

## CONFERENCE REPORT

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

SAO PAULO, 20 OCTOBER 2015

On 20 October 2015, leading experts met in São Paulo to discuss the challenges and impacts of strategic litigation on the right to quality basic education in Brazil. The objective was to enrich a study co-sponsored by the Open Society Justice Initiative and the Open Society Foundation's Education Support Program, comparing experiences in Brazil, India and South Africa. The research is led by Professor Ann Skelton, the head of the Centre for Child Law the University of Pretoria and UN Chair: Education Law in Africa. Attorney Thiago Amparo of the Central European University and the field researcher for the study on Brazil organized and moderated the session.

## Introduction

### Challenges to strategic litigation on the right to quality education in Brazil

1. The Brazilian experts highlighted the difficulty of designing a nationwide litigation strategy on the right to quality basic education, given that the duty bearers are primarily local governments, especially municipalities. Because of this, educational policies vary greatly from one place to another. Thus, despite the existing federal law on education in Brazil which sets basic parameters applicable throughout the country, the Brazilian experts have interest in knowing how it is possible that India and South

Africa managed to design more detailed norms and standards throughout the country and to which extent the judiciary participated in this process.

2. Comparative studies such as this one are highly necessary for their daily work on strategic litigation in this field, the Brazilian experts say. They have showed interest in other countries' strategies to promote the right to quality education taking note of the potential to replicate some of those strategies in Brazil.

### **Ministério Público Vis-à-Vis Civil Society Organizations**

3. There is a pressing need to reform the procedure of Termos de Ajustamento de Conduta (Terms of Conduct Adjustment - TAC), in order to enable more participation of civil society organizations, according to the Brazilian experts. The Brazilian experts complain that often – as shown in the second case on the teaching of Afro-Brazilian culture and history – civil society organizations are left out of the process of monitoring the implementation of a TAC, even they are the ones who initiated the proceedings in the first place.
4. The Brazilian experts disagree with how the Concept Note defines the role of civil society organizations vis-à-vis the Ministério Público and Defensoria Pública. In that document, civil society is said to play an accessory role in comparison with state lawyers, being the later the main litigators in this area. The Brazilian experts highlight the need of a more nuanced explanation of this relationship. For them, the research should show that while state lawyers certainly have filed more individual cases on the right to education than civil society organizations, those organizations are responsible for the main cases of strategic litigation either as direct applicants or for indirectly pressuring states lawyers to present a case.

### **Cases Presented**

5. The Brazilian experts emphasized that the current list shows the main cases on strategic litigation on the right to education, being cases with clear participation of civil society organizations.
6. Yet, there is a need of expanding the list both thematically (primarily, in order to include cases on indigenous education, and accommodation for children with disabilities in schools) and geographically (beyond the Southeast region of Brazil, namely: São Paulo, Rio de Janeiro and Minas Gerais). In this regard, the Brazilian experts suggested the Field Researcher to contact the branch of the Ministério Público on the rights of persons with disabilities (specially, prosecutor Eugênia Fávoro), as well as to contact the NGO CEDECA in the Northern state of Ceará. Both organizations should have, the Brazilian experts say, other examples of strategic litigation on the right to education. The Field Research has already established contact with those two focal points.
7. While the Brazilian experts have stressed the large social mobilization generated by the third case, on education funding decided by the Supreme Court, there is still doubt of the measurable impact of the decision for an in-depth discussion on the concept of quality in education. If the focal points mentioned in the item b, above, offer cases with more measurable impact, the third case on funding – the Field Research suggests – could come as background to the analysis of strategic litigation in Brazil.

### Standard-Setting: The Judiciary and the Education Field

8. While the Brazilian experts agree that the third case, on educational funding, deals primarily with how extensive is the legislative authority of the Federal Government in establishing quality education standards, some of them doubt whether using strategic litigation is the most appropriate way to foster the development of quality standards.
9. There are legal challenges to a nationwide case on norms and standards (since it is still unclear in the Brazilian Supreme Court's jurisprudence the extension of the federal legislative authority in this field). In addition, the Brazilian experts emphasize that there is a strong resistance from educators to initiatives of strategic litigation seeking to use the judiciary to help shape what quality education would mean, since educators themselves disagree on how national standards of quality education should look like.

## Transcript of Meeting

NOTE: The excerpts in *italic* refer to a direct transcription of the meeting, with minor edits. All other parts are summary of the discussion. The excerpts underlined are what the Field Researcher considers to be the key points of the debate held.

### Introduction

10. Thiago Amparo: The research is conducted by the Open Society Foundations and aims at analyzing the impact of the strategic litigation on the right to education in three countries: Brazil, India, and South Africa. There are two limitations in this research. The focus is on the impact of decisions, and not so much on the process of reaching a judicial decision. So, the study will look at the impact of each decision on different fronts, such as impact on the judiciary, impact on public policy undertaken by states and municipalities, and the impact on public opinion and on how cases are portrayed by the media. Another limitation is that the study specifically deals with basic education. Thus, the focus is not on higher education, which is a shame because in Brazil the case of affirmative action in universities could have been included. In addition to the focus on basic education, this study analyzes quality basic education. In this sense, this research questions whether the judiciary is a key player for the development of the meaning of quality in education.
11. The research has a modest ambition, to map the main cases on education, the legal context and the actors involved in litigation on the right to education in these three countries. The purpose of the research is not to make a general mapping of all existing cases, but rather of the major strategic cases. For example, in the meeting held in Delhi, it was discussed what would be strategic cases. There, we agreed that a strategic case would like to seek to gain not only that particular case, but cause a broader impact on the right to education. In this sense, this research is much more qualitative than quantitative, with the purpose of analyzing some strategic cases and their impact. Furthermore, the different contexts in each country matter. There are interesting similarities, such as the prominent role of the Constitution in each of them, a population of considerable size, strong judiciary and budgetary difficulties, as well as well-articulated social actors in the three countries.
12. The purpose of this meeting is to promote exchange between different actors and experts in this field. The first step in the research is to contextualize the right to

education in these three countries, including the regulatory framework, and what are the main actors involved, describing the role of the Defensoria Pública, Ministério Público and civil society organizations on the right to education field and litigation.

13. **Salomão Ximenes:** It is important to highlight that the place that civil society has is equivalent to the Defensoria Pública and the Ministério Público.
14. **Thiago Amparo:** In the Concept Note of the research, it was mentioned that in the case of Brazil state lawyers (Defensoria Pública and the Ministério Público) are the primary litigators on the right to education, and there the role of civil society was considered as being accessory to the role of these institutions. One of the purposes of this research is to interview civil society actors to uncover the actual paths taken by these cases to get where they got, i.e. what kind of social pressure took those cases ahead. I believe that many of these stories get lost when, for example, only one sees only the of the public prosecutor in the Termo de Ajustamento de Conduta proposed by the Ministério Público or in a lawsuit filed by the Defensoria Pública.
15. Today, our meeting's goal is to first look at the cases we have in Brazil on the basis of the list I gave you, and which other cases could enter this list and did not enter. Secondly, I suggest discussing about the types of impact that these cases have had at least in three aspects: impact on the judiciary, impact on public policy, and impact on public opinion and the press.

## Brief Debate on South Africa and India

16. After the introduction, the Brazilian field researcher and the invited experts discussed briefly strategic litigation in South Africa and India, upon the request of Salomão Ximenes, and what are the similarities and differences between the countries regarding strategic litigation on the right to basic education.
17. At this moment, some of the issues from South Africa and India briefly discussed were: the role of private sector in the educational field, which seems to be more prominent in the Indian context; the strong mobilization of civil society groups in India and South Africa around the right to education; the process of building national standards such as the India's Right to Education Act; the role that continuing mandamus orders play in right to education litigation in India vis-à-vis the Brazilian experience with the monitoring mechanism in the access to basic education case in São Paulo; the social rights' jurisprudence in South Africa, including mud schools case; and finally – in a related manner - to which extent a nationwide case could ever be brought to reform the infrastructure of the schools in Brazil given the country's federal system.

## Brazilian Cases

### Case 1: Access to Basic Education

Primarily discussing how to measure impact

18. **Thiago Amparo:** With regard to Brazil, we have three cases. The first one is the case of early childhood education in São Paulo, with the use of strategic litigation to generate three main impacts: impact on the judiciary's position on early childhood

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education, to change the jurisprudence; institutional impact in improving the monitoring of education policies and, finally, the impact in terms of public opinion, since in this case it was held for the first time a public hearing at the Court of Appeals of São Paulo.

19. I wanted to ask: how do you assess the work of the Monitoring Committee set up in this case? Since we know that the decision will not be fully implemented in time, has the Monitoring Committee been effective, what is its impact?
20. **Salomão Ximenes:** The Committee has been working. They meet periodically. The Committee has worked as a space for accountability and transparency, which is already worthy in itself. A database organizing all the information was also created.
21. **Thiago Amparo:** In the article you wrote with Ester, it was mentioned that some writs of mandamus ('mandados de segurança') were filed before the main lawsuit ('ação civil pública') was presented in this case as a strategy to force public authorities to provide you with data on access to basic education.
22. **Ester Rizzi:** This case has several phases, so it is important to unpack it. In terms of impact, our assessment is that the very fact that the mayor's candidacy made an electoral promise in 2012 of 150,000 new vacancies derives from the case that began in 2008. This is a major and complex case, there were many legal actions involved in this case: 2 lawsuits in 2008, 1 in 2009, 2 in 2010, several 'mandados de segurança'. There was an initial fight for transparency of data on basic education. We lost one of the 'mandados de segurança', because it had lost its object. Once we informed the media about the filing of the case, the journalist called the Secretariat of Education in the City of São Paulo, and the data were made available on the following day. Thus, there was a clear impact of the mere filing of the case.
23. **Thiago Amparo:** It would be interesting to study it, even to unravel the influence of the media.
24. **Ester Rizzi:** Totally. We always combined strategies: a legal strategy with a communication strategy. There was another case where the media influenced the government to make a new policy, reversing the policy of putting 3 year-old children in school. It is difficult to analyze this because we have many examples, we always have legal and communication joint strategies.
25. **Thiago Amparo:** Is there systematically in one place what were the injunctions?
26. **Ester Rizzi:** Yes, there is. All we have is an article mentioning all the 'mandados de segurança'. Find it at the [www.direitoeducacao.org.br](http://www.direitoeducacao.org.br) website.
27. **Salomão Ximenes:** About the Committee ... This is the question: what is the Committee's impact? The Committee has worked as a space for sharing data on education. Now we are at a time lock: it is clear that the judicial order will not be met, part of it will be met in violation of the quality requirements, and right now we are

preparing a lawsuit (provisional execution) to challenge the agreements with universities. This lawsuit will lead to another decision that will assess whether the agreement with universities violates principles of quality of education or not. This case will be advanced enough to be studied completely in 2018. From the quality point of view, what's interesting to show now in analyzing this case in the research is the use of the case as a strategy to change the jurisprudence of a fully justicialized issue: the access to primary education. In fact, in massive numbers, the Defensoria Pública and Ministério Público are the litigators. However, what are the types of actions that these organizations join?

28. **Thiago Amparo:** Is there an impact analysis of the lawsuits filed by the Defensoria Pública?
29. **Isabela Rahal:** There is no impact research of strategic litigation on education in Brazil.
30. **Salomão Ximenes:** A fundamental issue is: how do we rigorously measure impact?
31. **Isabela Rahal:** Yes. One should choose a specific case, conduct interviews, analyze the data. Without this, the only possible thing left is impressions on the topic.
32. **Salomão Ximenes:** For example, how many of those 72,000 new vacancies created in early childhood education in São Paulo since 2013 have so far been created because of a court ruling? There are quantitative parameters to assess this impact.
33. **Isabela Rahal:** You can also do so through interviews and etc.
34. **Ester Rizzi:** What I know is that, from a qualitative point of view, the City Attorney has a policy stance to deny the importance as a determining factor. This is a political position, which is relevant for a qualitative research. They have a political position to speak "I would do it anyway." The dispute for access to information had a fundamental impact on the public debate on the topic, because it uncovered the actual magnitude of the problem of access to education. There were 2 of 'mandados de segurança' and 1 'ação civil pública' about it. The strategy was, every time the authorities stopped the disclosure of data, we presented an injunction or legal action. There were 3 repeated judicial requests for disclosure of information. Also, a municipal law determining the disclosure of information was adopted and to pass this law was also a struggle.
35. **Salomão Ximenes:** A clear impact of the case has been the judicial agreements for the return of financial resources diverted by the former mayor of Sao Paulo, Paulo Maluf, in bank accounts in Switzerland. If you want, I have the contact of the judge who is ratifying the agreements. In these agreements there is a clause that 90% of the resources should be allocated to early childhood education - which will be a great sum, something like 15 million Brazilian Reais.

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## Case 2: Afro-Brazilian History and Culture

36. Primarily discussing the relationship between Ministério Público and civil society organizations in strategic litigation
37. **Thiago Amparo:** The second case we have is related to the implementation of Law 10.639, mandating the teaching of Afro-Brazilian culture and history. Here we analyze the TAC between the Ministério Público and the UFSCar university, motivated by a petition of the NGO CEERT NGOs, as remembered by Daniel, to the Ministério Público.
38. **Daniel Teixeira:** We were not the only organization that has filed petitions to the prosecutor, but this case in the region of São Carlos (countryside of São Paulo) in 2006 was followed by a petition we represented in the same year to all municipalities in the region and, indeed, for the municipalities of the whole state of São Paulo. We addressed several different issues here. We asked the municipalities on the actions taken in compliance with the law, as well as on the budget assigned for this purpose, including the breakdown of the annual budget, including the specific part of the mandatory budgetary allocation that was being allocated for compliance with the guidelines for the teaching of ethnic-racial relations. A prosecutor of the São Carlos region reproduced the administrative procedure we initiated in the capital and in some other cities. In the region of São Carlos, the administrative procedure resulted in the Termo de Ajustamento de Conduta (TAC) because in this region there was UFSCar university with expertise in the teaching of this subject but at this point we were not more active in the case.
39. In fact, this is one of the criticisms we have made including at the UFSCar itself: to what extent the organization, that filed the petition to the Ministério Público, may continue to monitor the case? We know even that there are delays in the implementation of this TAC. The relationship with the Ministério Público is not always easy because of the difficulties of monitoring and participation of civil society.
40. **Thiago Amparo:** In the TAC itself is explicit that should be established a monitoring unit with the participation of civil society. When reading the TAC, the participation of civil society seems to be very well structured. How has it been implemented?
41. **Daniel Teixeira:** Exactly. There has been no satisfactory implementation of the TAC. I requested more details on the implementation of the TAC from a teacher linked to UFSCar. First, there has been little implementation, including teachers responsible for this implementation not being properly paid.

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

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