

# A COMPARATIVE LEGAL ANALYSIS OF THE RIGHT TO ADEQUATE AND QUALITY EDUCATION\*

## Nitelikli ve Yeterli Eğitim Hakkının Karşılaştırmalı Hukuk Analizi

Onur BAŞOL\*\*

### Abstract

By virtue of the importance attributed to basic education for individuals and society to transform and develop the country as well as the self-fulfilment of individuals brought forward that the right to education contains not only a right of enrolment to a school but also adequate education which fulfil certain standards and criteria. The history of segregation and disparity in welfare in South Africa, India, and the USA make this issue more important. The courts have not answered the legal questions on adequacy in a uniform way, particularly whether this right guarantees a certain standard of education, and if yes, what standard is this. This essay will compare and contrast the courts' understandings of the right to adequate basic education in these jurisdictions. This will be done through the analysis of the interpretations given to the constitutions and international instruments to determine the responsibilities of the states to realise this right. The first question of the analysis is how the courts inter-

### Öz

Ülkenin dönüşmesi, kalkınması ve bireyin kendini gerçekleştirme amacıyla bireyler ve toplum açısından temel eğitime verilen önem, eğitim hakkının sadece okula kaydolma hakkını değil, aynı zamanda bu hakkın gereklerini yerine getirecek belirli standartlar ve kriterlere sahip yeterli eğitimi de içerdiği tezini de ön plana çıkarmıştır. Güney Afrika, Hindistan ve ABD'deki ayrımcılık ve refah eşitsizliğinin tarihi, bu konuyu daha da önemli hale getirmiştir. Bu ülkelerin mahkemeleri, özellikle bu hakkın belirli bir eğitim standardını garanti edip etmediğini ve eğer ediyorsa bu standardın ne olduğu gibi temel eğitimin yeterliliğine ilişkin hukuki soruları yeknesak bir şekilde yanıtlamamıştır. Bu makalede, söz konusu yargı alanlarındaki mahkemelerin yeterli temel eğitim hakkına ilişkin anlayışlarını karşılaştırılmaktadır. Bu karşılaştırma, bu hakkın gerçekleştirilmesinde devletlerin yükümlülüklerini belirlemek amacıyla ilgili ülkelerin anayasalarının ve uluslararası hukuk belgelerinin yorumlanması yöntemiyle

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\*\* Avukat, E-posta: onurbasol1@gmail.com, ORCID: 0000-0003-3636-1054

pret the legal instruments, particularly their constitutions, to decide whether the right to education includes a right to adequate education. The second point is how the courts determine and reason the adequacy standards of the basic education. It will be argued that the apex courts of India, Kentucky, and New Jersey provided that basic education is subject to certain constitutional standards; however, these courts displayed different understanding of adequacy. Kentucky Court examined the content of the right to education to provide a comprehensive adequacy criterion, whereas, the New Jersey Court focused on substantively equal funding of schools. Indian and South African Courts considered the concept of adequacy in terms of the adequacy of school facilities rather than its content or finance.

**Keywords:** Right to Quality Education, Right to Adequate Education, Education Law, Right to Education, Socio-Economic Rights

gerçekleştirilmektedir. Analizin ilk sorusu, mahkemelerin eğitim hakkının yeterli eğitim hakkını içerip içermediğine karar vermek için yasal belgeleri, özellikle de anayasalarını nasıl yorumladıklarıdır. İkinci nokta ise mahkemelerin temel eğitimin yeterlilik standartlarını nasıl belirlediği ve gerekçelendirdiğidir. Hindistan, Kentucky ve New Jersey yüksek mahkemelerinin temel eğitimin belirli anayasal standartlara tabi olduğunu belirttikleri, ancak bu mahkemelerin yeterlilik konusunda farklı anlayışlar sergiledikleri ileri sürülecektir. Kentucky Mahkemesi kapsamlı bir yeterlilik kriteri sağlamak için eğitim hakkının içeriğini incelerken, New Jersey Mahkemesi okulların maddi açıdan eşit finansmanına odaklanmıştır. Hindistan ve Güney Afrika Mahkemeleri ise yeterlilik kavramını içerik veya finansmandan ziyade okul tesislerinin yeterliliği açısından ele almıştır.

**Anahtar Kelimeler:** Nitelikli Eğitim Hakkı, Yeterli Eğitim Hakkı, Eğitim Hukuku, Eğitim Hakkı, Sosyo-Ekonomik Haklar

## INTRODUCTION

The right to education has become a prominent concept in the last century thanks to the importance attributed to education for the individuals and modern society (United Nations Committee on Economic, Social and Cultural Rights, 1999: 1). In this context, the right to education has been subject to several international agreements and the constitutions of numerous countries (Veriava and Coomans, 2005: 2). Access to education is still an important concern in the several parts of the world, at the same time, the content and quality of education, in general, has also become a major topic of discussion in the last decades (Moses, 2009: 370; Zhang, 2022: 151).

At this point, the notion of adequate education has begun to be used by several writers as an umbrella term to qualify the right to education (Tron, 1982). Although this notion has evolved from international and domestic legal texts which refer to terms such as efficient, thorough, good quality or minimum standards, it is hard

to speak of a single and common definition or criterion. In this process, the work of Katarina Tomasevski, the Special Rapporteur on the right of education argued that education should be accessible, available, acceptable, and adaptable; the '4A principle' (Tomasevski, 1999: 6). Several writers associated the adequacy with availability and acceptability, and some of them regarded adequacy as an additional element to this principle (Woolman and Fleisch, 2009: 130). However, the common point of all these different approaches is that education should be satisfactory in quality and quality to realise the purpose of education shown in international treaties, particularly in the International Covenant on Economic, Social and Cultural Rights of 1996 (ICESCR).

The absence of a conclusive definition of adequacy provides flexibility to authorities and courts of each country to identify it in accordance with its own understandings. This raises a comparative question: What have been the approaches to adequacy in domestic jurisdictions? Is a common understanding of the concept of adequacy arising? This essay answers these questions for South Africa, India, and the USA.

The use of basic education is twofold (Woolman and Bishop, 2008: 57). Firstly, basic education is used for the compulsory education period, which is subject to different durations and characteristics in each jurisdiction, or for a certain part of it regarded as fundamental for this educational period in place of primary or elementary education (Woolman and Bishop, 2008: 57). Secondly, the term is used for the fundamental and required minimum standards of education (Woolman and Bishop, 2008: 57). In this paper, the term basic education will be used according to the approaches of each jurisdiction.

The jurisdictions of South Africa, India, and the USA were chosen for several reasons. Firstly, these jurisdictions share a similar history regarding social segregation and similar characteristics of social stratification. The significant disparity in society has been reflected in the school systems (Berger, 2003: 616). Today, still, the discussion on inequality is ongoing (Baker et, 2022). This disparity led to similar long litigation processes and educational reforms after the court cases in these jurisdictions (Mcconnachie and Mcconnachie, 2012: 554). Furthermore, the South African Constitution provides a significant room to use comparative law since it requires courts to consider international law; and allows them to consider foreign

law in human rights matters. In addition, the Supreme Court of India declared education as a fundamental right flowing from the right to life, even though education was not on the list of fundamental rights. Only after that, the constitution was amended in line with the Court's decision and this led to a different path for the notion of adequacy. Besides, the textual differences of this constitutional right provide an opportunity to compare the interpretation of the courts. New Jersey and Kentucky were selected among the states of the USA since New Jersey has one of the earliest and the longest litigation processes with continuous legislative reforms following court rulings and Kentucky had one of the poorest states of education in the USA and has one of the most assertive case decisions (Rebell, 2002: 65).

The analysis will be based on the apex courts in each jurisdiction to provide more efficient and consistent comparison. However, for the USA, State Supreme Courts rather than the US Supreme Court will be taken as subjects of the examination because of the progress of right to education in the USA as will be explained in Chapter I.

The involvement of courts in education and related monetary duties might lead to separation of powers, democracy, and legitimacy debates which socio-economic rights frequently confront (Sunstein, 2001: 21). For reasons of space, this essay will not attempt to cover all these issues and debates, or to provide a general answer for the role of courts in socioeconomic rights and education. Instead, it focuses on the role of courts in interpreting what adequate education means substantively.

Chapter I, which follows this Introduction, will provide a brief socio-legal context of the given jurisdictions on adequate education. The history of segregation will be presented, as well as the adequacy-related education laws. The current situation of the education in these countries will also be mentioned.

In Chapter II, the courts' understanding of the adequacy of education will be compared and analysed. The first legal question to be addressed in the Chapter II is the adjudication of the courts on whether basic education is subject to any standard of adequacy in their jurisdiction. It will be examined whether and how the courts interpret the international and domestic legal instruments, particularly their constitutions, to decide whether the right to education includes a right to adequate education. The second legal question to be addressed in Chapter II is how the courts determine and reason for the adequacy standards of the basic education.

It will be argued that the Courts have displayed different approaches towards the adequacy of education. Firstly, South African and Indian Courts focused on the material and physical conditions of the schools such as infrastructure and textbooks rather than the content of education, outcomes or financing of the schools. On the other hand, Kentucky Supreme Court has interpreted adequacy as the capacities which should be acquired by the students and the organisation of the school system as well as its governance. Finally, the New Jersey Supreme Court perceived adequacy as equal educational opportunity, and therefore, the question of substantively equal funding of the school has been at the heart of adequacy.

## I. SOCIO-LEGAL CONTEXT OF THE JURISDICTIONS

### A. SOUTH AFRICA

The education in South Africa has suffered extremely under the Apartheid regime which strengthened the racial segregation lasting during colonialism (Berger, 2003: 615). In 1948, the regime legalised the education system based on racial discrimination with Bantu Education Act (Berger, 2003: 616). As a result, black people and the schools belonging to them, have fallen behind significantly in education (UN Committee on the Rights of the Child, 1997: 69). As of 1990, 66 percent of the South Africans were illiterate, most of them black (Reschovsky, 2006: 24).

After the end of apartheid, the right to basic education has been introduced in the Interim Constitution of 1993 (Calderhead, 2011). In 1996, a modern and novel Constitution regarded as transformative and including several positive rights was adopted. Under it, the State is obliged to respect, protect, promote, and fulfil the rights contained in the Bill of Rights of the Constitution (Stewart, 2019: 488). The right to education is guaranteed by the Article 29 of the Constitution as follows: ‘Everyone has the right to a basic education, including adult basic education.

In addition to the right to basic education, Article 28 of the Constitution states that ‘a child’s best interests are of paramount importance in every matter concerning the child’. Another aspect of the South African Constitution which should be taken into account is the Article 39 on the interpretation of the Bill of Rights. According to Article 39:

*“When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; must consider international law; and may consider foreign law.”*

The use of the term ‘basic education’ has created some uncertainty since it was not clearly established at that time (Calderhead, 2011). White Paper on Education and Training 1995, South Africa Schools Act of 1996 (SASA) and the Education Laws Amendment Act of 2005 regulate important aspects of basic education; however, these Acts do not provide clear adequacy standards for basic education or a definition of the right to basic education (Woolman and Fleisch, 2009: 115). Another important point is that in South Africa, this right is not texted as right to free basic education, unlike the other jurisdictions; however, the SASA states that ‘no learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body under section 39.’

The South African school system still experiences substantial difficulties with the adequacy and quality of the education (See *Equal Education and Another v Minister of Basic Education and Others*, 19 July 2018,). Although important progress has been observed in years, the effects of the prior highly discriminatory regime could not be completely eliminated (Calderhead, 2011: 3). Despite ongoing plans and programs, the schools suffer from a lack of facilities and teachers (Legal Resources Central, 2020).

## **B. INDIA**

Indian education system has suffered from colonialism, caste divisions, poverty, and disparity in wealth (Pal and Chauhan, 2008: 227). India is a federal republic that has a strong central government and education is under the mutual responsibility of the central, federal, and local authorities (Sripati and Thiruvengadam, 2004: 150).

The first legal regulation on the right to education was made with the directive principles of Article 41 and Article 45 envisaging the realisation of free and compulsory education within ten years. However, significant progress could not be observed for a long time, and as of 1991, more than half of the children were not going to school (Kothari, 2004: 7).

In 1991, *Mohini Jain* case before the Supreme Court of India (SCI) brought this right to the public agenda. The Court ruled that education is a fundamental right, even though it is not listed under fundamental rights in the Constitution (Das, 2013: 45). According to this ruling, the right to education flows directly from the right to life because of the importance of the education and its connection with the other fundamental rights as well as the directive principles and the Universal Declaration of Human Rights. In 1993, the right to education was reconsidered in *Unni Krishnan* case. The Court confirmed again that the right to a free and compulsory education is a fundamental right. But it clarified that it applies for the children under 14, referring to previous reasoning as well as the ICESCR (Kothari, 2004: 9). It was argued that the Court felt a necessity to intervene with the education system due to its condition and these decisions considered as the examples of judicial activism (Kothari, 2004: 9). Moreover, the courts were considered as ‘the last resort of the oppressed and bewildered’ (Baxi, 1987: 50).

Almost ten years after these decisions, the Constitution was amended and the right to education was recognised as a fundamental right with Article 21A (Berger, 2008: 39). Article 21A provides that ‘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.’ After that, in 2009, the Right to Education Act (RTE) was adopted. The RTE regulates the State’s obligation to provide infrastructure including school building, teaching staff and learning equipment, good quality elementary education conforming to the standards and norms specified in the Schedule, and timely prescribing of curriculum and courses of study for elementary education. The Constitutional Amendment and the RTE Act drew enormous positive and negative reactions (Sripati and Thiruvengadam, 2004: 154). The main criticisms of these acts were that they are excluding 0-6 years old children, bringing legal obligation to parents to send their child to school, lack of financial guarantees, and the ambiguity on the terms free and compulsory (Sripati and Thiruvengadam, 2004: 155). Some authors have seen the Act as a missed opportunity because of the inadequacy of the minimum standards and details as well as the wide discretionary power conferred to the government (Dubey, 2009: 7). On the other hand, it is also regarded as a very important step, especially for the poor students (Das, 2013: 285).

It was reported that basic education enrolment rates increased after the RTE Act (Almeida, 2019: 1). However, it has been argued though more than 10 years

after the RTE Act, the improvement of the quality of education in India is limited (Baily, 2021: 81) and it has been claimed that basic schools are still in bad condition and quality of teaching is poor (Mondal and Islam, 2023: 88). Another research illustrates that the outcome of RTE Act is not very encouraging in terms of student performance (Chatterjee, et., 2020). For these reasons, RTE Act has been criticised that its priorities are placed wrong, therefore, it is not able to realise quality education (Iyer and Counihan, 2018: 367).

Indian school system consists of four different groups of schools: government schools, aided private schools, special category schools, and non-aided private schools (Dubey, 2009: 7). India has ongoing problems with education, particularly regarding access and adequacy of education (Das, 2013: 252) It is reported that teacher attendance is inadequate, the satisfaction of the quality of the building, quality of toilets, reliability on teachers is very low, share of education in GDP is decreasing, and the disparity in education between rich and poor is remarkable, and education is usually confined to literacy (Das, 2013: 292). On the other hand, India has achieved universal primary enrolment with an adjusted net enrolment rate of 98% as of 2020 (Mondal and Islam, 2023: 90).

### C. UNITED STATES OF AMERICA

Education in the USA, like in South Africa, has suffered from racial segregation and disparity in wealth (Goldin, 1999). In the gradual progress following the abolition of slavery, a crucial decision on de-segregation of African-Americans was one regarding education: *Brown v. Board of Education* before the Supreme Court of the USA (Feasley, 2014: 13). However, claiming the right to education per se at the federal level is difficult since the Federal Constitution does not include a specific provision regarding education (Baker, 2019: 1113; Weishart, 2021: 67). However, several scholars discussed that there is still a federal right to education because of its importance and relations with other fundamental rights even though the Federal Constitution does not clearly contain (Areto, 2019: 443; Weishart, 2019: 304; Friedman and Solow, 2013: 92; Safier, 2001: 993).

Nevertheless, most of the federal cases on the education were based on the equal protection clause of the 14th Amendment (Gillespie, 2010: 991). Therefore, the legal discussion related to education on the federal level was not examining a federal right



to education or the adequacy of education but the applicability of discrimination law regarding segregated schools. In *Brown v. Board of Education*, the Supreme Court ruled that ‘separate educational facilities are inherently unequal’ and declared the unconstitutionality of the separate schools. However, the implementation of this judgement was difficult, so that in 1963, only 1 % of black children were in schools with white children (Rebell, 2002: 220).

The education finance system in the USA has been traditionally based primarily on the local property taxes. This created material differences in funding due to the difference in the values of real estate in poorer districts (Harris, 2019: 245). The federal contribution to education was confined to 7 % only (Rebell, 2002: 218). However, in the milestone case *Rodriguez v. San Antonio School District* from 1973, the Supreme Court rejected the claim that the San Antonio school finance system based on local property taxes was in violation of the constitutional equal protection clause. This showed the limits of Supreme Court litigation based on the federal equal protection clause. The *Rodriguez* decision is often understood as the end of the first wave of the school finance litigation<sup>1</sup>.

However, it is still a part of a great legal debate questioning whether the US Constitution provides a right to education (Weishart, 2018: 123). Almost fifty years after the *Rodriguez* case, the question was brought again before a federal court (Nornes, 2022: 74). In *Cook v. McKee*, a case action filed in 2018, the plaintiffs argued that due to conditions of public schools they had been deprived of their right to education under the United States Constitution which enables them to be capable civic participants. Nevertheless, the argument was not accepted by the district court and the First Circuit Court of Appeals confirmed the ruling; however, after the rulings the State has offered a settlement to improve the quality of basic education and in return, the case was not brought the before the Supreme Court for appeal (Nornes, 2022: 78). The cases of *Haymer v. Reeves* and *Gary B. v. Whitmer* have also shared the same fate and therefore the question has not been escalated to the Supreme Court (Strauss, 2020; Weber, 2020; Nornes, 2022: 79). Therefore *Rodriguez* still protects the its legal value as precedent case. Consequently, the relationship conundrum between equal protection and the right to education has not been solved yet (Herskoff and Yaffe, 2020: 75).

<sup>1</sup> No Child left Behind Act 2001 and The Every Student Succeeds Act 2015 following the Equal Educational Opportunities Act 197470 attempted to solve this problem on federal level.

Plaintiffs who could not find the reliefs they sought before the federal courts have turned to the state courts instead (Dinan, 2010: 97). These cases have taken place in 46 of 50 states so far (Rebell, 2019: 143). The main advantage of these challenges has been the clear provisions of the right to education in most state constitutions.

The so-called 'second wave' litigation has thus been before the State Courts and has been based on the alleged violations of the equal protection provisions, in connected to the rights to education according to State Constitutions (Gillespie, 2010: 998). The *Robinson v. Cahill* judgment of the New Jersey Supreme Court on the constitutionality of the state school finance system in terms of fulfilling the state's obligation to provide a thorough and efficient school system was the first example (Dinan, 2010: 97). The 1947 New Jersey Constitution obliges the legislature with a duty to 'provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years'. The issue was that the Bateman Act stipulated the make-up of funding as 28 % by state, 5 % by federal state, and 67 % by local government (Jaffe and Kersch, 1991: 282). Moreover, the factual disparity in the schools in New Jersey was more remarkable (Tractenberg, 1974: 315). This fact was the subject of a whole series of litigation - 7 decision in the Robinson litigation and 21 in the successor litigation of *Abbott v Burke*. The reasoning of these cases in respect of adequacy of education will be examined in Chapter II. At this point, is worth noting that the litigation resulted in several enactments of the Legislature reforming the education system substantially including the Public School Education Act of 1975 and the Quality Education Act of 1990 (Jaffe and Kersch, 1991: 282). Nevertheless, the federal aid system for public schools is still being frequently criticised and several new formulations are suggested to improve the adequacy of the basic education (Baker et., 2022: 2).

The 'third wave cases' have mainly been based on the education clauses of state constitutions rather than the equality provisions (Dinan, 2010: 97). Kentucky -one of the states with the lowest literacy rate, per pupil expenditure, test results and disparity- witnessed the first example of the third wave cases with *The Council for Better Education v. Rose* (Newman, 2013: 66).

The Kentucky Constitution, similarly to New Jersey, introduced a duty upon the General Assembly 'by appropriate legislation, [to] provide for an efficient system of

common schools throughout the State.’ In this case the Court, with a significant public support, claimed the unconstitutionality of the education system and found the entire education system with all its parts unconstitutional (Newman, 2013: 259). As it will be analysed in Chapter II, this case created a new concept of adequate education. The Kentucky Education Reform Act (KERA), passed as a consequence in 1990 (Safier, 2001: 1010), included major reforms and resulted in the rise of Kentucky from 43th to 16th among the US states in terms of per pupil spending<sup>2</sup>. It has also led to an improvement in examination results compared to other states (Newman, 2013: 82)<sup>3</sup>.

## II. THE NOTION OF ‘ADEQUACY’: ANALYSIS AND COMPARISON

In this Chapter, the courts’ understanding of adequate education will be analysed and compared. The foremost matter before the courts on the adequacy of the education is the interpretation of their constitution. The constitution is the most important text before the courts to determine whether the State is responsible for providing citizens with education, and if yes, what kind of education under which conditions. The constitutions of South Africa, India, New Jersey, and Kentucky all contain the right to education as shown in Chapter I. Therefore, the question is whether these constitutions contain a requirement for adequate education, and if yes, what is the standard of adequacy.

It will be argued that the Courts diverge from each other at the interpretation of adequate education. The courts apply mainly three different approaches towards the adequacy of education. The first is the approach of the Kentucky Supreme Court which adequate education is assessed based on the capacities to be gained by the students during basic education. The second approach, adopted in India and South Africa, emphasises the physical and material conditions of the schools including teaching, infrastructure, textbooks, toilets, sanitation, water, and safety while determining the adequacy of basic education. The third approach, here represented by the New Jersey Supreme Court protects the adequacy of basic education by

<sup>2</sup> In 2007, another case regarding the adequacy was brought before the court. A trial court rejected this claim because of the improvements under the Rose case. This case was not appealed. *Young v. Williams*, (2007) Franklin Circuit Court (Ky.), Civil Action No 03-CI-00055.]

<sup>3</sup> Recent statistics illustrates that the Kentucky’s ranking has fallen sharply after the initial impact of the new education legislation. <https://www.lpm.org/news/2022-05-01/kentucky-drops-in-national-rankings-for-teacher-pay-student-spending>

examining school funding laws to provide all students with equal educational opportunity.

## A. SOUTH AFRICA

The Constitution of South Africa protects the right to education along with the child rights, human dignity, and other democratic principles. The *Juma Masjid* ruling of the South African Constitutional Court (SACC) was a major breakthrough in the right to education. It clarifies the right to education as unqualified and immediately realisable. Even though the South African courts ruled on several matters<sup>4</sup> related to the adequacy of education including textbooks for every student, basic infrastructure and non-teaching personnel as parts of right to education, the standard of education protected by the Constitution remains still open to question (Buthelezi, 2022: 610). The number of cases before the SACC regarding the adequacy of basic education including the content of basic education, capacities to be gained, adequacy of facilities, and teaching has been also very limited. Although some particular cases examined the adequacy related issues without referring to adequacy or education, it is very hard to discuss a concept of the right to adequate education in South Africa which is applied by the courts other than the adequacy of facilities. Nevertheless, the discussion regarding the case law and analysis of the substantive law provides important perceptions of adequacy to compare and analyse it with other jurisdictions.

The first step of the role of the Court on the adequacy of education is the interpretation of the constitutional right to education in order to examine the concept of adequacy. Similar to the Indian Constitution, the South African Constitution does not refer to a certain type of basic education. However, the SACC has not qualified the right to education and has not interpreted the constitutional right to education as a right to adequate, of good quality or efficient education in contrast to the given jurisdictions. Moreover, the Court has not provided a guideline for the content of education except for dealing with the material conditions of the schools in particular cases.

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<sup>4</sup> See *Equal Education vs Minister of Basic Education* [22588/2020]; *Equal Education vs Minister of Basic Education* [276/2016]; *Minister of Basic Education v Basic Education for All* [20793/2014] [2016 (4) SA 63 (SCA)]; *Madzodzo and Others v Minister of Basic Education and Others* [2144/2012] All SA 339 (ECM); *Centre for Child Law v Minister of Basic Education* [1749/2012] 2013 (3) SA 183 (ECG) [3 July 2012].

The interpretation of the right to education under South African law can be analysed through three different provisions of the South African Constitution, namely the interpretation of the Bill of Rights, the limitation of rights, and the right to education. Most importantly, the Article 39 of the Constitution systematises the interpretation of the Bill of Rights.

Firstly, the Court is under obligation to promote the values of democracy, human dignity and equality. In South Africa, education is not considered only an ordinary socio-economic right but as an empowerment and multiplier right for fulfilling oneself by attaining the necessary faculties to realise the other fundamental rights and freedoms including economic, social, and political activities as well as personal development (Fredman, 2008: 217). Therefore, education is considered a prerequisite for a democratic society based on the common values of humankind. These values and their importance have also emphasised several times by the SACC (Woolman and Bishop, 2008: 8). Therefore, it has been argued that the objectives of the education, the capacities to be gained, the method and the tools to implement them should also be capable to realise these goals, and thus the right to education should be interpreted as a right to adequate education (Woolman and Bishop, 2008: 9). However, the Court has not provided a consideration or justification of these values while determining whether the constitutionally protected the right to education requires adequate education in accordance with the 39-1(a) (Calderhead, 2011: 27).

Moreover, the Court is under the duty to consider international law while interpreting the right to education. There are several international legal instruments to assist the SACC to interpret the Constitution. The ICESCR, which has been recently ratified by the Government, states the required minimum standards for education. The General Comment 13 of the ICESCR underlines clearly the importance of the adequate education (Mcconnachie and Mcconnachie, 2012: 567). Furthermore, the Convention on the Child Rights 1989/103 and the African Charter on the Rights and Welfare of the Child and African Youth Charter also highlight the importance of the good quality education. Furthermore, the 4A Scheme developed by Katarina Tomasevski, Special Rapporteur on Education, accepted later by the CESCR, provides a guideline that education should be available, accessible, acceptable, and adaptable. Nevertheless, the SACC has not considered and discussed these instruments in the adequate education cases. Aside from international law, the

Court, in accordance with the 39-1(c), can also look abroad. It may thus be assisted by the New Jersey, Kentucky, and Indian examples to interpret the scope of the right to education to develop its jurisdiction on the right to education; nevertheless, the Court has not considered these examples yet (Mcconnachie and Mcconnachie, 2012: 573).

The legal framework for interpretation of the constitutional right to education has been examined thus far and it has been stated that the SACC has not interpreted this right as a right to adequate education, despite the presence of several legal instruments potentially indicating this requirement. However, the conditions of the South African which were demonstrated in Chapter II should be borne in mind as well as the case-law of regional courts to comprehend the notion of adequacy in South Africa.

Firstly, the so-called mud schools problem is a significant part of the adequacy litigation in South Africa. The schools are deprived of most essential elements and materials of schooling, to illustrate; some of them do not have even roofs (Skelton, 2013: 1). The State is also aware of these problems and the mud schools cases have been concluded with the settlement of parties to improve the conditions of these schools. However, since the judiciary has not played an active role in these agreements and most importantly their monitoring, it is hard to draw inferences from these settlements in respect of a general notion of adequate education.

Secondly, the schooling materials within the scope of the right to education have been considered by regional courts in several cases. For example, the importance of appropriate furniture for schools was underlined in the *Madzodzo* case by a High Court. The Court stated that:

*“The state’s obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: - schools, classrooms, teachers, teaching materials and appropriate facilities for learners. It is clear from the evidence presented by the applicants that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education.”*

In addition, in *Minister of Basic Education*, the Supreme Court of Appeal ruled that textbooks are important parts of education and that the State’s failure to provide

every student with textbooks violates the right to education. These decisions were based on the clear evidence of the inadequacies of the schools (Mcconnachie and Mcconnachie, 2012: 573) and the attributed importance to textbooks and desks rather than an examination of the content of the education. In addition, as it is seen in *Centre for Child Law v Minister of Basic Education*, the Court mainly focused on the conformability of these particular situations to the SASA and Education Employers Act and procedural aspects rather than reviewing the content of this constitutional right (Fredman, 2016: 165). However, the High Court enriched this perspective. In 2022, in *Khula Community Development Project v Head of Department of Eastern Cape Department of Basic Education*, the High Court of South Africa held that the pupils' right to basic education was violated through the non-delivery of textbooks and the government was found liable to budget in accordance with its obligations regarding right to education.

This may lead us to another discussion since it is a well-known fact there is a great disparity between the schools, particularly among different regions, in South Africa (Woolman and Fleisch, 2009: 109). In this case, should equal protection apply to the other aspects of education, at least the ones considered as particularly significant to education like textbooks? However, the Court did not suggest an answer to this question and confined herself to the dispute before the Court. In this respect, neither adequacy nor equality provides an instructive guideline to the State to ensure the protection of adequate basic education.

Another important issue which should be considered for South Africa is that the right to basic education is immediately realisable in contrast to some of the other social rights (Seleoane, 2003:140). In this regard, the Constitution does not make a reservation such as the state, through reasonable measures, must make progressively available and accessible, unlike housing, health care, food, water and social security and further education (Seleoane, 2003: 141). Because of the distinctive difference in the writing of this provision, this right is regarded as an unqualified right and the SACC confirmed it in the *Juma Musjid* decision. It is argued that the effect of not being limited to progressive realisation or within reasonable resources is that everyone will have this right to claim when it enters into force (Seleoane, 2003: 141).

This decision has two different legal impacts on the adequacy of education. Firstly, the State cannot argue that her responsibility is limited to a reasonable plan to realise this right progressively and the individuals cannot claim enforcement of this right before the courts until its completion. However, as Skelton states, the unqualified nature of this right does not provide a 'magic wand' to the government to realise it immediately (Skelton, 2013: 4). Nevertheless, an unqualified right to education does not necessarily mean a right to adequate education since this notion is attached to timing of realisation of the right rather than its content. Then, the second point is that how the responsibility of this state can be determined?

As Woolman and Fleisch has stated there are two options in front of the court (Woolman and Fleisch, 2009: 136). The first is establishing higher standards for the adequacy and declaring the school system or its some parts unconstitutional (Woolman and Fleisch, 2009: 136). The second is not specifying any standard to create room for the courts and states for each case. As it is observed so far, the Court follows the second path to abstain from establishing a criterion for adequacy.

Nevertheless, this approach does not provide the students with a legal protection since the content of their right as well as the time of realisation is left indeterminate and it is necessary to discuss in each case whether a particular act of the legislative or executive, or a particular situation of the current school system is constitutional or not (Woolman and Bishop, 2008: 57). Moreover, although the Court test the reasonableness of the realisation plans of the rights which are subject to progressive realisation, this approach of the Court's toward education exempts it from such an evaluation and undermines the duty of State to realise of this right.

It is pointed out that the Courts take the resource constraint in the country into account and thus abstain from any effect on the distribution of them (Berger, 2008: 39). It is clear that it would not be fair to expect a state-of-the-art school system taking into account the resources available to South Africa. However, the SACC has functional tools in terms of interpretation, legal review and remedies to balance the requirements of the adequate education in the given Bill of Rights with the realities of the country (Woolman and Fleisch, 2009: 125). As a matter of fact, Article 36 of the Constitution brings a provision that will allow the restriction of any right with a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. In that case, the Court can still



give content to the right to education rather than a narrow interpretation and any limitation should be provided by the State with a general law which is also subject to legal review of the Court in terms of reasonableness and justification. This approach might contribute to education much better in the long term since a criterion in compliance with the international law and standards would be instructive for the state and public opinion, the courts would be able to monitor the developing of education by crafting appropriate remedies, it would encourage states to invest in education and assist them for asking extra taxes or financial contributions and it would lead to an open-ended educational improvement rather than legalisation of the current school system (Woolman and Fleisch, 2009: 121).

It can be stated that an inclusive standard for adequate education has not been established by the Constitutional Court. The SACC focused more on the access and enrolment issues rather than the adequacy of education. The recent case law also illustrates this approach. For example, on 17 June 2020, in *AB and Another v Pridwin Preparatory School and Others*, the Constitutional Court ruled that termination clause in private school's contract with parents are unconstitutional since "removing a child from their school is a major life-changing event for a child and, therefore, the child should be afforded the opportunity to have their views and wishes given due consideration". Moreover, in 2021, the SACC ruled that the right to basic education is not limited to attending or participating in school but includes also access to a diploma and graduation in *Moko v Acting Principal of Malusi Secondary School and Others*.

Therefore, the nature of the right to basic education in terms of adequacy, progressive realisation and legal review has not been clearly solved. Thus, the reasons for the inadequacies in the South African school system and solutions to them could not be determined, to illustrate, whether the inadequacy was rooted in the lack of a general budget allocated to education, its distribution, bad governance, or any other reason (Berger, 2008: 39).

However, the Court of Appeals and regional High Courts considered the importance of material condition of the schools within scope of right to education for several occasions. In 2018, the High Court of South Africa confirmed that "schools and classroom built substantially from mud as well as those built substantially from materials such as asbestos, metal and wood, must within a period of three years from

the date of publication of the Regulations” must be replaced and must access to basic infrastructure (*Amatolaville Primary School v. Minister of Basic Education*). Moreover, in *Komape and Others v Minister of Basic Education of 2018*, the High Court of South Africa ruled that “a sufficient number of toilets for each school for the use of children which are easily accessible, secure and safe and which provide privacy and promote health and hygiene” shall be installed at each rural school.

High Court’s attempts to determine the content of the right to education have not been limited to the physical conditions of the schools. On 25 June 2015, in *Tripartite Steering Committee and Another v Minister of Basic Education and Others*, the High Court of South Africa declared that the ministry is required to provide scholar transport to the plaintiff students.

In conclusion, the unique wording of the South African Constitution with regard to the right to education and the role of courts provide an invaluable possibility to analyse the nature of the right to adequate and quality education. However, the content of the adequate and quality education shows itself on the rulings of high courts case by case rather than by a general determination by the Constitutional Court. Even so, the experience of South Africa is rewarding to comprehend the nature of adequate education. The judiciary of South Africa provided several substantial perspectives of the adequacy of education including the physical conditions of the schools, safety, sanitary, energy, access to textbooks and other materials, and transportation to schools. Therefore, South African case-law serves as a model and benchmark in terms of the content of the adequacy and quality of education.

## B. INDIA

Even though the legal problems in respect of the right to education in India have some similarities with the other three jurisdictions to some extent, the SCI has diverged from them in the interpretation of their constitution and its approach to adequacy of education in several points (Feasley, 2014:11). The Court has provided that the constitutional standard of basic education is of good quality; however, like South Africa, substantive and comprehensive content of the adequacy and good quality has not been established and the Court displayed a very material understanding of educational institutions on adequacy while deciding on particular cases.

Firstly, as it is demonstrated in Chapter I, unlike the other three jurisdictions, an enforceable right to education was first recognized by the Court, in spite of the absence of a clear provision of the right to education in the Constitution (Feasley, 2014: 11). Therefore, the judiciary has played an important role on shaping this right and considered education as a significant part of the right to life in India. Since the Court in *Mohini Jain* decided that education is vital to the protection and fulfilment of the right to life and human dignity, the right to education has gained a qualification and mission regarding its role in the enjoyment of other fundamental rights. It was only following this decision that the right to education was guaranteed by a constitutional amendment and the necessary legal regulations have been made (Kothari, 2014).

Therefore, the second main difference in respect of the practice of the Supreme Court of India, unlike the New Jersey and Kentucky courts, in the first place, the Court has not reviewed the compliance of education laws or school funding systems with the Constitution but itself played an essential role on crafting this right before the amendment of Constitution. Although the minimum standards term has been mentioned several times in the *Mohini Jain 1992* and *Unni Krishnan 1993* rulings, the Court did not use the quality and adequacy aspects while formulating this right.

However, after the adoption of the constitutional right to education with the Article 21A in 2002, the Court started to use the concept of quality and adequacy, and in different cases examined the content of the right to education. The most remarkable point to be noted is that the Court highlighted in several cases that the ‘education’ guaranteed by the Constitution is not any type of education but an education of good quality as a result of its textual interpretation. An interesting point to be remarked is that the Constitutions of South Africa and India converge on the formulation of this right since neither the Indian nor South African Constitution involves a further reference to quality or adequacy such as ‘thorough’ or ‘efficient’ compared to Kentucky and New Jersey Constitutions. Nonetheless, unlike South Africa, the Indian Court has not abstained from explicitly declaring that the Constitution ensures a right to quality education.

Nevertheless, the Court has provided neither a criterion on the content of quality education nor a comprehensive set of material standards that should be fulfilled by the education system. At this point, the Court displayed an attitude similar to the

SACC focused on particular cases and examined the physical status of the schools. Moreover, the Court clearly stated that the case law on the adequacy of education will be developed in time case by case in *Avinash* ruling as '[i]n the instant case, we have no need to sketch all the contours of the Constitution's guarantees, so we do not. We merely hold that the right to education incorporates the provision of safe schools'.

Moreover, a broad outline of the purpose of education has also been provided by the judiciary. The Court, in *Unaided*, suggested that the ultimate purpose of education is 'overall development of the child' and the details of its content have been left to the legislature and executive to be set. As it was stated in Chapter I, this development of case law on adequate education has been responded by the Legislature and Executive with several pieces of legislation, most importantly the Right to Education Act 2009. At this point, it can be also argued that the textual interpretation of the SCI is significantly broader compared to the SACC, despite the resemblance of the legal instruments on international and constitutional levels. However, as the SACC, the SCI also does not provide an inclusive and detailed guideline for the adequate by stating that it is not necessary to interpret the provision with its all aspects to settle the alleged violation.

Furthermore, a detailed criterion for quality education has been left to the government in both jurisdictions. The Court provided its view of the right to education in the *Ashoka Kumar Thakur* case in 2007 with its unequivocal wording:

*"It has become necessary that the Government set a realistic target within which it must fully implement Article 21A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education."*

In different cases for particular claims, the Court has ruled on the physical situation of the schools, provision of materials, the safety of the schools and students. For example, in *Environment & Consumer Protection Foundation* case, in which several

interim orders and dialogues with the states and local authorities have been taken place, the Court ruled that the State should provide ‘the basic infrastructure facilities like toilet facility, drinking water, class rooms, appointment of teachers and all other facilities so that children can study in a clean and healthy environment’. The Court based its decisions on several communications with the federal states and justified their reasonableness under the importance of each material claim for the quality education. Therefore, it can be stated that Indian courts apply a similar material approach to education like the SACC but the SCI displays a more comprehensive attitude toward the particular issues in question and examines the content of that precise issue (Shankar and Mehtain, 2008: 168). Moreover, it could be argued that the SCI interprets this right in a way which is in accordance with the demands of litigants in South Africa, namely the right to education contains right to adequate education facilities.

Furthermore, the Court examined the duty of state regarding the safety of schools in *Avinash Mehrotra* after a tragic fire in a school, and ruled that ‘[i]n view of the importance of Article 21A, it is imperative that the education which is provided to children in the primary schools should be in the environment of safety’. More to the point, the Court provided a detailed writ on the fire safety measures in schools including the training of school teachers and other staff, and school building specifications.

In *Grootboom*, the Court stated that ‘educating a child requires more than a teacher and a blackboard, or a classroom and a book’ as the SACC remarks ‘that housing entails more than bricks and mortar’. However, it should be stated that the SCI has not considered this right within progressive realisation and grant remedies for individuals of those whose rights were violated. Litigation attempts addressed to qualify the right to quality education in India is limited compared to the South Africa (Open Society Foundations, 2017: 41). Therefore, the general tendency of public interest litigation is taking advantage of every opportunity that the right to education case law provides (Jamil, 2020). One of these attempts is *Rajneesh Kumar Pandey and Ors. v Union of India* case. On 28 October 2021, the Indian Supreme Court decided that schools shall maintain a pupil-teacher ratio especially for the children with special needs.

A very unique approach of the Court is taking the compulsory nature of basic education into account on the adequacy of education. Due to compulsory education, children and parents are also obliged to attendance of the children to the basic education. Therefore, the Court rules that the parents and children cannot be compelled to attend the schools, unless they are safe and healthy. Particularly the SACC would also benefit from such an approach since the physical situation of the important number of schools in South Africa poses a threat to the health of the children.

However, in general, the Court has not questioned the funding of schools for adequate education under the RTE Act and other education laws. The Court confined itself to warn the government in case the poor financing of schools poses a threat to the right to quality education, the Court may intervene with the monetary policy to ensure the right to education. Therefore, unlike New Jersey, the school funding system has not been examined to ensure the realisation of adequate education and it leads us to another discussion. As the Court itself remarks, many schools in India do not comply with these standards. Although the mentioned decisions show that the Court has examined the content of the right to education, since these decisions made in particular cases, their effect on the general interpretation of the right to education is limited (Sripati and Thiruvengadam, 2004).

Therefore, the Court has been criticised in respect of its contribution to solution these problems since the Court does not examine the reasons behind the failure of realising this right by focusing only the material aspects of adequacy (Shankar and Mehtain, 2008: 171). Several researchers suggest that various adequacy problems in India are related to the teaching methods, content of education and overall governance of education system (Das, 2013: 5; Shankar and Mehtain, 2008: 151). Because of these reasons, it was argued that the role of the court on adequacy in India suffers from the absence of reviewing the capacities to be gained in basic education, in which financial means they will be delivered to the students, and how the overall education system will be governed (Dubey, 2009).

### **C. KENTUCKY**

Similar to New Jersey, in a class action case before the Kentucky Supreme Court, the unconstitutionality of Kentucky education system including its funding system has been alleged (Rebell, 2002: 234). In 1989, the Kentucky Supreme

Court ruled on the adequacy of education in a very novel and bold way compared to other education litigation (Gillespie, 2010: 1013). The Court with a majority opinion, in *Rose v Council for Better Education*, declared the entire education system unconstitutional with 'all its parts and parcels' without excluding statutes, funding rules, and procedures. This time, while the plaintiff based their arguments on the equality and state education clause, they also explicitly claim that the education system was inadequate throughout the country (Newman, 2013: 70). The claim of the plaintiffs as well as the court's approach toward it has started a new era in litigation on adequate education (Dinan, 2010: 71). Another distinct feature of this litigation was that it was consisted of a single judgement compared to several different cases in South Africa and India, and several rounds of cases in New Jersey.

According to the Court, there were mainly four legal questions to be answered (Dinan, 2010: 105). Firstly, what does the constitutionally protected 'common and efficient system of common schools' mean? Secondly, who is responsible for providing this education? Thirdly, how should this school system be funded? Fourthly, and last, does a violation of equal protection arise in the present school system?

This approach of the Court is the most important difference from the other three jurisdictions since the Court interpreted the Constitution to find out what the Constitution requires to establish criteria for an adequate school system before examining whether the current state is constitutional or not. Moreover, the Court has not only analysed the part of the right which might be necessary for the particular dispute but explored all aspects of the efficient and common school system. At the outset, the Court briefly studied the terms of 'common' and 'throughout' and stated that it means a system of schools includes all the students of the entire Kentucky. Then, the Court has determined that an efficient education system requires proper and adequate education based on the literal meaning of the word. The Court sought the answer for what does the efficient system means in the statements of the framers, former court decisions, affidavits and expert opinions, and in the practices of other courts. According to this research, The Court has interpreted the 'efficient system of common schools throughout the State' as 'each and every child in this state should receive a proper and an adequate education, to be provided for by the General Assembly'. The Court has displayed two different approaches to the adequacy of education. The first part of adequate education is the substantive content of the

basic education in terms of capacities which the student will acquire through schools and the second is the overall school system and its governance.

Moreover, the Court did not confine itself to this broad interpretation but after examining the affidavits, expert opinions, claims and responses, the Court defined the criteria of an efficient education in a very detailed way compared to other courts. The Court enlisted the elements of this proper and adequate education with its unequivocal saying:

*“[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (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.”*

As it is clear in this excerpt, the Court focused on the adequacy of the content of the education rather than the adequacy of educational facilities. Moreover, the Court drew inferences from the Constitution and set general principles rather than settling this dispute based on factual arguments such as clear inadequacy of district schools without referring to the principles. It is interesting to note that this approach of the Court bears significant resemblance to the international agreements and UN Documents without referring them. Furthermore, the Court has not provided a detailed content or justification of all these aspects but simply enlisted them and set some of these principles as an inevitable and direct result of the text of the Constitution and set some of them by working on various sources. The Rose decision has not provided a comprehensive reasoning and justification for each element; however, it evidently leads to the legislator to realise these goals.



While formulating the adequacy criteria, the Court did not consider the children as citizens or future economic actors but as individuals of those personal and overall developments are crucial along with the citizenship and economic roles. For instance, the requirement of ‘sufficient knowledge of economic, social, and political systems to enable the student to make informed choices’ and ‘sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation’ reflects the importance attributed to the students as future voter of the democracy. On the other hand, ‘... compete favorably with their counterparts in surrounding states, in academics or in the job market’ demonstrates that higher education and the economy have also been considered as central to education. However, the most striking distinct feature is focusing on the individual needs of the child, her selfdevelopment and self-fulfilment.

Another important legal issue to be considered is the relationship between equality and adequacy. The *Rose* decision does not examine the equal protection and education; however, states that a uniform school system and ‘equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances’ should be established. The crux of this issue is the feasibility of such a principle without establishing proper financial mechanisms to enforce it. Justice Vance in his dissenting opinion remarks this problem and argues that it is not possible to achieve this constitutional standard with a dually funded education system rather than an equal and uniform funding of schools. Therefore, the Court has not based its reasoning on equality; however, the equality was used as a broader term to reinforce the general concept of adequacy rather than crafting principles or remedies to ensure equal educational opportunity.

Almost 35 years after the landmark *Rose v Council for Better Education* case, the school finance issue was brought again before the Kentucky courts. In December 2021, a legislation enabling state funding of charter schools in addition to common schools found unconstitutional. The Court held that privately owned and operated ‘charter schools’ shall not be funded by the taxpayers’ money and therefore found the legislation inconsistent with the Kentucky Constitution. This ruling was affirmed by the Supreme Court of Kentucky on December 15, 2022. A year later, a similar legislation was also struck down by a state court on the same grounds on November 12nd 2023, in *Council for Better Education v. Commissioner of Kentucky Department of Education*.

As a result, it can be stated that the Supreme Court of Kentucky has provided inclusive adequacy standards for both basic education and the school system in a very different way compared to other jurisdictions. Unlike New Jersey, equal educational opportunity was of secondary importance with regard to right to adequate education. The Court displayed an approach which does not directly interfere in school finance law but provides standards of education that should be accomplished regardless of the method of funding. Moreover, the Court based the adequacy on the content of education rather than facilities, finance or other components of the basic education.

#### D. NEW JERSEY

The New Jersey Supreme Court interpreted the education clause in the State Constitution in a way focusing on equal educational opportunity through substantive equal funding of schools under the education clause in the State Constitution<sup>5</sup>. The development of its caselaw provides an important opportunity to analyse the relationship between adequate education and the school finance system and the following text concentrates on it.

New Jersey Supreme Court examined this issue in two different litigation processes, namely *Robinson v. Cabill*, followed by *Abbott v Burke*. In these cases, the claimants argued that school funding laws and their application were violating the Constitution and the students of poor districts were being discriminated due to the unequal composition of and disparity in the school budgets based on local property taxes (Plosia, 1987: 195). It was the traditional and ongoing fiscal neutrality argument of the education litigators claiming that the resources available to schools should be equal regardless of the wealth of the districts under the equal protection clause at the federal and state levels (Dinan, 2010: 97).

However, the novelty of their arguments was that they did not only base themselves on the principle of equality but also the education clause in the Constitution obliging the legislature to provide a 'thorough and efficient school system'. They argued that thorough and efficient school system should be interpreted in a way that education provides 'at least such instruction as is necessary to fit for the ordinary duties of citizenship' and a minimum education allowing the children 'to read, write and function in a political environment' (Tractenberg, 1974).

<sup>5</sup> Since this paper examines the concept of adequacy, the technical details regarding the taxation schemes will not be addressed. For more information, See (Terman and Behrman, 1997)

Therefore, in this context, the Court faced several important legal questions. Firstly, should this disparity in schools examined under state equal protection clause or under state education clause? In the first place, the Court rejected that this disparity claim falls under the equal protection clause by referring *Rodriguez* decision and probable difficulties regarding its application. Because of this reason, the Court chose to settle this dispute under ‘thorough and efficient’ school system clause.

Secondly, and more important to our point, the Court was faced with the question of whether the Constitution requires any standard for education or school funding system. In this context, the Court interpreted this education provision by referring to the *Landis* decision in 1895 as follows: ‘[t]he Constitution’s guarantee must be understood to embrace that educational opportunity, which is needed in the contemporary setting to equip a child for his role as a citizen and a competitor in the labor market.’ The citizenship aspect of this approach bore a resemblance to the arguments of plaintiffs and the following arguments of the Court has been based on the role of education in the political and economic world. Unlike Kentucky, the Court has not provided a detailed and comprehensive interpretation and definition of ‘thorough and efficient system of free public schools’ during this litigation; the Court has left the definition and scope of the adequate education to the State by stating that ‘...[s]tate must define in some discernible way the educational obligation and must compel the local school districts to raise the money necessary to provide that opportunity’. Nevertheless, the Court suggested that the ‘thorough and efficient’ education does not mean a state-of-the-art education system by referring to the *Landis* decision and stating as follows:

*“...but, beyond this constitutional obligation, there still exists the power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service.”*

Therefore, comprehensive standards for the school system and education have not been determined in these cases, unlike the *Rose* decision. The Court applied more concrete understanding of adequacy based on finance rather than establishing abstract or obscure standards (Martell, 1977: 149). One of the main reasons leads the Court not to establish a clear substantive adequacy was the apparent inadequacy and disparity of the poor district schools which does not require comprehensive

criteria to confirm that they were inadequate (Rebell, 2002: 232). Secondly, the most remarkable aspect of the situation of the school system was the disparity between the schools and substantially unequal budget of the different public schools which has been also basic claim of the plaintiffs (Plosia, 1987: 215). Moreover, it has been argued that regardless of the its substantive content, the adequate education is substantially related to the positive duties of the states since the provision of teachers, teaching materials and the sufficient infrastructure as well as the other education related expenses play an important role in the adequacy of education (Mcconnachie and Mcconnachie, 2012: 573). This relation leads us to the discussion on the funding the education system. Because of these reasons, the litigation in New Jersey has been mainly based on the school funding system.

However, adjudication on the school finance system requires the Court establish judicially manageable tools to review a funding system. As Terman and Behrman ask how the school finance can be reviewed without criteria of what the school system is expected to achieve (Terman and Behrman, 1997: 4). At this point, the Court has applied different methods in the different rounds of the cases explicitly or implicitly. Firstly, the Court accepted the importance of funding on education as a fact and stated:

*“Obviously equality of dollar input will not assure equality in educational results. There are individual and group disadvantages which play a part... But it is nonetheless clear that there is a significant connection between the sums expended and the quality of the educational opportunity.”*

Since the criterion for the ‘thorough and efficient’ system of schools has been determined in the first step, the Court crafted a judicially manageable tool to assess the constitutionality of the financial system as equal educational opportunity (Plosia, 1987: 200). Therefore, it has been decided that the taxation and school funding system should be rearranged in a way that provides substantially equal funding to schools to ensure equal education opportunity. In this point, the New Jersey Court insisted on a more absolute standard compared to the Kentucky Court.

However, as the Court confirms equal spending in terms of a fixed spending or state aid per pupil does not necessarily mean the equal and adequate education for every student. The needs of every school, every classroom and the student are different; therefore, the situation of the particular education unit becomes the

determinative factor of adequacy (Welner, 2010: 88). Since the prior conditions are not same, an equal spending may lead to sustain the previous disparities. The *Abbott v. Burke* litigation which was conducted in 1985 in favour of students of poorer urban districts clearly showed that poorer districts require more spending and special attention for the realisation of adequate education (Lichtenstein, 1991: 429).

This observation brought a new concept of the adequacy in addition to the already established equal educational opportunity (Rebell, 2002: 233). In this case, the Court ruled that the Legislature should assure the foundation level ‘substantially equivalent’ funding to *Abbott* schools and provide ‘adequate’ supplemental programmes to improve the conditions of the disadvantaged of urban children (Sciarra, 2009). Therefore, it can be argued that this perception and persistence on the equal funding provides a keen understanding of adequacy as an equal educational opportunity. Moreover, the novel tool of the Court in *Abbott* cases overcome a presumptive inefficiency of equal spending that will violate the rights of the all students due to a policy on low spending for every school or pupil as well as maintaining existing disparities with equal funding.

The New Jersey Supreme Court has consistently maintained its precedent on the right to education, with only a few cases being heard, such as *H.G. v. Harrington*. In this case, the plaintiffs alleged that the state’s last-in-first-out policy for teacher tenure undermines the quality of education and breaches the constitutional guarantee of a comprehensive and effective education. On December 12th, 2018, the Court confidently declined to hear an appeal regarding the policy for teacher tenure, in line with its established stance.

It could be concluded that New Jersey Supreme Court has a unique approach on the adequate education among other three jurisdiction since the Court focused on equal educational opportunity through substantive equal funding for every student in contrast to the Kentucky Supreme Court which focus on the substantive content of adequacy of education and school system, and thus, granting a broad discretion to the Legislature to realise it without insisting on a certain type of funding. Moreover, unlike South Africa and India which are assessing the material conditions of the schools, New Jersey Court use the school funding system itself as a base rather than its practical outcomes such as infrastructure or teaching materials. This approach has

been subject to several criticisms as well as political opposition (Jaffe and Kersch, 1991: 285) since it is argued that the adequacy of education is not limited to funding but it is only a part of it and there is not a direct and indispensable connection with the monetary issues and the outcomes of education; therefore, it has been argued that focusing on the capacities outcome of the education in addition to physical criteria may encourage states to find effective and innovative solutions to gain these outcomes with the resources they allocated to education (Woolman and Bishop, 2008: 57).

## CONCLUSION

The importance of education and the right to education is one of the concepts that is generally accepted as a rule throughout the world today. However, the question of whether education, which is the subject of the right to education, is merely the privilege of enrolment in a school has been overshadowed by the general importance attached to the right to education. The content of this right has been an important agenda item even after the right to a universal education has been achieved, especially in countries where there is significant segregation on grounds such as colour, nationality, and social class. This agenda led to the UN making inclusive and equitable quality education for all one of its 17 Sustainable Development Goals. In this context, in countries such as South Africa, India, and the USA, frequent lawsuits on the quality of education, combined with judicial activism, have created a rich jurisprudence on the content and realisation of the right to education. This jurisprudence has provided guidance on the future of the right to education and an important opportunity for comparative legal analysis.

In this sense, the aim of this paper is comparing and contrasting the role of South African, Indian, and the USA courts on the adequacy of basic education. The role of the courts in the determination, implementation, and supervision of the content of this right has gained importance following a number of plaintiffs in different jurisdiction take this matter before the courts claiming that their constitutional right to education is being violated with the failure of the state to fulfil this right. The main challenge before the courts has been interpretation of the legal instruments to decide whether the right to basic education guarantees a certain standard of education. The main challenge before the courts has been interpretation of the legal instruments to decide whether the right to basic education guarantees a

certain standard of education. Except for South Africa, the courts clearly stated that the right to basic education contains a certain standard of basic education in these jurisdictions. These standards examined by the courts has been analysed under the adequate education concept. It has been argued that although the courts accepted the constitutionally protected standard, each jurisdiction has displayed very different approaches towards the adequacy of education beyond the textual differences and the demarcation of this standard as efficiency, quality or adequacy.

This paper argued that there is a divergence between the Courts' interpretation of adequate education. The courts apply mainly three different approaches towards the adequacy of education. The first is the approach of the Kentucky Supreme Court which adequate education is assessed based on the capacities to be gained by the students during basic education. The second approach, adopted in India and South Africa, emphasises the physical and material conditions of the schools including teaching, infrastructure, textbooks, toilets, sanitation, water, and safety while determining the adequacy of basic education. The third approach, here represented by the New Jersey Supreme Court protects the adequacy of basic to education by examining school funding laws to provide all students with equal educational opportunity.

It is not possible to rank the superiority of these methods for several reasons. Firstly, the balance of separation of powers and constitutional limits in each country differ significantly from one another. Secondly, the socio-economic conditions in each country also differ from one another. Finally, there is insufficient empirical evidence on the practical effects of the role of the judiciary in the realisation of socio-economic rights. Nevertheless, the methods and definitions of the courts' handling of the content of the right to education, together with the practical effects of these judgements, provide an important reference for courts and researchers in other countries to ensure quality education for all.

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