

#2

Volume 23  
2022



# ESR REVIEW

Economic & Social Rights  
Review in Africa

ENSURING RIGHTS MAKE REAL CHANGE

**SPECIAL EDITION ON COVID-19**



**DULLAH OMAR INSTITUTE**  
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

A publication of the Dullah Omar Institute for  
Constitutional Law, Governance and Human  
Rights (formerly Community Law Centre)  
at the University of the Western Cape

**ISSN: 1684-260X**

A publication of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights (formerly Community Law Centre), University of the Western Cape.

## **EDITORS**

### **CHIEF EDITOR**

Prof Ebenezer Durojaye

### **CO-EDITOR**

Gladys Mirugi-Mukundi

### **GUEST EDITOR**

Prof. Usang Maria Assim

---

## **ESR REVIEW ONLINE**

<https://dullahomarinate.org.za/socio-economic-rights/esr-review>

---

## **PRODUCTION**

The *ESR Review* is produced by the SocioEconomic Rights Project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights, with the financial assistance of AmplifyChange and CS Mott Foundation.

The contents of the ESR Review are the sole responsibility of the Socio-Economic Rights Project and can under no circumstances be regarded as reflecting the position of the AmplifyChange or CS Mott Foundation.

---

## **CONTACT**

### **Socio-Economic Rights Project**

Dullah Omar Institute for Constitutional Law, Governance and Human Rights.

University of the Western Cape, New Social Sciences Building. Private Bag X17, Bellville, 7535

**Tel:** (021) 959 2950

**Fax:** (021) 959 2411

**Email:** [serp@uwc.ac.za](mailto:serp@uwc.ac.za)

**Website:** <https://dullahomarinate.org.za>

# **Contents**

---

## **03 EDITORIAL**

---

### **04 FEATURE**

The Implications of Food-Parcel Corruption for the Right to Food during the Covid-19 Pandemic in South Africa

---

### **10 FEATURE**

Realising the Right to Education for Learners with Disabilities during the Covid-19 Pandemic in Kenya

---

### **16 FEATURE**

The Impact of the Covid-19 Pandemic on Children's Rights to Education in South Africa

---

### **22 FEATURE**

Re-Examining the Right to Education for Children with Disabilities in Uganda's 'New Normal'

---

### **27 UPDATES**

The Significance of Equal Education and Others v Department of Basic Education and Others

# Editorial

---

Welcome to *ESR Review 2* of 2022, the third issue in a special series on the impact of Covid-19 on the enjoyment of socio-economic rights. The pandemic has highlighted the importance of socio-economic rights globally, with basic needs such as those for food and water having taken centre-stage. The effect of the pandemic on children's right to education is especially noteworthy – Covid-19 has compromised the right to education, particularly among the poor and vulnerable, including children with disabilities.

In South Africa, as in most parts of the world, schools were abruptly closed in March 2020, with children ordered or encouraged to continue learning from home. The Department of Basic Education (DBE) committed to making resources available to support remote learning, including broadcasting educational content on radio and television. However, these resources were not enough to make a meaningful impact on the majority of learners whose education was compromised by the pandemic. Across the nation, reports were rife about the inability of pupils to access online resources and the inadequacy of printed materials, among other things. The DBE also indicated that Covid-19 was, in 2020, a contributor to increased dropout rates that affected vulnerable groups of pupils the most.

With many schools unable to complete the curriculum for 2020 (even after it had been trimmed), the result was disparate educational outcomes for children based on socio-economic differences. The consequences of this state of affairs continued into 2021, with the reopening of schools for the 2021 academic year postponed from

27 January to 15 February. Reasons provided for the postponement included the need for more time to prepare school environments to ensure the safety of teachers and learners.

Against this background, it is evident that drastic intervention measures are required to address the impact of the Covid-19 pandemic on the right to education. These include measures to trace and track school dropouts and reintegrate them into schools; making provision for all Covid-19 protocols to ensure safety; bridging the digital divide between poorer students and others; implementing targeted interventions for children with disabilities among other vulnerable groups; and developing remedial or catch-up programmes for those who need them.

In this issue, our first article by Paul Mudua explore the implications of corruption for the distribution of food parcels, which worsens the impact of the pandemic on the poor. The second and fourth articles by Wilson Macharia and Tuhairwe Herman and Godfrey Ayeranga examine the impact of the pandemic on the right to education for children with disabilities in Kenya and Uganda, respectively; the third article by Nomzomhle Kona explores the impact of the pandemic on the right to education in South Africa generally. In the updates section, we consider the significance of *Equal Education and others v Department of Basic Education and Others (2020) on the school National School Nutrition Programme*.

We hope you find this issue useful in shedding light on these topical subjects, and we thank our guest writers and anonymous peer reviewers for their contributions.

---

*Prof. Usang Maria Assim*  
**Guest Editor**

## FEATURE

# The Implications of Food-Parcel Corruption for the Right to Food during the Covid-19 Pandemic in South Africa

Paul Mudau

## Introduction

*The right to have access to sufficient food (which is closely associated with the rights to health, water, life, trade, social security, land, and so on) is explicitly provided in section 27(1)(b) of the Constitution of South Africa. However, the outbreak of Covid-19 caused the government to place the country under a nationwide lockdown, with strict regulations and directives that curtailed a number of socio-economic rights. The affected rights included the right to have access to sufficient food. The situation culminated in widespread food insecurity, hunger and malnutrition, as evidenced by affected poor urban families and other vulnerable groups, including the homeless living in designated shelters. These groups were unable to gain access to sufficient food or to buy it because of loss of income or lack of access to the informal market. In response, the government embarked on large-scale food-parcel distribution schemes geared towards feeding 'deserving' people.*

Nevertheless, the process, which involved municipal councillors, was marred by corruption allegations and became highly politicised (Government of South Africa 2020a). One of the key contributing factors that led to municipal councillors' involvement related to the impending 2021 local government elections. Local politicians began electioneering through food-parcel distribution, with some of them diverting food parcels for themselves or selling them for personal gain.

Against that background, this article sets out to ascertain the nature of the structural implications of food-parcel corruption for the right to sufficient food during the Covid-19 pandemic in South Africa. A subsidiary aim is to offer useful solutions aimed at remedying the profound impacts of these structural implications. A fundamental pillar of the solutions entails a human-rights-dimensioned response, as well as the

steadfast strengthening of anti-corruption mechanisms in food relief initiatives during emergencies caused by natural disasters.



**Local politicians began electioneering through food-parcel distribution, with some of them diverting food parcels for themselves or selling them for personal gain.**

On 11 March 2020, the World Health Organization declared Covid-19 a pandemic. The uncontrollable spread of Covid-19 reached South Africa and preceded the declaration of a national state of disaster by the Minister of Co-operative Governance in terms of section 27 of the Disaster Management Act of 2002. On 15 March, with the objective to contain the spread of the virus, President Cyril Ramaphosa announced that the government had taken the drastic decision of placing the country under lockdown, effective from 27 March.

However, the lockdown restrictions aggravated the dire conditions of disadvantaged and marginalised groups, seriously affecting the enjoyment of socio-economic rights, including the right to have access to sufficient food. Access to food is closely linked to poverty and unemployment, and those lacking access to a disposable income, employment or social grants were more likely than others to be food-insecure (South African Human Rights Commission 2020). Even under normal circumstances, vulnerable communities without decent employment opportunities face a constant struggle for sustainable food security while relying on informal trading for survival.



**...communities without decent employment opportunities face a constant struggle for sustainable food security while relying on informal trading for survival.**

According to Statistics South Africa (2020), there are synergies between food security, unemployment, poverty and inequality. Exacerbating the challenges of poverty and inequality, the strictly imposed lockdown regulations and directives resulted in increased unemployment, loss of income, lack of access to the informal market, food prices hikes, and, ultimately, to limited access to sufficient food. Consequently, the lockdown

aggravated the pre-existing crisis of widespread food insecurity and hunger in South Africa.

The government's food relief initiative was meant to feed the needy communities. Families were eligible to receive food parcels if they were (1) child-headed households suffering from the impact of HIV and AIDS; (2) single parents with no means of income; (3) elderly persons living without help; (4) families where no one was employed; or (5) families where the one person who was working was not getting paid because of the lockdown (Humana People to People 2020). The South African Social Security Agency (SASSA) played a leading role in the distribution of food assistance through vouchers and cash transfers. As part of this effort, the Department of Social Development collaborated with the Solidarity Fund, NGOs and community-based organisations to distribute parcels across the country.

However, as a result of food parcel corruption, the needs of the poor and hungry were not met (Corruption Watch 2020). The structural implications of food-parcel corruption for the right to food during the Covid-19 pandemic exposed the weakness of the government's response in dealing with corruption during emergency situations. More generally, a number of concerns were also raised about the lawfulness of aspects of the government's response to Covid-19, particularly with respect to several fundamental rights enshrined in the Constitution (Mudau 2020). The implementation of food-parcel provision was not transparent, and anti-corruption mechanisms were virtually non-existent.

## The right to food: Scope and normative content

Section 27(1)(b) of the Constitution stipulates that 'everyone has the right to have access to sufficient food'. Section 27(2) places a positive duty on the state to take reasonable legislative and other measures within its available resources to progressively realise this right. Apart from extending this right to everyone, the Constitution confers additional protection to children in section 28(1)(c) by stating that 'every child has the right

to basic nutrition'. The same right is guaranteed to detainees and sentenced prisoners as stipulated by section 35(2)(e). At the international level, the right is also recognised, among others, by article 25(1) of the United Nations Declaration of Human Rights and article 11(1) of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR). However, it has remained unclear how the right to food should be interpreted (Khoza 2004).

The right to food entails that all human beings are entitled to live in dignity, free from hunger, food insecurity and malnutrition. Ziegler (2009) contends that 'the right to food is not about charity, but about ensuring that all people have the capacity to feed themselves in dignity'. Conventionally, the right to food is thought to impose three types of state obligations – the obligations to respect, protect and fulfill. This typology of states' obligations was defined in General Comment 12 by the United Nations Committee on Economic, Social and Cultural Rights (ESCR) and endorsed by states when the Food and Agriculture Organisation of the United Nations (FAO Council) adopted the Right to Food Guidelines in November 2004.

First, the obligation to 'respect' requires that governments desist from taking any measures that arbitrarily deprive people of their right to food. Secondly, the obligation to 'protect' means that states should enforce appropriate laws and take other relevant measures to prevent third parties, including individuals and corporations, from violating the right to food of others. Finally, the obligation to 'fulfill' (facilitate and provide) entails that governments must proactively engage in activities intended to strengthen people's access to and utilisation of resources and means so as to ensure their livelihood, including food security. As a last resort, where an individual or group is unable to en-

joy the right to sufficient food for reasons beyond their control, states have the obligation to fulfill that right directly.

In the South African constitutional context, the right to food may be limited solely in terms of the limitation clause stipulated in section 36 of the 1996 Constitution, to the extent that such limitations would be deemed reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

## Structural implications of food-parcel corruption for the right to food

Prior to the Covid-19 pandemic, about 13.4 million people in South Africa were reported to be food insecure (Statistics South Africa 2019); the lockdown worsened the situation when it caused an unprecedentedly high demand for food. In April 2020, the government began the food-parcel distribution scheme aimed at feeding those who suffered the most from the impact of the lockdown.

Due to their close proximity to the people, local governments are customarily responsible for the provision of basic services. As municipalities are the coalface of service, it was apparent that – in the initial alert levels of the lockdown, when no ordinary free movement was allowed – local leaders could play a leading role in food distribution. It is also important to acknowledge the significant food-parcel assistance that marginalised communities received by way of donations and contributions by non-profit groups acting independently of the government.

**“ As municipalities are the coalface of service, it was apparent that – in the initial alert levels of the lockdown, when no ordinary free movement was allowed – local leaders could play a leading role in food distribution. ”**

However, numerous reports of food-parcel corruption emerged, with allegations that individuals belonging to political parties were selling the food parcels or unfairly distributing them to politically affiliated beneficiaries (Moche 2020). At the height of corruption during the pandemic, President Ramaphosa wrote a scathing letter to every member of the governing party, the African National Congress (ANC), and laid bare the impact of Covid-19-related corruption.

Central to these malfeasances were tenders for personal protective equipment (PPE) awarded to bidders connected with ANC leaders and cases of public servants flouting the law (Government of South Africa 2020b). Significantly, President Ramaphosa stated:

*As we have seen during the Covid response, there are local ANC leaders who have used food parcels meant for the poor to buy political favours from those people in the branch or broader community who they rely on for their positions. These practices quite literally take food out of the mouths of the poor.*

The President's lamentation was his second expression of dismay. His first official outcry came as early as April 2020, when he stated that 'we are deeply disturbed by reports of unscrupulous people abusing the distribution of food and other assistance for corrupt ends' (Government of South Africa 2020a).

Judging from the above, although the food-parcel distribution scheme was meant to be a measure consistent with the fulfilment of human rights, the structural implications of food-parcel corruption refract the scheme's purpose and thus constitute a violation of the right to food. Preventing food-parcel corruption would have enhanced measures geared towards fulfilling the right to food of deserving poor people. The link between corruption and palliatives to address the impact of Covid-19 shows that coordination of the food-parcel initiative lacked proper direction, transparency and accountability.

In times of widespread desperation and suffering, where marginalised and disadvantaged groups needed adequate food in order to earn a livelihood, their trust in local leaders was betrayed by food-parcel corrup-

tion. Needy communities were overlooked due to their unknown political affiliations or lack of money to buy the food parcels which were supposed to be given to them for free.



**Needy communities were overlooked due to their unknown political affiliations or lack of money to buy the food parcels which were supposed to be given to them for free.**

In relation to the linkage between the emergency caused by the Covid-19 pandemic and elections, Ellena et al. (2020) submit that 'there is heightened risk of abuse of state resources and violations of political finance regulations to influence electoral outcomes'. In the South African context, it is obvious that the anti-corruption measures were caught off-guard because of the strong allegations of food-parcel corruption, confirmed by President Ramaphosa. Municipal councillors manipulated the food-relief initiative by choosing who would receive food parcels. In certain instances, 'some have been accused of only giving parcels to their relatives and members of their constituencies, thereby sowing serious divisions within communities' (Mahlangu 2020). In other cases, some councillors were accused of demanding donations and contribution from businesses, but without food parcels reaching the intended recipients. Food-parcel corruption caused food-related protests in several provinces, with there being fears that the protests could turn into national protests.

In view of the above, if there is a future declaration of a national state of disaster caused by a virus or other natural disaster, the palliatives to prevent corruption during emergencies must include strengthening anti-corruption mechanisms to ensure that food distribution processes comply with applicable and binding standards. This will assist in the fulfilment of the right to food enjoyed by everyone, including the disadvantaged and marginalised.

## Call for realising the right to food during Covid-19

---

Mushwana (2016) correctly argues that identifying obstacles that prevent the optimal implementation of the right to food and devising corrective measures that secure its fulfilment are necessary. The Covid-19 pandemic drastically altered the common course that is often projected, desirable and pursuable in the effective implementation of the right to food. In this regard, the emphasis is on the need to take into account the nature of the novel situation caused by the Covid-19 pandemic and the stringent extraordinary legal measures that curtail access to food. Notwithstanding the above, the state is still obliged to fulfill the right to sufficient food for needy and deserving poor people.

In *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC), the Constitutional Court held that the realisation of fundamental socio-economic rights allows people disadvantaged by their social and economic circumstances to 'become more capable of enjoying a life of dignity, freedom and equality'. In this regard, Currie and De Waal (2016: 564) argue that socio-economic rights oblige the state to fully secure for all its members of the society a basic set of social goods, including food. The report of the United Nations Special Rapporteur on the Right to Food, *Critical Perspective on Food Systems, Food Crises and the Future of the Right to Food*, insists that the elimination of hunger and malnutrition requires a holistic, coordinated and rights-based approach. In addition to this substantive assertion and while acknowledging the aggravated food-insecurity and hunger caused by the Covid-19 pandemic as well as the structural implications of food parcel corruption, it is hereby argued that the food-parcel distribution process requires a rights-based approach that is accompanied by strong anti-corruption measures.

Importantly, General Comment 12 of the Committee on ESCR (1999) states that the realisation of the right to food is accomplished when every person has 'physical and economic access at all times to adequate food or means for its procurement'. During periods of natural or other disasters, as in the context of the Covid-19 pandemic, the General Comment provides that states

still bear a core obligation to take the necessary action to mitigate and alleviate hunger, as provided for in article 11(2) of the ICESCR.

The effectiveness of the South African government's food relief initiative in cushioning the effects of Covid-19 among vulnerable groups was dealt a severe blow by its politicisation by municipal councillors, who corruptly used it for electioneering. In the early days of the pandemic, few had adequate information on emerging corruption vulnerabilities and government operations, or dared to challenge state reactions to the pandemic (Ellena et al. 2020). Those who did speak out were rapidly silenced as irrelevant or as acting inappropriately in extraordinary circumstances (Mahlangu 2020).

## Conclusion

---

The food-parcel initiative by the government was meant to fulfill the right of access to sufficient food for all citizens during the lockdown. This would have assisted in mitigating food insecurity and hunger. However, food-parcel corruption had a major impact on the effectiveness of state responses to the Covid-19 pandemic. Given the enormous need for food, the hunger of disadvantaged and marginalised groups was not appropriately alleviated or eradicated but instead aggravated by corruption. These groups have been profoundly affected by Covid-19 and require rapid, direct assistance, without which some may find it difficult, if not impossible, to recover during the post-pandemic phase (UN Office on Drugs and Crime 2020).

The emergency response to the Covid-19 pandemic came with diminished transparency in food distribution, impacting on the ability of governmental oversight mechanisms to deter, detect and demand accountability for corruption. The length and severity of the Covid-19 crisis have undermined anti-corruption efforts by entrenching emergency measures in a way that erodes accountability measures and detracts from corruption-prevention priorities. The thriving of food-parcel corruption meant that the most affected people, the disadvantaged and marginalised groups, lack access to food.

Hence, the structural implications of this corruption constitute a violation of the right to food. The concerns raised in this article are also mindful of future circumstances where a national state of disaster could be declared. Therefore, from a human rights perspective, emergency responses must place the respect, promotion and fulfilment of human rights as central to their conception and implementation. Corruption cannot be allowed to continue unabated when the most vulnerable in society are forced to endure unbearable hunger at the expense of corrupt electioneering or personal enrichment on the back of state resources originally meant to feed the needy. The governmental response should have ensured that the intended recipients enjoyed their rights to have access to sufficient food. Lastly, the constitutional-democratic principles of human rights, responsiveness and accountability demand that the government and municipal councillors have to fulfill their legal obligations in the realisation of the right to sufficient food. The latter must desist from corrupt activities that perpetuate socio-economic vulnerabilities in society.

*Paul Mudau is a PhD Candidate and Researcher at the School of Law, University of the Witwatersrand. Mudau holds an LLB from the University of Limpopo, an LLM in Human Rights and Democratisation in Africa from the University of Pretoria, and an LLM in Law, State and Multilevel Government from the University of the Western Cape.*



**Corruption cannot be allowed to continue unabated when the most vulnerable in society are forced to endure unbearable hunger at the expense of corrupt electioneering or personal enrichment on the back of state resources originally meant to feed the needy.**

## References

- Corruption Watch (2020) 'Food parcel distribution falls prey to corruption'. Available at <https://bit.ly/3qfASZH>
- Currie, I & De Waal, J (2016) *The Bill of Rights Handbook*. Cape Town: Juta.
- Ellena, K (2020) 'Preventing government corruption in crises', IFES COVID-19 Briefing Series. International Foundation for Electoral Systems.
- Government of South Africa (2020a) 'Additional Coronavirus COVID-19 economic and social relief measures'. Available at <https://bit.ly/3qSL6xS>
- Government of South Africa (2020b) 'Let this be a turning point in our fight against corruption'. Available at <https://bit.ly/3zGUsRE>
- Humana People to People (2020) 'Food relief initiative during lockdown for needy communities'. Available at <https://bit.ly/3G8iWFR>
- Khoza, S (2004) 'Protecting the right to food in South Africa: The role of framework legislation', *ESR Review* 5(1) 3–5.
- Mahlangu, T (2020) 'Government to tackle food parcel corruption'. Available at <https://bit.ly/3t6OTKK>
- Moche, T (2020) 'Timeline: COVID-19 food parcels, PPE corruption timeline'. Available at <https://bit.ly/3n8eP4R>
- Mudau, P (2020) 'Has the COVID-19 pandemic exposed the fragility of South Africa's constitutional democracy?' Available at <https://bit.ly/3G9MrHe>
- Mushwana, L (2016) 'Right to food is also a human right'. Available at <https://bit.ly/31CkGle>
- South African Human Rights Commission (2018) 'The right to access to nutritious food in South Africa 2016–2017'. Available at <https://bit.ly/3qWtMbC>
- Statistics South Africa (2019) 'Towards measuring food security in South Africa: An examination of hunger and food inadequacy', Report: 03-00-14.
- United Nations Committee on Economic, Social and Cultural Rights (1999) CESCR General Comment No. 12: The Right to Adequate Food (Art. 11).
- United Nations Office on Drugs and Crime (2020) 'Accountability and the prevention of corruption in the allocation and distribution of emergency economic rescue packages in the context and aftermath of the COVID-19 pandemic'.
- United Nations Special Rapporteur on the Right to Food (21 January 2020) *Critical Perspective on Food Systems, Food Crises and the Future of the Right to Food*, UN Doc A/HRC/43/44. Available at <https://undocs.org/A/HRC/43/44>
- Ziegler, J (2009) 'What is the right to food?' Available at <https://bit.ly/3q3i0Si>

# FEATURE

## Realising the Right to Education for Learners with Disabilities during the Covid-19 Pandemic in Kenya

Wilson Macharia

### Introduction

---

*On 11 March 2020, the World Health Organization declared Covid-19 a pandemic. Following the confirmation of the country's first Covid-19 case on 12 March 2020, the Government of Kenya acted to address the pandemic through a number of regulatory measures anchored upon the Public Health Act of 1921 and the Public Order Act of 1950. Subsequently, policy-makers, including those in the education sector, undertook Covid-19 response and recovery measures that could disproportionately affect the most marginalised people in society. These include learners with disabilities (LWDs), who are vulnerable and often depend strongly on accommodations that are designed to overcome constraints arising from their disabilities.*

Generally, LWDs have been subjected to discrimination in education for a long time in Kenya, with only about 9 per cent of all persons with disabilities (PWDs) being able to attend public schools with other non-disabled children (Kenya National Survey for Persons with Disabilities 2009). The majority of LWDs are forced to attend special schools designed to accommodate specific categories of disabilities. Even before the pandemic, LWDs were less likely than other learners to complete education, and more likely to be excluded altogether from schooling.

In order to curb the spread of the virus, Kenya closed all learning institutions on 20 March 2020, and subsequently adopted remote teaching to support distance learning and online education. Most of the learning institutions hastily moved their education programmes onto virtual platforms, an approach which has raised attendant difficulties for learners who cannot afford

the necessary software and hardware, or who face logistical difficulties when they seek to participate in online classes.

These difficulties have been magnified for LWDs since, far too often, the new changes have not taken account of their specific needs. Social distancing requirements have meant that LWDs may not use human assistance, virtual platforms have not been configured to be accessible, and learners with reduced mobility have been less able to attend classes that conflict with Covid-19 restrictions such as curfews. This creates an imperative for states to carry out a multidimensional response to the crisis which ensures that the interests of society's most marginalised groups are appropriately addressed. This article explores the measures that the Government of Kenya has put in place to support learning for LWDs during the Covid-19 pandemic and discusses effective approaches for ensuring inclusive learning for



**Most of the learning institutions hastily moved their education programmes onto virtual platforms...**

PWDs during this period. Additionally, the article suggests measures to improve the realisation of the right to education for LWDs during the Covid-19 period and beyond.

Among them are: developing disability-specific measures to address the needs of LWDs; enhancing the accessibility of Covid-19-related information, facilities, services and programmes; undertaking meaningful consultation with LWDs and their representative organisations and institutions; and establishing monitoring and evaluation frameworks to ensure that LWDs are not left behind.

## Recognition of the right to education for LWDs

The promulgation of the Constitution of Kenya 2010 (Kenyan Constitution) brought with it a progressive bill of rights that enshrines socio-economic as well as civil and political rights. Odongo & Musila (2016) have argued that the rationale for the consensus on the inclusion of socio-economic rights was twofold.

First, it was the result of the demand for 'a constitutional framework that would enable the state to transform society in social, economic and cultural spheres, and to protect the most vulnerable and marginalised'. Secondly, there was wide recognition of these rights as justiciable rights, as evidenced by a wealth of jurisprudence and literature on their judicial enforcement in other African countries such as South Africa.

It should be noted that the Kenyan Constitution places a strong focus on vulnerable and marginalised groups, imposing a duty upon all state organs and public officers to address their needs, including the needs of persons with disabilities and of children. This gives vulnerable and marginalised groups an opportunity to demand accountability from the state in regard to measures it has taken to protect, promote and fulfill their rights, including during a pandemic such as Covid-19.

The right to education is recognised in article 43(f) of the Kenyan Constitution and reinforced under article 53, which provides for every child's right to free and compulsory basic education. The Constitution also en-

shrines substantive provisions on persons with disabilities that have a direct bearing on the right to education for LWDs. Article 54 provides as follows:

1. A person with any disability is entitled – ...
- b. to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
- c. to reasonable access to all places, public transport and information;
- d. to use sign language, Braille or other appropriate means of communication; and
- e. to access materials and devices to overcome constraints arising from the person's disability.



**This gives vulnerable and marginalised groups an opportunity to demand accountability from the state in regard to measures it has taken to protect, promote and fulfill their rights, including during a pandemic such as Covid-19.**

In addition to these constitutional provisions, the right to basic education for LWDs is protected under national legislation, particularly under the Basic Education Act of 2013 and the Persons with Disabilities Act of 2003. Despite the express recognition of LWDs under its provisions, the Basic Education Act has been criticised for failing to provide for reasonable accommodation in education and for creating 'a system in which all children with disabilities are required to attend separate schools, solely based on their disability' (Aseka & Kanter 2014).

This failure may be cured by the progressive implementation of the Sector Policy for Learners and Trainees with Disabilities, a normative framework adopted

to promote inclusive education in Kenya. Kenya is also party to a range of international instruments that form part of Kenyan law under article 2(6) of the Constitution and promote and protect the right to education for LWDs. These include the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities (CRPD); the African Charter on Human and Peoples' Rights; and the African Charter on the Rights and Welfare of the Child.

## Government response to Covid-19's effects on LWDs

The Covid-19 pandemic caused a global education crisis that disrupted learning for more than 1.5 billion learners worldwide (Human Rights Council 2020; UNESCO 2020), including more than 18 million Kenyan learners and trainees (Ministry of Education 2020). This is a significant threat to the attainment of Sustainable Development Goal 4 on access to quality, equitable and inclusive education. To curb the spread of the virus, the Government of Kenya took a three-pronged approach to facilitate the continuation of remote learning: providing digital learning; supporting access to textbooks and other teaching and learning materials in remote areas; and improving water and sanitation infrastructure in preparation for the reopening of schools.



**First, learners who do not have access to the requisite digital devices such as TV and radio were left out.**

Undoubtedly, the adoption of remote teaching to support distance learning and online education posed a challenge to the inclusion of LWDs, most of whom would lack access to the requisite media of learning. First, learners who do not have access to the requisite digital devices such as TV and radio were left out. Secondly, learners with print disabilities did not have home access to assistive devices such as braille devices, screen readers, magnifiers and other devices which

are available in special and mainstream schools. Thirdly, lessons conducted on television cannot be accessed by learners with hearing impairments unless captioning and sign language interpretation is provided. Also, most learners with intellectual, mental and psychosocial disabilities require a more adapted and personalised mode of learning.

In other words, remote learning for LWDs in most cases would require far more than the availability of a TV or radio, a pen, and an exercise book. The challenges faced by LWDs are directly linked to the interactions between their impairments and their living conditions, and are exacerbated by a lack of effective communication media as well as a lack physical human support as a result of social distancing. Additionally, most LWDs from poor households depend on schools for meals and basic health-care services and information.

To address the effects of Covid-19 on education, the Ministry of Education, in collaboration with other stakeholders, developed the Basic Education COVID-19 Emergency Response Plan, which aims to ensure continued learning and promote the health, safety and well-being of learners, teachers and education officials during and after the coronavirus crisis. The Response Plan targets, among others, the most vulnerable learners in the Kenyan school system. The objectives of the one-and-a-half-year plan include providing access to quality, equitable and inclusive education, and developing and implementing intervention programmes for the marginalised and most vulnerable.

Commendably, the Response Plan mainstreams disability issues and proposes some disability-specific interventions, such as:

- sharing educational content in sign language, with more screen space for the sign language interpreter;
- using captions and providing audio descriptions during online and televised sessions;
- providing offline resources such as textbooks, study guides and equipment to learners from poor, marginalised and vulnerable households;
- providing appropriate psychosocial support to learners, teachers and education officials, as well as caregivers, to manage the impact of Covid-19 on learners;

- identifying and supporting the most vulnerable learners who may have suffered due to Covid-19; and
- providing scholarships for the most vulnerable, including LWDs.

At the time of writing, it is difficult to assess the effectiveness of the plan since it is still in the initial stages of implementation. Be that as it may, the plan offers inclusive interventions which, if properly implemented, should enhance the effective participation of LWDs on an equal basis with others.

## What is the way forward?

Given that the Covid-19 pandemic has deepened pre-existing inequalities, it is necessary that the Government of Kenya mainstream disability and, in some cases, develop disability-specific measures in its Covid-19 response to address concerns that have been raised by the disability movement. Several human rights mechanisms and bodies have outlined key actions and recommendations that can be employed to ensure the inclusivity of Covid-19 response and recovery measures, including the right to education. In regard to these recommendations, this article identifies four overarching areas of action that Kenya should consider as it implements the Response Plan.

First, the Ministry of Education should develop disability-specific guidelines to build the capacity of the implementing partners in order to ensure that remote learning platforms are safe and accessible to LWDs; ensure that teachers are trained in accommodating LWDs remotely; and ensure that special education programmes are included in measures supporting the continuity of education for learners with severe disabilities. Moreover, the guidelines should offer support to the caregivers of LWDs, including those with developmental or intellectual disabilities, in implementing

specific considerations when managing the care and education of children at home.

Even though the Response Plan includes some key interventions that address concerns that have been raised with regard to LWDs, it does not provide specific interventions that should be applied when accommodating learners with different types of impairments. As mentioned, LWDs have different types and degrees of impairment, a fact that necessitates individualised interventions – mere acknowledgement of the barriers LWDs face cannot address their concerns.

Secondly, Kenya should ensure that all information, facilities, services and programmes that have a bearing on the education of LWDs are accessible to all. Notably, Kenya has not satisfactorily ensured that accessibility is at the centre of its activities. For example, the educational activities that have been undertaken through mainstream media have not included captions or provided sign language interpretation for learners who are deaf.

Additionally, the Covid-19 measures that have been undertaken, including the Response Plan, have not been provided in alternative formats. This is despite the availability of timely and comprehensive information on disability considerations during the Covid-19 period, as provided by the WHO and the disability movement. To enhance accessibility of all information, Kenya should

- include captioning and sign language for all live and recorded educational events and communications;
- convert educational materials into an easy-read format so that they are accessible for learners with intellectual disability or cognitive impairment;
- develop accessible written information products by using large print and braille formats for people who are deaf-blind; and
- include captions for images used in documents or online media.



**...the educational activities that have been undertaken through mainstream media have not included captions or provided sign language interpretation for learners who are deaf.**

Thirdly, Kenya should undertake meaningful consultation with, and enhance the active participation of, LWDs and their representative organisations while undertaking Covid-19 response and recovery measures. Commendably, a purposive reading of the Response Plan can lead to the conclusion that disability focal points were involved in developing the plan. The proposed interventions, some of which are disability-related, provide clear indication of such engagement.

This notwithstanding, disability focal points, and even LWDs, should be involved in the development of the proposed disability-specific implementation guidelines. Without a doubt, the educational experiences of LWDs could contribute greatly to creativity, new approaches, and innovative solutions to the identified challenges. Additionally, local organisations of PWDs can assist in the identification of LWDs and their specific needs, and in the development of key messages aimed at building capacity on disability inclusion in communities.

Finally, the development of a clear monitoring and evaluation strategy should inform the assessment of the successes and challenges in the proposed interventions, and facilitate necessary adjustments if needs be. It should plug administrative loopholes that have resulted in delays in disability-focused investments and which should be considered a priority for the country. Additionally, the strategy should ensure the availability of effective accountability measures to guarantee proper implementation of disability-related policies, strategies, programmes and activities.

The long-term impact of Covid-19 on education will depend on the measures that the government adopts now. Accordingly, to avoid reversing the progress that has been made in recent decades, the interventions undertaken by the government should be relevant in the long term.

## Conclusion

The inclusion of PWDs in the Covid-19 response and recovery plan is essential for ensuring that no one is left behind; it is also a critical test of the commitments by Kenya made in ratifying the CRPD. The CRPD, the national human rights framework, and the 2030 Agenda call for PWDs to be placed at the centre of all efforts, including those relating to Covid-19. As things stand, Kenya is increasingly recognising the need to mainstream disability in its pandemic response. Nonetheless, a disability rights-inclusive approach is required so as to ensure PWDs are not left behind in the global mission of 'building back better'. In the words of the UN Secretary-General:

A disability inclusive Covid-19 response and recovery will better serve everyone. It will provide for more inclusive, accessible and agile systems capable of responding to complex situations, reaching the furthest behind first. It will pave the way for a better future for all.

*Wilson Macharia is an advocate of the High Court of Kenya and a senior graduate assistant at Strathmore University Law School. He also coordinates the Public Participation Disability Inclusion Index project, which seeks to enhance participation of PWDs in political and public life in Kenya. At the time of writing, Macharia was an LLM candidate at the Centre for Human Rights, University of Pretoria, and pursuing a brief internship with the Dullah Omar Institute at the Faculty of Law of the University of the Western Cape.*

*This article is an extract from a forthcoming book chapter, 'Covid-19 pandemic and the socio-economic rights of persons with disabilities: A comparative analysis of Kenyan and South African Laws and policies'(2021).*



**...the strategy should ensure the availability of effective accountability measures to guarantee proper implementation of disability-related policies...**

## References

---

Aseka, W & Kanter, AS (2014) 'The Basic Education Act 2013: Why is it one step forward and two steps back for children with disabilities in Kenya?' 2(35) African Disability Rights Yearbook.

Human Rights Council (2020) Right to Education: Impact of the Coronavirus Disease Crisis on the Right to Education – Concerns, Challenges and Opportunities. Report of the Special Rapporteur on the Right to Education, A/HRC/44/39.

Human Rights Watch (2020) 'Impact of Covid-19 on children's rights in Africa'. Available at <https://bit.ly/3q65LPQ>

Ministry of Education (2018) Sector policy for learners and trainees with disabilities.

Ministry of Education (2020) Kenya Basic Education Covid-19 Emergency Response Plan. Available at <https://bit.ly/3F7YBin>

Odongo, G & Musila, G (2016) 'Direct constitutional protection of economic, social and cultural rights under Kenya's 2010 Constitution' in Chirwa DM & Chenwi L (eds), The protection of economic, social and cultural rights in Africa. Cambridge University Press.

UNDP (2018) 'Human development indices and indicators: 2018 Statistical update'. Available at <https://bit.ly/3f3Bivz>

UNESCO (2020) 'Including learners with disabilities in Covid-19 education responses'. Available at <https://bit.ly/31DzwON>

United Nations (2020)

# FEATURE

## The Impact of the Covid-19 Pandemic on Children's Rights to Education in South Africa

Nomzomhle Kona

### Introduction

---

*In South Africa, the right to a basic education is entrenched in section 29(1) of the Constitution. However, the outbreak of Covid-19 resulted in the declaration of a national state of disaster and nationwide lockdown that gravely impacted on children's right to education. Among other things, the regulations proclaimed under the Disaster Management Act of 2002 prescribe social distancing, quarantine and self-isolation, measures which were introduced to curb the spread of Covid-19. It is within this context that educational facilities were closed as of 26 March 2020, forcing the education system to rely on digital technology in order to continue teaching and learning.*

However, due to the digital divide, the vast majority of children could not receive education after the closure of schools. The question of how the right to education can be realised during the pandemic has been a subject of great contention. Despite the new constitutional dispensation, the pandemic has exposed socio-economic inequalities in the country's education system in regard to access to basic education. As a result of these inequalities, the vast majority of pupils spent a significant number of months without attending classes or continuing academic activities remotely.

This article examines how children's rights to education were impacted on by the pandemic. It seeks to shed light on children's struggles to access education and the challenges that go with open distance learning, digital learning, limitations on access to technology, and un conducive learning environments during the lockdown. In unpacking these issues, the article considers how the government can still attempt to realise children's rights to education during the era of Covid-19. Overall, it argues for the need for education departments and learners to embrace technological solutions in order to ensure that children's rights to education are realised.



**Despite the new constitutional dispensation, the pandemic has exposed socio-economic inequalities in the country's education system in regard to access to basic education.**

This article examines how children's rights to education were impacted on by the pandemic. It seeks to shed light on children's struggles to access education and the challenges that go with open distance learning, digital learning, limitations on access to technology, and un conducive learning environments during the lockdown. In unpacking these issues, the article considers how the government can still attempt to re-

alise children's rights to education during the era of Covid-19. Overall, it argues for the need for education departments and learners to embrace technological solutions in order to ensure that children's rights to education are realised.

The Constitution of South Africa is considered one of the best constitutions in the world, with its founding values based on human dignity and the achievement of equality and freedom. It has an array of socio-economic rights, including the right to education and the protection of the best interests of the children. These promise a bright future and the restoration of justice after many years of colonisation and apartheid. Yet, notwithstanding such progressive changes, the advent of Covid-19 has exposed discrepancies in the socio-economic accessibility of children's rights to education.

As is well known by now, the coronavirus has had destructive and devastating effects on humanity. It has changed the way we live, limited our rights to freedom of movement, trade and association – in the case of South Africa, doing so by virtue of lockdown restrictions imposed in terms of the Disaster Management Act – and, in particular, it has disrupted educational processes.

This article presents a broad overview of the challenges faced by children during Covid-19 in respect to their enjoyment or exercise of their right to education. Like many other countries, South Africa declared a national state of emergency with strictly imposed regulations that curtailed children's right to education. While Covid-19 has primarily affected human health, its effects have trickled down to education, largely because of the extension of school closures that were meant to observe regulations prescribing social distancing and self-isolation.

## Children's' rights to basic education

---

Children's right to education is provided for in terms of section 29(1) of the South African Constitution. Globally, the right to education is recognised by article 26 of the Universal Declaration of Human Rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a cornerstone for the international protection of human rights. The ICESCR is one of the most comprehensive texts on the right to education, especially in its articles 13 and 14. The International Covenant on Civil and Political Rights (ICCPR) also deals with the right to education within the broader context of freedom of thought, conscience and religion. Article 18(4) provides that 'States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.

The Convention on the Rights of the Child (CRC) refers to education in articles 28 and 29. Article 28 affirms the right of the child to education and the state's duty, notably, to ensure that primary education is free and compulsory. In addition, the CRC states that school discipline should be administered in a manner consistent with a child's human dignity. Article 29 adds that the education of the child shall be directed towards developing the child's personality, talents, and mental and physical abilities to their fullest potential.

Additionally, articles 5(v) and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination recognise the right to education. The Convention on the Rights of Persons with Disabilities also recognises the right to education. At continental level, the right to education is provided for in articles



**Like many other countries, South Africa declared a national state of emergency with strictly imposed regulations that curtailed children's right to education.**

11 and 17 of the African Charter on Human and Peoples' Rights, as well as article 17 of the African Charter on the Rights and Welfare of the Child.

## The impact of Covid-19 on children's rights to education

The extended interruption of contact learning disengaged students from the process of learning, and it is very likely that the knowledge they acquired through other means is limited (World Bank 2020). Many children face learning challenges; some are dealing with socio-economic problems, while others are children with special educational needs whose learning would be more effective in a physical-contact class setup. These challenges have been obstacles to remote learning, as has the failure to access information through the technology platforms that are being used.

Due to the closure of schools, educators were unable to complete the 2020 curriculum (Van der Berg & Spaul 2020). Strategies to try and save the academic year involved remote learning. However, the country's persistent socio-economic inequalities have been exposed by the digital divide and digital illiteracy. Many public schools have limited resources and little exposure to technology or access to digital platforms to implement online learning (Van der Berg & Spaul 2020); by contrast, many better-off schools were able to assist their teachers to prepare online content for learners.

Due to the closure of schools, educators were unable to complete the 2020 curriculum (Van der Berg & Spaul 2020). Strategies to try and save the academic year involved remote learning. However, the country's persistent socio-economic inequalities have been exposed by the digital divide and digital illiteracy. Many public schools have limited resources and little exposure to technology or access to digital platforms to im-

plement online learning (Van der Berg & Spaul 2020); by contrast, many better-off schools were able to assist their teachers to prepare online content for learners.

As such, it has been difficult for South Africa to implement a remote-learning strategy effectively because access by all learners countrywide has been impossible. Consequently, learners from disadvantaged backgrounds are left behind, with schools' lack of appropriate remote learning systems standing to exacerbate inequality in education. This can result in learners becoming demoralised about completing their studies and hence dropping out of school.

Van der Berg (2015) and Spaul & Kotze (2015) postulate that many children in academically weaker schools perform below the required benchmarks. Therefore, Covid-19 will worsen learning deficits, increasing inequalities in the learning system. Despite the fact that schools have been permitted to gradually open with limited numbers of learners in class, who are taught interchangeably, educators are still struggling to cover the whole syllabus within a short space of time. A key contributing factor is that schools were not able to implement remote learning. It has therefore become necessary to determine how the syllabus might be implemented without detracting from learners' ability to progress to the next grades.

Statistics South Africa shows in its 2018 General Household Survey that only 22 per cent of households have computers (StatsSA 2019: 63). Although 90 per cent of households in South Africa have access to mobile phones, only 60 per cent access the internet with them (StatsSA 2019: 56). It should be noted this data refers to adults, so we do not know whether children in these households had access to devices and the internet during the lockdown. Those learners within the remote learning group may not receive adequate supervision from their parents or caregivers, who might not be equipped to provide learning guidance to their children.



**These challenges have been obstacles to remote learning, as has the failure to access information through the technology platforms that are being used.**

American research shows that learners there between the grades of 3 to 8 may have lost 30 per cent of a year's learning in reading and more than 50 per cent in mathematics, whereas younger children may have lost almost a full year of mathematics (Van der Berg & Spaul 2020: 16). In the South African context, the numbers are probably much higher, since many schools have few educational materials to conduct effective remote learning. The foundation phases, grades R and 1, are crucial, especially for mathematics, because if children miss this phase their understanding of mathematics in other grades will be adversely affected (Spaul & Kotze 2015). Furthermore, international research on the cumulative impact of losses in learning shows that these effects continue five years after the fact (Das et al. 2020).



**In contrast to online classes, this was possibly a better way of trying to reach learners throughout the country, because almost every household has a television**

South Africa aired some learning classes via the national broadcaster, the South African Broadcasting Corporation (SABC) during the lockdown period (DBE 2020b). In contrast to online classes, this was possibly a better way of trying to reach learners throughout the country, because almost every household has a television. However, even with this intervention in place, problems persisted; for example not every household is a suitable or conducive environment for learning. Furthermore, the intervention targeted only grades 10–12 and lessons ran for only 90 minutes per day.

There has long been a culture of dropping out of school, especially by learners from low-income groups; however, Covid-19 and the extended closure of schools has made this problem worse (World Bank 2020). Child-headed families were among the families that were hit hardest by the lockdown. The danger of the

virus itself, and concern about when the pandemic would end, was a concern to these families. There was enough stress just dealing with where the next meal would come from, and trying to focus on school. Many dropped out or resorted to theft because the piece jobs that would normally be available outside of lockdown were nowhere to be found.

Children from dysfunctional or abusive homes looked forward to leaving their homes to go to school, which is a safe haven for them. Being at home for a very long time and experiencing abuse affected them psychologically (Save the children 2020) and had negative impacts on their education. Children from extremely disadvantaged backgrounds are the most affected because their families occupy one-room shelters where it is difficult to do schoolwork or avoid conflict; they can be caught up in the conflicts of their parents. It can be very difficult for them to focus on their education as they can suffer psychologically and their academic work can be affected.

Most schools provide feeding schemes, and for many children it is a highly anticipated meal of the day. The extended closure of schools precludes these learners from accessing those meals unless alternative measures are in place (Van der Berg & Spaul 2020: 14). The General Household Survey data demonstrated that, even prior to the lockdown, about 2.5 million children lived below the food poverty line. The closure of schools severely exacerbated their lack of food (Van der Berg & Spaul 2020: 2). In 2018, statistics showed that approximately 77 per cent of children in public schools, or an estimated 9 million children, received a meal at school (StatsSA 2019). Without meals, children cannot fully commit to their schoolwork.

A vast number of people lost employment during lockdown. People became depressed, not knowing how they would feed their families and meet their daily expenses. The ban on alcohol and cigarettes, coping mechanisms for certain people, caused many of them to have mental breakdowns and some even committed suicide (Van der Berg & Spaul 2020). Statistics show that children living through such circumstances are likely to have long-term psychological stress. As a result, their academic performance is affected.

When the economy reopened, some schools remained closed (Van der Berg & Spaul 2020: 3). This, however, had a negative impact: caregivers would go to work and leave children at home without care. When there is no one to supervise remote learning, this puts strain on children's education and they tend to fall behind. The statistics from the Quarterly Labour Force Survey (QLFS) data of 2019 demonstrate that when all of the workforce returns to work, there will be approximately 2 million children ranging from the ages of 0–15 years who do not have a 15-year-old or older sibling or a caregiver to care for them. Therefore, they will have little or no academic supervision.

South African classrooms accommodate approximately 40 learners and it is difficult to implement social distancing in such a setup. However, other measures – such as washing hands with water and soap, constantly sanitising, and wearing masks – should be observed. This leads to the question of the accessibility of running water and how many learners there are in each classroom.

We can use the Covid-19 pandemic as an occasion to reflect on the 26 years of democracy that have passed – in all those years, the country has not been able to equip all schools with running water and proper sanitation. Apart from the fact that access to running water is essential for curbing Covid-19, it is a basic right for the dignity of all humans. However, on 7 June 2020, the Minister of Basic Education, Angie Motshekga, announced that 95 per cent of schools were now equipped with running water (DBE 2020a). The government should be commended for achieving such remarkable progress within a short period of time.

## Recommendations

---

Medical research on Covid-19 shows that the mortality rate from this disease is strongly tied to age (Department of Health 2020). Therefore, those who are sus-

ceptible to being infected by Covid-19 and experience severe illness are older people. South African medical reports show that approximately 80 per cent of the people who died of Covid-19 were 50 years or older. Thus, those who are between the ages of 0–19 have a very small chance of dying of Covid-19.

These medical findings are of great import in this discussion because school closures have been justified as a way to preclude the health-care system from being overwhelmed and of protecting children and educators who are at a high risk of contracting Covid-19. Based on the above research, there is no reason why some schools are still closed or other grades are still not yet back at school. However, great concern has been shown by teacher societies, which caution against the opening of schools because many teachers are older and may contract the virus. That is why safety measures should be put in place to ensure that they remain healthy, and at the same time are able to teach learners and not lose academic years.

Many learners are from families which have a reduced income. This may limit learners' attendance at school because there is no money for school fees. Therefore, schools should consider cancelling the fees temporarily, or negotiate how fees can be paid over time, rather than prohibiting learners from attending classes.

## Conclusion

---

The Covid-19 pandemic has transformed our lives in many ways. When Covid-19 first reached South Africa, it was unclear what impact it would have on children, which is why schools were closed for such a long period. However, now that medical research has shown that children are not so susceptible to being infected by Covid-19, they should be allowed to return to school. During the national lockdown, many children suffered psychologically, others went to bed without food, while others did not learn through the remote learning sys-



**The General Household Survey data demonstrated that, even prior to the lockdown, about 2.5 million children lived below the food poverty line.**

tem because of inequalities in access to learning materials. Therefore, the full return of children to schools is in their best interests, and any further delay will be detrimental to their education.

*Nomzomhle Kona is a final-year LLB student at the School of Law, University of the Witwatersrand.*

## References

Actuarial Society of South Africa (2020) Department of Health Covid Modelling Symposium. Available at <https://bit.ly/3qWx2n7>

Das, J, Daniels, B & Andrabi, T (2020) 'We have to protect the kids', RISE Insight. Available at <https://bit.ly/3G7BS7x>

Department of Basic Education (DBE) (2020a) 'State of readiness for the reopening of schools'. Available at <https://bit.ly/3t8YErO>

Department of Basic Education (DBE) (2020b) 'Basic Education and SABC launch Coronavirus COVID-19 TV and radio curriculum support programmes for learners'. Available at <https://bit.ly/34yANYw>

Our World in Data (2020) 'Coronavirus: Case fatality rates by age'. Available at <https://ourworldindata.org/mortality-risk-covid>

Save the Children (2020) 'Children at risk of lasting psychological distress from coronavirus lockdown. Available at <https://bit.ly/3f6yAFL>

Spaull, N & Kotze, J (2015) 'Starting behind and staying behind in South Africa: The case of insurmountable learning deficits in mathematics', *International Journal of Educational Development* 41.

Statistics South Africa (StatsSA) (2019) *General Household Survey 2018*. Pretoria: StatsSA.

Van der Berg, S & Spaull, N (2020) 'COVID-19 school closures in South Africa and its impact on children', *South African Journal of Childhood Education* 10(1).

Van der Berg, S (2015) 'What the Annual National Assessments can tell us about learning deficits over the education system and the school career', *South African Journal of Childhood Education* 5(2).

World Bank (2020) 'Guidance note on education systems' response to COVID-19'. Available at <https://bit.ly/3JXSu46>

## FEATURE

# Re-Examining the Right to Education for Children with Disabilities in Uganda's 'New Normal'

*Tuhairwe Herman and Godfrey Ayeranga*

*Prior to the Covid-19 pandemic, children with special needs in Uganda were educated in three types of schools – special schools, units in mainstream schools, and 'all-inclusive' schools which allow access to all children whether or not they have disabilities. In March 2020, Uganda recorded its first Covid-19 case, prompting the President to issue a stay-at-home order and declare, inter alia, the closure of all educational institutions (Kiplagat & Kamoga 2020). These institutions have remained closed since then, even though other sectors of the nation gradually reopened. Schools were initially supposed to reopen fully on 27 April 2020, but this was postponed to 4 June and, thereafter, indefinitely (Mukwanason 2020).*

Both the President and Minister of Education intimated that schools would not be reopened until a vaccine or cure is discovered (Mukwanason 2020). With the continued closure of schools, the Ministry of Education directed that learning should continue from home and be offered by parents and guardians or through radio and television (New Vision 2020). There was, however, no further coordination or guidance regarding the conduct of the classes. As such, radio and TV stations, which are primarily private-run entities, offer classes at times of their own discretion. In the absence of a nationally timetable or syllabus to follow, teachers follow their own routines and there is no uniform allocation of time. Some topics are inevitably not covered, while others are repeated by the various media channels.

The lessons are focused on students in 'candidate' classes (Primary Seven, Senior Four and Senior Six) who were set to undertake various national examinations later in 2020. The education is also teacher-centred rather than learner-centred. For the entire lesson period, the teacher engages in a monologue with the camera in front of him or her, and there is no opportunity for the learner to ask questions or seek clarification. Without feedback from the learners, it is difficult, if not impossible, to determine the effectiveness of such classes. The teacher's pace, being constant, does not cater for the needs of various students.

To mitigate such issues, some teachers have resorted to contacting parents and caregivers to share educational materials. But this costs money, whereas the TV and radio classes are free. In addition, some of the children are in hard-to-reach areas and are unable to access materials (Murungi 2020).

Even before the closure of education institutions due to the Covid-19 pandemic, children with disabilities were often excluded from mainstream education (Kalibbala 2018). With disability still a source of stigma in most communities (Nangosi 2014), children and their families have not been receiving sufficient support. The classes currently being conducted have excluded children with special needs. In all the lessons taught since March 2020, there has been no consideration of children with special needs. For example, there are no sign language interpreters to cater for learners with hearing impediments (Nangozi 2020). In addition, because teachers have to conduct classes in a short time, they tend to rush through the content, while children with physical disabilities are unable to take notes at the same pace as those without disabilities (Nangozi 2020).



**The education is also teacher-centred rather than learner-centred.**

Children who have visual impairments require the use of braille devices, computers or other related devices to take notes while in class (Kirk et al. 2006). Francis Dawka (2014) has argued that ‘the use of appropriate technological devices promotes effective inclusion’. Those children who are unable to afford such learning devices at home can only listen but are unable to take notes, and so are left behind – this is all the more so in the case of those with intellectual disabilities. With schools that have such devices having been closed indefinitely, learning for students with visual impairments has more or less come to an end. Studying for such children has been difficult or impossible as it is hard to catch up with other students without disabilities. Even students with mild visual impairments will find that fonts and illustrations on TV may not be large enough.

**“ Studying for such children has been difficult or impossible as it is hard to catch up with other students without disabilities.**

Aware of the low coverage of TVs and radios, especially in the rural areas of Uganda, the Ministry of Education, with support from UNICEF, printed ‘self-study’ packages and handed them to local council officials for onward distribution to children across the country (Mukalele 2020). None of the materials, however, included any content for children with special needs, something that the Ministry of Education conceded was a ‘big shame’ (Nangozi 2020).

In view of such inequalities, the only children with disabilities who have continued to undertake education are those whose parents or caregivers are able to afford private tutors in their homes, or those whose private schools have reached out to them. Prior to the Covid-19 lockdown, less than 20 per cent of children with disabilities were able to access education (World Bank 2020). However, the pandemic has aggravated inequality with regard to access to education, notwithstanding Uganda’s obligations arising from international, regional and national legislation.

## Legal framework on the education rights of children with disabilities

### *International legal framework: Soft law*

The Universal Declaration of Human Rights (UDHR) recognises the right of every person to education, including children (article 26). This provision also applies to children with special needs. Similarly, article 2 of the Sundberg Declaration provides that every disabled person should be able to exercise his or her fundamental right to have full access to education. Article 2 therefore mandates the state to take effective action to ensure the fullest possible participation by disabled persons.

In its General Comment No. 4 (2016), the Committee on the Rights of Persons with Disabilities (CRPD Committee) requests that states actively involve and consult persons with disabilities (PWDs), including children with disabilities, through their representative organisations (OPDs) in all matters regarding the planning, monitoring and evaluation, and implementation of inclusive education policies. It has also urged states to ensure that educational institutions consult with PWDs and ensure that their opinions are given due consideration in the education system (CRPD Committee General Comment No. 7 (2018: 85)).

Furthermore, the CRPD Committee, in General Comment No. 4 (2016: 41), has called upon states to ensure that persons with disabilities are not excluded from education and to eliminate structural disadvantages so as to attain equality as well as effective participation for all PWDs. Therefore, the Government of Uganda should undertake consultation with children with disabilities through their representatives to ensure that their views are integrated in the measures it undertakes to ensure continuity of learning during ‘the new normal’.

Article 1 of the Salamanca Statement, which was adopted at the 1994 World Conference on Education, reiterates the need for states to commit to education

for all persons and recognises the necessity and urgency of providing special needs education within the regular education system. Article 2 of the Salamanca Statement stipulates that every child has a fundamental right to education, that children with special educational needs should have access to the regular education system, and that this system should accommodate them within a child-centred pedagogy capable of meeting these needs. With physical-contact schools closed and education moving to the media and the internet, there is a need to accommodate children with special needs.

Rule 6 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities highlights the need for the state to give special attention to vulnerable groups of PWDs. Likewise, the CRC Committee, in its General Comment No. 9 (2006: 80), requires states to ensure that all the steps taken to protect and promote the rights of children with disabilities pay special attention to their vulnerability.

Article 3(5) of the World Declaration on Education for All stresses the need to give special attention to the needs of PWDs and to provide equal access to education to every category of disabled persons. In addition, the CRPD Committee in General Comment No. 4 (2016: 24) has urged states to ensure that PWDs have access to education in both private and public academic institutions on an equal basis with others.

The same General Comment (2016: 38) obliges states to ensure that PWDs are able to access vocational training, general tertiary education, adult education and lifelong learning without discrimination and on an equal basis with others; states are also enjoined to identify and remove all the barriers to education that PWDs may interface with. Accordingly, the government should ensure that children with special needs have access to the same study materials as other children by removing the obstacles that may hinder this access.

The CESCR Committee in General Comment No. 5: 35 has called upon states to ensure that youth, children and adults with disabilities have access to equal opportunities when it comes to primary, secondary and tertiary education by ensuring that they have access to the necessary support and equipment and that their teachers are well trained to educate children with disabilities within regular schools. The aim of this is to bring PWDs up to the same level of education as their non-disabled peers.

### ***International legal framework: Hard law***

Uganda, as a state party to the Convention of the Rights of Persons with Disabilities (CRPD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC), has an immediate and minimum core obligation to ensure equality and non-discrimination on the basis of disability. The CESCR Committee in General Comment No. 5:15 refers to 'any exclusion, distinction, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of impairing or nullifying the exercise or enjoyment or recognition, enjoyment of economic, social or cultural rights'.

The ICESCR (article 13) and CRC (article 28) recognise the right to education of all children, including children with special needs. The above instruments also oblige states to undertake measures aimed at ensuring that the education received by the children leads to the full development of the children. The CRPD Committee in General Comment No. 4 (2016: 15) has echoed that education must aim at the full development of human potential, dignity and self-worth and the strengthening of respect for human rights and human diversity.

Articles 5 and 24(1) of the CRPD affirm that the right to education should be guaranteed without discrimination and on the basis of opportunity. The CRPD Committee in General Comment No. 6 (2018: 63) has highlighted



**Accordingly, the government should ensure that children with special needs have access to the same study materials as other children by removing the obstacles that may hinder this access.**

that articles 5(1) and 24 oblige states to remove all types of discriminatory barriers, including legal and social barriers, to inclusive education. Thus, the failure by states to provide students with disabilities and those who experience intersectional discrimination or multiple forms of discrimination with equal access to mainstream school with inclusive and quality education is discriminatory, contrary to the objectives of the Convention, and in direct contravention of articles 5 and 24. Therefore, the Government of Uganda should ensure that students with disabilities have access to study materials which meet their special needs and are not subject to discrimination.

Article 23 of the CRC emphasises the need to provide services while considering the financial resources of parents and their caregivers. The CRC Committee in General Comment No. 9 (2006: 39) enjoins states to develop appropriate policies and procedures aimed at making public transportation safe, free of charge, and easily accessible to children with disabilities, whenever possible, while taking into consideration the financial resources of the parents or others caring for the child.

### ***Regional framework***

Article 11 of the African Charter on the Rights and Welfare of the Child recognises that all children have a right to free basic education and secondary education, and obliges all states to progressively realise this right. This right also exists under the ICESCR (article 13(2)a) and CRC (article 28(a)), which require states to make primary education compulsory free and without discrimination.

 **Articles 5 and 24(1) of the CRPD affirm that the right to education should be guaranteed without discrimination and on the basis of opportunity.**

## **Conclusion**

The above provisions are a call to the state to pay special attention to the provision of education to PWDs. These obligations are in place to ensure that such persons are not rejected by the school system simply because of their disabilities. This implies that equal opportunities for access to education should be availed to them, no matter the circumstances.

The current delivery of education through the media has not been inclusive of children with special needs. As basic education is indispensable for employment in many spheres and a precondition to economic independence, the right to education is of specific importance for PWDs. Education is also a central part of the rehabilitation process, since people are able to develop their capacities to become more independent and integrated into the day-to-day affairs of mainstream society. Uganda is considered to be one of the pioneers of access to basic education in sub-Saharan Africa.

The expansion of primary education through the UPE programme has been largely pro-poor and has therefore greatly improved access to education throughout the country. Even in the midst of a pandemic, children with special needs should not be precluded from accessing this education. The learning needs of children with disabilities should be given special attention, so that they can also access quality education even in the midst of a pandemic.

To these ends, the government should ensure that the study materials developed are adapted to the requirements of children with special needs, and are accessible to these children so as to aid in the learning process during the new normal that is remote learning. It should also ensure that children with special needs have access to the relevant devices (such as braille devices) that are used by children with special needs, and that the children are properly accommodated during the learning process in this period of the new normal.

The teachers conducting classes via the media should be trained and guided by the government on how to conduct classes in an inclusive manner while

considering the different needs of the children with special needs, so as to ensure that no child is left behind during this period.

The government should also provide appropriate support to the parents, guardians and caregivers of children with special needs during this period, to ensure that the children receive inclusive education.

*Tuhairwe Herman is the Research and Publications Officer of the Law Development Centre, Uganda.*

*Godfrey Ayeranga is a lecturer and legal research fellow at Cavendish University in Uganda.*

United Nations Committee on the Rights of Persons with Disabilities (2016) General Comment No. 4.

United Nations Committee on the Rights of Persons with Disabilities (2018) General Comment No. 6.

United Nations Committee on the Rights of the Child (2006) General Comment No. 9.

World Bank (2020) 'Special needs education in Uganda: Sustainable Development Goal (SDG) #4 Concerns quality and inclusive education'. Available at <https://bit.ly/3f3Di77>

## References

Dakwa, FE (2014) 'Inclusion of children with visual impairments in regular schools: A Zimbabwean perspective', *International Journal of Academic Research in Progressive Education and Development* 3(1).

Hyuha, MA (2020) 'Covid-19: Why we should reopen schools now', *Daily Monitor*. Available at <https://bit.ly/3tonbJV>

Kalibbala, G (2018) 'Children with deaf-blindness can do better in mainstream schools', *New Vision*. Available at <https://bit.ly/3r1faYd>

Kiplagat, E & Kamoga, J (2020) 'Uganda's Museveni orders closure of schools, bans public gatherings', *The East African*. Available at <https://bit.ly/3F73mJ8>

Kirk, SA et al. (2006). *Educating Exceptional Children*. Boston: Houghton Mifflin Harcourt.

Mukalele, R (2020) 'Homeschooling: Schools, Ministry of Education, publish self-study materials online and print', *ICT Teachers Association of Uganda*. Available at <https://bit.ly/3HL70u2>

Murungi, P (2020) 'A Kenyan radio, food and bikes: Home-schooling in Amudat', *Daily Monitor*. Available at <https://bit.ly/3JW6ivY>

Nangozi, Y (2020) 'Covid-19 lockdown: Learners with disability feel the pinch', *The Observer*. Available at <https://bit.ly/3qY6KB4>

*New Vision* (2020) 'First Lady speaks out on continuity of learning'. Available at <https://bit.ly/3t6Czub>

United Nations Committee on Economic Social and Cultural Rights (1994) General Comment No. 5.

## CASE NOTE

# The Significance of Equal Education and Others v Department of Basic Education and Others

*Paula Knipe*

---

*On 17 July 2020, the North Gauteng High Court in Pretoria handed down a judgment that ordered the Minister of Basic Education, Angie Motshekga, and eight Members of Executive Council (MECs) to produce a progress report every 15 days on the implementation of the National School Nutrition Programme (NSNP). The decision in Equal Education and Others v Department of Basic Education and Others is significant because it recognises the interrelatedness of the right to food, nutrition and education. It also highlights the importance of access to food during a time of crisis, especially as socio-economic conditions worsen.*

## The status of the NSNP during the Covid-19 pandemic

---

The Covid-19 pandemic has disrupted economies, societies and every aspect of daily life – there is no country that has not been affected. In South Africa, as in numerous other countries, the government ordered a nationwide lockdown to curb the spread of the virus. This led to the closure of workplaces, schools and public spaces, with only essential services continuing to operate. This had devastating impacts on the private and public sectors, where resources were stretched to respond to a myriad crises. The initial lockdown was particularly difficult for marginalised groups unable to support themselves and dependent on government programmes for survival.

In particular, the closure of schools prevented the implementation of the NSNP, which is a national programme run by the Department of Basic Education (DBE) and feeding roughly 10 million learners in public schools daily. The NSNP was founded in 1994 with the aim

of combating malnutrition and hunger and noticeably improving educational outcomes. It is seen as a critical programme for realising learners' constitutional rights to basic nutrition, guaranteed in section 28(1)(c) of the Constitution, and basic education, protected in section 29(1)(a) of the Constitution.



**The NSNP was founded in 1994 with the aim of combating malnutrition and hunger and noticeably improving educational outcomes**

The NSNP has been widely celebrated as one of the government's most effective pro-poor policies, reaching the most vulnerable children in the country. However, the complete disregard of its significance during the lockdown was described as 'an astounding betrayal of its previous undertakings', where those who required the most support during a time of crisis were ignored.

Director-General Mathanzima Mweli explained the DBE's position, stating that

[b]ecause the Disaster Management Regulations did not provide for school nutrition as an 'essential service' ... all key stakeholders in the Basic Education Sector concluded that school feeding would not only be unlawful ... but undesirable as young learners would violate the law by leaving their homes.

He also noted that, according to the Public Finance Management Act,

[t]his Conditional Grant is made available on the basis that the NSNP is designed to run and operate when schools are in session, in other words on school days when the schools are open. The legal authorisation thereof is thus for a feeding Programme in school, and to go outside these parameters will be unlawful ....

## The facts

On 18 March 2020, schools closed in order to combat the spread of Covid-19 in South Africa, immediately halting the rollout of 10 million meals daily. On 26 March, the lockdown commenced, resulting in loss of income for millions of families and a surge in food insecurity.

On 10 April, an open letter entitled 'Open letter to the Minister of Basic Education Planning in a time of crisis – School feeding schemes can and must continue' was drafted by Equal Education (EE), Equal Education Law Centre (EELC), SECTION27, the Children's Institute, and the Centre for Child Law to Minister Motshekga, who had claimed previously that the DBE had 'assessed [its] capacity' and determined that it would not 'be able to' run feeding schemes during the lockdown.

The letter contested this, stating that 'the continuation of school nutrition provisioning for learners is critical and urgent ... to ensure that children's needs are prioritised and protected in government's plans'. On 17 April 2020, the EELC and SECTION27 wrote a letter to the Presidency and DBE for the urgent resumption of the NSNP, regardless of whether schools reopened.

Communications continued in the months to follow, with the EELC and SECTION27 calling for an urgent joint portfolio committee meeting on children's access to food with the portfolio committees for the DBE and Department Social Development (DSD) to ensure that children would have access to basic nutrition.



**... to ensure that children's needs are prioritised and protected in government's plans'.**

Communications continued in the months to follow, with the EELC and SECTION27 calling for an urgent joint portfolio committee meeting on children's access to food with the portfolio committees for the DBE and Department Social Development (DSD) to ensure that children would have access to basic nutrition.

The DBE eventually responded on 11 May, stating that the NSNP would resume once schools reopened. Throughout May, public meetings were held at which Minister Motshekga declared the NSNP would be reinstated, based on context-sensitive models. The Standard Operating Procedures for Covid-19 in schools were eventually published, with guidelines for resuming the NSNP safely.

However, there were discrepancies among provinces in terms of the availability of food resources for learners. The DBE announced that schools would reopen on 1 June 2020 for learners in grades 7 and 12, but this statement was revoked and schools were permitted to open on 8 June. Minister Motshekga then backtracked on her previous statement that the NSNP would resume for all qualifying learners, announcing that

[w]e would have wished also even to provide nutrition for grades that we have not phased in. But I had requested the sector and the MECs to say maybe we need to wait a little. Get ourselves to acclimatise to the new environment, manage that which we are still struggling to get right before we can introduce new programmes ....

Minister Motshekga went on to say that

there is no way we can take care of 12 million kids outside of the education system infrastructure. We are not going to run special programmes. We won't be able to do it, so parents must take that responsibility and communities must assist.

## Legal action taken

EELC and SECTION27 wrote to the Minister seeking clarity on the roll-out of the NSNP and threatening to take legal action if the plans for implementation were not made available. They released a statement arguing that '[t]he proposed suspension of the NSNP is a regressive measure in violation of various rights enshrined in the Constitution'. The Minister responded by confirming that all learners would receive meals based on the context-specific plans. However, when schools reopened on 8 June, the NSNP did not resume for learners at home, and reports showed that even some learners in grades 7 and 12 who had returned to school did not receive a meal.

On 9 June 2020, the Director-General presented to the National Coronavirus Command Council the state's readiness to reopen schools, but noted that food supplies varied from province to province. Frustrated by this response, the EE and two school governing bodies in Limpopo launched an application to the North Gauteng High Court.

In the days that followed, the legal action resulted in a speedy response from the DBE, who then compelled all eight MECs (excluding the Western Cape, which had already committed to implementing the NSNP) to reinstate the programme for all learners from 22 June 2020. The responses from various provinces were unsatisfactory, relying on the excuse of 'context-specific plans' and saying that 'chaos and confusion' characterised the roll-out of the NSNP during this period.

On 2 July 2020 the urgent application of *Equal Education and others v the Department of Basic Education and others* was heard virtually by Judge Potteril. The EE and others argued that the rights to basic education and basic nutrition are interdependent and that the decision not to roll out the NSNP to all qualifying learners, where plans had been made to do so safely and promises made to that effect, was 'irrational, unreasonable and unlawful'.

The judgment was handed down on 17 July in favour of the applicants. The court relied on the argument that the government has a 'negative' obligation not to impair a right protected in the Constitution and that the Minister and the MECs had diminished the rights protected by sections 27(1)(b), 28(1), and 29(1)(a) by stalling the implementation of the NSNP. Additionally, the court detailed the dismal conditions of child hunger in South Africa even during the normal operation of the NSNP, and concluded that without its resumption, the health of millions of learners would diminish.

The court concluded that all qualifying learners are entitled to a daily meal from the NSNP. It held that the NSNP had been introduced expressly to address both the right to basic education and the right of children to basic nutrition; that, as such, the Minister of Basic Education and the MECs had a constitutional duty to provide basic nutrition to learners; that learners had a basic right to nutrition; and that the suspension of the NSNP had infringed upon that right.

The court ordered Minister Motshekga and the eight MECs to produce a progress report every 15 days on the implementation of the NSNP. However, as of the first reporting period, only the Minister had filed a report to the court, with most of the MECs filing at later dates. The decision is significant because it recognises the interrelatedness of the right to food, nutrition and education. It also highlights the importance of access to food during a time of crisis, especially as socio-economic conditions worsen. The court reiterated that it required urgent action by ordering that the NSNP



**The Minister responded by confirming that all learners would receive meals based on the context-specific plans.**

be fully implemented without delay. The order of regular reports also ensures that there is some level of accountability, even after the judgment. EE, EELC and SECTION27 have since continued to advocate for the full resumption and effective implementation of the NSNP since the judgment.

*Paula Knipe is a Doctoral Researcher at the Socio-Economic Rights Project, Dullah Omar Institute, University of the Western Cape.*

## References

---

Child, K (2020) 'Coronavirus lockdown to leave SA's poor high and dry'. Available at <https://bit.ly/3zClIAH>

Equal Education (2020a) 'Background: The National School Nutrition Programme court case #schoolmealsnow'. Available at <https://bit.ly/3f3lKHl>

Equal Education (2020b) 'Media statements'. Available at <https://bit.ly/3HNdMiY>

Equal Education (2020c) 'School meals monitoring'. Available at <https://bit.ly/3f5jbFy>

Equal Education and Others v. Minister of Basic Education and Others, (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020)

Pikoli, Z (2020) 'Who's right? Court battle over children's rights to education and basic nutrition'. Available at <https://bit.ly/3eZUxX3>

## Contact

### Socio-Economic Rights Project

Dullah Omar Institute for Constitutional Law,  
Governance and Human Rights

University of the Western Cape  
New Social Sciences Building  
Private Bag X17, Bellville, 7535



**Tel:** (021) 959 2950



**Fax:** (021) 959 2411



**Email:** [serp@uwc.ac.za](mailto:serp@uwc.ac.za)



**Website:** <https://dullahomarinstitute.org.za>