Breaking New Ground in Class Action Litigation in South Africa: The Right to Education as "Immediately Realisable."

Author: Qingliu (Mary) Yang, Columbia Law School, J.D. Candidate 2016
With many thanks to: Sarah Sephton, Regional Director of the Legal Resources Centre

I. INTRODUCTION

On 11 April 2011, the Constitutional Court of South Africa declared that the right to basic education is "immediately realisable," as opposed to some of the other socio-economic rights, which must be "progressively realised" within "available resources" subject to "reasonable legislative measures."[1]

Despite this declaration, and despite the wide scope that this right is theoretically afforded, a proper basic education remains elusive for hundreds of thousands of learners across South Africa. This paper will consider the reasons behind the wide gap between court judgments such as *Juma Musjid Primary School & Others v. Essay N.O. and Others* (2011), and the reality of education conditions on the ground.

The main conclusion is that strategic litigation–specifically class actions–are a uniquely positioned tool for closing this gap. Class actions are new to South Africa,[2] and have historically only been used in socio-economic rights litigation.[3] However, due to the many challenges that this type of litigation faces, class action litigation on its own is unlikely to be enough to fulfil the right to education. Additional strategies, including both litigation

[1] *Governing Body of the Juma Musjid Primary School & Others v. Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13

[2] *See also* BUSINESS DAY LIVE, *Class-action Storm Brewing on the Horizon*, (Sept 28, 2014). http://www.bdlive.co.za/businesstimes/2014/09/28/class-action-storm-brewing-on-the-horizon. (In South African law, use of class actions is not only a new development, it also significantly changes the bargaining positions of parties in liability litigation that companies cannot rely only on their ability to out-lawyer an opponent.)

[3] There have only been four certified class actions, all of which are related to socio-economic rights: *Ngxuza v. Permanent Secretary* (2001), *Trustees for the time being of the Children's Resource Centre Trust v. Pioneer Food Pty Ltd* (2013), and *Mukaddam v. Pioneer Foods* (2013).

and non-litigation based strategies, may be needed to bolster the effectiveness of this type of litigation.

Discussion Roadmap

First, this paper will give an overview of the "right to basic education" in the South African context, considering major court decisions and new legislative reforms that have promised continued steps in fulfilling this right.

Second, the discussion present a theoretical framework of the "value added" and "costs" of class action litigation, and the "front end" and "back end" considerations of class actions to determine that class actions are a uniquely positioned tool for education reform in South Africa. Since there has only been one class action in South Africa on the right to basic education,[4] the paper will analyse analogous cases: (1) class action litigation methods that other countries have used to fulfil the right to basic education, and (2) class action litigation in South Africa on other socio-economic rights, such as the right to food.

Finally, the paper will evaluate the role of the Legal Resources Centre ("LRC") in its ground-breaking class action case, *Linkside and Others v. Minister of Basic Education (2014)*, set for judgment later this year. The paper will use lessons drawn from analogous class action cases to determine if there are procedural or substantive solutions to problems that have arisen in *Linkside*, and will end with proposals of litigation and non-litigation strategies that could improve the effectiveness of *Linkside* and other similar cases in the future.

Scope of Discussion

This paper is limited to the public school education system in South Africa, and will only discuss the right to basic education. It will not discuss private schools, continuing or further education for children, or basic education for adults. The phrase "right to education"

[4] *Linkside and Others v. Department of Education and Others* (2014)

specifically refers to the "right to basic education." Since the right to basic education is treated differently than most other socio-economic rights in the South African Constitution, its analysis and conclusion would not be clearly applicable to other socio-economic rights in South Africa, which would be more meaningfully discussed under the *Grootboom*, *Treatment Action Campaign*, or *Khosa* cases.[5]

II. CONSTITUTIONAL COURT DECISIONS, LEGISLATIVE REFORM, AND CONTEMPORARY FAILURES OF THE RIGHT TO EDUCTION IN SOUTH AFRICA

Overview of Constitutional Court Judgments on the Right to Basic Education

The South African Constitution provides for the right to basic education in Section 29.[6] The Constitutional Court first defined the boundaries of the right to basic education in 1995. In *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*, the Court held that: "[The right to basic education] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education."[7] The state is not only prohibited from impairing access to the right to education, but is also obligated to take positive steps to ensure this right is fulfilled. However, this decision did not determine the specific time limits under which the right must be fulfilled, so progress on this right remained slow for fifteen years.[8]

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[5] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC). *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); 2002 10 BCLR 1033. *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 6 SA 505 (CC). The *Grootboom*, *TAC*, and *Khosa* frameworks of "reasonableness" may still be applicable to the right to education, but not vice versa.

[6] South African Constitution Section 29. 29(a): "Everyone has the right – (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[7] Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995 (CCT39/95) [1996] ZACC 4; 1996 (4) BCLR 537; 1996 (3) SA 165 (4 April 1996).

[8] There was some progress through case law, but the right to basic education would be not be directly addressed: See, e.g., *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 2 SA 415 (CC)* (principal focus was on the restriction of access to education through the implementation of the language policy of the school); *MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1)*

The Governing Body of Juma Musjid Primary School & Others v. Essay N.O. and Others, decided on 11 April 11 2012, was the first case that proclaimed the right to basic education as "immediately realisable."[9] The Court proclaimed that "unlike some of the other socio-economic rights, [the right to basic education] is immediately realisable . . . section 29(1)(a) may be limited only in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom."[10] By implication, a right accorded the status of "immediately realisable" cannot be left unfulfilled for budgetary constraints that the government might face.

The Court's reasoning is that the right to basic education is a cornerstone right in discarding the lasting effects of the segregation of apartheid, and that these lasting effects are due to "systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners." [11] The Court implies that giving this right an elevated priority will speed the development and transformation of the society under the Bill of Rights more quickly than giving that status to any other socio-economic right. This is consistent with the Court's emphasis on interpreting these rights with an understanding of the "history and background to the adoption of the Constitution,"[12] and with the government's vision of education as a tool to set aside apartheid's inequities. [13]

SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007); (principal focus was on religious and cultural expression in public schools).

[9] *Governing Body of Juma Musjid Primary School & Others v. Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13] at paragraph 37.

[10] *Id.*

[11] *Id.* at paragraph 42.

[12] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 16. *See also* Arendse's article: http://www.saflii.org/za/journals/PER/2011/34.html

[13] South African Government's *Plan of Action: Improving Access to Free and Quality Basic Education for All*. (2003) "In 1994, a Government elected by the people of our country could at last set that schooling system on a more normal course, where institutions could nurture our youth in an environment of peace, and could produce the scientists, teachers, voters, mothers, fathers, politicians and business people of the next generations, generations for whom apartheid and the denial of access to learning would be a thing of the past."

However, despite this proclamation, Judge Nkabinde in *Juma Musjid* avoided the question of what formed the "essence" or "core" of the right to basic education,[14] so the decision was limited in its impact. The question before the Court involved learners enrolled at Juma Musjid School, which was a public school situated on private property. [15] The owner of the property, Juma Musjid Trust, obtained an eviction order against the occupants of the school, displacing learners from their school.[16] In issuing the judgment, the Constitutional Court focused solely on the placement of the learners[17] and did not have to confront the difficult question of what the right to basic education specifically entails.

Litigation Continues on an Issue-by-Issue Basis, Supported by Incremental Legislative Reform

Because the *Juma Musjid* decision was limited in its scope, litigation on the right to basic education has continued today on a range of specific issues. These cases are brought in parallel with each other, often by public interest legal organizations such as the Legal Resources Centre, Equal Education, or Section 27, among others.[18] This type of litigation has been categorized as "strategic litigation" by practitioners advocating for public school reform,[19] as these judgments often build upon one another in a piecemeal fashion to develop a working definition of the substantive core of the right to education.

The term "judgments" is narrow. Judgments do not always spell progress, and the lack of a judgment does not mean that the application or case had no impact.[20] For instance, "judgments" have been made with regards to decision-making authority between the School

[14] L Arendse, *The Obligation to Provide Free Basic Education in South Africa : An International Law Perspective*, (2011), available at: http://www.saflii.org/za/journals/PER/2011/34.html
[15] *Governing Body of Juma Musjid Primary School & Others v. Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13] at paragraph 11
[16] *Id.* at paragraph 12.
[17] *Id.* at paragraph 78-79.
[18] David J. McQuoid-Mason. *The Delivery of Civil Legal Aid Services in South Africa*. (2000) "The LRC is the most successful specialist law firm in South Africa that provides legal aid services in civil cases for the poor and marginalized in the country." See also http://www.equaleducation.org.za/ and http://www.section27.org.za/.
[19] The Legal Resources Centre. "Ready to Learn? A Legal Resource For Realising the Right to Education." (2013)
[20] For example, compare *Juma Musjid* and *Centre for Child Law & Others v. Government of the Eastern Cape Providence & others* (settlement agreement).

Governing Boards and the Provincial Departments of Education,[21] what the minimal amount and quality of school furniture is needed to support the right to basic education,[22] standards for post-provisioning for educator positions,[23] and standards for textbook provision and delivery.[24] However, considerable precedent has also been made through settlement agreements with regards to national government intervention [25] and the adequacy of school building infrastructure. [26]

This foregoing litigation has been facilitated by incremental legislative reform. From an early point in the South African democracy, the government regarded basic education as "the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults." [27] In addition to the large international regimes on socio-economic rights, the South African government also committed itself to the *Dakar Framework* in 2000, [28] which commits its signatories to realize "six [educational] goals" by implementing or improving national plans of action for the realization of the right to primary education. [29]

[21] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013) (Department of Education has ultimate discretion and control over the implementation of admissions decisions.)
[22] *Madzodzo and Others v. Minister of Basic Education* (2014) (Dealing with the question of adequate furniture in schools in the Eastern Cape Province.
[23] *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012) (2012] (Dealing with Post Provisioning). See also *Linkside and Others v. Minister of Basic Education*. (2014)
[24] *Section 27 and Others v Minister of Education and Another* (24565/2012) (2012) (Concerning textbook provision and delivery in the Gauteng High Court). See also *Basic Education For All and Others v Minister of Basic Education and Others* (23949/14) (2014] (Concerning textbook provision and delivery, now pending before the Constitutional Court).
[25] Settlement Agreement in *Save Our Schools and Community and Another v. President of the Republic of South Africa and Others* (ECB) case no 50/12 (Concerning section 100 intervention of the National Department of Education).
[26] Settlement Agreement in *Centre for Child Law & Others v. Government of the Eastern Cape Providence & others* (ECB) case no 504/10 (Concerning the eradication of mud schools in the Eastern Cape). For the impact of this settlement, see Cameron McConnachie and Chris McConnachie. *Concretising the Right to Basic Education*. (2012) 129 South African Law Journal 554.
[27] GN 196 in GG 16312 of 15 March 1995 (*White Paper on Education and Training)*
[28] Dakar Framework paragraph 7.
[29] *Id.*

In 2007, the South African government amended the South African Schools Act 84 of 1996 ("SASA") [30] to include section 5A, which provides for the Minister of Education to make regulations prescribing minimum uniform norms and standards for public school infrastructure. [31] In 2013, after a testy and protracted dispute in courts, proponents of the right to education scored a victory under section 5A when the Norms and Standards for Public School Infrastructure [32] were written pursuant to a settlement agreement. [33] Additional litigation will follow if the deadlines for meeting these Norms and Standards pass without the implementation of these standards by the Department of Education.

Continuing Failures of the Right to Basic Education in South Africa Today

In 2003, the Department of Education published its national "Plan of Action," which stressed that:

> "[I]nforming our entire plan, and hence reiterated throughout the document, is the need for *free and quality education* for all. This implies that - public funding of schools, especially where learners are poor, must be sufficient to cover the cost of all the basic inputs required for a quality education, schooling must provide all learners with meaningful knowledge and skills that will empower them to take part fully in the economic, political and cultural life of the country; and no learners, especially those of compulsory school-going age, should experience any economic, physical or other barriers to attending school."[34] [original emphasis]

Despite these national goals, the state of basic education in South Africa remains dire.[35] As of 2013, "only half of South Africa's schools have water and sanitation, 93% of its schools do not maintain proper school libraries, and 95% do not have science facilities."[36] Other problems remain after protracted litigation: some students are still forced to study in

[30] South African Schools Act Preamble (1996): "To provide for a uniform system for the organisation, governance and funding of schools."
[31] South African Schools Act Section 5A
[32] Norms and Standards for School Infrastructure. (2013)http://www.education.gov.za/LinkClick.aspx?fileticket=oyuBQ0STm4k%3D&tabid=347
[33] The settlement agreement can be found here: http://equalizermagazine.files.wordpress.com/2013/01/settlement.pdf
[34] South African Government's *Plan of Action: Improving Access to Free and Quality Basic Education for All*. (2003), page 8.
[35] The Legal Resources Centre. *Ready to Learn? A Legal Resource For Realising the Right to Education*. (2013) page 1.
[36] *Id.*

"mud structure schools," especially in areas such as the former Transkei region; [37] nearly 19,000 teacher posts are vacant throughout South Africa, many in the Eastern Cape Province;[38] and many South African schools have a shortage of desks and chairs for students, forcing many students to sit on the floor and preventing some teachers from handing out written assignments.[39] Furthermore, many schools lack adequate number of classrooms, electricity, water, sports facilities, internet and computer facilities, and perimeter security.[40] The public school system fails to provide for the educational needs of severely and profoundly intellectually disabled children in the Eastern Cape Province,[41] which is further complicated by discrimination on the basis of refugee status and language differences.[42] Finally, many students lack safe, reliable, and affordable transportation to schools, [43] and there is a large inequity gap between the richest and poorest schools in the country. [44] The aspirations of the government's 2003 Plan have not been realized.

III. THE EFFECTIVENESS OF CLASS ACTIONS AS A WEAPON IN REALISING THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA

There are many categories of class action litigation around the world: plaintiff and defendant class actions, mass tort and consumer class actions, structural reform and constitutional rights based class actions, among others. While the focus here will be on class actions on socio-economic rights, specifically the right to basic education, lessons on fee structures, incentives, and remedies will be drawn from other types of class actions in different countries.

[37] Cameron McConnachie and Chris McConnachie. *Concretising the Right to Basic Education*. (2012) 129 South African Law Journal 554.
[38] The Legal Resources Centre. "Ready to Learn? A Legal Resource For Realising the Right to Education." (2013) page 3.
[39] *Id.*
[40] *Id.*
[41] *Id.* at page 4.
[42] *Id.*
[43] *Id.* at page 5.
[44] *Id.* at page 6.

This section will begin with a discussion of the "value added" and "costs" of class action litigation, and an enumeration of certain "front end" and "back end" considerations when bringing a class action lawsuit. After establishing the theoretical framework, the paper will analyse (1) two socio-economic rights class actions in South Africa, and (2) several foreign class actions drawn from other countries on the right to education. Finally, the discussion will turn to analysing lessons taken from these case studies to inform the main case of interest: *Linkside II*, an ongoing class action in the Eastern Cape High Court on the right to education.

The Value Added and the Costs of Class Action Litigation

Institutional reform class actions "have made and continue to make an enormous contribution to the realization of fundamental constitutional values – a contribution that no other governmental construct has proven able to duplicate." [45] In South Africa, a class action mechanism is approved by the Constitution to "alleg[e] that a right in the Bill of Rights has been infringed or threatened."[46] This is consistent with the Supreme Court of Appeal's explanation that the class action provision of 38(c) must be interpreted in light of the "constitutional entitlements" of "such persons, who are most lacking in protective and assertive armour."[47]

More importantly, an analysis of the "value added" and "costs" of class actions in different contexts leads to the conclusion that the class action mechanism in South Africa is uniquely positioned to address socio-economic rights reform.

A.) Value Added

[45] Deborah Rhode. *Class Conflicts in Class Actions*. 34 Stan. L. Rev. 1183, 1184 (in the context of constitutional rights based class actions in the US).
[46] Section 38(c) of the South African Constitution.
[47] *Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuza.* [SCA] (2001). At paragraph 13.

What is the "value added" in bringing a class action application as opposed to an individual or joinder application?

One, the class action vehicle is an important tool in compensating or bringing injunctive relief to large numbers of plaintiffs in a relatively efficient matter,[48] and "aggregate[ing] small claims that could not be brought on an individual bases because doing so would be cost prohibitive."[49] In a normal individual or joinder based application, the government can settle individual cases or distinguish individual cases. In a class action, a court has already determined the common issue, and the government can no longer "pick and choose" individual cases to oppose or settle. In the South African context, the class action vehicle may provide an opportunity for poorer schools to access the courts, or for many schools to bring smaller claims before the court.

Two, the size and force of a class action creates incentives for the government to take both the substance of the application and the possibility of settlement more seriously. Class actions are generally considered to be "high stakes litigation," and in the case of institutional reform class actions, can represent a political thorn in the defendant government's side.[50] For governmental or corporate defendants, this force causes the vast majority of class actions to settle in the United States, ultimately reducing the continuing costs of litigation for the plaintiffs.[51] While this is true for other countries that use class actions, the possibility of

[48] *See also* Sandra Liebenberg, *Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape*, submitted to the SPECULUM JURIS (2014) at 3.
[49] Patrick A. Luff. *Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions.* (2010)
[50] Joshua D. Bank. *Dismissing the Class: A Practical Approach to the Class Restriction on the Legal Services Corporation*. 110 Penn St. L. Rev. 1 ("Last, the mere possibility of a class action lawsuit may encourage a government or private agency to change its behavior without engaging in litigation."). See also *See also* Sandra Liebenberg, *Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape*, submitted to the SPECULUM JURIS (2014) ("The alternative for the public or private party responsible for the violation would be to face major class action litigation with its attendant financial implications and adverse publicity.")
[51] Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal Courts: Final Report to the Advisory Committee on Civil Rules*, at 11 (Federal Judicial Center, 1996), *at* http://

increased governmental attention in South Africa is stronger because the class action mechanism is so new, [52] and each instance is widely covered in the media.[53]

Three, "the deterrence effect of class actions cannot be denied."[54] The deterrence argument is often used to explain the deterrence of class actions on defendant companies (as opposed to defendant governments), and asserts that "class actions provide an important private supplement to public enforcement of social norms."[55] This reasoning translates well to socio-economic rights class actions against the South African government. An incumbent government wishing to retain legitimacy will be deterred from certain types of activities that may trigger such a lawsuit in the future.

Four, the size and force of a class action brings a certain moral legitimacy to the legal claim. In the United States, before the advent of mass torts and personal injury cases, the class action was originally used for civil rights litigation.[56] This moral component also strengthens the case for class actions as a mechanism for social change in South Africa. In *Ferreira v. Levin NO and others*, the court held that the Section 38 provisions on standing, which includes two broad overarching requirements,[57] must be interpreted "generously and expansively, consistently with the mandate given to the courts to uphold the Constitution,

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www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf (only 4% of cases in the sample went to trial; 28% of those cases settled during or after trial)

[52] BUSINESS DAY LIVE, *Class-action Storm Brewing on the Horizon*, (Sept 28, 2014). http://www.bdlive.co.za/businesstimes/2014/09/28/class-action-storm-brewing-on-the-horizon. (In South African law, use of class actions is not only a new development, it also significantly changes the bargaining positions of parties in liability litigation that companies cannot rely only on their ability to out-lawyer an opponent.)

[53] *Id.*

[54] Christopher Keleher. *Class Inaction: U.S. Supreme Court Reins in Class Actions*. 55-MAY Res Gestae 22. Page 31.

[55] William Rubenstein. *Newberg on Class Actions: §1:8. Deterrence.* (2014)

[56] See Fed. R. Civ. P. 23 Notes of the Advisory Comm. on Rules - 1966 Amends., Subdiv. (b)(2) (stating that the primary cases that fall within this Rule are "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration"); James E. Pfander, Brown II: Ordinary Remedies for Extraordinary Wrongs, 24 Law & Ineq. 47, 72 (2006)

[57] *See Ferreira v. Levin NO 1996* 1 SA 984 (CC) (1) ("It must be a right in the Bill of Rights has been infringed or threatened . . . (2) The applicant must be able to demonstrate that the individual, group or class bringing the action has a "sufficient interest" in the remedy that is sought.")

thus ensuring that the rights in the Constitution enjoy the full measure of protection to which they are entitled." [58]

B.) Costs

Beyond the "value added," what are costs of class action litigation? Some typical costs faced in the United States are not relevant to the South African context, making class actions in South Africa uniquely effective for this type of socio-economic rights litigation.

For instance, the concerns about "frivolous claims" and the unique "burden" that the high number of class actions put on federal courts [59] are not applicable in South Africa because there have only been several adjudicated class action certification cases. Additionally, much of U.S. class action literature has focused on the negative fee and control incentives for attorneys.[60] In contrast, South African attorney compensation tends to be a "loser pays" system but with the court having a major discretionary role in allocating attorney's fees.[61] As a result, some of the concerns raised in U.S. class action literature are less applicable to South African litigation.

The plaintiffs may sometimes incur personal costs. In certain types of employment class actions, the plaintiffs may incur costs such as "retaliation, isolation, ostracism by co-workers, "black listing" by future employers, emotional trauma, and fear of having to pay defendants' legal fees." [62] However, the South African school system structure may avoid some of these costs. For example, cases can be brought on behalf of the independent "school

[58] Cameron J in *Ngxuza* quoting *Ferreira v. Levin NO and others* 1996 (1) SA 984 (CC) par 165
[59]Patrick A. Luff. Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions. (2010) Page 66.
[60] Ferdinand Tinio, *Attorney's Fees in Class Actions*, 38 A.L.R.3d 1384. Louis Bechtle, Attorney Fees for Plaintiffs' Lead Counsel: Fair or Excessive?. 11 No. 2 Andrews Class Action Litig. Rep. 18. Linda Sandstrom Simard: *Fees, Incentives, and Deterrence*, 160 U. Pa. L. Rev. PENNumbra 10.
[61] Mathias Ramann, *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Page 51.
[62] Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*. Page 397.

governing boards," rather than on behalf of the educators or principals of the schools employed by the Department. [63]

There may also be class conflict or costs associated with the crafting of requests for relief. Collective litigation "is the compromise of individual positions, interest and autonomy in the service of a joint good."[64] In some cases, the lawyers may face problems with class conflict and the desire for fragmented or different remedies for different plaintiffs. Class conflicts in plaintiff class actions in the U.S. have been a problem in the past because "the lawyer represents an aggregation of litigants with unstable, inchoate, or conflicting preferences. The more diffuse and divided the class, the greater the problems in defining its objectives." [65] In class actions that ask for injunctive relief, the "often indeterminate quality of relief available makes conflicts within plaintiff classes particularly likely." [66] There have not been enough cases to determine whether this cost will be significant in South Africa, although it is a serious possibility to consider.

C.) "Front End" and "Back End" Considerations

Additionally, there are considerations at the front end and back end of class actions that can potentially become "value added" or "costs" but do not necessarily fit neatly into those categories.

At the "front end," should a class action be opt-out or opt-in? Class action procedures in the United States are governed by the Federal Rules of Civil Procedure.[67] South African class action procedural rules are governed by common law and are more flexible. The three

[63] This unique dual governance system may continue to allow plaintiffs in class actions on the right to education to avoid this personal cost in the future, but it still does not protect them from the damaging effects of an adverse attorney's fees order.
[64] Stephen C. Yeazell, Collective Litigation as Collective Action, 1989 U. Ill. L. Rev. 43, 60 (1989)
[65] Deborah Rhode. *Class Conflicts in Class Actions*. 34 Stan. L. Rev. 1183, 1183.
[66] Deborah Rhode. *Class Conflicts in Class Actions*. 34 Stan. L. Rev. 1183, 1184.
[67] Compare FRCP 23(b)(1) and FRCP 23(b)(2) which are "no opt-out" class actions with FRCP 23(b)(3) which allows "opt-out."

class action certifications that have been adjudicated before *Linkside* are "opt-out" class actions.[68] *Linkside* represented a new form of "opt-in" class action, which was recently approved by the Constitutional Court.[69] The case will be more thoroughly discussed below.

The flexibility in South African courts to create these procedural rules [70] allows the legal representatives to have more leeway to define whether the action should be "opt-in" or "opt-out." For certain types of strategic litigation, "opt-out" class actions are more effective because even if a notice is circulated in an "opt-in" class action, many times the poorer potential clients may be less informed or lack the capacity to affirmatively "opt-in." However, certain cases like *Linkside II* require additional collecting of information–such as the individual names of educators to be appointed–which would make an "opt-out" action unenforceable. In such an instance, it is useful to have a more targeted "opt in" mechanism.[71] Additionally, opt in class actions have the advantage of reaching a carefully targeted group, which makes it easier to monitor the effectiveness of remedies after the judgment or settlement.

Another consideration on the "front end" is that the class action vehicle is generally more complicated and requires a broader engagement by all parties involved, which can be both a "value added" and a "cost." For organizations such as the Legal Resources Centre, this engagement may entail higher costs in communicating with client schools in the rural regions, because the nature of the client base is that the neediest schools are often the hardest schools

[68] *Ngxuza* paragraph 3 and *Pioneer Food* paragraph 10
[69] *Imraahn Ismail Mukaddam v. Pioneer Trust Foods Pty (Ltd)*. (2013) "A further error committed by the Court was the finding that certification in an opt-in class action requires the applicant to show exceptional circumstances."
[70] *Imraahn Ismail Mukaddam v. Pioneer Trust Foods Pty (Ltd)*. (2013). "The guarantee in section 34 of the Constitution does not include the choice of procedure or forum in which access to courts is to be exercised. This omission is in line with the recognition that courts have an inherent power to protect and regulate their own process in terms of section 173 of the Constitution."
[71] Linkside II was an "opt-in" class action and as a condition of its certification by the court, the applicants needed to collect additional information from schools concerning teacher salaries and vacant posts, which varied greatly from school to school.

to reach.[72] On the other hand, this broader engagement on the "front end" may be useful when it comes time to enforce the "backend" remedies, because those channels of communication and engagement have already been opened. Furthermore, this broader engagement may be useful for bringing applications on behalf of these clients in the future. Therefore, while this may be a difficulty for organizations such as the Legal Resources Centre in the beginning of a class action, it may set the stage for improved litigation strategy down the road.

On the "backend," there are considerations about what type of remedy should be pursued in these types of "right to education" cases. Without an effective remedy, "socio-economic rights litigation can offer no more than 'hollow hope' to the beneficiaries of a right."[73] In the South African context, courts have experimented with a wide range of remedies: "reading in" orders, immediate and suspended orders of invalidity, declaratory orders, mandatory orders, orders obligating the government to report back to the court on its compliance, structural interdicts, and awarding "constitutional damages" (monetary compensation for violation of constitutional rights).[74] Courts in the Eastern Cape have been especially creative with their remedies,[75] and have tried a combination of the above options. The fact that South African courts are liberal and creative with remedies makes the newly developing class action mechanism especially useful for socio-economic rights litigation.

The type of remedy sought also has an effect on other components of the case. Private lawyers would be less interested in representing a class that is pursuing solely a specific performance or injunctive remedy, because the attorneys would not be compensated for those

[72] "Among School Children in the Transkei." http://www.dailymaverick.co.za/article/2013-03-12-among-school-children-in-the-transkei/#.VBz6nPldV9U
[73] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991)
[74] Sandra Liebenberg, *Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape*, submitted to the SPECULUM JURIS (2014).
[75] Sandra Liebenberg, *Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape*, submitted to the SPECULUM JURIS (2014)

remedies unless there is a fee-shifting rule. On the other hand, specific performance remedies may be more effective for this type of structural reform through litigation. Fortunately, South Africa is home to organizations such as the Legal Resources Centre, who have the capability to pursue these types of actions and seek specific performance remedies without placing emphasis on the personal cost recovery for the attorneys.

On the "backend," there may also be possible government retaliation and backlash to class actions. In the 1980s, legal aid organizations in the United States were very active and successful in bringing a variety of class actions against the government. However, in the late 1980s or early 1990s, there was a backlash by the legislature, which passed a restriction on class action involvement by legal services attorneys that remains in effect today.[76] This is a possible concern for many different types of structural reform litigation, but may not be as applicable in countries where the government has less control over the funding of the legal aid organizations, such as in South Africa.[77]

In summary, South African class actions may retain many of the benefits and may suffer fewer of the costs due to the flexible nature of its procedural rules, the novelty of the class action vehicle, and the attorneys' fees structure, among other reasons.

South African Class Actions in the Context of Other Socio-Economic Rights

Case studies also support the contention that class actions are a uniquely positioned tool for education reform in South Africa.

The authority for class actions comes from Section 38(c) of the Constitution,[78] although the procedure for the class action vehicle has been defined through case law. [79] An

[76] Ilisabeth Smith Borstein. *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys.*
[77] http://www.lrc.org.za/about-us/mission-vision
[78] SA Constitution Section 38(c)
[79] *Ngxuza* and *Pioneer Food*.

early case in the South African Constitution's history emphasized that "no unnecessary restrictions should be placed on the application of the constitutional provisions concerning class actions."[80]

The first success story in this area of socio-economic rights is the earlier mentioned *Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuza* ("*Ngxuza*").[81] *Ngxuza*, originally an action brought in the Eastern Cape High Court, dealt with an opt-out class action claim brought by three social assistance grantees on behalf of other social assistance grantees whose disability grants had been arbitrarily terminated by the provincial government due to problems of fraud. Froneman J's opinion in *Ngxuza* was a pioneering judgment that laid the foundation for class action procedure in South Africa. His opinion was upheld by Cameron J in the Supreme Court of Appeals,[82] who emphasized the following:

> "It is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasized must animate our understanding of the Constitution's provisions. And it is against the background of their constitutional entitlements that we must interpret the class action provision in the bill of Rights."[83]

From there, using case and procedural precedent drawn from other nations,[84] he laid out the elements of the class action certification that would later be developed in the *Pioneer Food* case.[85]

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[80] *Beukes v. Krugersdorp Transitional Local Council*, 1996 (3) SA 476 (W).
[81] *Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuza* (2001 4 SA 1184 (SCA)).
[82] *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR 1322 (E): "Making it easier for disadvantaged and poor people to approach the Court on public issues…serves our new democracy well…The novelty of these proceedings should, however, not be a bar to Courts finding ways to regulate these proceedings in a practical manner in order to ensure that they expeditiously finalized."
[83] *Ngxuza* paragraph 13.
[84] South African Constitution Section 39(1)(c): Foreign law may be considered when interpreting the Bill of Rights.
[85] *Ngxuza* paragraph 21: "From the point of view of practical definition, it is beyond dispute that (1) the class is so numerous that joinder of all its members is impracticable, (2) there are questions of law and fact common to the class, and (3) the claims of the applicants representing the class are typical of the claims of the rest, and (4) the applicants through their legal representative, the Legal Resources Centre, will fairly and adequately protect the interests of the class. The quintessential requisites for a class action are therefore present."

A second case, *Children's Resource Centre Trust v. Pioneer Food*, was based on a claim that bread producers around the nation had fixed the price of bread in contravention of the Competition Act 89 of 1998, which prejudicially affected bread consumers and interfered with their right to have access to sufficient food under Section 27 of the Constitution.[86]

This case was less successful with class certification,[87] but it has been referred back to the high court and has the potential for certification success in the coming months. Specifically, while the proposed "Class 2" [88] was struck down as un-certifiable, "Class 1" [89] remains certifiable if the class was adequately defined, and if a proper distribution method for the remedy could be ascertained. [90] The court was very willing to create guidelines for the plaintiffs to improve their class certification argument, citing various other cases from other countries that could be used to improve their argument.[91]

The Pioneer Food case also listed a number of "overlapping" elements that would aid a court in determining class certification, which built upon the requirements listed by Froneman J and Cameron J in Ngxuza,[92] and carefully elaborated on the following class action certification requirements: class definition,[93] cause of action raising a triable issue,[94] common issues of fact or law,[95] and having an adequate legal representative.[96] The court was also willing to provide analogies and suggestions to create a workable framework for this

[86] *Children's Resource Centre Trust v Pioneer Food* (50/2012) [2012] ZASCA 182 (29 November 2012)
[87] *Pioneer Food* Paragraph 1 and 2
[88] Class 2 was defined as "All persons who purchased the bread of the first, second or third respondents in Gauteng, Free State, North-West, or Mpumalanga Province during the period 1 September 1999 to 6 January 2009." (*Pioneer Food* paragraph 12)
[89] Class 1 was defined as "All persons who purchased the bread of the first, second or third respondents in the Western Cape Province during the period 18 December 2006 to 6 January 2009." (*Pioneer Food* paragraph 12)
[90] *Pioneer Food* Paragraph 75 and 80
[91] For example, on the question of damages arising from anti-competitive conduct, the court recommended that the plaintiffs look at an English case involving a price fixing cartel. (Pioneer Food paragraph 59).
[92] *Pioneer Food* Paragraph 26.
[93] *Pioneer Food* Paragraphs 29-34
[94] *Pioneer Food* Paragraphs 35-43
[95] *Pioneer Food* Paragraphs 44 - 45
[96] *Pioneer Food* paragraphs 46 – 48.

type of class action in the future. The court recognised the value of this case, and provided an option for certification requirements to be satisfied in the future:

> "In summary the claim that the appellants see to advance has a potentially plausible basis, but it is premature at the stage of this appeal for this court to determine the questions in view of their novelty, complexity, and the fact that they are raised for the first time in the court…it is desirable to refer the present application back to the high court." [97]

The Constitutional Court's most recent proclamation on class actions was in *Mukaddam v. Pioneer Foods (Pty) Ltd.*, [98] which clarified two procedural requirements for class actions[99] while leaving unanswered some other important questions on the state of the class action.[100] The *Mukaddam* case broadened the possibility of using class actions as a tool for socio-economic rights while trying to more carefully define the limits of that right.

While class action litigation in South Africa is new, it is gaining acceptance and interest with the courts as a potential tool for reforming socio-economic rights. There may not be enough case law to make a definitive assessment of the efficacy of class actions in South Africa, so it is helpful to consider foreign class actions on education rights before turning to the *Linkside II* case.

Foreign Class Actions in the Context of the Right to Education

A.) Argentina and the "Asociación Civil por la Igualdad y la Justicia" (ACIJ)

[97] *Pioneer Food* Paragraph 75
[98] *Mukaddam v. Pioneer Foods (Pty) Ltd*, 5 SA 89 (CC) [2013]
[99] Specifically, the Court emphasized that (1) the list of requirements listed in the *Pioneer Food* case should be regarded as factors to be taken into account in a flexible overall assessment as to whether it is in the public interest of justice for the class action to proceed (paragraph 35), and (2) the requirement of prior certification does not apply to class actions in which litigants seek to enforce a right in the Bill of Rights against the State. (*Mukaddam* paragraph 40).
[100] The Court left open the question whether the institution of a class action to enforce a right in the Bill of Rights against a private litigant required prior certification. (*Mukaddam* paragraph 41). *See also* Sandra Liebenberg, *Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape*, submitted to the SPECULUM JURIS (2014).

An Argentine class action from Buenos Aires poses useful questions.[101] Like South Africa, the Argentine Constitution contains right to education provisions.[102] However, the power of these provisions are arguably stronger in Argentina,[103] and they are further buttressed by municipal constitutions that can impose even stricter requirements for the right to education.[104] Unlike South Africa or the U.S., however, Argentina faces the organizational difficulty of having no "agent" in the education community that could act in the defence of the children's interest (i.e. school governing bodies or parents associations, respectively).

Starting in 2002, city officials and education activist organizations noticed that there was a shortage in the number of openings for early education in Buenos Aires.[105] The Asociación Civil por la Igualdad y la Justicia (ACIJ) filed a lawsuit on behalf of Buenos Aires children who were denied their right to early education due to a shortage of vacancies at these schools.[106]

The ACIJ planned its litigation strategy carefully. First, the ACIJ carefully collected data on these vacancies over a period of years before bringing the lawsuit.[107] Second, the ACIJ used the Freedom of Information Act to obtain budgetary information from the government and then used an innovative "budget analysis"[108] to show that the government had been underspending budget resources that had been allocated for schools' infrastructure

[101] Asociación Civil por la Igualdad y la Justicia case. (Original case in Spanish).
[102] Argentine Constitution Articles 5 and 14.
[103] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.* ("One of the conditions that the national constitution places on the guarantee of autonomous functioning for all local governments is that the provision of primary education is ensured" and "local jurisdictions are constrained by specific national statutes that impose minimum standards on the education system.")
[104] *See* CONSTITUTION OF THE CITY OF BUENOS AIRES, which establishes that the government "must guarantee and finance a public, secular, and free education system that respects the principle of equal opportunities." This duty imposed by the city applies to every child over the age of 45 days, as opposed to the national duty of every child over 5 years of age.
[105] Asociación Civil por la Igualdad y la Justicia case. (Original case in Spanish.)
[106] Asociación Civil por la Igualdad y la Justicia case. (Original case in Spanish.)
[107] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.*
[108] In the case, leveraging the freedom of information regulations and budget analysis "revealed itself to be a greatly useful tool for social rights litigation" because it provides an acceptable argument for courts "that are willing to enforce the law but are reluctant to intervene in public policy debates."

and maintenance purposes.[109] Third, once the case was brought before courts, ACIJ overcame understandable scepticism of judges' ability to make decisions about education policy by negotiating a detailed and precise draft agreement with the government so that expert actors could provide input instead of following a judicial order, and setting up a public hearing to engage actors in the education community in a public debate.[110] At the hearing, the support for the draft agreement was almost unanimous.[111] Fourth, the ACIJ, an experienced actor in public education debates, mobilized media at different stages of the litigation process to help motivate the government and make public officials accountable.[112]

This litigation strategy forced the government to focus its attention and resources on the problem.[113] By the time that an agreement was struck between the ACIJ and the government, the government "acknowledged the existence of a legitimate demand" and agreed to be placed under judicial oversight for implementing a plan to address the problem. In fact, the duties that the government committed to are "wide and more detailed than those contained in any possible judicial injunction,"[114] and will set an extraordinary precedent for education rights litigation through the country.

Additional benefits to the education system sprang from this class action. A new digital information system was implemented to improve transparency of enrolment and

[109] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.* "The unspent budget allocations showed that a political decision to advance infrastructure work in the education system had already been made and that the government should be held accountable for not executing that decision."
[110] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action*. (Stating that this was the first public hearing ever held by the city's highest court.)
[111] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.*
[112] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.*
[113] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.*
[114] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.*

registration.[115] Furthermore, the case "forced different state agencies, such as the ministries for education and social development that had traditionally worked in an uncoordinated fashion, to start working together."[116]

This case study shows that there is tremendous value in planning an effective litigation strategy, especially by leveraging the freedom of information regulations, collecting detailed data over a long period of time, engaging in innovative data and budget analysis, engaging public and private actors to participate through the media and public hearings, and negotiating a binding agreement in lieu of a judicial proclamation to avoid the scepticism that the judiciary is not competent to make public policy decisions.

However, Buenos Aires' right to education requirements are particularly high, and the difficulties of mobilizing an entire nation around education issues in South Africa are higher than the difficulties faced in mobilizing the city of Buenos Aires. Despite these differences, this case shows that pushing through with this type of comprehensive litigation strategy can result in wide ranging benefits for the educational system.

B.) U.S. Class Actions on Education Rights

The United States Constitution does not include an explicit provision for the right to education, but many states constitutions within the United States do include such provisions.[117] There have been a number of class actions brought in state courts that assert claims based on their respective state constitutional and statutory provisions. These cases in the United States are infrequently referred to as "right to education" cases, but are framed more narrowly in relation to a specific statute or regulation.

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[115] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.*

[116] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.*

[117] Roger J.R. Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore and Lure of Law*. "All fifty states have constitutions that include provisions regarding education (with the possible exception of Mississippi)" (Page 218).

A significant string of cases on the education rights of disabled children began in Pennsylvania in 1971. In *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania*,[118] plaintiffs challenged in federal court a statute that postponed or denied to some mentally retarded children access to free public education and training.[119] In the ensuing consent agreement, the court enjoined Pennsylvania from denying any child up to twenty-one years of age admission to a public school program "appropriate to his learning capacities," or from having his educational status changed without first being notified and given the opportunity for a due process hearing. The next year, the D.C. circuit decided *Mills v. Board of Education*, a class action brought on similar grounds.[120] The district court held that no child could be denied a public education because of "mental, behavioral, physical or emotional handicaps or deficiencies."[121]

From there, twenty-seven decisions[122] around the nation followed the footsteps of *P.A.R.C.* and *Mills*, mobilizing congressional action and leading to the passage of the "Education for All Handicapped Children Act," known as the "Individuals with Disabilities Education Act," or "IDEA."[123] The primary purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education." [124]

A more recent case is a class action filed in state court by Michigan's American Civil Liberties Union ("ACLU") in July 2012, on behalf of eight students who represented 1,000

[118] *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 279 (E.D. PA 1972)
[119] *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 279 (E.D. PA 1972)
[120] *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972)
[121] Cite *Mills* cases.
[122] http://disabilityjustice.tpt.org/right-to-education/
[123] IDEA: 20 USCA § 1400(a)
[124] § 11:2.Purposes of IDEA - Americans with Disabilities: Practice and Compliance Manual

children attending kindergarten to 12th grade public schools in Highland Park, Michigan.[125] The amended complaint alleges that the Department failed to take effective steps to ensure that students are reading at their respective grade levels as set forth by Michigan state law and the Michigan State Constitution.[126] The executive director of the ACLU of Michigan commented that this "is a first-of-its-kind lawsuit asserting a child's fundamental right to read."[127] Highland Park is one of the worst performing school districts in Michigan and in the United States, ranking in the bottom 1% of schools state wide.[128] While the Highland Park case might be an extreme example, it is expected to have "national significance."[129] If successful, it would have the potential to serve as precedent for actions brought by similar low-performing school districts around the nation.

The United States case studies have implications for class action litigation on the right to education in South Africa. First, while the line of *PARC* and *Mill* class action cases are related to the special case of education for disabled children, these class actions spurred the adoption of federal legislation on the right to education. As discussed in the "value added" section above, the force of a class action – especially parallel class actions on the same issue in a variety of districts – has the potential to ensure lasting legislative change. It is too soon to tell if *Linkside II* will spur legislative change, but it is a first step. Secondly, if the ACLU Michigan's case proves to be successful, it has the potential to change the nature of class actions brought on the right to education throughout the country. It is also too soon to tell if *Linkside II* could have similar nation-wide impact, but the potential remains.

[125] ACLU complaint – no judgment has been handed down yet. http://www.aclumich.org/sites/default/files/EducationAmendedComplaint.pdf
[126] ACLU complaint – no judgment has been handed down yet. http://www.aclumich.org/sites/default/files/EducationAmendedComplaint.pdf
[127] ACLU press release: https://www.aclu.org/human-rights/highland-park-students-file-class-action-right-read-lawsuit
[128] ACLU press release: https://www.aclu.org/human-rights/highland-park-students-file-class-action-right-read-lawsuit
[129] CNN press article: http://www.cnn.com/2012/07/16/us/michigan-education-suit/

IV. AN EARLY CASE STUDY IN SOUTH AFRICA: LINKSIDE

Finally, the discussion turns to the LRC's ground breaking case *Linkside and Others v. Minister of Basic Education and Others*, [130] and considers the challenges that this new class action brings in implementing the right to basic education.

The case was brought in two phases - *Linkside I* [131] and *Linkside II* [132] - which contain generally the same substantive claims, but are different procedurally. Both claims were brought in the Eastern Cape Province, one of the poorest, if not the poorest, provinces of South Africa.[133] The level of poverty increases the difficulty of socio-economic rights litigation.[134] *Linkside I* consisted of thirty-three schools which approached the court "in terms of section 38(a), (c) and (d) of the Constitution in their own interests, in the interests of their learners and the learners at schools throughout the Eastern Cape Province, and in the public interest." [135] *Linkside I* was not a class action case. However, the 20 March 2014 court order issued for *Linkside I* also certified the first ever opt-in class action in South Africa, paving the way for 90 schools bring their claims as a class in *Linkside II*'s class action.[136]

A.) *Linkside I* and substantive claims

Linkside I and *Linkside II* contained the same two substantive claims. Both claims arise from a process known as "post provisioning," where the Department of Education determines annually how many teaching posts each public school in the province is entitled to,

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[130] *Linkside and Others v. Minister of Basic Education.* (2014).
[131] Application brought November 2013, Court Order March 2014
[132] Application brought 06 June 2014, Court Hearing Date is 31 October 2014
[133] http://www.news24.com/SouthAfrica/News/Eastern-Cape-SAs-poorest-province-20110727.
[134] *See* Sandra Liebenberg, *Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape*, submitted to the SPECULUM JURIS (2014) ("Litigating socio-economic rights in the context of the Eastern Cape is exponentially harder due to the deep levels of poverty, administrative dysfunction, and the barriers to community organisation and public interest lawyering created by dispersed, largely rural communities and poor infrastructure.")
[135] *Linkside and Others v. Minister of Basic Education.* (2014).
[136] *Linkside and Others v. Minister of Basic Education.* (2014). (*Linkside II* was filed 06 June 2014.)

and then permanently appoints and pays teachers to fill those posts.[137] Since 2010, the Department has followed through with the provisioning process, but then failed to permanently appoint and pay teachers in accordance with the new allocations.[138] As a result of the Department's failure to adhere to their obligations, many schools have been left with vacant educator posts.

For schools that have a stronger financial base, the parents of the learners have to pay for school-appointed educators out of their own pockets. Educators at these schools may be paid a fraction of the salary of a government-appointed educator, or sometimes must go months without pay. Some of these schools have had to escalate school fees or forego other student development activities such as recreation in order to make ends meet.

For schools that do not have such resources, learners must go without an educator for an entire academic year or combine into other classes, leading to overcrowded classrooms and educator burn-out. This introduces a further problem of inequality into the already strained Eastern Cape public school system.

The Legal Resources Centre brought an application[139] seeking three main forms of relief: (1) to secure the permanent appointment of educators to the vacant substantive posts allocated to them by the Department, (2) to secure reimbursement of the payments that they have made to school-appointed educators filling vacant posts, and (3) to certify a class action for similarly situated schools across the Eastern Cape.[140]

On 20 March 2014, the Legal Resources Centre scored a victory on all counts. The court ordered the Department to reimburse schools for payments made to school-appointed

[137] *Linkside and Others v. Minister of Basic Education.* (2014).
[138] *Linkside and Others v. Minister of Basic Education.* (2014).
[139] Analogous to a "complaint" under U.S. Civil Procedure law.
[140] *Linkside and Others v. Minister of Basic Education* (2014). The original "notice of motion" was structured in a way as to avoid having to file another application. The provision in the notice of motion, which was incorporated into the court order of *Linkside I*, allowed the LRC to directly proceed with a writ of execution in terms of Section 3 of the State Liability Act.

educators for the year 2013 in the amount of 29 million rand. The court also ordered the Department to temporarily appoint school educators currently in the vacant posts and pay them through 1 July 2014 (at which time they are to be either be replaced by permanently appointed educators, or to become permanently appointed themselves). Finally, the court certified a class action, paving the way for *Linkside II* in June of 2014.

B.) Continuing Enforcement Problems with *Linkside I*

Despite this victory, there are continuing problems with enforcing the court order. First, the Department did not reimburse a single school within the required time, and only paid the judgment after the LRC issued a writ of execution to attach movable state assets.[141] Second, the Department has not met the 1 July 2014 deadline for finding suitable permanent educators for appointment, has not processed letters of appointment for any of these educators filling vacant posts, and has only paid a few educators who are filling vacant posts. As Sarah Sephton of the LRC explained:

> "That the department is unable or unwilling to process 145 permanent (teacher) appointments in three months indicates a level of dysfunction that may explain why this province has such an acute shortage of teachers . . . all that was required was to process 145 letters of appointment." [142]

The LRC filed a contempt application in September 2014 against the Department with regards to the appointment of educators.[143] If the application is successful, both national and provincial basic education ministers and their departmental heads may be jailed for contempt.

As for the school reimbursement claim, the 20 March 2014 court order contained a provision ordering that upon expiration of the 120 day window in which the Department must pay, any unpaid reimbursement constitutes a debt owed by the State in terms of section 3 of

[141] SABC News: "EC Education Department's Assets Attached." http://www.sabc.co.za/news/a/75d5b38045aca36687048790ca3f4715/EC-Education-departments-assets-attached-20141001
[142] Dispatch Live: "Teachers Call for Bhiso Heads to Roll." Available at: http://www.dispatchlive.co.za/news/teachers-call-for-bhisho-heads-to-roll/
[143] *Linkside and Others v. Minister of Basic Education.* (2014).

the State Liability Act of 1957. The LRC sent a notice of intention to proceed under the State Liability Act in September 2014, and attached state assets two weeks later.[144] Soon after, the Department paid the 29 million rand judgment, an extraordinary victory for the LRC.[145]

C.) Troubles on the Horizon for *Linkside II*

The ninety school applicants in *Linkside II* together constitute the first "opt-in" class to ever be certified in South Africa, and together they seek over 80 million rand of compensation from the Department, as well as hundreds of teacher appointments across the Eastern Cape. The LRC's role in this litigation not only breaks new ground for class actions in the country, but breaks new ground for the right to education as a constitutionally protected right. Especially innovative is the LRC's decision to request the appointment of a Claims Administrator to disburse claims for all ninety plaintiffs, which has never been attempted before in South Africa.

Despite the certification victory, the enforcement challenges faced in *Linkside I* do not bode well for the applicants in *Linkside II.* [146] Early signals of problems have already appeared: for example, the Department requested an extension of time to file an answer but has failed to do so. The court date for *Linkside II* is 30 October 2014.

V. BEYOND LINKSIDE: MOVING FORWARD WITH CLASS ACTION LITIGATION ON THE RIGHT TO BASIC EDUCATION.

In moving forward, is the class action vehicle an effective and/or realistic method of implementing the right to basic education? After a brief discussion of the challenges faced by

[144] Business Day Live: "Motshekga's car seized over teachers' pay." http://www.bdlive.co.za/national/education/2014/10/01/motshekgas-car-seized-over-teachers-pay. (Oct. 1, 2014)
[145] Legal Resources Centre. "Press Release: Schools Paid After Minister of Education's Vehicle Attached." http://www.lrc.org.za/press-releases/3265-press-release-schools-paid-after-minister-of-education-s-vehicle-attached. (Sept 30, 2014).
[146] Daily Dispatch. "Teachers Call for Bhisho Heads to Roll." (2014) "But, with the department unable to even meet its obligations to the 32 applicant schools, it seems questionable it will do so for the 90 other schools now involved in the litigation." http://www.dispatchlive.co.za/news/teachers-call-for-bhisho-heads-to-roll/

this type of litigation in South Africa, the paper will conclude with strategies to bolster the effectiveness of cases like *Linkside* in the future.

Challenges faced in Linkside and Others

Enforcement is a main challenge for these cases.[147] It is vital to investigate the reasons behind this enforcement barrier if such cases are to be effective in the long run. The enforcement troubles are especially prominent when seeking injunctive relief. [148]

It is unclear whether the enforcement problems are due to a lack of funding, poor efficiency, poor organization, incompetence, corruption, a lack of respect for the courts, a lack of accountability, or a combination of the above factors. The National Development Plan Vision 2030 lists the primary cause for the failing of the school system as "weak capacity throughout the civil service – teachers, principals and system-level officials, which results not only in poor schooling outcomes, but also breeds a lack of respect for government.[149]"

The potential inability to enforce *Linkside* does not have to strip the case of its usefulness. Perhaps the continued use of this type of class action will mobilize legislative reform in this area (like in the U.S. IDEA cases), or maybe it will galvanize public support and pressure enforcement to be carried out (like in the Argentine ACIJ case).

An additional future challenge is that the Constitutional Court has not always sided with the implementation of socio-economic rights, especially when the essence of that right has not been defined.[150] For instance, in *Mazibuko v. City of Johannesburg*, applicants were unsuccessful in establishing that the City of Johannesburg did not provide residents

[147] Equal Education Law Centre would add a fifth "A" to the 4 "A's" on the international standard to education. http://www.eelawcentre.org.za/focus_area
[148] As was shown in *Linkside I*, enforcement with regards to monetary compensation may be more easily realisable than previously imagined under the State Liability Act.
[149] National Development Plan 2030
[150] Cases in which the court was willing to intervene in sensitive political decisions (*Treatment Action Campaign* 2002, *Glenister* 2011, *Democratic Alliance v. President of South Africa* 2013); Cases in which the court adopted a more deferential approach to the legislature for socio-economic rights [*Mazibuko* 2010, *National Treasury & Others v. Opposition to Urban Tolling Alliance and Others* 2013]

"sufficient water" as required by Section 27 of the Constitution.[151] Specifically, the Court concluded that it is not appropriate for a court to give a quantified content to what constitutes "sufficient water" because this is a matter to be addressed by legislators. The Constitutional Court seems to be more comfortable enforcing positive constitutional duties that have been given greater content through statutes and regulations, rather than defining the contours of certain socio-economic rights.[152]

Mazibuko can be distinguished from right to education cases, because "right to sufficient water" is a "progressively realisable" right, whereas the right to basic education is "immediately realisable." However, as discussed above, the Constitutional Court has not yet defined the substance of the right to basic education either. There is a concern that the Court will be hesitant to side with certain educational claims that may appear to be more concerned with education policy,[153] but it is too early to tell at this point. It is even harder to predict what the Court's stance will be with regards to class actions seeking education reform. While the force of the class action may lend itself to a certain moral legitimacy and diffuse some of the concerns about courts being involved in public policy,[154] it is an extremely novel mechanism in the area of education rights.

Options on Proceeding Forward with Class Actions on the Right to Education

Linkside II and future cases can employ a variety of strategies to ameliorate the effect of the above challenges.

A.) Improving Client Organization

[151] *Mazibuko & Others v. City of Johannesburg & Others* 2010 (4) SA1 (CC)
[152] This is the "minimum core debate" among South African scholars. Mazibuko stands as an example of courts not wanting to define the minimum core.
[153] This does not pose a problem for cases such as Linkside, where the question was not education policy but the Department's clear inability to follow prior regulations and statutes.
[154] Refer to note 151.

First, the organization of the client base matters significantly to the outcome of a case. In the Argentine ACIJ case, data collected over a period of years was only possible due to ease of communication and efficient organization of clients. Client organization was simplified in that case because the applicants were all contained within one city. Future education rights class actions in South Africa face greater challenges in communication and collective action because many of the schools who would be served are rural and poor schools who have limited access to fax, internet and e-mail, and regular mail. Cell phone or land phone communications with these clients are often ineffective due to language barriers or differences in cultural and regional norms.

The Legal Resources Centre has recognized that a possible solution to these difficulties is to create stronger intra-district governing body organizations for collective action. For instance, the Rockville School District is widely dispersed and situated primarily in rural areas of the former Transkei region. Rockville has organized more effectively to create a Rockville "Circuit" of interested parents and school governing board members who frequently attend meetings together. In the future, local school districts could organize in a similar fashion so that the LRC can quickly communicate and process affidavits from them.

B.) Improving Use of Contempt Applications

Filing contempt application after another is not an ideal strategy. It is a waste of resources to essentially litigate the same case multiple times. The Legal Resources Centre has considered trying to build in an "automatic contempt provision" into the "requests for relief," but it is unlikely that courts would want parties to be bound to that provision so early in the litigation process.

For monetary amounts that are not paid, the plaintiffs can fortunately resort to attaching state assets under the State Liability Act,[155] if there are even enough "moveable assets" to attach that can satisfy the judgment.[156] The problem is more severe with regards to specific performance or injunctive-style relief, where attaching state assets would not make a difference in the relief requested.

Mobilizing the media will be useful. The LRC leveraged the influence of the Daily Dispatch to give the Department a final push before filing a contempt application.[157] The Dispatch wrote a scathing front page article on the Department's failure to satisfy its court order obligations. This led to a slight reaction from the government upon release of the news article.[158]

This strategy can be with increasing frequency at various stages of the litigation process. For example, in the Argentine case, the ACIJ mobilized the media at all stages of the litigation process, before and after bringing the lawsuit. Its media campaign culminated in a public hearing to invite a public and open debate on the issues, which was also heavily covered in the media. With enough public support, the government may be forced to face the reality of the lawsuit and its impact on their party's political power and influence.

C.) Continuing the Use of Amicus Interventions to Influence the Trajectory of Constitutional Court Rulings

The Legal Resources Centre has frequently made use of *amicus curiae* briefs to shape the trajectory of Constitutional Court decisions on the right to basic education. For example, in the recent *Rivonia* case,[159] the LRC recommended factors and considerations to be taken into account that would achieve an appropriate power balance between school governing

[155] State Liability Act (1957), Section 3.
[156] This issue arose in *Linkside I*, where the plaintiffs have attached moveable state assets but they are not significant enough in value to satisfy the entire judgment amount.
[157] Daily Dispatch. "Teachers Call for Bhisho Heads to Roll." (2014)
[158] Specifically, a few teachers received their letters of appointment.
[159] MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others (CCT 135/12) [2013]

boards and provincial departments of education. In a recent *Kwazulu-Natal* case,[160] the LRC made an even more important contribution by reframing the main question away from whether an enforceable contract had arisen in the case, a position that the majority and dissenters did not accept, to refocus on the basic right to education in light of the SASA and the recent Norms and Standards. In another case pending before the Supreme Court of Appeal,[161] the LRC will argue that inadequate textbook provision and delivery to rural, poor, and primarily black Limpopo schools constitutes not just a violation of the right to basic education, but also the right to equality. Finally, the LRC has had a large role in shaping the outcome of the two "bread" class action cases. [162]

The LRC amicus briefs have been subsequently quoted in Constitutional Court judgments,[163] and have had a significant impact in guiding the development of the right to education. In the long run, contributing through *amicus curiae* briefs will aid in setting the stage for additional victories on the right to education before the Constitutional Court.

D.) Incorporating Innovations from Foreign Law

One of *Linkside II*'s most innovative requests for relief is to ask the court to appoint a Claims Administrator to aid in disbursing the 80 million rand of reimbursement to 90 schools across the Eastern Cape. The idea was borrowed from the United States' class action settlement model,[164] and if accepted by the Eastern Cape High Court, will become a new procedural option for future plaintiffs seeking complex and detailed monetary sums. Other

[160] KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal and Others (CCT 60/12) [2013]
[161] Basic Education For All and Others v Minister of Basic Education and Others (23949/14) [2014] ZAGPPHC 251; 2014 (4) SA 274 (GP); [2014] 3 All SA 56 (GP) (5 May 2014)
[162] *Children's Resources Centre Trust v. Pioneer Food.*
[163] *Rivonia*, *Kwazulu-Natal* cases.
[164] Francis McGovern. *Distribution of Funds in Class Actions - Claims Administration*. (2009)

interesting procedural mechanisms borrowed from other jurisdictions may be available to South African class action plaintiffs in the future.[165]

The effectiveness of different civil and criminal contempt sanctions in other countries may be a useful lesson. Being "held in contempt"–essentially only a reputational harm–may not be as effective as fines and the imprisonment of responsible officials. Courts in countries such as the United States have had to resort to more extreme measures in the past, such as putting a county under the control of a court appointed officer, or sending in a federal marshal to restore order, both extremely rare examples. A recent housing discrimination case in the United States appeared to be flirting with the possibility of such contempt sanctions, although the situation has been recently diffused. [166] Expanding the possibilities of contempt sanctions could change the incentives for enforcement of court orders against the government.

"Incentive awards" given by U.S. judges to plaintiffs in a number of class actions may be another useful strategy. These awards serve to "(1) reimburse[e] some or all of the representative plaintiff's non-pecuniary costs; (2) reward[] the representative plaintiff for superior service; (3) compensate[e] the representative plaintiff for complying with the attorney's wishes, even at the expense of the class; and (4) achiev[e] proportionality between the incentive award and other outcomes in the case.[167]" Some of these considerations are not as relevant in the South African case, where organizations such as the Legal Resources Centre bring these claims instead of private attorneys. However, if class actions do become a frequently used mode of litigation in South Africa, these kinds of incentives may encourage the involvement of attorneys from other sectors. A similar incentive is found in Brazil, where

[165] *See also* BUSINESS DAY LIVE, *Class-action Storm Brewing on the Horizon*, (Sept 28, 2014). http://www.bdlive.co.za/businesstimes/2014/09/28/class-action-storm-brewing-on-the-horizon. (Another issue that companies should bear in mind is that class action in South Africa is new, with the rules being made up as we go along. While the thought of a test case is thrilling for lawyers and academic writers, it is the type of litigation that companies should be wary of engaging in.)
[166] *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester Co.*, (S.D.N.Y. 2014)
[167] Theodore Eisenberg and Geoffrey Miller. *Incentive Awards to Class Action Plaintiffs: An Empirical Study*. Pages 1307-1308.

statutes protect class representatives from the responsibility for defendant's attorney's fees, costs, and expenses in case of loss, except in cases of bad faith litigation.[168]

Brazil also has a unique statutory provision for a "Special Fund Account in Protection of Diffuse rights,"[169] which is a special bank account that serves as a repository for damages awarded in class actions. If a defendant is ordered to pay a fine or damages in the course of a class action, the amount will be deposited into this account.[170] If it is impossible to distribute individual damages to absent class members, the judge will calculate the damage caused to all members as a whole and the defendant would deposit a "lump sum" into this account. This fund is then used flexibly and creatively to protect group rights similar to those advanced by the class action. Typical uses "include funding of research and educational projects."[171] This is an innovative concept that can be researched more thoroughly to see if its adaptation in South Africa would be realistic or sensible.

Non-litigation strategies to realizing this right in South Africa

The effectiveness of class actions on the right to education can also be bolstered by certain non-litigation methods.

One, it may be important to focus on mobilizing civil society to aid in changing attitudes towards the courts and the law in the long term. The Constitutional Court is relatively new and highly progressive, and its decisions may not resonate as well with older and more entrenched notions of executive and legislative power.

Two, continued mobilization of the media is vital. As discussed in the ACIJ case study, "media coverage is a useful tool for promoting judicial activism. Public scrutiny of

[168] Antonio Gidi. *Class Actions in Brazil – A Model for Civil Law Countries*. Note that Brazil is a civil law country and so litigation there is generally more straightforward and inexpensive. It may be hard to institute a similar provision in common law countries.
[169] Public Civil Action Act, art. 13
[170] Antonio Gidi. *Class Actions in Brazil – A Model for Civil Law Countries*.
[171] Antonio Gidi. *Class Actions in Brazil – A Model for Civil Law Countries*.

cases directed at ending injustices creates a disincentive to judicial restraint and increases judges' accountability."[172] Specifically, the ACIJ in that case continued to build its relationships with media outlets over many years, and put itself in a strong position when it came time to bring the case before the courts. ACIJ's public campaign started before the lawsuit and continued long afterwards, consisting of "disseminating information about the education crisis and encouraging members of the public to write letters of complaint to public officials."[173] Today, this form of media mobilization may occur more frequently through social media avenues.[174]

Three, it may be useful to involve the private sector in future cases. Companies in the U.S. frequently take stands on public issues and adhere to certain "best practices" as a means of bolstering their reputation with customers as a matter of corporate social responsibility.[175] A similar campaign on education rights could prove useful for South Africa in the future.

Four, organizations such as the LRC could become more involved in political campaigning for education rights and push for more legislative solutions that hold the Department of Education to a higher standard. This push could include continued amendments to existing pieces of legislation like the Norms and Standards, or could include an entirely new piece of legislation that focuses on some of the difficulties that litigation cannot adequately address.

Five, the academic sector can continue to push for a focus on the right to education. Professors such as Sarah Liebenberg of Stellenbosch University have written extensively on

[172] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action*.
[173] Fernando Basch, *Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action.*
[174] The LRC and similar organizations maintain a presence on many social media venues (i.e. Twitter and Facebook).
[175] See, e.g., Akshay Mishra, *Corporate Social Responsibility Practices in India* (2014) and Ana Patrícia Duarte, *Tell Me Your Socially Responsible Practices, I Will Tell You How Attractive You are! The Impact of Perceived CSR on Organizational Attractiveness.* (2014)

socio-economic rights, and continue to serve as valuable resources to the attainment of socio-economic rights in South Africa today.

VI. CONCLUSION

The right to basic education in South Africa has surely made significant progress "on paper." Yet despite the theoretical prominence of this right, and despite the international and national standards that have been set for this right, it remains elusive for thousands of learners across South Africa.

Even though class action litigation is rare in South Africa, it is uniquely positioned to serve as a tool for education rights reform, after considering (1) "value added" and "costs" specific to South Africa, (2) front-end and back-end considerations that are unique to South Africa, (3) other socio-economic rights cases (*Ngxuza, Mukaddam,* and *Pioneer Food*), and (4) the results of similar litigation in other nations (ACIJ and IDEA cases).

The most recent innovation in this area of education rights is the class action introduced by in *Linkside II*. Despite the innovative energy of *Linkside and Others*, the class action as a vehicle for education reform faces several challenges, the foremost being the difficulty of enforcing court orders against the Department of Education.[176] Until the enforcement problem can be solved, other methods will boost the effectiveness of this type of litigation. Litigation specific methods include improving the organizational structure of plaintiff clients, improving the effectiveness of contempt applications, submitting amicus briefs to the Constitutional Court, and incorporating foreign law innovations. Non-litigation specific methods include mobilizing civil society, media, and private sectors, as well as increasing involvement of education rights actors in various sectors. A combination of the above methods may push this type of litigation forward until the enforcement problem can be

[176] To be sure, enforcement issues are not unique to class actions, but they are going to be a larger problem in class actions due to the magnitude of the case and the larger monetary compensation amounts.

solved. This comprehensive way of conducting socio-economic rights litigation "offers the only hope of success in redressing deep structural problems and administrative dysfunctions. There is no magic wand or once-and-for-all court intervention that can solve such deep-seated problems."[177] However, with a combination of both litigation and non-litigation strategies, the South African legal community can continue to improve the realization of this basic right.

[177] Sandra Liebenberg, *Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape*, submitted to the SPECULUM JURIS (2014) at 16.