



Legal Norms and the Capabilities Approach (CA): Reinterpreting Children's Right to Access to Basic Education

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Abstract: This article discusses access to basic education as a constitutionally entrenched legal norm. It presents an exposition of inherent interdependence between rights-based approaches to child development and theoretical underpinnings founded in the Capabilities Approach (CA). The article is considerate of the fact that every progressive developmental state needs literate and educated citizenry to achieve sustainable economic and human development, and thus secure social stability and human well-being. It relies on the Constitution, 1996's foundational values and theoretical connotations founded in Sen and Nussbaum's Capabilities Approaches. Nussbaum is the focal point because her account of the CA is linked with fundamental ideals of constitutional law and rights-based approaches to development. It proposes a pattern of combining and using frameworks of rights and capabilities to move beyond promises made through legal instruments. It is asserted that access to equitable and quality basic education is yet to be achieved in South Africa. It remains a distant dream owing to narrow interpretations and dual system of private-public education, under which quality education is commodified and only accessible to the wealthy few. Thus, to improve access to quality basic education, we ought to understand that laws are normative standards that need to be complimented by strong moral and ethical commitments in order to be responsive to children's and society's social developmental needs.

Keywords: constitutional law; right to basic education; capabilities approach; human rights; transformation

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1. Introduction

The moral appeal of legal norms, especially those propagated through the idea of human rights have had profound impact on every segment of society, especially in terms of governance, public administration and human development. This is attributable to the fact that legal norms establish normative frameworks that determine people's constitutional entitlements and the role to be played by states in achieving such entitlements. Hence, Constitutions and legal tradition of interpretation ought to help facilitate development of people's capabilities, including those of children, in order for them to secure all prerequisites of a life worthy of dignity (Nussbaum, 2007, p. 7). Every so often, rights discourses concerning children's access to basic education explicitly illustrates that the liberal constitutional law and the theory of distributive justice emboldens states to prioritize putting basic education at the forefront of every developmental initiative. This has been given added impetus by the fact that the past five decades explicitly characterized increases in children's educational access and participation as fundamental symbols of national development (Colclough, 2012). Thus, the law in the Constitution of the Republic of South Africa, 1996 (*hereinafter, the Constitution*), and in international legal instruments enjoins us to respect, value, protect and safeguard children's right to access to quality basic education. It is from this premise that we should be able to discern how the law is supposed to create an environment of enabling children to develop their unique capabilities to the fullest through education (Nieuwenbuis, 2011) in a manner that bolsters efforts of achieving their well-being and social justice, thereby cultivating society's sustainable development.

In defense of education as a greater tool for social transformation, two historic statements stand out. According to Nkomo et al (2009), these statements explains a pivotal role borne by education in improving societies, further stressing its impact to society's essential social advancements.

"Although education cannot transform the world, the world cannot be transformed without education" (Robinson, 1982, p. 31).

"Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor; that a son of a mine worker can become head of the mine; that a child of a farm worker can become the president of

a great nation. It is what we make out of what we have, not what we are given, that separates one person from another” (Mandela, 1994, p. 194).

Therefore, it is non-contentious that every developing country needs an educated citizenry in order to register notable progresses in significant areas of social cohesion, social justice, peace, economic, political and legal developments. Realistically, it is impossible to achieve these wishes when illiteracy and lack of education prevail. And, without education, society is vulnerable to outbreaks of violence and major social turbulences. This prompts the need to ask how the law in the Constitution sought to achieve an educated society and how this may be complimented by moral and ethical theories that strengthen state’s obligation to deliver what legal norms enjoins them to, thereby ensuring meaningful realization of this right to basic education. This is considerate of the fact that South Africa’s post 1994 transition urgently needed to negotiate competing needs for economic development and greater equality in society through its engrained rights-based discourses (Hammet & Staeheli, 2013, p. 312) without which distributive justice would be elusive. Thus, access to quality basic education is seen as one of indispensable human entitlements needed to navigate these post-1994 dreams.

2. Research Objectives and Approach

The object of this article is to illustrate that inflexible legal approaches with regards to certain constitutional entitlements need to be modified. Law need to be tailored in such a way that it keeps up with constant socio-economic changes in order to be effective. The article stresses that it is essential for courts, the state and its functionaries, Non-Governmental Organizations (NGOs) and relevant stakeholders to interpret legal norms in a manner that resonate the spirit and purport of the Constitution, taking into account Sen and Nussbaum’s Capabilities Approaches, which accentuates that states ought to mainly address social conditions characterizing people’s socio-economic deprivations in order to enable them to assert their rights (Nussbaum, 1998, p. 278; 2011, p. 26). This is because both the languages of human rights and capabilities share common aspirations even though they differ in their distinct ways (Sen, 2005, p. 152). Thus, there is a need to at least adapt to progressive approaches that offer comprehensive explanations when assessing society’s social achievements and challenges. We believe that legislating education as a constitutional right does not necessarily translate into it being realized and enjoyed. This entails that South Africa’s constitutional entrenchment of

guaranteeing children's right to basic education need to be complimented by theoretical and practical approaches that offer better meanings on what constitute quality and equitable basic education. In that way, it becomes feasible to evaluate whether or not, this right is being realized. In that process of assessing children's right to basic education, key aspects of access, resources (infrastructure, facilities, studying materials etc), quality and safe environment are amongst factors that may be used to determine fulfillment of quality basic education.

This article adopted content analysis method. It focused on legal instruments and scholarly articles and books to position legal norms and the CA in influencing achievements of children's welfare and development. Conclusions arrived at were informed by the rights-based approaches to child development and Nussbaum's theoretical underpinnings founded in the CA. That is because her account of the CA is normative and pragmatically linked with fundamental ideals of constitutional law (Nussbaum, 2009, p. 341). Thus, to improve children's access to quality basic education, we ought to appreciate that laws are normative standards that still need to be complimented by leadership, and strong moral and ethical values.

3. Theoretical Framework

Since its inception, the idea of human rights has been integral to the legal revolution (Arzoz, 2009, p. 541), especially with regards to the setting of legal norms and standards intended for human development and social improvement of human life. Legal norms are crucial because they firmly articulate state obligations and entitlements owed to citizens (Bothe, 1980, p. 93). It is for this reason that human rights have immensely helped determine state behavior when it comes to such social and legal commitments. Thus, the constitutional law assumes the task of espousing all ideals of human rights with the view to helping people exercise agency and achieve basic capabilities. Given that human rights have successfully permeated all segments of legal developments, they became legal norms whose prescripts require non-negotiable state fulfillment. The right to access to basic education is one such a legal norm which the international law and the Constitution have categorically ordained as an essential children's entitlement. However, recent challenges immersing legitimate human rights claims, such as to basic education, suggest that states are struggling to apply appropriate interpretations that can specify content of rights and define what central obligations exist on their part. This prompts the need to seek philosophical and practical guidance on how to make rights entitlements

work better. The CA seems to offer such a possibility of reimagining the right to basic education.

The CA was first conceived by Amartya Sen. It is concerned with *functionings* (person's achievements or what a person may value doing or being), *capabilities* (freedoms a person enjoys) and *agency* (ability to act in pursuit of what one values) (Sen, 1985, p. 203). He constructed a strong relationship between education, development and freedom (Sen, 1999). It was developed further by Martha Nussbaum as a special species of human rights approach (2007, p. 21) and a normative tool to benefit our common humanity (1992:214), owing to its ability to resolve deprivations afflicting children, women and the poor (2006, p. 48). Sen and Nussbaum stresses that the CA is best suited to evaluate well-being, and in this case, it can be used to assess whether the right to basic education is being realized meaningfully or not. The CA embraces a humanist stance which seeks to safeguard "*a better life for all*", a slogan adopted by the African National Congress (ANC) post 1994, while offering an alternative discourse in policy terms, concerning modern instrumental practices (Wright, 2012, p. 421). Hence, the CA possesses an intuitive strength to reinforce legal norms if applied concurrently with the Constitution's fundamental values of dignity, equality and freedom. For purposes of this article, it is asserted that the CA is best suited for reimagining children's right to basic education. That is, its theoretical underpinnings proffer coherent guidelines in terms of which to determine how to meaningfully assess children's enjoyment of their education rights. Thus, to say this right is being achieved, what should be core considerations? This derive from the fact that a mere right guarantee will be hollow if it ignores preconditions that if addressed would give it cogency.

Nussbaum (2007) uses phrases such as sense, imagination, thought and practical reason on her list of central capabilities, to express education as a crucial capability, which Wright (2012, p. 417) emphasized is integral in expanding other capabilities. Sen (1992, p. 44) also held that basic education is an inherent precondition for child development, thus a crucial basic capability. This approach requires legislated rights to be complimented by state action in order to empower a child by providing essential needs for optimal functionality of schooling. It means state ought to improve social conditions in order for the right to be fully enjoyed. This relate to state's duty to build institutions, create schools' infrastructure, provide materials and technical assistance to achieve effective learning. All these factors that make learning environment conducive are what will form the basis of child capabilities, because in the main they remove structural impediments that impede child

development. It is at this point that basic education as children's entitlement interacts with the rights-based approaches, through which the legal norms attempts to nurture childhood, thereby building children's present and future freedoms. Hence, it is vital to establish how rights-based legal instruments partner with the CA to improve our understanding of the content of quality basic education.

4. International Legal Instruments on the Right to Basic Education

Children's right to basic education also enjoys comprehensive recognition and protection in terms of international legal instruments. This international legal framework has built a strategic normative approach to basic education, and has to date played a fundamental role in guiding states as regards what to prioritize when promulgating laws to protect this right and children as bearers of it. Thus, education's universal legacy as a matter that is rooted in human rights is well established. For international law to declare education as a human right, it meant these legal norms effectively solidified it a moral imperative for every person's expansion of capabilities, which is critical for buttressing world peace and democracies (Lake & Pendlebury, 2009, p. 19). And its significance is attributable to its power to enable individuals to claim legitimate entitlements that are needed to exercise certain freedoms (Christie, 2010, p. 5).

This status of education as a human right can be traced in the UN Universal Declaration of Human Rights, 1948 (UDHR). Article 26 expressly states that "everyone has the right to education and that education shall be free, at least in the elementary and fundamental stages". By virtue of being the first international legal instrument to affirm education as a right, the UDHR in effect played a pivotal role in universalizing the importance of children's access to basic education. Thenceforth, every other legislative and policy initiative on education would be premised on fundamental norms built upon the UDHR. It is for this reason that the right to basic education featured among key Millennium Development Goals (MDGs). The MDGs encourages international cooperation which is needed to fulfil MDG-2, requiring states to accelerate efforts of ensuring that all boys and girls complete a full course of primary education.

Other than the UDHR, a variety of rights-based international legal instruments also enshrined education as a right. In terms of Article 13(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), member states are obligated to make primary education compulsory and free, while secondary

education is required to be made generally available and accessible. The ICESCR recognized that education is key to human development, and thus required that it should be streamlined to ensure full development of human personality, realization of dignity, and attainment of freedoms. The UNESCO Convention against Discrimination in Education, 1960 (CDE) adds an essential dimension of equality regarding access to education. It also enjoins member states to uphold and protect the right to basic education. Article 4(a) obligate member states to promote equality of opportunity and treatment on education, and requires that primary education be made compulsory and free, to promote equality. It prohibits unfair discrimination, which entails that member states may not directly or indirectly discriminate against children even when it comes to matters of access to quality basic education.

Most importantly, the right to basic education was entrenched in the UN Convention on the Right of the Child, 1989 which has been lauded as the supreme legal instrument addressing children's rights (Myers, 2001, p. 39). It has added essential impetus in terms of how we interpret and protect children's rights. Article 28(1) provides for and require members states to make primary education compulsory and free, while article 28(1) (b) obliges that secondary education be made available and accessible to the child. Reynaert et al (2009, p. 518) describes the CRC as the sole progressive bearer of children's rights dialogue. Explicitly the CRC entrenched the whole idea that children's rights ought to be treated as part and parcel of international human rights law (Sloth-Nielson & Mezmur, 2007, p. 331) thereby emphasizing on protecting child's best interest at all times. Thus, it founded a coherent set of norms within which both child sensitive legal and policy development could occur (Sloth-Nielson, 1995, p. 420), which justifies why the CRC is at the forefront of children's rights protection.

Recognizing the prevalence of child economic exploitation, Article 7(1) (a) and (b), and Article (2) and (3) of the ILO Minimum Age Convention, 138 of 1973 prohibits child's participation in works that that prejudices their schooling. It goes without saying that such participation deprives children of their right to education, and thus compromises development.

South Africa ratified these conventions and is bound to protect children, and ensure realization of access to basic education. Government has a constitutional duty to respect, protect and promote this right, informed by both domestic legislation and prescripts of international laws. This also derive from the fact that section 39 (1)(b) of the Constitution obligates courts and/or any forum to have regard for international

law when interpreting any constitutional provision(s) and/or any domestic legislation.

5. The Constitution and Children's Right to Basic Education

South Africa's advent of democracy culminated in the Constitution, the supreme law of the republic, which assumed the function of being a facilitating tool for an infusion of human rights culture into all spectrums of society, including country's educational systems (Roux, 2012, p. 30). It was fundamentally envisioned to be a transformative text in furtherance of comprehensive social, economic, legal and political transformation, fully departing from apartheid's culture of authority to a new culture of justification grounded in legal norms (Klare, 1998; Langa, 2006; Moseneke, 2010). The then political leadership deliberately pursued social justice and a new legal culture of justification premised on securing socio-economic development and human well-being. The new culture had to uproot fascist repressive tendencies. However, this new culture of justification would have been incomplete had it not officially created a legal platform for prioritization of children's rights and their protection.

Accordingly, the Constitution enshrined the right to education in section 29,¹ guaranteeing it an all-inclusive protection. Specific inclusion of "basic education" in section 29(1) (a) is of particular interest because at this point arises the need to explicitly discern how education got domesticated as children's key entitlement. This is complimented by section 28(1) (f) (ii) which protects children against performing

¹ 29. Education (l) 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.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account;

- (a) equity;
- (b) practicability; and
- (e) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain at their own expense, independent educational institutions that-

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

work or providing services that place at risk the children's well-being, compromising the child's education, physical, mental health, moral or social development. These constitutional provisions are normative in nature as they set non-derogable standards that require state to only fulfill its obligations without delay. This constitutional protection of education has been described as a "hybrid right" (Arendse, 2011, p. 97), because it carries a civil and political right character (*first generation right*), it is socio-economic in nature (second generation right) and it is also a crucial developmental asset (*third generation right*). Given that there are clear constitutional prescripts on education, it is vital to understand the role played by courts in applying legal interpretations that help develop children's capabilities.

6. Courts on the Right to Basic Education and Children's Capabilities

Children's right to access to basic education has been a subject of scrutiny in courts of law where government's commitment to fulfill its constitutional obligation on education was put to test. At the center of attention has been court's willingness to countenance the best interests of the child, as canvassed in *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T). It was held that the best interests of the child transcend every other aspect which arises in any such disputes concerning the child's education. This also arose during 2012 academic year when several schools in Limpopo Province, Polokwane, experienced widespread crisis of lack of delivery of studying materials. This culminated in *Section 27 and Others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114, a High Court judgment which dealt with government's failure to provide the much needed studying materials mostly for children in grades R, 1, 2, 3, and 10. Kollapen J, held that government's failure to provide text books constituted a grave violation of the right to basic education and accordingly ordered the department to provide such materials to affected learners on an urgent basis, commencing on 31 May 2012 and concluding by no later than 15 June 2012. He highlighted that education is a means for children to fulfill their full potential in a wider sense of personal development. Thus, the Department was ordered to immediately develop a 'catch-up/remedial' plan for affected Grade 10 learners in the province. Nadine Gordiner and Gwede Mantashe described as appalling, the fact that children's effective learning was compromised, especially those in rural schools. They argued that this incident contravened the transformative

ambition of the Constitution in a manner that disturbingly entrenches society's persistent inequalities.

In *the Governing Body of the Juma Masjid Primary School & Another v Essay N.O* 2011 (8) BCLR (CC), Nkabinde J, held that unlike other socio-economic rights, the right to basic education ought to be instantly realized by everyone, and that it is not subject to internal limitation of progressive realization and implementation based on availability of resources. This entailed that government must unconditionally ensure access and quality education for all. Intrinsically, this ascribed education as a human need (Dieter-Beiter, 2006), which is also a site for nation building (Hammet, 2013, p. 327), aspects which in *Section 27*, Kollapen J, stressed are impossible to conceive in the midst of lack of studying materials.

It is clear that courts have adopted approaches that accentuate the urgent nature of focusing on improving material needs and social conditions to support development of children's capabilities than merely ending at pronouncing rights entitlements. In accordance with Nussbaum's approach, it is important to have legal norms that guarantee rights entitlement and their protection. But it is one thing to have laws, and it is the other to effectively implement them. In this regard, courts can be lauded to have taken an activist stance in terms of guiding government with regards to the contents of rights, which create strong interface between languages of rights and capabilities. This is particularly crucial because according to Nussbaum, both rights and the CA require government action and institutional support in order to be meaningfully realized.

7. Socialization of Basic Education and Its Right Content

What lessons can be obtained from *Section 27* judgment? And what implications does it have on basic education as children's essential right and a basic capability? *First*, we believe it presupposes that there is a need to calibrate the way we socialize legal norms. That is, obliging to legal prescripts on child education is not only about boosting the presence of legal norms, but it is about taking practical proactive action to safeguard children's present and future freedoms. Hence, this is a significant judgment because it highlights that no matter how appealing laws may appear, it is meaningless if there is no understanding of social effects of rights content on human well-being, especially on the part of administrators tasked with implementing such laws and policies. *Second*, it means majority of children are yet to realize and fully enjoy their right to access to basic education. This is the case owing to the fact that

both rights discourses and the CA require state to provide infrastructure, facilities and studying materials for education to befit being considered to be at optimal standard. Thus, to improve this experience, it is indispensable to transit from abstract support of legal values into a space where stakeholders involved appreciate the significance of legal norms in nation building. That is, legal norms and rights are fundamentally a means to greater social ends.

Also deducible from *Section 27* is the view that it represents an acute failure on the part of the state to fulfill its constitutional obligation on basic education, a deprivation of children's capabilities. This may have resulted from misinterpretations on the part of state functionaries in terms of what and how legal norms sought to hold state accountable for its commitments. Sadly, society that fails to safeguard children's access to quality basic education suffer acute social disinvestment, which adversely affect development of skills needed for children to be productive and contribute positively towards development (Holgado et al, 2014).

In sociological terms, the human rights ideology can be regarded as a phenomenon through which communities have an opportunity to incorporate a theory of moral sympathy among humans. Education connect with this ideal through its power to positively influence social cohesion, labour markets, economic development (Karapehliwa, 2015, p. 20), social welfare, human well-being and human development. This justifies why education ought to be understood as central to children's capabilities development. The problem of inaccessibility as illustrated in *Section 27* adversely affect the right to equality, eventually resulting in imbalanced development favourable only to the wealthy few. It has been reported that while many interventions have been directed at erasing inequality from the educational system since 1994, stark differences in educational resources, practices and outcomes across wealthier and poorer schools remain common (Van der Berg, 2007; Spaul, 2013). This is mainly because education has been commodified, and that socio-economic disparities still play a major role in determining access and successes in education. This has unwittingly been entrenched by a dual system of private-public service where the poor are subjected to poorly resourced and underperforming public institutions while the rich gets it all easy in highly funded, well-resourced and better performing private institutions (van der Berg, 2008). Consequently, this deprives children a chance to acquire necessary skills, rendering rights and legal norms simply formal but ineffective tools.

8. Conclusion

This article affirms the importance of interpreting rights in a manner that resonate the spirit and purport of South Africa's transformative ambition as propounded through the Constitution. It espouses that interpretation of legal norms ought to be development driven, and thus take into account socio-economic implications of law, especially with regards to human development and achievement of well-being. It is argued that children's access to basic education should not only be conceived as a mere right, but as an expansion of capabilities urgently needed for children to be able to exercise agency and realize their functionings. Children's participation in education enhances their chances of realizing central functionings such as employment, good health, social welfare and even the ability to engage politically. *Section 27* judgment illustrates that children's basic education is a means to greater social ends, in that it teaches, empowers, develops and liberates. It is a crucial judgment as it connects rights-based approaches to child development with the capabilities language, with their aspiration being to secure child development and well-being. Therefore, to bolster the transformative goals of the Constitution, state ought to unceasingly interpret children's right to basic education in accordance with the Constitution's social and historical context which is indispensable to eliminate inequalities inherited from the past. This was also stressed in *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC):22, where the court highlighted the importance of considering challenges of poverty, inequalities and lack of opportunities when formulating public policy. That is, every effort of enforcing legal norms to enable rights realization require approaches that are cognizant of social conditions characterizing people's lives.

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