

Editorial: Special focus on promoting access to basic education through the law in sub-Saharan Africa

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1 Introduction

There is broad acceptance that the right to basic education is a fundamental multiplier right. However, the implementation of the right to education has still not been fully achieved in sub-Saharan Africa. Over the last two decades, educational development has witnessed notable improvement in Africa, as the number of children accessing school at all levels has increased. Despite this considerable gain, equal access to quality education remains far from being achieved. This is evidenced in a 2022 report released by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on out-of-school children, which indicates that an estimated 244 million children between the ages of six and 18 years worldwide were not attending school. Ninety-eight million of these children reside in sub-Saharan Africa. There have also been further setbacks due to the COVID-19 pandemic which impeded the progress of many children at school, and caused many to disengage. Without urgent political will and investment in education, the situation will likely get worse as the region faces a rising demand for education due to an expanding school age population. This requires a scaling up of education by the public sector. A further risk is the spread of low fee private schooling which, while it may serve a purpose on a temporary basis, endangers

the public system if it is unregulated or causes governments to cut back on planning, budgeting and spending on public education.

While each country's education system may face unique problems, general issues that characterise most countries are the perennial challenges of the lack of resources, inadequate planning and budgeting, an insufficient number of schools, charging of fees and hidden costs, inequality in access to education, dilapidated learning facilities, ill-equipped teachers, and overcrowded classrooms. These challenges have continued despite the existence of legal frameworks (international, regional and domestic) that impose an obligation on government to provide access not only to education for all children within their jurisdiction, but quality education. The potential of these legal instruments has not been fully explored to achieve the goal of ensuring access to quality education for every child. It is in this context that the UNESCO Chair on Education Law in Africa at the University of Pretoria explores the legal solutions to some of these challenges, and aims to advance access to quality basic education for children in sub-Saharan Africa.

Education law creates the normative framework for education, within international and regional human rights standards. All countries in sub-Saharan Africa have ratified the United Nations (UN) Convention on the Rights of the Child (CRC); almost all have ratified the African Charter on the Rights and Welfare of the Child (African Children's Charter) and many have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). All of these instruments require states to ensure universal access to free and compulsory basic education. Some of the constitutions of countries in the region make similar promises, and also commit to achieving greater access to basic education. This strong normative framework, together with national constitutions, provides space for the law and legal processes to be used to achieve gains in education.

2 The special focus edition on 'Promoting access to basic education through the law in sub-Saharan Africa'

The nine articles in this special focus edition emanate from a call by the UNESCO Chair on Education Law in Africa, University of Pretoria for contributions on topics or themes reflecting the use of the existing legal framework on the right to basic education to promote the right to basic education of children in sub-Saharan Africa, either through law reform or litigation.

In particular, the editors were keen to receive articles using law reform or litigation to advance the right to education (or rights in education). We invited accounts of work already done, or explorations of plans or strategies to use law reform or litigation to advance the right to education (or rights in education).

The articles received provide many fascinating narratives about the use of law in the battle to ensure that states respect, protect and fulfil the right to basic education. An overview of the articles provides a landscape of selected 'legal stories' stretching from South Africa to Nigeria.

Veriava brings together the themes of law reform and strategic litigation in her article which examines the impact of the Basic Education Laws Amendment Bill (BELA Bill) on the policy-making functions of the school governing bodies (SGBs), in particular, changes to the unchecked autonomy of the SGBs in making language and admissions policies for schools. The author argues that the jurisprudence emanating from earlier school governance litigation acknowledges the history of racism and apartheid spatial injustice which has had the effect of limiting access to well-resourced schools for black people in South Africa. The South African Constitutional Court, therefore, placed a duty on SGBs when formulating policies to be cognisant of the broader systemic concerns in education impacting the access rights of learners. The jurisprudence has now been codified into law in the school governance reforms in the BELA Bill. The author illustrates how the formulation of school governance principles and their ultimate inclusion in the BELA Bill stands as a case study in transformative constitutionalism beyond the courts.

Ally and Kazim examine the lessons to be gleaned from the minimum core approach. Drawing on case law, the authors unravel the South African judicial approach to minimum core, and observe that the courts have never expressly disowned a minimum core approach to basic education. The authors also observe that the Constitutional Court in *AB v Pridwin Preparatory School* implicitly acknowledged that the state is obliged to provide education of a certain quality or standard. The authors examined the case law through which the courts have given the right to basic education minimum content: The courts have held that the right to basic education includes a right to textbooks, classroom furniture, basic infrastructure, sufficient teachers, transport and, more recently, nutrition. The authors identify three lessons that can be drawn from this 'minimum core' type approach, including a shift from minimum inputs to minimum outcomes, the prospects for applying the 'minimum core' approach to the interpretation and development of

other immediately realisable rights recognised by the Constitution, such as the right of every child to basic nutrition, and the potential for developing the minimum content of progressively realisable socio-economic rights.

Smit looks at the human rights duties of private schools in giving effect to the right to basic education. Relying on the case of *AB & Another v Pridwin Preparatory School & Others*, in South Africa, the author notes that private schools have constitutional obligations to give effect to the right to basic education. However, she argues that much uncertainty remains on the effect this has on a private school's ability to suspend or expel a learner for failure to pay school fees.

Maistry and Van Schalkwyk reflect on the use of litigation to promote the right to basic education of undocumented children in South Africa. The authors interrogate the *Centre for Child Law & Others v Minister of Basic Education & Others* judgment and its implication in advancing the right to basic education in South Africa. The authors in this article map the events leading up to the litigation, the strategy adopted in bringing the case, the eventual findings of the Court, and the challenges in implementing the judgment. The authors argue that while the findings of the Court have provided some clarity on the interpretation of section 29(1) of the Constitution and its application to undocumented learners, some ambiguity in the framing of the order and a lack of awareness of the judgment among schools and provincial education departments have hampered implementation.

Quan, Fambasayi and Ferreira explore the right to receive education in an official language of one's choice as enshrined in section 29(2) of the South African Constitution. The authors argue that the South African education system has not offered sustained learning as well as equal opportunities for most of the population in more than one language. Although language in education determines the language of learning and teaching (LOLT), language in education remains contentious in South Africa. They observed that the Department of Basic Education policy has failed to address the need to ensure sustained use of the mother tongue by prompting a switch to English in grade four. The authors interrogate how the learning and teaching in schools could potentially perpetuate discrimination in accessing schools, against the backdrop of constitutional rights and values such as equality and non-discrimination.

Moving to another part of the sub-continent, Skelton and Mutu explore the crucial role that strategic litigation can play in actualising the right to basic education in Kenya, focusing on the constitutional provisions that underpin this legal strategy and the pivotal role of

the judiciary. The authors argue that the Kenyan Constitution and the entire legal framework provide a solid legal background for civil society organisations and other interested parties to deploy strategic litigation to pressure the government for the realisation of the right to basic education in the country. However, the success of such an effort is largely dependent on how the judiciary understands its crucial role in driving the transformative potential of the Constitution.

The next article moves to neighbouring Uganda, where Mutu investigates the effectiveness of strategic litigation in promoting access to equal quality education, with a specific focus on the landmark case of the *Initiative for Social and Economic Rights (ISER) versus the Attorney General*. The article adopted a multidimensional impact model (material impact, instrumental impact and non-material impact) to determine the impact of the litigation in advancing the right to education in Uganda. The author not only interrogates the implication of the Court's decision in the understanding and protection of the right to education, but also in establishing a legal precedent for holding the government accountable for providing quality basic education.

Chitha reflects on the barrier that impedes access to education for Rastafarian children and female Muslim children in Malawi. The author notes that Rastafarian children and female Muslim students are denied access to education for having dreadlocks or long hair and wearing of the hijab, respectively. The author interrogates the various efforts deployed by stakeholders to ensure that such barriers are removed to give equal opportunity to every child to access school. The author identifies litigation, the drafting of memoranda of understandings, and the issuing of circulars as some of the measures deployed to address the access to education challenge for these children. The author observes that as much as the adopted approaches have played a crucial role in ensuring access to education for Rastafarian and female Muslim children, there is a need for more action in terms of legislative reform as well as dissemination and public awareness, in particular about the recent High Court decision concerning Rastafarian children and their access to education.

Safety in schools is the theme explored by Onuora-Oguno and Silas. The authors argue that beyond the obligation of states to promote and fulfil the right to education, the obligation to protect, which is crucial, is often neglected. The authors spotlight how access and availability of education are limited when states do not protect the school space and make it safe for learners. With a focus on Nigeria, and particularly the failure to deal effectively with the education-related actions of Boko Haram, they argued that the lack

of fulfilment of the obligation to protect on the part of the Nigerian state is a violation of its obligations under international human rights law. Relying on Nigeria's obligations under various African human rights treaties, the authors make recommendations on how the obligation to protect will be realised and, thus, the right to education respected in its entirety in Nigeria.

3 Conclusion

Law provides us with avenues to pursue the goal that quality education should be provided to all children. The articles in this special focus edition provide examples of the way in which law and lawyers are filling the gaps in policy, law and practice. There is a growing awareness on the sub-continent that lawyering can enhance learning. In particular, strategic litigation has shown promising results in several countries. In South Africa the courts have upheld the principle that the right to basic education is immediately realisable, and in a series of cases have fleshed out some of the content of the right to include textbooks, desks and chairs, teachers and school transport. There have also been several cases on the rights of children within education, such as positive findings regarding corporal punishment, the exclusion of pregnant girls, and the rights of children in private schools. In Eswatini, lawyers brought a series of cases which initially garnered a declarator on the rights of all children to free primary education and, although the appeal was ultimately lost, the case seemed to get the government moving on rolling out primary education. In Nigeria, lawyers have been successful in the Economic Community of West African States (ECOWAS) Court and in the High Court in establishing that education is a justiciable right, despite being included in the non-justiciable part of the Constitution. Cases in Uganda and Kenya have caused closure of private schools that failed to meet standard. The ECOWAS Court has issued a decision finding that the exclusion of pregnant learners in Sierra Leone is not in line with the African regional standards – and similar cases at the national level have been brought in Kenya. Treaty bodies such as the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) have also been engaged to hold state parties such as Senegal, Kenya, Uganda and Sudan accountable for violating the right to education of children within their jurisdiction.

These remarkable narratives are not the only ones that tell a positive story about what law can do to advance the right to education, and hopefully they are just the beginning of many legal journeys.