputs and outputs.⁵⁰ The Court found that tens of thousands of students were being placed in overcrowded classrooms, being taught by unqualified teachers and were being provided with inadequate facilities and equipment.⁵¹ Test results and the high drop-out rate were also relied on to show that learners were not receiving a basic education.

⁴⁷ 719 N.Y.S.2d 475.

⁴⁸ [100 N.Y.2d 893 (NY 2003)].

⁴⁹ Ibid 111.

⁵⁰ Ibid 113-120.

⁵¹ Ibid 115. While textbooks were explicitly noted as being included in such measurement of input, the Court found that textbooks supplies were adequate at that time.

The Court therefore ordered the state to: (1) ascertain the actual cost of providing a sound basic education⁵²; (2) reform the funding system so that every school in New York has the resources to provide the opportunity for a sound basic education; and (3) establish an accountability system that ensures reforms that actually provide this opportunity. The Court gave the state a 2004 deadline to implement the measures. This subsequently resulted in significant legislative reform and increased funding, though recent budget cuts have undermined these reforms.

3 India

3.1 Background

The right to education in the Indian Constitution like other socio-economic rights in the Indian Constitution, was, until recently, listed as a non-justiciable directive principle of state policy (DPSP), rather than being entrenched as a fundamental right. In 1990 however, the Indian Supreme Court, in a case addressing the constitutionality of legislation to curb excessive ‘capitation’ fees at private institutions of higher learning went beyond the strictures of that case to discuss the status of education as a right. In the case of *Unnikrishnan JP v State of Andhra Pradesh* (*Unnikrishnan*) the Court noted that Article 45 on Education was the only directive principle that contained a time-limit of ten years within which the right should have been realised. The Court pointed out that 44 years had gone by since the Constitution was first written – four times the time limit. The Court posed the question as to whether this– converted the obligation into an enforceable right to education.⁵³ The Court went on to link the right to education with the right to life and personal liberty.⁵⁴

⁵² This remedy may be compared to that recently handed down in the Connecticut education litigation that followed the reasoning in the *CFE* cases but which then went beyond the *CFE* reasoning. Following a string of cases, in *Connecticut Coalition for Justice in Education Funding (CCJEF) v Reil* X07HHDCV145037655 (7 September 2016) the Court held that the State was spending more than was determined minimally adequate by the New York courts. As such more was needed than a costing out study. Instead the court also imposed a rationality test which required that State’s spending plan be ‘rationally, substantially and verifiably connected to creating education opportunities for children’. It held therefore that the State of Connecticut had defaulted on its constitutional duty to provide adequate public school opportunities. The Court ordered the State to submit proposed reforms in all of these areas within 180 days. The State has announced its intention to appeal this decision.

⁵³ AIR 1993 SC 2178 at 2232. In the subsequent case of *M.C. Mehta v State of Tamil Nadu* AIR 1997 SC 699, the Supreme Court stated that Article 45 had acquired the status of a fundamental right following *Unnikrishnan*.

⁵⁴ *Unnikrishnan* (note 51 above) 2253.

Legal scholar, Muradlihar notes that many subsequent education reforms may be attributed to the *Unnikrishnan* case.,⁵⁵ Sripati and Thiruvengadam point out that it became the rallying point for activists seeking education reform and led to the creation of the National Alliance for the Fundamental Right to Education (NAFRE) which successfully advocated for an amendment to the Constitution to formally entrench the right to education as a fundamental right.⁵⁶

Thus, in 2002, the Indian Constitution was amended to formally make the right to education a justiciable right. Article 21 A states: 'The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.'

3.2 Litigation under Article 21A that entrenches the right to education as a fundamental right

Following the Article 21A amendment, in 2009, the Indian Parliament passed the Right of Children to Free and Compulsory Education Act, colloquially referred to as the 'RTE' Act.⁵⁷ The Act aims to give substantive content to the right to education for learners between the age of 6 and 14 years of age by addressing issues of access and quality.

Thus, for example, the RTE Act defines what free education means.⁵⁸ It specifies the obligations of government to provide compulsory education.⁵⁹ It specifies the duties and responsibilities of the different tiers of government as well as that of schools and teachers. The RTE Act contains a prohibition against expulsion within this phase of education.⁶⁰ It also contains a prohibition against corporal punishment and mental harassment.⁶¹ It provides for the regulation of the curriculum during this phase of schooling. It also regulates the

⁵⁵ S Muralidhar 'India: The expectations and challenges of judicial enforcement of social rights' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative Law* (2008) 102-123.

⁵⁶ V Sripati & AK Thiruvengadam 'Constitutional Amendment making the right to education a fundamental right' (2004) *International Journal of Constitutional Law* 153.

⁵⁷ Act 35 of 2009.

⁵⁸ In terms of section 3(2), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing an elementary education.

⁵⁹ See for example section 8.

⁶⁰ Section 16.

⁶¹ Section 17.

constitution and function of the School Management Committee.⁶² This School Management Committee is similar to the South African school governing body (SGB).

Importantly, the RTE Act lays down the norms and standards that impact on the quality of education in Indian schools. These include for example norms and standards for learner-teacher ratios, school infrastructure, school-working days, teacher-working hours.⁶³

As such the RTE Act has the potential to provide a blueprint for significant education reform. Unfortunately, as will be illustrated below, there have been very few cases seeking the implementation of the RTE Act. The poor implementation of the RTE Act was confirmed in the 2017 report of a three-country study of India, South Africa and Brazil produced by the Open Society Foundation (OSF) titled 'Strategic litigation impacts: Equal access to quality education.' For example, the report notes that despite deadlines for schools meeting the requirements stipulated in Act having passed, less than 10 per cent of schools comply with RTE norms.⁶⁴

3.2.1 *The reservation provision cases*

The cases that have reached the Supreme Court have been largely driven by private schools seeking waivers from the obligations imposed by the Act. The first case of this nature was that of *Society for Un-aided Private Schools of Rajasthan v Union of India (Society for Un-aided Private Schools of Rajasthan)*⁶⁵.

Section 12 of the RTE Act requires all schools including private schools, to reserve 25 per cent of places for children from disadvantaged groups. Schools are reimbursed by government to the extent of 'per-child-expenditure incurred by the State' or the actual amount the school charges, whichever is less.

The Society for Unaided Private Schools challenged this provision, colloquially referred to as

⁶² Sections 21-22.

⁶³ These are set out in the Schedule to the RTE Act.

⁶⁴ A Skelton (note 1 above) 40. The report measures the impact of litigation in the three countries by evaluating (1) the material outcomes from litigation, (2) policy changes or jurisprudential shifts and (3) agenda change as a result of the litigation.

⁶⁵ AIR 2012 SC 3445.

the 'reservation provision'. The Society argued that this provision violated the rights of private schools to practice any profession or occupation free from government interference protected under Article 19 of the Constitution, and the right of minority groups to establish and administer schools protected under Article 30 of the Constitution.

In its majority decision, the Court acknowledged that the RTE Act was promulgated to give effect to the right to education guarantee in the Constitution.⁶⁶ The Court reiterated that the State's primary obligation is to provide for free and compulsory education to all children, particularly those who cannot afford primary education. The reasoning of the Court was that while it recognised the rights of private schools, it held that section 12 of the RTE Act was a 'reasonable restriction' of those rights in the public interest.

However, the Court went on to make a distinction between private schools generally and private minority schools. It therefore exempted minority schools from the section 12 provision on the basis that to impose the 25 percent quota on such school would violate the right of minority groups to establish private schools under Article 30.

As noted, *Society for Un-aided Private Schools Society of Rajasthan* was brought by private schools seeking to limit the provisions of RTE that sought to improve access to quality education for poor learners. Progressive civil society therefore intervened to defend the provisions of the RTE Act. The Centre for Law and Policy Research (CLPR) represented an organisation called the Azim Premji Foundation as an intervenor, . arguing that government was constitutionally obliged to 'redress historical and social disadvantage, through proportionate equality measures.'⁶⁷ It is noteworthy that CLPR's argument drew on the similarities between the South Africa Constitution and the Indian Constitution as justifying a transformative approach to interpreting the right. CLPR stated:⁶⁸

⁶⁶ Ibid para 5. See too in the case *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1 para 3 where the Supreme Court noted that: 'Parliament has made the law contemplated by Article 21A by enacting the [RTE Act].' This case is discussed further below.

⁶⁷ Written Submissions on behalf of the Azim Premji Foundation 3 March 2011 para 4.1 in *Society for un-aided Private Schools of Rajasthan v Union of India* AIR 2012 SC 3445.

⁶⁸ Ibid para 5.6

Therefore, it is submitted that the genesis of the South African constitutional scheme, like that of India, lies in a commitment to address and remedy grave social inequalities of every kind. One such remedy has been to entrench justiciable socio-economic rights within the constitutional text. *It is respectfully submitted that given both the South African and Indian legal paradigms commitment to transformative constitutionalism, the approach of the South African Constitution and Highest Courts may be considered.* (Own emphasis.)

The Court, in its finding that the section 12 was horizontally applicable in respect of private schools, acknowledged the contribution of CLPR in the case.⁶⁹ However, the case was ultimately disappointing because it excluded minority schools that were subsidised by the state from having to respect the reservation requirement of the RTE Act.

There was a second challenge to the reservation provision, *Pramati Educational and Cultural Trust v Union of India (Pramati)*.⁷⁰ The judgment confirmed and elaborated on the *Society for Un-aided Private Schools of Rajasthan* case, extending the non-applicability of the reservation provision to private schools established specifically for minorities- even in cases where the schools were not subsidized by the government.

3.2.2 Education provisioning litigation

In recent years, a few cases have begun to focus on education provisioning in schools. The first is *Avinash Merhotra v Union of India (Avinash Merhotra)*⁷¹. In this case, a devastating fire had swept through a middle school in Madras in the state of Tamil Nadu. The school was a low fee private school with more than 900 learners in ‘a crowded, thatched-roof building with a single entrance, a narrow stairway, windowless classrooms and only one entrance and exit.’⁷² The judgment also notes that the ventilation of the entire school building was extremely poor and that the thatched roof violated standard building regulations. When the fire started, people tried to rescue the children but were impeded by the absence of exits and

⁶⁹ *Society for Un-aided Private Schools of Rajasthan v Union of India* (note 63 above) para 28.

⁷⁰ Note 64 above. The CLPR again represented the Azim Premji Foundation as an intervenor. They argued that minority education institutions should also share the responsibilities and obligations with the other educational institutions under the Act to provide for free education to children belonging to disadvantaged or weaker sections. This time however, the Court did not appear to have accepted their submissions.

⁷¹ (2009) 6 SCC 398.

⁷² *Ibid* para 21.

the narrow stairs. The roof collapsed, resulting in the tragic death of 93 children. The judgment noted that the school's failure to comply with school safety regulations was not an isolated case but was a systemic concern throughout India.⁷³

As a result of the fire, the petitioner initiated a petition in terms of the right to life and the right to education for improved school conditions. In particular, it alleged that the State of Tamil Nadu is duty bound to protect and secure the lives of learners by developing minimum safety standards and ensuring their implementation.

The Court issued a notice requiring states to file affidavits detailing the current safety of their schools and plans for improvement. A court appointed *amicus curiae* was also requested to develop a minimum set of safety standards for schools. The Court found that most states did not comply with these minimum standards.

Citing an earlier case, the Court in its judgment noted: ⁷⁴ 'Similarly, we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety. '

Significantly, the Court then went on to note that 'the right to education incorporates the provision of safe schools'.⁷⁵

The Court therefore laid out a set of minimum standards that schools should abide by. It also required all schools to install fire extinguishing equipment within six months, and ordered all states to file an affidavit of compliance of this order within one month after installation of fire extinguishing equipment.

⁷³ Ibid paras 6-7.

⁷⁴ Ibid para 30.

⁷⁵ Ibid para 32.

Another case is the case of *Environmental and Consumer Protection Foundation v Delhi Administration (ECPF)*⁷⁶ that was initiated as far back as 2004.⁷⁷ The ECPF sought broad relief to improve conditions in schools across India under the Article 21A education guarantee. This included that government provide basic infrastructure facilities like toilet facilities, drinking water and classrooms as well as the appointment of teachers and classrooms so that children could ‘study in a clean and healthy environment.’⁷⁸ While the relief sought was broad, a major focus of the case appears to be the lack of separate toilets for girls and adequate toilet facilities more generally. While the case was pending, the Indian government passed the RTE Act.

Prior to the final judgment, the Court had issued a number of interim orders requiring all states to provide toilet facilities at all schools and to provide temporary facilities until permanent toilets could be constructed. The states were further ordered to file affidavits outlining compliance with the infrastructural norms in the RTE Act.

A number of states complied by filing affidavits while others did not. The affidavits indicated that not all schools had toilet facilities or made provision for drinking water. The Court’s final order noted that the states must comply with the provisions on the RTE for implementation within six months from the date of the judgment. The Court further noted that if its directions were not fully implemented, aggrieved parties could apply for appropriate orders.

While the order was vague and lacked a proper structural remedy to ensure compliance, the court unambiguously held that adequate toilet facilities form part of the education guarantee. In particular, the Court re-stated its finding in an earlier interim order noting:⁷⁹

It is imperative that all the schools must provide toilet facilities. Empirical researchers have indicated that wherever toilet facilities are not provided in the schools, parents do not send their children (particularly girls) to schools. It clearly violates the right to

⁷⁶ AIR 2013 SC 1111.

⁷⁷ The petitioner was described in para 1 of the judgment as a ‘registered charitable society’.

⁷⁸ Ibid para 2.

⁷⁹ Ibid para 4.

free and compulsory education of children guaranteed under Article 21-A of the Constitution.

It is also noteworthy that the Court relied on empirical data of impact in determining the content of the education guarantee.

The OSF report's analysis of both the *Avinash Merhotra* and the *ECPF* cases is that the orders in both were 'very broad'. Furthermore, the report notes that because both of these cases attracted minimal media attention and were not supported by strong social movements, implementation of these orders has been very weak.⁸⁰

The OSF report notes further that there are new cases that are being initiated in the high courts. One case in particular is worth noting because of its remedial impact. The case was initiated in the state of Karnataka by the Court Registrar, following a newspaper report alleging that nearly 50 000 children remained out of school in the state.⁸¹ The case led to a door-to-door survey by the government in 2013, which found that the number of out-of-school learners was as high as 170 000. Section 3(1) of the RTE Act provides that 'every child of the age of six to fourteen shall have a right to free compulsory education in a neighbourhood school till completion of elementary education'.

To address the issue of out-of-school learners the High Court directed the formation of a committee referred to as the 'High Powered Committee' comprising of government, NGO's and lawyers involved in the case. The OSF report notes that there has been 'some progress with regard to the implementation of strategies to mainstream out of school children.'⁸² This has been attributed to the functioning of the Committee that has engaged in a solution-orientated dialogue rather than imposing a top-down order that characterised both the *Avinash Merhotra* and the *ECPF* cases and which resulted in weak court orders.⁸³

⁸⁰ A Skelton (note 1 above) 43.

⁸¹ *Registrar (Judicial) of High Court of Karnataka v State of Karnataka* WP 15768 of 2013.

⁸² A Skelton (note 1 above) 43.

⁸³ One such change was to introduce a position of an 'attendance authority' in the education administration so that when a child is out of school for more than seven day, this person has an obligation to investigate the reason for the child being absent. Thus, the OSF report notes the number of out-of-school children has been reduced from 170 000 children in 2013 to approximately 15 000 children in 2015. Ibid 59 and 64.

4. Brazil⁸⁴

4.1 Background

In Brazil, a post-dictatorship Federal Constitution was adopted in 1988.⁸⁵ The Constitution entrenches a wide array of socio-economic rights,⁸⁶ which have been described as 'immediately applicable' and justiciable by the courts.⁸⁷ They are also called 'stone clauses' because they are immune to amendment.⁸⁸

Articles 205-214 are the education provisions in the Constitution. Article 208 establishes the normative parameters of the education guarantees: 'free and compulsory elementary education from the ages of four to seventeen, the progressive universalisation of secondary education, education of learners with disabilities (preferably inclusive) and access to higher education 'according to individual capacity'. It further appears to guarantee specified educational inputs by providing for:⁸⁹ '[E]ducational assistance in all stages of basic education by means of supplemental programs of school books, teaching materials, transportation, nutrition and health care.'

Particularly noteworthy and distinguishable from the South African and Indian education guarantees are not only the specific elaboration of the rights but also an elaboration of the corresponding duties on government. Thus, for example, Article 208 explicitly notes that free and compulsory education is a 'subjective public right' and the failure to provide this or the 'irregular' provision thereof 'implies liability on the part of the competent authority.'

Finally, there have been important constitutional amendments from 2009 onwards that have sought to extend the right guarantee to early childhood education. Thus, the beginning of the age of compulsory education was amended to include learners from the age of four.

⁸⁴ The case-law and most of the academic articles discussing the right to education in Brazil are in Portuguese. Thus, much of the discussion of the Brazilian case-law is drawn from secondary sources.

⁸⁵ See F Piovesan 'Brazil: Impact and challenges of social rights in the courts.' in Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative Law* (2008) 182 -191.

⁸⁶ Article Six of the Constitution states: 'Education, health, nutrition, labor, housing, transport, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth in this Constitution.'

⁸⁷ F Piovesan (note 83 above) 183. A Skelton (note 1 above) 30.

⁸⁸ F Piovesan Ibid 182.

⁸⁹ Article 208, para 7.

These amendments have impacted dramatically on litigation and education campaigns of civil society that have focussed on improved funding for early childhood education.⁹⁰ This is discussed in more detail below.

There are unique features in the structure and functioning of the legal system that are relevant to an analysis of education litigation in Brazil. First, despite the existence of federal law on education in Brazil that establishes some basic norms for the country, the duty bearers for education delivery are primarily local governments, especially municipalities. As a result of this, educational policies vary greatly between local governments. The OSF report therefore notes that this has made impact litigation and advocacy in education more difficult at the national level and the most innovative cases and reforms have occurred at a more localised level.⁹¹

Another significant and distinguishing characteristic of the Brazilian system is that one of the institutional functions of the public prosecutors and state-funded lawyers is to initiate public interest litigation, though this is not to the exclusion of private litigants. The *Ministerio Publico* is tasked with protecting vulnerable groups and has been involved in initiating collective cases on behalf of groups. The *Defensoria Publica* is tasked with providing legal assistance to poor individuals and has been involved in initiating several of the individual cases as opposed to wider impact cases. Both these institutions have units working specifically on children's rights and the right to education.⁹²

Another unique feature appears to be the availability of an array of speedy extra-judicial remedies that were introduced in the 1988 Constitution, particularly in the lower courts for the protection of rights and which are utilised by civil society. One such remedy within the context of the cases discussed is an extra judicial remedy, known as *Termos de Ajustamento de Conduta (TAC)*, meaning Terms of Conduct Adjustment. This is an agreement that allows for the speedier resolution of an issue than a judicial agreement. The OSF report describes the TAC as an agreement signed by the parties to undertake to fulfil certain conditions in

⁹⁰ A Skelton (note 1 above) 32.

⁹¹ A Skelton Ibid 33.

⁹² Ibid 30-31.

order to solve the problem, according to timelines.⁹³ Monitoring committees are set up to oversee compliance. The process leading up to the TAC allows for participation of civil society organizations and state lawyers in determining the solution.⁹⁴

4.2 Litigation

Ocatavio Luiz Motta Ferra notes that there has been an ‘explosion’ in socio-economic litigation since 1998. This litigation has however centred largely on health rights, particularly in respect of access to medicines, operations and equipment⁹⁵. Motta Ferra notes further that litigation on the right to education has been experienced at a much lower volume and that focus has been primarily on early childhood education.⁹⁶

Motta Ferra notes too that cases brought by individuals are more likely to succeed than collective cases. He attributes this to a ‘greater difficulty of the judiciary to translate the generic norms of the Constitution into specific orders for the state when the suit is collective and requires structural measures.’⁹⁷ Thus, his analysis suggests a judicial deference in complex matters that involved polycentric decision-making. He argues that this contributes to inequality, since individual law suits give ‘a clear advantage’ to those who have better access to the courts because they are better informed and have better access to resources.⁹⁸ This may be changing as while earlier litigation focused on relief to individuals in cases dealing with access and infrastructure issues, more recent cases from civil society and state lawyers have focused on strategic litigation ‘to foster large-scale structural changes of public policies on education’.⁹⁹

The main area of progressive impact litigation in defining the content of the right to education, appears to be in provision of early childhood education. The Brazilian scholarship on the right to education suggests that cases for provision of early childhood education have

⁹³ Ibid endnote 26.

⁹⁴ Ibid 31 and 87.

⁹⁵ O L Motta Ferraz ‘Brazil: Are collective suits harder to enforce?’ in M Langford, C Rodriguez-Garavito & J Rossi (eds) *Social Rights and the politics of compliance: Making it stick* (2017) loc 5279.

⁹⁶ Ibid loc 5712.

⁹⁷ Ibid loc 5686.

⁹⁸ Ibid.

⁹⁹ A Skelton (note 1 above) 35.

been litigated over a long period of time culminating in a 2013 ruling by the Court of Appeal of the state of São Paulo. Early cases tended to focus on ensuring individual access to institutions for children under the age of five.¹⁰⁰ This led to an insufficient number of spaces providing for this category of children. Therefore, a case led by a coalition of civil society organisations, including the civil society organization, *Ação Educativa*, under the umbrella of *Movimento Crèche para Todos* (Childcare for All Movement) sought improved provisioning for early childhood education. The Court of Appeal ruled that the municipality of São Paulo should provide at least 150 000 new spots in childcare facilities and elementary schools by 2016, for children aged five years old and under.¹⁰¹ It further required that the municipality present within 60 days, a plan for expansion of the vacancies for early childhood education, including the building of new schools. Finally, the Court ordered the municipality of São Paulo to present a detailed report every six months on the measures taken.¹⁰²

According to the legal scholar, Oscar Vilhena Viera¹⁰³ this decision reversed the rulings of the lower courts, which accepted the government's argument that the judiciary should remain silent in matters of public policy.

Viera's analysis of the order notes:¹⁰⁴

The solution in this case could not have been more creative. The Court ordered the municipality itself to draft a plan, with a fixed deadline that has just expired, for the provision of 150,000 additional school places, while making it clear that the expansion of the school system must meet various educational quality standards established by law as well as by the National and the Municipal Councils for Education. Moreover, the judges ruled that the Court's section on children's rights would be responsible for monitoring the implementation of the plan, along with civil society organisations, the

¹⁰⁰ For a brief listing of these cases See F Piovesan (note 83 above) 188-189.

¹⁰¹ *Tribunal de Justiça do Estado de São Paulo* [Court of Appeals of the State of São Paulo or TJ/SP], *Apelação* [Appeal] no 0150735-64.2008.8.26.0002, *Movimento Creche para Todos* [Movement Childcare for All] v *The Municipality of São Paulo*.

¹⁰² A Skelton (note 1 above) 36.

¹⁰³ O Vilhena Viera, 'Judicial Experimentation and Public Policy: A New Approach to the Right to Education in Brazil', (OxHRH Blog, 31 July 2014).

¹⁰⁴ *Ibid.*

Public Prosecutor's Office, the Public Attorney's Office, among others, 'in relation to the opening of new school vacancies, or in relation to the provision of quality education.' The Court kept open the possibility of penalising the failure of the executive to produce a consistent plan, or even adopting its own plan in the case of an unsatisfactory proposal from the executive.

Viera goes on to note in respect of the court order that by placing the obligation to draft a plan squarely on the shoulders of municipality officials while requiring the implementation of this plan to be monitored by lawyers and civil society, the judgment mediates the difficult challenges inherent in socio-economic rights adjudication: That of, on the one hand, recognising the legal norm, and then on the other, developing a remedy that seeks to vindicate the rights violation without treading into the domain of the executive and the legislature.¹⁰⁵

The OSF study notes that the monitoring committee receives reports every two months on the implementation of the court order, and that consequently there has been a high level of implementation of the court order.¹⁰⁶

The early childhood education case was accompanied by community mobilisation. There are many similarities between this mobilisation and that of the Pritchard Committee discussed under the US case study. The *Movimento Crèche para Todos* started as a social movement cultivating the groundwork for mobilisation for years before the 2012 case. Thus, a large part of the work of the movement was creating awareness through advocacy, petitions and protests. The work of the movement at the beginning included a registration drive to ensure that all children had access to early childhood education. This led to an increasing demand for school spaces. The movement then tried smaller cases and initiated a dialogue with municipal officials and only when that failed they initiated the 2010 litigation.¹⁰⁷

¹⁰⁵ Ibid.

¹⁰⁶ A Skelton (note 1 above) 58, 31. The OSF report notes that at least 66 135 vacancies were created as a result of the litigation.

¹⁰⁷ Ibid 68.

Another interesting case concerns the teaching of Afro-Brazilian history and culture as required by Federal Law in both primary and secondary schools and including public and private schools. While this case is not about education provisioning per se and did not result in a formal court order, it is instructive from the perspective of discussing remedies to vindicate the right to education.

Civil society groups in this case approached the public prosecutor to ensure the implementation of the law. The proceeding that ensued resulted in a *TAC* in 2011. The agreement established guidelines for Afro-Brazilian studies in schools in eleven municipalities. It further provided for the establishment of a monitoring unit within each of those municipalities to monitor the implementation of the guidelines.¹⁰⁸ The *TAC* in the Afro-Brazilian case is described as an example of committees functioning to ensure the vindication of the rights.¹⁰⁹

5. Conclusion: Lessons from the US, India and Brazil

An examination of the right to education in the US, India and Brazil suggests that judgments on the right to education in all three countries have to some degree contributed to the normative development of the right to education in their respective jurisdictions.

In Brazil, this has occurred through the recognition of the necessity of adequate provisioning of early childhood education. In India, the jurisprudence in *Avinash Merhotra* and the *ECPF* cases have begun to define the meaning of safe and adequate infrastructure. Noteworthy, in determining whether the right to education had been violated in the *ECPF* case was the reliance by the Court on empirical evidence of the impact of poor sanitation particularly on girl learners.

The most developed approach however to interpreting the right appears to be that which has developed in the US. The US standards-based litigation appears to have developed a three-

¹⁰⁸ Ibid 36.

¹⁰⁹ Civil society organizations have however simultaneously complained in other fora of being left out of the process of monitoring the implementation of the *TAC*, even though they are the ones who initiated the proceedings in the first place. See (Open Society Justice Initiative 'The impacts of strategic litigation on equal access to quality education in Brazil (20 October 2015) 2.

pronged inquiry to determining the content of the right. This involves: (1) Identifying an ever-evolving concept of the value and function of an education; (2) Defining an adequate education capable of achieving the objectives in (1) above; (3) Specifying the requisite inputs for achieving an adequate education.¹¹⁰

Moreover, defining adequacy is not determined by a reliance on external standards established at the level of United Nations (UN) such as the notion of 'minimum core' in the General Comments to the ICESCR and which has largely been rejected by the South African Constitutional Court¹¹¹ but through more participative forms of determining adequacy at localised levels such in the Kentucky case-study. Thus, in a South African context, this would require the various stakeholders in education to define the goals for an adequate education and identify what programmes and/or educational inputs are necessary to achieve these goals. For example, the achievement of a goal of basic literacy skills may require the development and implementation of a national literacy programme in the foundation phase of learning together with ensuring sufficient and suitably trained teachers for that phase of learning.

As has been noted in the introduction, while the South African courts have identified certain components of the right to basic education, no clear standard for determining the content of this right is ascertainable from the South African jurisprudence. The US approach can therefore provide useful guidance in developing a viable standard for determining the content of the right to basic education in South Africa.

In a comparative study of socio-economic rights litigation edited by Malcolm Langford, Cesar Rodriguez-Garavito and Julieta Rossi, the editors note that despite the significant increase in socio-economic rights litigation and jurisprudence over the last two decades, the jurisprudence is not always matched by compliance with judgments in favour of applicants. The study therefore focusses on examining strategies all over the world that have increased

¹¹⁰ See also C McConnachie & C McConnachie (note 16 above) 574. See too M Rebel (note 16 above) 229.

¹¹¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 29-33; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721(CC) paras 26-39 and *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 51-68.

the likelihood of compliance with judgments.¹¹² While mindful that ‘a single strategy is unlikely to be effective on its own’¹¹³ the authors note that the strategy most cited as contributing to improved compliance is social mobilisation.¹¹⁴ This is discussed below.

Langford et al also note ‘high levels of compliance where remedies were more reflexive, experimental and dialogical’.¹¹⁵ They attribute this success to defendants, which are governments, being more invested in the development of solutions.¹¹⁶ They also attribute this to the fact that the monitoring of the implementation of the judgments provides a continued space for social mobilisation.¹¹⁷ Experimentalism or the ‘dialogic model of reform’ is often proffered as the antidote to the ‘doctrinal dilemmas’ in respect of the separation of powers in socio-economic rights litigation.¹¹⁸

The most effective remedies within the three comparators discussed in this article are those that appear to display experimentalist characteristics.

Thus, in India, the ongoing out-of-school learners case in Karnataka, in particular, through the formation of a committee to remedy the violation of the right of access to education stands in contrast to the weak orders in the *Avinash Merhotra* and the *ECPF* cases. In Brazil, the more dynamic aspect of the education litigation appears to be in respect of the remedies employed. This includes the formal court orders such as in the early childhood education case as well as the *TAC* in the case to include Afro-Brazilian studies in the curriculum. Both these remedies established minimum standards which government officials were required to comply with. Moreover committees were established comprising of the state prosecutors, government and civil society to monitor court orders and agreements.

¹¹² M Langford, C Rodriguez-Garavito & J Rossi ‘Introduction: From jurisprudence to compliance’ in M Langford, C Rodriguez-Garavito & J Rossi (eds) *Social Rights and the politics of compliance: Making it stick* (2017) loc 5279loc 452 and loc 468.

¹¹³ *Ibid* loc 970.

¹¹⁴ *Ibid* loc 819.

¹¹⁵ M Langford et al (note 108 above) loc 880.

¹¹⁶ loc 897.

¹¹⁷ *Ibid* loc 907.

¹¹⁸ For more on experimentalism see CF Sable & WH Simon ‘Destabilisation rights: How public law litigation succeeds’ (2003-2004) 117 *Harvard Law Review* 1016; M Dorf & C Sabel ‘A constitution of democratic experimentalism’ (1998) 98 *Columbia Law Review* 267 and S P Sturm ‘A normative theory of public law remedies’ (1991) 79 *Georgetown Law Journal* 1355.

The Pritchard Committee in Kentucky is another example of remedies being crafted through dialogue and their implementation monitored by committees comprising of civil society, government and experts.

In the US, court orders in many of the cases are also characterised by structural orders requiring that governments report back on progress made in realising the right. Thus, the courts order the other two branches of government, that is, the executive and the legislature, to reform the school finance legislation and to spend more on education. This has the potential of intruding into the domain of these other two spheres of government, but scrutiny of the case law however suggests that the US courts deliberating on these concerns have over time, and through experience, learnt to strike the delicate balance between inaction on the part of the other branches government, and intruding in the domain of the other two branches of government. This has occurred by defining the standard of education that is adequate and then directing the legislature to reform the education system in accordance with this standard and to report back to the court on its efforts.

These varying models of experimentalist remedies provide useful lessons for South African basic education litigation. For example, a major stumbling block to the delivery of furniture following the original court order in *Madzodo* was the failure of the provincial procurement processes. This eventually led to the National Treasury stepping in to develop a transversal tender to facilitate furniture delivery. Thus, re-imagining the case within an experimentalist approach, once there had been finding of a rights violation, the remedial phase could have entailed a court mandated engagement between all relevant stakeholders that included the National Treasury. Moreover, a task team to facilitate the delivery of furniture which was established in the final rounds of the litigation, could have been established at the outset.

The significance of social mobilisation in ensuring compliance with remedies has been noted by Langford et al. Albisa and Shanor, through an analysis and comparison of the standards-based litigation in the different states in the US, similarly illustrate that the development of legal norms arising from legal judgments and the implementation of the remedies arising

from these judgments are significantly affected by the ‘level’ of social movement activity.¹¹⁹

They note that in Texas, despite decades of litigation, without a broad social movement, while the judgments were able to increase funding, the judgments were unable to create and maintain substantial education reforms.¹²⁰ In respect of mobilisation led by the CFE in the New York litigation they observe that while the litigation resulted in new legislation, and while the CFE worked to ensure the enforcement of the judgment, the absence of leadership at a community level or broad-based parental involvement has undermined progress in education reform particularly after the fiscal crisis in 2008. They note that while parents and learners turned out for marches, the decision makers were the ‘professional advocates’, while parents and learners were ‘beneficiaries’ of these decisions.¹²¹

By contrast, the Kentucky litigation led by the Pritchard Committee is viewed by Albisa and Shanor as the most successful case study with ‘statewide comprehensive reform’.¹²² They note that the work of this citizen-led committee was initiated at least ten years before the *Rose* case. This included ‘engagement, advocacy and education’¹²³ by holding citizen forums across the state. The result of which was a report calling for significant education reform. As noted earlier, in the *Rose* case, the report became the basis for the KERA. Thus, taking a similar view to Isaacs, they note that ‘significant social and political groundwork was laid prior to the judicial decision.’¹²⁴

The modus operandi of the Pritchard Committee is also comparable to the *Movimento Crèche para Todos* in Brazil serve. What is distinctive in these movements is the genuine grassroots activity and the ground work that often precedes the litigation in each case study. Moreover, the tactical repertoires adopted in each of these social movements are similar. To a greater or lesser extent, they all embrace tactics of public awareness, advocacy, research, the strategic use of media, the threat of litigation, an incremental approach to litigation and

¹¹⁹C Albisa & A Shanor (note 28 above) loc 7618 and loc 8192.

¹²⁰ Ibid loc 7782. The chronology of the Texas litigation is set out in 29 above.

¹²¹ Ibid loc 7916.

¹²² Ibid loc 7940.

¹²³ Ibid loc 7937.

¹²⁴ Ibid loc 7977.

finally ensuring compliance with court orders by the monitoring of court orders. The OSF study points out that few of the cases in India were brought by a social movement, but nevertheless, the judgments themselves did lead to increased awareness and social mobilization, particularly with regard to the 25% reservation clause. The South African experience of litigation for education has also shown how litigation can catalyse social movements, and monitoring of the results of litigation creates new opportunities.¹²⁵ The link between social movements and strategic lawyering is not linear, but rather interactive.

While the study highlights that the most successful litigation strategies are those that occur within the social mobilisation model described, the importance of responsive litigation must not be underestimated. This is illustrated in the reservation clause litigation in the Indian Supreme Court, which may have led to different outcomes had progressive civil society organisations not intervened in these cases. The CLPR led litigation in both the cases of *Society for Un-aided Private Schools of Rajasthan* and the *Pramati* sought to mitigate the potential harm litigation initiated by narrow interest groups. The OSF report notes however that there have been unintended consequences as a result of litigation in respect of the reservation provision. It has received 'disproportionate attention' both at the level of awareness of the RTE Act and from civil society efforts at mobilisation.¹²⁶ In particular, civil society mobilisation has focussed on securing places for disadvantaged learners in private schools rather than implementing other aspects of the RTE Act that could improve the quality of education in public schools. This is comparable to some of the *amicus curiae* interventions of civil society which attempted to highlight broader systemic concerns in the school governance disputes between provincial education departments and individual schools governing bodies in South Africa. The involvement of *amici curiae* broadened the focus of the cases to an approach which persuaded the courts to consider the importance of equal access for all children. Following *Juma Masjid*, the tide appeared to turn, with a new wave of provisioning cases that shifted the centre of education litigation to the poorest and most disadvantaged of schools.

¹²⁵ Skelton (note 1 above), 79.

¹²⁶ A Skelton (note 1 above) 43.

The strategies and tactics adopted by the different civil society organisations in each of the three comparators provide a useful yardstick against which South African civil society may evaluate and enhance its own repertoire.