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The Role of Lawyers in Bridging the Gap between the Robust Federal Rights to Education and Relatively Low Education Outcomes in Guatemala

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**THE ROLE OF LAWYERS IN BRIDGING THE GAP BETWEEN THE ROBUST
FEDERAL RIGHTS TO EDUCATION AND RELATIVELY LOW EDUCATION
OUTCOMES IN GUATEMALA**

**EL PAPEL QUE JUEGAN LOS ABOGADOS EN REDUCIR LA BRECHA ENTRE
EL AMPLIO DERECHO FEDERAL A LA EDUCACIÓN Y LOS RELATIVAMENTE
BAJOS RESULTADOS EDUCATIVOS EN GUATEMALA**

MARYAM AHRANJANI¹

Abstract

Relative to other countries in the world and in Central America, the Guatemalan Constitution and the federal education law include a robust and detailed right to education. However, literacy rates and secondary educational attainment, particularly for Indigenous people and young women living in rural communities, remain low. The COVID-19 pandemic has only exacerbated disparities. Once children return to schools after the pandemic, the gaps will be even larger. Lawyers can play a critical role in making the strong Constitutional right to education more meaningful.

Key Words

Education, Constitution, Right to Education, Human Rights, Human Capital, Civil Rights, Children, Literacy.

Resumen

Comparado con otros países en el mundo y de Centroamérica, la Constitución Política de la República de Guatemala y la Ley de Educación Nacional, Decreto Legislativo 12-91 incluyen un sólido y amplio derecho a la educación. Sin embargo, los índices de alfabetización y la asistencia a la secundaria, particularmente para los grupos indígenas y las adolescentes en las comunidades rurales se mantienen bajos. La pandemia del COVID-19 solamente ha venido a empeorar estas desigualdades. Cuando los niños regresen a las escuelas después de la pandemia, la brecha será aún más grandes. Los abogados

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pueden jugar un papel importante en hacer que el fuerte derecho constitucional a la educación sea más significativo.

Palabras clave

Educación, Constitución, Derecho a la Educación, Derechos Humanos, Capital Humano, Derechos Civiles, Niños, Alfabetismo.

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BACKGROUND

1. Right to Education Enshrined in the Guatemalan Constitution and Federal Law

Articles 71 to 81 of the *Constitución Política de la República de Guatemala* (1986) recognize a right to education and set forth general guidelines.² Federal law - the *Ley de Educación Nacional, Decreto Legislativo 12-91*³ - further supports the constitutional requirement. This law outlines the principles and objectives (articles 1 and 2) of the education system in Guatemala (article 3). Articles 33 to 38 explain the legal obligations of all the participants of the education system (the state, students, parents, teachers, school principals and coordinators). Articles 39 to 42 describe the rights of all these actors.

In general, Guatemala has compulsory, free basic education that lasts 10 years, from ages 6 until 15, or for primary and secondary school. Only 19 out of 100 students who enroll in primary school complete secondary education in Guatemala.⁴ Other data will be explored in the next section, but the gap between the law and the reality bear noting.

² Constitución Política de la República de Guatemala [CONSTITUTION] Title II, Section 4, art. 71–81, https://www.mindef.mil.gt/biblioteca%20virtual/images/leyes_y_reglamentos/constitucion_politica.pdf.

³ Ley de Educación Nacional, https://www.mineduc.gob.gt/estadistica/2012/data/Conozcanos/Ley_Educacion_Nacional.pdf.

⁴ U.S. AGENCY FOR INT'L DEV., THE FUTURE OF THE GUATEMALAN EDUCATION SYSTEM: A MACRO ANALYSIS OF EDUCATIONAL QUALITY AND QUANTITY'S IMPACT ON DEVELOPMENT 2 (2019), <https://drupalwebsitepardee.s3-us-west-2.amazonaws.com/pardee/public/The+Future+of+Guatemalan+Education.pdf>.

By way of comparison, many wealthier countries do not have such strong federal protections for education. The Law Library of Congress's Global Legal Research Center produced a 2016 report describing the law of the right to education in twenty jurisdictions. The countries include Argentina, Brazil, China, Egypt, England and Wales, France, Germany, Greece, India, Israel, Italy, Japan, Lebanon, Mexico, New Zealand, Nicaragua, Russian Federation, South Africa, Sweden, and Turkey.

All of the surveyed countries have a right to education. In fifteen of the twenty countries, the right appears in the national constitution, and in the other five, the right has been established through statutory law. The countries were selected for their diverse political, economic, and cultural landscapes.

South Africa represents the high-water mark. In its progressive post-apartheid Constitution, South Africa has an explicit right to education in its Bill of Rights. Its courts have interpreted the right to include the state's affirmative obligation to provide schools, classrooms, teachers, and textbooks, among other resources. On the other extreme, while the Russian Federation's Constitution provides a right to education, there is widespread discrimination in how resources are allocated.

Canada is not included in the Library of Congress report, but its approach to public education is relevant since it is a common law country with British (and French) roots, and it shares significant socio-political commonalities with the United States. It is a mostly English-speaking country of immigrants that strives to provide education to all its inhabitants. While the Canadian Charter, which is part of the Canadian Constitution, explicitly leaves education up to the provinces to address. There is no federal department of education, but all ten provinces have laws, regulations, ministry guidelines and policies, and case law requiring public education at least until the age of sixteen, and in Ontario until age eighteen.⁵ While the education is the exclusive domain of the provinces, the provincial laws may not violate the Charter.⁶

Among the surveyed countries and Canada, the United States falls somewhere close to the top in terms of its provision of a right to education and the support for the right. While there is no explicit language in the federal Constitution and the Supreme Court has resisted finding an implied federal right to education in the Constitution, all fifty states explicitly provide a right to education in the state constitutions.⁷ Further, while the Supreme Court has failed to find a federal right to

⁵ Stephen Clarke, *Canada*, in LAW LIBRARY OF CONGRESS'S CHILDREN'S RIGHTS: INTERNATIONAL AND NATIONAL LAWS AND PRACTICES 51 (Law Library, Library of Congress Aug. 2007), <https://tile.loc.gov/storage-services/service/lil/lglrd/2018298966/2018298966.pdf>.

⁶ Marvin A. Zuker, *Children, Education and the Law*, THE CAN. ENCYCLOPEDIA (last edited Dec. 16, 2013), <https://www.thecanadianencyclopedia.ca/en/article/children-education-and-the-law>.

⁷ Derek W. Black, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 2 (Wolters Kluwer, 3rd ed. 2021).

education, it *has* recognized the importance of public education many times and has adjudicated nearly one hundred cases dealing with allegations of violations of Constitutionally-protected rights in public schools. And, similar to Canada's ten provinces, in nearly all of the fifty states, state courts have adjudicated claims based on their respective education clauses and have upheld the right articulated in their respective constitutions. In contrast to Canada, there is a federal department of education in the United States that collects data, provides guidance to state and local governments on issues related to federal laws, and provides some funding for education.

2. Low Rates of Educational Attainment and Test Scores

According to a U.S. Agency for International Development report assessing the future of the Guatemalan education system, the country has made progress since the end of the civil war.⁸

However, progress has stalled in recent years, and Guatemala falls behind peer nations in Central America. Compared to other countries in Central America, Guatemala fares less well in terms of both educational attainment (quantity) and test scores (quality).⁹ The report documented a number of key findings regarding educational quantity and quality, including:¹⁰

- Average test scores declined since 2000, and primary school enrollment has decreased and attrition rates increased between 2009 and 2019;
- Compared to peer nations in Central America, in 2017, average educational attainment in Guatemala was nearly 20% lower, primary school test scores (across reading, science and math) are among the lowest in the region, and gender parity is also significantly lower; and
- Education spending stands at 2.5 percent of the Gross Domestic Product (GDP), which is the lowest in the region and falls short of global norms and the 7 percent agreed upon in the 1996 Peace Accords.

The report also provides projections for 2040 and 2060, and the outlook, without major policy changes, was grim.¹¹ According to the projections, the gap between Guatemala and other Central American countries will not only remain but widen in

⁸ U.S. AGENCY FOR INT'L DEV., *supra* note 4.

⁹ *Id.* at 5 (describing that in 2017, average educational attainment in Guatemala was nearly 20 percent lower than any other country in Central America and gender parity was well below Central American peers).

¹⁰ *Id.* at vi-vii.

¹¹ *Id.* at viii.

the coming years. Of course, the projections were made prior to the global COVID-19 pandemic. Education experts predict that globally the COVID-19 pandemic will result in stalled learning, higher dropout rates, and long-term problems resulting from a lack of education. Because of how Latin America has been hit by the pandemic and slow vaccination rollouts, some predict the impact in terms of educational attainment and test scores has been and will be drastic.¹²

3. Importance of Education

The *Ley de Educación Nacional* recognizes that education is important for the individual and for society.¹³ Individuals who are formally educated experience better health outcomes, longer life spans, greater earnings and overall stronger well-being.¹⁴ Societies with high education quality and quantity have lower crime rates, increased civic participation and stronger economic growth.¹⁵

Human capital – or the capacity of people to drive economic growth – is perhaps the single most important resource a country possesses. Manuel Orozco and Valdivia explain, that “very low levels of human capital have important implications for economic growth, wages and the presence of a significant informal sector.”¹⁶ Brain drain is another problem in Guatemala. Approximately 30 percent of college-educated Guatemalans reside in the United States.¹⁷

As described earlier, Guatemalan education outcomes have improved significantly since the end of the civil conflict in 1996, but the country remains one of the poorest performing in Central America and lags behind other countries at similar levels of income.¹⁸ Adult illiteracy was 19% in 2014, compared to 7% in the Latin America and Caribbean region as a whole.¹⁹ Educational attainment in Guatemala is 5.7 years, compared to 6.9 in Honduras and 8.5 in Costa Rica. Compared to international income peers, it also falls below Morocco (5.9 years), Bolivia (8.5), and Guyana (8.2). As the chart below indicates, indigenous people and women fare worse than non-indigenous ladinos and men.²⁰ Guatemalan women have on average five

¹² See, e.g., Julie Turkewitz, *1+1=4? Latin America Confronts a Pandemic Education Crisis*, N.Y. TIMES (June 26, 2021), <https://www.nytimes.com/2021/06/26/world/americas/latin-america-pandemic-education.html>.

¹³ Ley de Educación Nacional, *supra* note 3.

¹⁴ U.S. AGENCY FOR INT’L DEV., *supra* note 4, at 1.

¹⁵ *Id.*

¹⁶ Manuel Orozco & Marcela Valdivia, *Educational Challenges in Guatemala and Consequences for Human Capital and Development*, THE DIALOGUE (Feb. 2017), <https://www.thedialogue.org/wp-content/uploads/2017/02/Educational-Challenges-in-Guatemala-and-Consequences-for-Human-Capital-and-Development-1.pdf>.

¹⁷ U.S. AGENCY FOR INT’L DEV., *supra* note 4, at 6.

¹⁸ *Id.*

¹⁹ Orozco & Valdivia, *supra* note 16, at 2.

²⁰ *Id.*

months less education than males, whereas in the rest of Central America (other than El Salvador), women have higher average levels of education than men.²¹

Literacy Rate by Sex, Ethnicity and Age Group, 2011

	<u>Sex</u>	<u>Indigenous</u>	<u>Non-Indigenous</u>
Population 15+	men	74.6	88.9
	women	51.9	81.1
Population ages 15-24	men	90.9	95.3
	women	80.9	93.3

Source: INE, Caracterización: Rep. de Guatemala, 2011²²

Before the global pandemic, there already was backsliding in progress, and surely the fact that many schools around the country have simply been closed with no instruction provided since March 2019 will result in further drops.

THE ROLE OF LAWYERS IN BRIDGING THE GAP

More than likely, to this point, nothing described in this essay is news to the reader. What may be new is to learn how lawyers may be able to bridge the gap between strong Constitutional and statutory protections for education and weak outcomes. Based on the American experiment (which is nowhere near complete, by the way), the author posits that lawyers have a crucial role to play in bridging the gap.

Lawyers have a duty to uphold, respect, and reform the law. It may be argued they are the most powerful actors in a democratic society. As such, for an issue as important as education, a right that touches the lives of every citizen, lawyers have an obligation to promote equality. In particular, in Guatemala, that could include raising the public's awareness of the importance of education for *all* Guatemalans, bringing cases before the Constitutional Court, and advocating for greater funding for education.

Educational progress has been slow in the United States, largely because of the lack of a blanket federal constitutional or statutory right. There is no federal right to education, but all fifty states have some form of a constitutional right to education.

²¹ U.S. AGENCY FOR INT'L DEV., *supra* note 4, at 5.

²² Orozco & Valdivia, *supra* note 16, at 2 (citing INE, *Caracterización: Rep. de Guatemala*, 2011).

The language in the education clauses vary and have been the subject of much litigation.²³

Rather than leave it up to states to litigate the terms of their respective constitutions, some scholars argue convincingly that a federal right is necessary to provide an even floor across the country.²⁴ Notwithstanding the relatively strong system of public education in the United States, these experts argue that entrenched societal inequality along racial and wealth lines will not change unless the floor is raised across the board. They articulate that American society would be more equitable if a federal right to education existed. Whether through an act of Congress, constitutional amendment, or the Supreme Court finding an implied right through the Due Process Clauses of Fourteenth Amendment, there are different ways to arrive at a federal right, and pros and cons for each.²⁵ While there is no federal right to education, lawyers have played a strong role in advocating for greater protections.

In contrast, there is a very robust federal right to education in Guatemala, but to date lawyers have not played a strong role in advocating for greater protections. The claims that have been filed do not relate to equity or equality for traditionally excluded children, but rather to vindicate the rights of wealthy children to access education.²⁶ This section makes several arguments regarding the role lawyers could play.

4. Raising the Public’s Awareness of the Importance of Education for All Guatemalans

In the seminal 1954 United States Supreme Court case *Brown v. Board of Education*, Chief Justice Earl Warren wrote, “The opportunity of an education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” Professor Derek Black points out that it was only upon the state offering education that equal protection was triggered.²⁷ And Black also points out that the

²³ Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. L. CTR., <https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf>.

The language varies: “thorough and efficient,” “general,” “uniform,” and “free” are some of the common descriptors.

²⁴ Kimberly Jenkins Robinson, *The Essential Questions Regarding a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 19–24 (Kimberly Jenkins Robinson ed., 2019).

²⁵ *Id.*

²⁶ See, e.g., Expedientes 434-2012, 1885-2004, 880-2013, 2997-2011, 2198-2013 (cases involving challenges to private schools). See also email conversations with Lcda. Carolina Chacón, Coordinadora de Investigación de la Facultad de Derecho de la Universidad del Istmo (July 7, 2021) and phone and email conversations with Lic. Juan Pablo Villatoro, attorney advisor to the Chief Justice of the Corte de Constitucionalidad (May 25, 2021).

²⁷ BLACK, *supra* note 7, at 19.

requirement that all children attend school on a regular basis through high school was a principle that evolved slowly and was met with resistance into the 1960s.²⁸ However, over time Americans' public expectations have changed, and there is an expectation that the state will provide education.²⁹ In fact, when the state fails to provide whatever level of education is guaranteed by federal and state laws, state constitutions, and case law, there are often outcries. Public expectation that the state must provide public education serves as a motivator for government actors responsible for funding and running public schools because they know they will be held accountable if they do not. In fact, employment of public/media education is now a well-established strategy of civil rights organizations.³⁰ When members of the public are concerned enough about an issue, litigation ensues. Litigation may serve as another incentive - or punishment - when the state fails to meet its obligation to provide public education.

5. Bringing Cases Before the Constitutional Court

The U.S. Supreme Court, which is the final arbiter of the U.S. Constitution, has held that there is no explicit or implicit right to education in the U.S. Constitution.³¹ However, although there is no federal constitutional right to education in the United States, claims may and have been brought that other individual rights have been violated by the government in the school context. Those rights include, inter alia, free speech, freedom of religion, freedom from establishment of religion, procedural due process, equal protection, freedom from unreasonable searches and seizures, freedom from cruel and unusual punishment, and others. In total, there have been over 100 cases in which the Supreme Court has weighed in on the rights of students.³²

In *Mendez v. Westminster*,³³ a case that paved the way for *Brown v. Board of Education*, the Ninth Circuit Court of Appeals held that segregating Mexican American children in separate public schools in California violated the Fourteenth Amendment's Equal Protection Clause. Governor Earl Warren - later Chief Justice Warren, author of the unanimous *Brown* decision - ordered immediate

²⁸ *Id.*

²⁹ *Id.*

³⁰ For example, the Southern Poverty Law Center, an organization that fights for racial and social justice in the South, prominently lists public/media education as the first of three prongs in its advocacy strategy. See generally S. POVERTY L. CTR., <https://www.splcenter.org> (last visited July 10, 2021).

³¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

³² See generally Maryam Ahranjani, *School "Safety" Measures Jump Constitutional Guardrails*, 44 SEATTLE U. L. REV. 273 (2021).

³³ 161 F.2d 774 (9th Cir. 1947).

desegregation efforts, and the California legislature repealed the statutory school segregation of Asian American and American Indian children.³⁴

Since the Court indicated in *Brown v. Board of Education* that *de jure* discrimination would not be tolerated and black and white children could not be segregated, there have been dozens of cases filed in the Supreme Court that relate to education. Litigation over the equal protection rights of minority students, free speech, freedom of religion, special education, English Language Learner issues, and overly harsh punishments, among other areas, have brought about new rules and systemic changes. Federal and state education agencies, like any institution, can be slow to make changes. Such litigation has been critical and necessary to force advancements in the provision of education, especially for vulnerable populations such as children with disabilities, children living in rural communities and minority children.³⁵

Who are the attorneys who bring these cases? In some instances, private attorneys bring cases against the government and are able to seek reimbursement for their fees from the government. For example, private attorneys representing children with covered disabilities are able to be reimbursed under the federal Individuals with Disabilities in Education Act.³⁶ Also, some attorneys handle education cases on a pro bono basis.³⁷ In other cases, particularly cases in which an entire class of children is being denied meaningful access to education, claims are often brought by non-governmental organizations such as the American Civil Liberties Union (ACLU),³⁸ League of United Latin American Citizens (LULAC),³⁹ Mexican American Legal Defense and Education Fund (MALDEF),⁴⁰ National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP LDF),⁴¹ Puerto Rican Legal Defense and Education Fund (PRLDEF),⁴² and Advancement Project.⁴³

Generally, the government settles these claims before trial because it is less costly and time-consuming, as well as less embarrassing, to do so.⁴⁴ Over the past 75

³⁴ BLACK, *supra* note 7, at 269.

³⁵ *Id.*

³⁶ Individuals with Disabilities Education Act § 300.517, 20 U.S.C. § 1415(i)(3)(B).

³⁷ *Free Legal Help*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_services/flh-home/flh-free-legal-help (last visited July 10, 2021).

³⁸ AM. CIV. LIBERTIES UNION, www.aclu.org (last visited July 10, 2021).

³⁹ Founded in 1929, LULAC is the largest and oldest Hispanic membership organization in the United States. See LEAGUE OF UNITED LATIN AM. CITIZENS, www.lulac.org (last visited July 10, 2021).

⁴⁰ Since 1968 MALDEF is the leading Latino legal civil rights organization in the United States. See MEXICAN AM. LEGAL DEF. & ED. FUND, www.maldef.org (last visited July 10, 2021).

⁴¹ NAACP LEGAL DEF. & ED. FUND, www.naacpldf.org (last visited July 10, 2021).

⁴² LATINOJUSTICE PRLDEF, www.latinjustice.org (last visited July 10, 2021).

⁴³ ADVANCEMENT PROJECT, www.advancementproject.org (last visited July 10, 2021).

⁴⁴ See generally Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. OF EMPIRICAL LEGAL STUD. 111 (2009).

years since *Brown*, these organizations have developed resources, influence, and strong reputations. While it would take time to develop similar organizations in Guatemala, there are numerous ways in which the ACLU, MALDEF, NAACP and the Advancement Project could jump-start training and support similar efforts in Guatemala. Given that great disparities exist in secondary school between boys and girls, between urban and rural communities, and, most importantly, between ladino and indigenous communities, the American civil rights organizations that have litigated high-impact gender equity, racial and ethnic discrimination, disability and other civil rights discrimination cases, they possess expertise that would be valuable to share with Guatemalan lawyers, judges, and general public.⁴⁵

Admittedly, lawsuits may take years and can be costly and there are certainly differences among legal systems. However, in the process of bringing suits, attorneys work with communities, individuals, and government actors.⁴⁶ This process of collaboration facilitates greater awareness, which may ultimately lead to preemptive change.

6. Advocating for Greater Funding for Education

At the very least every Guatemalan of school age must have access to a brick-and-mortar secondary school. While there may be challenges – transportation, need to take care of siblings, need to contribute to the household income – if the government does not even provide the option, they are not only ignoring their constitutional obligation, they are handicapping those children and the society as a whole. In *Plyler v. Doe*, the U.S. Supreme Court pointed out that “illiteracy is an enduring disability.”⁴⁷ According to USAID, Guatemala spends 2.8 percent of the gross domestic product (GDP) on education, which is less than the regional average.⁴⁸ The regional average is 5 percent of GDP. This lack of funding paired with poor government effectiveness and corruption impede the internal efficiency of the system and depress the learning outcomes of the students. Rural and indigenous communities lack secondary schools,⁴⁹ learning materials and properly trained teachers.

The country still faces serious challenges in education quality, coverage, teacher training, and gender and ethnic disparities. The last learning assessment conducted

⁴⁵ *Education*, U.S. AGENCY FOR INT’L DEV., <https://www.usaid.gov/guatemala/education> (last updated May 19, 2021).

⁴⁶ See, e.g., Complaint, *Boisseau v. Picar*, No. 2:2007cv00565 (Feb. 1, 2007), https://www.naacpldf.org/wp-content/uploads/BoisseauVPicard_NOLA_Complaint.pdf.

⁴⁷ 457 U.S. 202, 222 (1982). In this case, the U.S. Supreme Court held that denial of public education to undocumented students was unconstitutional.

⁴⁸ U.S. AGENCY FOR INT’L DEV., *supra* note 45.

⁴⁹ *Orozco & Valdivia*, *supra* note 16, at 6.

for primary grades found that only 40 percent of sixth graders reached performance standards in reading. Exacerbating the challenge, the majority of Guatemalan youth do not reach high school with 41 percent of all teenagers (13–18 years) out-of-school. This rate rises to 61 percent in the Western Highlands, which is predominantly indigenous.

CONCLUSION

In democratic countries such as Guatemala, there is no doubt that education plays a crucial role in training inhabitants to be engaged citizens, inculcating national values, preparing students for work and/or further education, decreasing poverty and migration, and facilitating economic growth. While Guatemalan federal law protects robust rights related to education, which offers a hope that lawyers can more quickly facilitate compliance than has been the case in the United States, which does not have *any* federal right to education. The right to education is protected by state constitutions, but few are as specific as those provided by the Guatemalan Constitution. Through decades of litigation, legislative action, and other reforms, the American public at large now has robust expectations for education and correspondingly has a relatively well-developed system of public education.

As pointed out by the World Bank, crises present opportunities to restructure.⁸ Once children return to school, the damage to their progress may be assessed.⁹ The staggering impact of near-complete lack of education access during the pandemic may be just the wake-up call needed to spurn interest convergence in Guatemala.

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