

**The limitation of the educator's right to strike by the child's right to basic
education**

by

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LIST OF ABBREVIATIONS

CCMA	Commission for Conciliation, Mediation and Arbitration
CESCR	United Nations Committee on Economic, Social and Cultural Rights
BCEA	Basic Conditions of Employment Act
DA	Democratic Alliance
EJIL	European Journal of International Law
ICESCR	United Nations International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LRA	Labour Relations Act
NAPSG	National Association of Parents in School Governance
NATU	National Teachers Union
SAJHR	South African Journal on Human Rights
SAPA	South African Press Association
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

*Dedicated to all the children in South Africa who are constantly disadvantaged by
educator strikes*

1 Introduction

Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginali[s]ed adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recogni[s]ed as one of the best investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.¹

Education clearly plays a vital role in every person's life and is an essential fundamental right. This raises the question as to what the consequences would be if that right was being threatened, or worse, completely taken away. This may sound far-fetched in a democratic country like South Africa but the reality is nothing short of a nightmare for many struggling students, mainly children:²

In the first two weeks of June 2009, the Soweto Branch of the South African Democratic Teacher's Union (SADTU) embarked on an illegal strike/stay-away to protest against a district office of the Gauteng Department of Education appointment of certain school managers in Soweto. By the time the strike action came to an end, hundreds of teachers had missed more than two weeks of work, thousands of school children, including learners in the final years of secondary school, had missed their mid-year examinations, and a number of principals and teachers had been assaulted and intimidated.

In August 2010 another blow shook the country's education system in the form of a countrywide strike of educators due to the fact that unions and government

1 United Nations Committee on Economic, Social and Cultural Rights - General Comment nr 13 a 13 par 1.

2 Fleisch 2010 *Southern African Review of Education* 117.

could not find a solution with regard to educators' wages.³ Cases of intimidation and violence were reported.⁴ These instances illustrate that it is not only the child's right to education that is in the crossfire, but that children are also being subjected to violence and intimidation by the very persons that should be providing them with this basic right. Section 28(d) of the *Constitution of the Republic of South Africa*, 1996 (henceforth the Constitution) states that children must be protected from maltreatment and abuse and although this section does not fall within the scope of this study, it shows the extent to which the right of educators to strike has negatively impacted on South African children.⁵

The two sections of the Constitution which are mainly applicable to this study are sections 29(1)(a) and 23(2)(c) which provide that everyone has the right to basic education (section 29(1)(a)) and that every worker has the right to strike (section 23(2)(c)). Section 28(2) of the Constitution further states that a child's best interests are of paramount importance in every matter concerning the child. At first glance it would appear that the right to strike should thus in essence be subject to the child's best interest. This would include the right to education, but as this matter has yet to be taken to court, the educators' participation in public sector strikes appears to be the order of the day. In turn this would have a large impact on the realisation of the right to basic education by children.

The child's right to education, as guaranteed by section 29(1)(a) of the Constitution is textually unqualified. In the *Grootboom*-case⁶ however, the child's right to basic shelter contained in section 28(1)(c), which is also textually unqualified, was limited by the court by reading it together with section 26(2). This clause limits everyone's right to housing to the state's ability to reasonably realise this right progressively within available resources.⁷ Based on this

3 Cohen 2010 <http://bloomberg.com>.

4 Schultz 2010 <http://1pic4twenty.co.za>.

5 *Constitution of the Republic of South Africa*, 1996 (henceforth the Constitution).

6 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

7 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 81H.

principle, section 29(1)(a) will most probably be limited by section 29(1)(b), which states that education must be made available progressively through reasonable measures. This situation differs from the position in *Grootboom* on one critical point. The realisation of section 29(1)(a) is not limited to available resources. It is submitted therefore, that if the right to basic education is subject to the right to strike, it in practice results in the qualification of section 29(1)(a) on an unlisted ground, because it is only being realised within available resources (the resources being the teachers);⁸ these primary resources being incapacitated at a time of strike.

The importance of evaluating the extent to which educators' right to strike may be limited by the child's right to basic education is thus clear. This study will aim to determine the optimal balance between the educator's right to strike and the child's right to basic education.

2 Practical implications of strikes on children's right to education at ground level

Spring⁹ argues that strikes in the American educational sector occur when a teachers' union and the department of education are unable to reach an agreement with regard to educators' salaries and working conditions. In South Africa the situation is similar: Solidarity states that people in South Africa generally strike to direct attention to a grievance they might experience and to reach an agreement regarding a problem which pertains to interests of employers as well as employees.¹⁰ In chapter 1 of this study it was shown that, in the educational sector, these grievances are generally related to educators' compensation.¹¹ Strikes are usually preceded by union representatives who

8 Calderhead *The Right to an 'adequate' and 'equal' education in South Africa: An analysis of s 29(1)(a) of the South African Constitution and the right to equality as applied to basic education* 25.

9 Spring *American Education* 219.

10 Solidarity 2010 <http://www.solidariteit-blog.co.za>.

11 Cohen 2010 <http://bloomberg.com>.

bargain with the department of education over a new contract, containing a particular wage scale and labour rules.¹² Examples of these proposed bargaining agreements can be seen on various South African education unions' web pages.¹³ Wage scales will typically include educators' salaries and other benefits such as health benefits. The length of school days, class sizes and teaching loads are discussed in the labour rules. When the unions and the department of education cannot agree on contract terms, conflict is generated and a strike may follow.¹⁴

It is said that the implementation of collective bargaining into public education is the primary cause of strikes by educators.¹⁵ Collective bargaining can be described as a:¹⁶

good faith process between an organisation's management and a trade union representing its employees, for negotiating wages, working hours, working conditions, and other matters of mutual interest.

This process usually presents the management with a group of people with whom to negotiate, while greatly enhanced bargaining power is given to employees. The trade union system is based on the principle of collective bargaining.¹⁷ A strike (which is usually induced by trade unions) can be seen as:¹⁸

the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to *work* in this definition includes overtime work, whether it is voluntary or compulsory.'

12 Spring *American Education* 219.

13 See for example SADTU 2010 <http://www.sadtu.org.za>.

14 Spring *American Education* 219.

15 Neal *The Alliance Against Education Reform* 23.

16 ACM 2011 <http://www.businessdictionary.com>.

17 ACM 2011 <http://www.businessdictionary.com>.

18 *Labour Relations Act* 66 of 1995, s 213.

It is Neal's¹⁹ opinion that the industrial mode of collective bargaining, in particular labour strikes, should not have been transferred to the public sector, the reason being that monopoly government services (services that can't be purchased)²⁰ are essential to the health, safety and welfare of the public. Strikes are furthermore, in principle, an economic weapon that is inappropriate to public employment. Strikes by teachers are strikes against the South African community as a whole,²¹ and, as part of the public sector, these strikes do not serve the same purpose as in the private sector.²² When teachers strike, there exists no fair relationship between the economic gains for the educators on strike and the damage they inflict upon fellow citizens,²³ in this case, specifically children who are an especially vulnerable group of society. It is different in a private company where strikes are more legitimate because those who strike and those who employ are mutually dependent on each other in the following sense: if any of the two groups are unreasonable, the company and all involved will suffer irreparable damage.²⁴ People in general have a choice to make use of a certain company or product, but apart from the extremely wealthy, most people have no other option but to make use of government services.²⁵ Strikes in the public sector are thus inappropriate because they "distort the political decision-making process."²⁶

It is in the opinion of Mahlomola Kekana, president of the National Association of Parents in School Governance (NAPSG) that²⁷

the impact of the [2010] strike may affect the entire generation as the damage far outweighs the gains made by public servants, in particular the teachers.

19 Neal *The Alliance Against Education Reform* 25.

20 Neal *The Alliance Against Education Reform* 26.

21 Cohen 2010 <http://www.bloomberg.com>.

22 Burton and Krider 1970 *Yale Law Journal* 418.

23 Neal *The Alliance Against Education Reform* 26.

24 Joubert 2010 <http://www.rapport.co.za>.

25 Joubert 2010 <http://www.rapport.co.za>.

26 Burton and Krider 1969-1970 *Yale Law Journal* 418.

27 SAPA 2010 <http://www.news24.com>.

He further states that such a strike perpetuates the class system and causes inequality, because the majority of South Africans do not have a choice between public and private schools.²⁸

It has been reported that the nation-wide strike in 2010 caused disruption and was extremely destabilising.²⁹ Schools were shut,³⁰ teachers attacked pupils and pupils retaliated.³¹ This left an array of broken relationships that had to be repaired.³² In a previous educator strike in 2007,³³ grade 12 learners were prohibited from applying for bursaries on time, because they could not hand in their first term marks or testimonials from their teachers. Furthermore, many of the grade 12 learners that were to fail due to 2-3 months of missed classes, were not able to repeat their final year, because the school syllabus was changed.³⁴ It is obvious that this situation jeopardized the futures of countless children, especially learners from previously disadvantaged backgrounds. The 2010-strike that had lasted about 3 weeks³⁵ occurred less than 2 months before the final grade 12 examinations.³⁶ It has been reported during this time that Allen Thompson, president of NATU (National Teacher's Union), made the following staggering announcement:³⁷

There will be no Matric exams written this year in South Africa. We have decided to use the Matric exams as a lever if the government does not come forward with a better offer.

28 SAPA 2010 <http://www.news24.com>. According to Patsanza, teachers in private schools are paid better and work under better circumstances, for example, classes are smaller, whereas teachers in public schools work for smaller wages and struggle with large classes in sometimes disruptive environments.

29 Cape Argus 2010 <http://www.allafrica.com>.

30 Cohen 2010 <http://www.bloomberg.com>.

31 Cape Argus 2010 <http://www.allafrica.com>.

32 Cape Argus 2010 <http://www.allafrica.com>.

33 This strike didn't attract quite as much media attention as the 2009 and 2010 strikes.

34 SAPA 2007 <http://www.iol.co.za>.

35 Opperman 2010 <http://www.skoolnuus.co.za>

36 Patsanza 2010 <http://www.ipsnews.net>.

37 Yates 2011 <http://www.ezinearticles.com>.

This shows an absolute disregard for children's right to education. Anne Bernstein, director for the Centre for Enterprise Development has stated that between 75-89% of South African public schools are dysfunctional.³⁸ In 2007, pass rates fell from 67% in 2006 to 61%.³⁹ Also, in a 2007-study of forty one countries by United States-based National Centre for Education Statistics, South African Grade 8 learners came last in Maths and Science.⁴⁰ South Africa has also recently finished last of all *developing* countries when literacy and numeracy skills of children were tested.⁴¹ South Africa has further participated in two cross-country comparative studies during recent years: Progress in International Reading Literacy, which focuses on Grade 4 reading skills, and the Southern and Eastern Africa Consortium for Monitoring Education Quality, which focuses on Grade 6 reading and mathematical skills. Our country compared poorly to our more impoverished neighbouring countries and even worse to developing countries in other parts of the world.⁴² Woolman and Fleisch⁴³ correctly state that "we stand very much at risk of losing a second generation of learners." The Minister of Basic Education, Angie Motshekga, has stated that although South African schools are doing relatively well on enrolments, "our weakness is in the quality of education."⁴⁴ It has been found with regard to rural primary schools that the absence of teachers, the neglect of their duties and lack of discipline had lead to a decrease in pupil discipline, increased learner absences and the repetition of grades.⁴⁵

Another big problem that is related to an average teachers' strike is the intimidation of other teachers who choose to keep working, as well as of school-going pupils. A grade 10 pupil of a high school in Gauteng told a reporter that

38 Cohen 2010 <http://www.bloomberg.com>.

39 Cohen 2010 <http://www.bloomberg.com>.

40 Cohen 2010 <http://www.bloomberg.com>.

41 Woolman and Fleisch *The Constitution in the Classroom: Law and education in South Africa, 1994-2008* 109.

42 Department of education 2008 <http://www.education.gov.za>.

43 Woolman and Fleisch *The Constitution in the Classroom: Law and Education in South Africa, 1994-2008* 109.

44 Cohen 2010 <http://www.bloomberg.com>.

45 Coombe 1997 *International Journal of Educational Development* 113.

they were busy writing a test when about a 100 presumed striking teachers from other schools stormed into the classroom and assaulted the learners.⁴⁶ One striker hit a non-striking teacher in the face and tore up test papers while other pupils were threatened that they would be hurt if they contacted their parents. At another high school, armed strikers took down a fence to gain entry, broke windows and threw garbage cans from the first floor.⁴⁷ Learners and teachers left school early on the day of the attack and were afraid to return because of threats to burn down the school.⁴⁸ It is clear that violence and intimidation during strikes erode people's freedom to choose whether they want to strike or not and negatively affect the safety and security of non-striking educators and children during strikes.⁴⁹

There exists an important issue relating to the main question posed in the introduction of this study that needs to be answered at this point, namely, whether educator strikes aimed at influencing government policy should be permitted in a democratic state. In answer to this question:⁵⁰

it can be said that that political issues should be exposed, debated, decided, and legislated upon in the open political arena of Parliament, and those involved at the centre of the political process be accountable to the electorate. If strikes can be used to influence government policy, governments can no longer act upon the views of the majority of the people they purport to represent.

Because the typical municipal political structure is vulnerable to strikes by public sector employees, like educators, a non-strike model is preferable to a strike-model.⁵¹ Schermers⁵² is of the strong opinion that political strikes are unacceptable in a society where the wishes of the majority of the population are

46 Rademeyer 2010 <http://www.beeld.com>.

47 Rademeyer 2010 <http://www.news24.com>.

48 Rademeyer 2010 <http://www.beeld.com>.

49 Masiloane 2010 *Acta Criminologica* 31.

50 Novitz *International and European protection of the right to strike* 62.

51 Wellington and Winter 1969-1970 *Yale Law Journal* 441.

52 Schermers is quoted extensively in the work of Novitz *International and European protection of the right to strike* 62. I was unable to locate Schermers' original work.

the basis for decisions. He also states that a small group of persons in key positions that try to force a democratic government into a policy that the majority doesn't want, cannot be tolerated.⁵³

An important sub-question, as identified by Spring⁵⁴ is:

Should teachers worry only about fulfilling their instructional duties without concern for their wages or working conditions?

Coombe⁵⁵ suggests that while severe budget constraints do not at the moment allow for dramatic increases in teachers' salaries, policy makers and planners must:

reflect a positive intention to pay teachers a wage which enables them to give their best as professionals.

There are however, ways in which educators' conditions of service can be temporarily improved which are not dependant on salary levels.⁵⁶ The government can formally diversify all resources on which teachers depend for their survival by rationalising and streamlining benefits that teachers already receive from outside the public budget, for example, community built houses. The government can also decentralise fiscal responsibilities and do its best to ensure that the delays, inconsistencies, inconvenience and errors that currently occur in paying teachers' salaries are eliminated or, at least, drastically reduced.⁵⁷ Educators' conditions of service must be framed to suit the specific nature of the educational sector. These conditions must be put on paper and drafted in consultation with educators' representatives and must include leave arrangements the length and configuration of teaching periods, an educators' code of conduct, arrangements with regard to transfers and maternity leave, cover for educators on leave, appraisal and staff development and arrangements

53 Novitz *International and European protection of the right to strike* 62.

54 Spring *American Education* 220.

55 Coombe 1997 *International Journal of Educational Development* 113-114

56 Coombe 1997 *International Journal of Educational Development* 114.

57 Coombe 1997 *International Journal of Educational Development* 114.

with regard to promotions.⁵⁸ Negotiated agreements should be transformed into tangible benefits for educators and their families. The administrative capacity and sensitivity of government officials can diffuse a potential explosive situation and peaceful negotiations are definitely an alternative to an educator strike.⁵⁹

It is, however, also claimed that the state's legislative, regulatory and budgetary attempts come down to almost nothing more than 'hand-waiving.'⁶⁰ It is therefore suggested that, in accordance with our country's commitment to transformative constitutionalism,⁶¹ courts are in the position to help the government to achieve an adequate basic education for all,⁶² as well as provide educators with a voice with regards to the problems they face.

Keeping the above mentioned in mind it can be said that to strike is wrong when one's decision to strike causes someone else's vulnerability; people that cannot solve their own problems and who are not involved in a dispute between an employer and employee or have any say in the solution.⁶³ Although many people are not content with their salaries, it is important to remember what a salary is, which is the minimum sum that a person and his/her employer agrees on that is to be paid for services rendered according to our country's labour laws, which makes extreme exploitation very difficult. We also have a very open labour market, so if one doesn't like his/her job, he/she can always get another one if

58 Coombe 1997 *International Journal of Educational Development* 114.

59 Coombe 1997 *International Journal of Educational Development* 114.

60 Woolman and Fleisch *The Constitution in the Classroom: Law and education in South Africa, 1994-2008* 115.

61 Preamble of the Constitution; Pieterse 2004 *TSAR* 714. In his article, Transformative Constitutionalism (2006 *Stellenbosch Law Review* 252), Justice Pius Langa refers to the Epilogue of the interim Constitution to provide a definition of transformative constitutionalism. According to the Epilogue the Constitution must provide "a historic bridge between the past of a deeply divided society, characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

62 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 110.

63 Joubert 2010 <http://www.rapport.co.za>.

his/her services are so highly in demand.⁶⁴ South Africa has a great number of unemployed, qualified teachers who would gladly take over some of the employment and salaries educators are striking over.⁶⁵

These circumstances make it clear that a strike shifts the emphasis from the child as first priority with regard to education to the problems of teachers with teaching authorities.⁶⁶ This displacement of emphasis is strongly prohibited, as will be seen in the next chapter on international and regional law.

3 International and regional law

3.1 Introduction

Section 39(1) of the Constitution states that courts must consider international law and may consider foreign law when interpreting the Bill of Rights.⁶⁷ In the apartheid era international law was recognised neither constitutionally, nor by courts and lawyers.⁶⁸ Today, however, South Africa is a democratic state that constitutionally protects human rights and racial equality, and international law is now viewed as “one of the pillars of the new democracy.”⁶⁹ The significance of ratifying international agreements, in which the right to education is protected, is that state parties become obliged under international law “to realise the right to education and to respect freedom in education.”⁷⁰ On the other hand, international labour law seeks to promote the exercise of sovereign power in ways that promote just relationships between employers and employees.⁷¹ The

64 Hlahla *'I am nothing just zero' : exploring the experiences of black unemployed teachers in a South African rural community* 3; Joubert 2010 <http://www.rapport.co.za>.

65 Joubert 2010 <http://www.rapport.co.za>.

66 Strauss *Die Burger* 18.

67 Chapter 2 of the Constitution.

68 Dugard 1997 *EJIL* 77.

69 Dugard 1997 *EJIL* 77.

70 Beiter *The protection of the right to education by international law* 2.

71 Macklem *The right to bargain collectively in international law: Worker's right, human right, international right* 1.

role and instructions of international law with regard to both principles, as well as how they influence one another, will consequently be discussed.

3.2 The child's right to basic education

Article 26 of the Universal Declaration of Human Rights⁷² states that everyone has the right to free education and that elementary education is compulsory. This particular declaration is not a treaty, but simply a recommendatory resolution of the General Assembly.⁷³ Although it is therefore a non-binding instrument, the basic principles thereof form part of international customary law.⁷⁴ It also provides a good basis for the discussion of following treaties that South Africa has signed and ratified, since it was the first Human Rights instrument written by the United Nations after its transformation from the League of Nations.⁷⁵ Sub-article 2 stresses the fact that education is necessary for the “full development of the human personality” and the “strengthening of respect for human rights and fundamental freedoms.”⁷⁶ It also touches on the fact that education is needed to build positive relationships between individuals and nations.⁷⁷ When educators strike, it is thus directly detrimental to the development of the human personality and, not only do children fail to learn how to show respect, but they also get a first-class example of how to *disrespect* other people’s rights and fundamental freedoms.⁷⁸

Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in turn states clearly that all States Parties to the Covenant, recognise the right of everyone to an education.⁷⁹ South Africa signed this Covenant in

72 *Universal Declaration of Human Rights* (1948).

73 Dugard *International Law* 325.

74 Dugard *International Law* 325-326.

75 OHCHR 1996 <http://www.ohchr.org>.

76 *United Nations Universal Declaration of Human Rights* (1948).

77 Article 26(2) of the *Universal Declaration of Human Rights* (1948).

78 With reference to the violence and chaos associated with South African strikes.

79 *International Covenant on Economic, Social and Cultural Rights* (1966).

1994, but has to date not ratified it (making it a non-binding document).⁸⁰ South Africa has, however, by signing the Covenant, undertaken not to take any retrogressive measures which would defeat the object and purpose of the treaty.⁸¹ Liebenberg states that non-binding international law can, in terms of section 39(1) of the Constitution, be used as a guide to interpret the Bill of Rights.⁸² As part of the International Bill of Human Rights,⁸³ it is also important to consider, because it forms part of the basis for international human rights. An interpretation which takes into account international law undoubtedly has important implications with regard to various areas of the South African legal system.

One such implication is found in the United Nations Committee on Economic, Social and Cultural Rights (CESCR's) General Comment 3.⁸⁴ This particular General Comment states that any deliberately retrogressive measures taken by the state with regard to any socio-economic right listed in the ICESCR are prohibited unless they can be justified by referring to all the rights provided for in the Covenant and in the context of the full use of the maximum available resources.⁸⁵ Article 13 of the ICESCR should thus be understood in the context of General Comment 3. Article 13 provides *inter alia* that primary education must be freely available to all people and that secondary education must also be made available and accessible to all by every appropriate means. A section that educators who are pro strike may find encouraging at first glance is sub-article 13(e) that states that the material conditions of teachers must be improved on a

80 Human Rights Library 2011 www1.umn.edu.

81 Horsten *The social security rights of children in South Africa* 93.

82 Liebenberg *Socio-economic rights* 106.

83 Human Rights Library 2011 www1.umn.edu. The ICESCR and the ICCPR together form the International Bill of Rights.

84 General Comment 3 (Fifth session, 1990) 'The Nature of States Parties Obligations' UN DocE/1990/12/14, par 9. According to Liebenberg, one of the most important sources for interpreting the ICESCR is the general comments adopted by the CESCR; Liebenberg *Socio-economic rights* 106.

85 General Comment 3 (Fifth session, 1990) 'The Nature of States Parties Obligations' UN DocE/1990/12/14, par 9.

continuous basis. As this discussion will show, however, striking is not necessarily the answer to this much-desired improvement.

The CESCR's General Comment 13⁸⁶ is also a commentary on the above mentioned article. A very important theme that is found rather early in the discussion is the principle of the four A's, namely availability, accessibility, acceptability and adaptability.⁸⁷ Availability entails that schools and programmes are available in sufficient quantity. One of the factors upon which this requirement depends, is the availability of trained teachers.⁸⁸ In all fairness it should be acknowledged that the comment requires that teachers receive "domestically competitive salaries."⁸⁹ The fact of the matter, however, is that teachers are regarded as a necessary resource to fulfil children's right to a basic education. If teachers feel that they are not being paid enough, there are alternatives to the striking method as will be discussed in chapter 6. Accessibility requires that education should be accessible to everyone and one of the dimensions discussed in the comment that is of great value to this discussion is the dimension of physical accessibility – education has to be in the safe, physical reach of everyone.⁹⁰ Striking teachers that block access to schools that remain in session during a strike are definitely in non-compliance with this aspect. With regard to the other two A's, acceptability and adaptability,⁹¹ it is only logical to say that education can be neither acceptable nor adaptable if there is no education provided in the first place.

Another very important convention to consider is the United Nations Convention on the Rights of the Child.⁹² Article 28 of the CRC makes it clear that all children

86 General Comment 13 (Twenty-first session, 1999) 'Implementation of the International Covenant on Economic, Social and Cultural Rights' UN Doc E/C.12/1999/10

87 General Comment 13, par 6.

88 General Comment 13, par 6.

89 General Comment 13, par 6.

90 General Comment 13, par 6.

91 General Comment 13, par 6.

92 Ratified by South Africa in 1995; *United Nations Convention on the Rights of the Child* (1989); henceforth the CRC; Human Rights Library 2011 <http://www1.umn.edu>.

have the right to a basic education, while article 29 indicates what the child's education should be aimed at:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

It is painfully obvious that - especially in African countries - educator strikes do not promote the development of the child's personality, talents and abilities, but hinder it.⁹³ Since no respect for the child's right to education is shown by the strikers' behaviour, children will not learn to show respect for others' rights and fundamental freedoms. In the simple words of Perez:⁹⁴ "Children see, children do."

In a commentary on the CRC, Verheyde⁹⁵ states that the child's right to education as laid out in article 28 embodies two important principles. Firstly, "competent teachers should be sufficiently present in all countries;" *sufficiently* being the key word. If educators are only busy teaching in classrooms during certain non-striking days during school terms, can it really be said that they are "sufficiently present"? The second important aspect of article 28 is that it ensures that the child's right to receive an education shall not be hampered by factors such as parental neglect, abuse or ignorance, cultural resistance or child labour. What is happening in South Africa, however, is that the child's right to receive education is impeded, not by most parents in this case, but by teachers, who

93 Gboyega Date unknown <http://www.transformedu.org>.

94 Perez 1986 *The Reading Teacher* 8.

95 Verheyde "Article 28 – The right to education" 1.

neglect, abuse and totally ignore children during strikes. If parents' behaviour of this kind is not permitted, why should it be acceptable from teachers?

The child's right to education is, in very similar terms to those in the CRC, entrenched in article 17 of the African Charter on Human and People's Rights⁹⁶ as well as article 11 of the African Charter on the Rights and Welfare of the Child.⁹⁷ Both these charters have been ratified by South Africa, in 1996 and 2000 respectively. Sub-article 2 of the latter Charter echoes some of the provisions in article 29(d) of the CRC (as quoted and discussed above) and prescribes that education should, amongst other factors, be directed at the preparation of children for responsible life in a free society with the capacity for understanding, tolerance, dialogue, mutual respect and friendship among all people and respecting human rights.⁹⁸ Educator strikes as well as the underlying message of some educators' misbehaviour during these strikes do not promote any understanding of the above mentioned principles. Rather, it teaches children disrespect for other people's rights and that dialogue and tolerance play no part in the workplace.

3.3 *The educator's right to strike*

Article 8(1)(d) of the ICESCR grants members of State Parties the right to strike. Sub-article 2 however, states that lawful restrictions on the exercising of this right can be made by member states. This means that, according to this international instrument the right to strike may be limited by another right (in the case of this study, the right to education). The right to strike is also indirectly protected in the International Covenant on Civil and Political Rights⁹⁹ (signed in 1994 and ratified in 1998 by South Africa) through every person's right to freedom of

96 *African Charter on Human and People's Rights* (1981).

97 *African Charter on the Rights and Welfare of the Child* (1990).

98 *African Charter on the Rights and Welfare of the Child* (1990), a 11.

99 *United Nations International Covenant on Civil and Political Rights* (1966).

association.¹⁰⁰ The ILO's committee of Experts on the Applications of Conventions and Recommendations and its Committee on Freedom of Association have used the provisions of the Freedom of Association and Protection of the Right to Organize Convention¹⁰¹ as well as the Right to Organise and Collective Bargaining Convention¹⁰² to derive the right to strike from it.¹⁰³ Again, the right to strike can be limited if sub-article 2 of ICCPR is taken into account. It states clearly that restrictions may be placed on this right if necessary in a democratic society when it is in the interest of, amongst others, public order and to protect the rights and freedoms of others. The application of this fact to the limiting of the right to strike because of the child's right to basic education could not be more fitting.

3.4 The best interest of the child

Article 3(1) of the Convention on the Rights of the Child¹⁰⁴ states that in all actions concerning children, the best interest of the child shall be a primary consideration. Regionally, the African Charter on the Rights and Welfare of the Child¹⁰⁵ states that, not only shall the best interest be a primary consideration, but *the* primary consideration in all actions concerning children. By ratifying this instrument in the year 2000,¹⁰⁶ South Africa has thus committed itself to adhere to this very strongly worded principle. The implication of this commitment is that the child's best interest must therefore be the first aspect to consider in every situation involving children that occurs in South Africa, including educator strikes. The full impact of this principle will be discussed in chapter 4.1.3, since it has also been included in the South African Constitution. The next chapter will

100 Ratified by South Africa in 1996; A 22; Madhuku 1997 *International Labour Review* 510.

101 *Freedom of Association and Protection of the Right to Organize Convention* (1948).

102 Ratified by South Africa in 1996; *Right to Organise and Collective Bargaining Convention* (1949).

103 Madhuku 1997 *International Labour Review* 510.

104 *Convention on The Rights of the Child* (1989).

105 *African Charter on the Rights and Welfare of the Child* (1990).

106 Human Rights Library 2011 <http://www.umn.edu>.

specifically deal with the Constitution as well as other applicable South African legislation.

4 South African law

4.1 Constitution

4.1.1 The child's right to basic education

“Everyone has the right to a basic education...”¹⁰⁷

The wording of the right to education is very similar to the section on education contained in the CRC, which means that the South African Constitution complies with international law in this regard. The right to education has been described by authors as an ‘empowerment right’.¹⁰⁸ An empowerment right provides people with control over the course of their lives and, more specifically, with control over the state.¹⁰⁹ Without empowerment rights all other rights are “likely to be precarious”:¹¹⁰

Education provides much of the basic intellectual capacity that enables the individual to think seriously and critically about what it means to live a good life; to examine and appraise actions, institutions and ideas; and to choose a course of action on the basis of such appraisals.

The rights and values enshrined in the Constitution all point to the right to the provision of an adequate basic education for all children.¹¹¹ These rights include human rights, such as the right to equality (section 9) and the right to human dignity (section 10), as well as numerous other civil and political rights, such as the right to vote (section 19) and access to information (section 32), which cannot

107 Section 29(1) of the Constitution.

108 Donnelly and Howard 1988 *Human Rights Quarterly* 215.

109 Donnelly and Howard 1988 *Human Rights Quarterly* 215.

110 Donnelly and Howard 1988 *Human Rights Quarterly* 234-235.

111 Spreen and Vally 2006 *International Journal of Education Development* 354.

be properly understood or exercised if one is uneducated.¹¹² A good education is supposed to produce citizens who are fundamentally equal and people who actively participate in society.¹¹³ It enables people to enjoy the rights as well as fulfil obligations that are associated with citizenship.¹¹⁴ This is the type of citizen that transformation has as goal.¹¹⁵

Although the World Declaration on Education for All¹¹⁶ is not a binding document, its definition of basic education can contribute to giving content to this right. Its definition was indeed used in the *White Paper on Education and Training*.¹¹⁷ Basic education, according to these documents, is supposed to address basic education needs which consist of “essential learning tools” like literacy, oral expression, numeracy and problem solving. It also comprises “basic learning content” like knowledge, skills, values and attitudes that are required by all people.¹¹⁸

to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

Section 3(1) of the *South African Schools Act*¹¹⁹ prescribes that children must complete their schooling up until the ninth grade or up to the point where they reach the age of fifteen years, whichever comes first. It can be thus derived that basic education spans from grade one to grade nine.¹²⁰ Authors also describe the right to education as a strong, unqualified right.¹²¹ This strong, unqualified

112 Veriava and Coomans “The right to education” 57.

113 Woolman and Fleisch *The Constitution in the Classroom: Law and Education in South Africa, 1994-2008* 109.

114 Malherbe 2004 TSAR 428.

115 Pieterse 2004 TSAR 714.

116 *World Declaration on Education for All* 1990.

117 *White Paper on Education and Training* 1995.

118 *World Declaration on Education for All* 1990 a 1 par 1.

119 84 of 1996; which, according to its preamble, gives content to section 29 of the Constitution.

120 Osman and Leibowitz *A framework for heritage, multiculturalism and citizenship education* 96.

121 Woolman and Fleisch *The Constitution in the Classroom: Law and Education in South Africa, 1994-2008* 120; Malherbe 2004 TSAR 432. The truth of this statement is likely to

character is linguistically reflected when section 29(1)(a) is read.¹²² In the first place, instead of everyone being entitled to have ‘access to’ basic education, as is the case with regard to housing and health care,¹²³ everyone has a *direct* entitlement to a basic education itself¹²⁴ ¹²⁵ It is abundantly clear however, that children cannot provide themselves with a basic education and from the wording of section 29(1)(a) it is clear that the state must provide children with this right directly. Even if section 29(1)(a) were to be read together with section 29(1)(b),¹²⁶ it would not be subject to the availability of resources. Nurturing educational environments should be constructed, maintained and strengthened on a continuous basis and the state is obliged to allocate various critical resources for children in this regard.¹²⁷ Malherbe¹²⁸ explicitly places educators on a list of services that the state *must* provide to ensure a reasonable basic education for everyone.

What then constitutes a ‘reasonable’ basic education? The *textually* unqualified nature of the child’s right to basic education requires a standard of review that is higher than the standard that is used in respect of qualified socio-economic rights to determine what the state’s responsibilities with regard to the right to basic education is.¹²⁹ The possibility of using a proper standard of reasonableness

be challenged if *Grootboom* is kept in mind and this will be touched on later. For now the discussion of the attributes that makes this right *textually* unqualified is important.

122 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 120.

123 Sections 26 and 27 of the Constitution.

124 In contrast with only ‘access to’ that right, as described in *Grootboom* as the state having the duty to enable people to realise the rights in question themselves; Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 120; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) 67B.

125 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) 67B.

126 Which the Constitutional Court has recently deemed to be incorrect in the case of *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 8 BCLR 1 (CC) par 37. Henceforth the Juma-case. See the discussion of this case in chapter 5.1.1.5.

127 Knutsson “A new vision for childhood” 22.

128 Malherbe 2004 *TSAR* 432.

129 Veriava and Coomans “The right to education” 62.

review as such a higher standard will be further discussed in chapter 5 of this study.

If section 29(1)(a) imposes the obligation of a reasonable basic education, one can in the same breath say that a basic education should also be adequate. Education can in turn only be adequate when there exists an adequate infrastructure, equipment and *teachers*.¹³⁰

4.1.2 *The educator's right to strike*

"Every worker has the right to strike."¹³¹

The other end of the spectrum, namely the position of teachers, should also be taken into consideration. Many teachers are expected to work in extremely difficult conditions where they face overcrowded classrooms, unsafe and unsanitary schools, shoddy housing and a shortage of the most basic classroom resources. Teachers are "at the mercy of bureaucracies" which appear to them to be "irrational, unpredictable and unresponsive" and they feel that the system, and even their own principles, are disempowering them.¹³²

Many teachers also feel that they do not receive a "living wage."¹³³ Both teachers and the system are not able to cope because of inadequate remuneration which makes the profession appear unattractive to many prospective professional applicants.¹³⁴ Whether the position is truly as problematic, is at present an unanswered question because this matter has yet to be taken to court. If one looks at the judgement handed down in the case of

130 Calderhead *The Right to an 'adequate' and 'equal' education in South Africa: An analysis of s 29(1)(a) of the South African Constitution and the right to equality as applied to basic education* 4.

131 Section 23 of the Constitution.

132 Coombe 1997 *International Journal of Educational Development* 113.

133 Coombe 1997 *International Journal of Educational Development* 113.

134 Armstrong *Teacher pay in South Africa: How attractive is the teaching profession?* 2;8.

Mazibuko v City of Johannesburg,¹³⁵ it should also be possible to determine whether teachers are receiving a fair wage, depending on what a court decides a reasonable amount that the average person needs to live on is a dignified existence. Whatever the courts may or may not decide on this point, it is still reported that “there has been a noticeable reluctance on the part of African governments” to allocate enough money to pay better qualified teachers as more learners enrol in school. Almost 90% of the allocated money in the education budget is spent on teachers’ salaries and even though they are “rightly viewed as the foundation of educational change and development,” the salary costs of teachers are being curbed.¹³⁶ These conditions, as have been illustrated, are the ideal ingredients for a country-wide strike.

There is an argument that the right to strike is a necessity when it comes to democratic participation, which applies not only in the workplace, but to society as a whole. This principle provides a legitimate way in which workers can influence the formulation of government policy.¹³⁷ The right to strike is also associated with other rights in the Constitution such as freedom of association (section 18), freedom from forced labour (section 13) and freedom of expression (section 16).¹³⁸ The right to strike can, according to some, also be seen as an “appropriate supplement to effective worker participation in decision-making within the enterprise.”¹³⁹ This right is available to both public and private sector workers although no-one providing essential services is allowed to strike.¹⁴⁰ Essential services are those services which will lead to the endangerment of people’s lives, personal safety or health if they are interrupted.¹⁴¹ An in-depth look at this definition is necessary. What is the meaning of the term ‘life?’

135 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) par 28; The court determined the minimum quantity of water a human being is entitled to per day to live in a dignified manner.

136 Coombe 1997 *International Journal of Educational Development* 113.

137 Novitz *International and European protection of the right to strike* 40.

138 Novitz *International and European protection of the right to strike* 40.

139 Novitz *International and European protection of the right to strike* 59.

140 Madhuku 1997 *International Labour Review* 516-517.

141 ILO 2001 <http://www.ilo.org>; *Labour Relations Act* 66 of 1995.

Broadly interpreted, apart from the basic biological aspects of living, it means the *quality* of one's life. If learners receive a feeble education due to strikes and are not able to pass their matric exams at all, or with the desired marks, it affects their chances of entering a tertiary education centre which in turn will effect learners' future earnings (if they are able to get a job at all), thus their *quality* of life.¹⁴² With regard to the term 'health,' the World Health Organisation defines this term as follows:¹⁴³

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

According to Adams¹⁴⁴ the above mentioned definition also points to the goal that individuals should have the chance to develop to the maximum of their physical and mental potential and that 'health' extends beyond the boundaries of healthcare services into other socio-economic rights like education. Schools are in some cases the only place where children are taught basic hygiene (like washing their hands) and are also the only place where many children receive their only balanced and nutritious meal for the day. The child's physical health is thus being impaired when educators are not there to ensure that children actually practice healthy habits. The question as to where children are to go when schools are closed due to educator strikes is another issue pertaining to children's physical health and social wellbeing. Children wandering in streets amidst traffic and in dangerous neighbourhoods are an all too common sight in South Africa. If this is already a problem after school hours, it becomes even more so during educator strikes. Most parents are not at home during mornings, because they are busy trying to earn a living, leaving children without supervision. The fact that children are also physically in danger during educator strikes due to the misconduct of teachers was pointed out in section 2. With regards to children's mental health, the effects of educator strikes are anything but satisfactory. The disruption of classes, threats against children who actually

142 Adams *The education sector as an essential service* 63.

143 WHO 2011 <http://www.who.int>.

144 Adams *The education sector as an essential service* 63.

attend school, the uncertainty of not writing exams and the “emotional turmoil” of not knowing whether they will be able to qualify for entrance to a tertiary education centre all threaten the psychological (mental) health of children. Children can also not feel emotionally safe (to be “able to act, think and feel without fear”) in an environment where teachers are allowed to strike.¹⁴⁵ It is thus clear that the educator’s right to strike is endangering children’s lives, personal safety and health on a physical, mental and social level. Education should thus technically qualify as an essential service.

If one considers the wording of section 23 in the Constitution, it implies an individualistic theory.¹⁴⁶ This theory “considers the right to strike as belonging to the individual worker,” although the right is exercised collectively.¹⁴⁷ Though the right to basic education is at the moment not classified as an essential service, the services that public employees perform are all essential in some way.¹⁴⁸ It is the opinion of some that even:¹⁴⁹

strikes in non-essential government services should not be permitted because it is administratively infeasible to distinguish among the various government services on the basis of their essentiality.

Important to bear in mind is that the right to strike is not sacrosanct.¹⁵⁰

...it is a right like all other rights that must be weighed against the larger public interest, and it must be subordinated where necessary to the superior right of the public to protection against injury to health or safety.

More than health or safety is however claimed for the concept of essentiality. Government services are essential in two more ways, namely that the demand for it is relatively inelastic (or insensitive to changes in price). Elasticity, as

145 Adams *The education sector as an essential service* 64.

146 Madhuku 1997 *International Labour Review* 513.

147 Madhuku 1997 *International Labour Review* 513.

148 Wellington and Winter 1969-1970 *Yale Law Journal* 441.

149 Burton and Krider 1969-1970 *Yale Law Journal* 418.

150 Kheel 1969 *Monthly Labour Review* 63.

opposed to inelasticity, is exactly what is considered a strong determinant of union power.¹⁵¹ Inelasticity on the side of a resource tends to reduce the “employment-benefit trade-off” that unions face. This is true in the private and public sector, but in the private sector inelasticity of resources is not typical.¹⁵² In the private sector unions are also restricted by the entrance of non-union related members in the product market, while non-union rivals are not really an option in the public sectors.¹⁵³ This means that although a strike by educators may not create an immediate danger to public health and welfare,¹⁵⁴ teachers almost never have to fear for unemployment because of union-induced wage increases. There is also almost no threat of non-union rivals¹⁵⁵ as long as those who use private education pay taxes to support those using public education.¹⁵⁶ It can thus be derived that current education union members are in an inappropriate position of power. The concept of essentiality is also significant in the sense that municipal voters are inconvenienced by the disruption of educational services. Parents and other voting citizens have it in their power to punish the political leadership. The state is thus immensely vulnerable to the pressure from educator unions.¹⁵⁷

Another point of debate that has been going on for years, not only in South Africa, but also abroad, is the “unionism-professionalism debate.”¹⁵⁸ This debate revolves around the question of whether teachers should be seen as workers (as referred to in section 23) or professionals.¹⁵⁹ Professionalism “refers to the question of standards for controlling entrance into a profession.”¹⁶⁰ The term has become associated with strategies of persuasion and reason rather than force.

151 Wellington and Winter 1969-1970 *Yale Law Journal* 442.

152 Wellington and Winter 1969-1970 *Yale Law Journal* 442.

153 Wellington and Winter 1969-1970 *Yale Law Journal* 442.

154 Although in South Africa strikers' conduct clearly does.

155 Such as private schools.

156 Wellington and Winter 1969-1970 *Yale Law Journal* 442.

157 Wellington and Winter 1969-1970 *Yale Law Journal* 442.

158 Govender “Teacher Unions, policy struggles and educational change, 1994 to 2004” 286; Dobbs 2008 <http://www.typepad.com>.

159 Dobbs 2008 <http://www.typepad.com>.

160 Govender “Teacher Unions, policy struggles and educational change, 1994 to 2004” 286.

Unionism on the other hand is “concerned with maximising control in the work-related areas” like remuneration and service conditions.¹⁶¹ It is also “concerned with broader issues of economic and political contestation with the state” and organises militant strategies such as strikes.¹⁶² In the 1990’s there were strong differences regarding the ‘political’ role of teachers (which included the right to strike) as some unions defined it, and other bodies’ insistence on the “learner’s entitlement to uninterrupted learning.”¹⁶³ There is still not a definite answer to this question but it is said that the more interventionist a state’s role in socio-economic matters, “the likelier the right to strike is to be curtailed.”¹⁶⁴

The above paragraphs cover the conflicting rights of the worker to strike and the child’s right to education, but there is one more very important constitutional principle that should be taken into account wherever a child is involved, namely the best interests of the child. This particular principle will now be discussed in the context of the right to education.

4.1.3 *The best interest of the child principle*

Section 28(2) of the Constitution states that a *child’s best interests* are of *paramount importance* in every matter concerning the child.¹⁶⁵ This section is very similarly worded to article 3(1) of the CRC, as well as article 4(1) of the African Charter on the Rights and Welfare of the Child, which illustrates that the South African Constitution complies with international and regional law also on this point.

The best interest of the child principle forms part of the scheme of rights of the child contained in the whole of section 28, but it also creates a right that extends

161 Govender “Teacher Unions, policy struggles and educational change, 1994 to 2004” 286-287.

162 Govender “Teacher Unions, policy struggles and educational change, 1994 to 2004” 287.

163 Govender “Teacher Unions, policy struggles and educational change, 1994 to 2004” 272.

164 Madhuku 1997 *International Labour Review* 509.

165 Emphasis own.

beyond the other rights in this section and should be taken into account when any right (be it constitutional or legal) of a child is affected.¹⁶⁶

The Committee on the Convention on the Rights of the Child made it clear in a general comment¹⁶⁷ that children are dependent on responsible authorities (including professionals, like educators) to determine and represent their rights as well as their best interests with regards to any decision or action that will have an impact on their wellbeing. On a practical level this means that when the child's right to education is affected due to educator strikes, the best interests of the child must prevail. As already discussed, education is crucial to train South Africa's young citizens in the needed skills and attitude to survive as adults and to make a positive contribution in building a successful country. Receiving an optimal education is therefore clearly in the best interest of the child and the need arises for responsible parties in the educational sector to comply with their obligations with regard to the child's interests.

The committee on the CRC, in unison, states that all law and policy development, administrative and judicial decisions as well as service provisions that affect children in the school environment specifically, must not only take the best interest principle into account,¹⁶⁸ but, as indicated above, make it *the* primary consideration. Justice Sachs made it clear in *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*¹⁶⁹ that the Constitution requires people to "give paramount place to the interest of the child." He stressed that each child is unique and entitled to a good education regardless of the motives or passions of parents.¹⁷⁰ If not even children's parents are allowed to jeopardize children's right to education, how much smaller a role should the motives and

166 Malherbe 2008 TSAR 268.

167 A 13(a) of General Comment 7 (Fortieth session, 2005) 'Implementing Child Rights in Early Childhood' UN Doc E/2006/09/20; henceforth General Comment 7.

168 A 13(b) of General Comment 7.

169 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) par 53.

170 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) par 53.

passions of teachers play in this regard? The principle of the child's best interest serves as a safeguard with regard to official action in the school environment, supports South Africa's ideals for education and "strengthens our commitment to realise the best possible education for our children."¹⁷¹

The DA recently stated that it has taken its cue from section 28(2) of the Constitution and, with that in mind, submitted a private member's legislative proposal to the Speaker of the National Assembly which seeks to balance the best interest of the child as well as the child's right to a basic education with the educator's right to strike.¹⁷² This bill contains the following regulations:¹⁷³

- Teachers' strikes can only legally take place after consultation and agreement between government, unions and school governing bodies (meaning parents). Together, these various groups will agree on the manner in which the strike must be conducted, and the treatment of the learners during the strike period.
- The rule of "no work, no pay" must be strictly enforced.
- Individual striking teachers who engage in violence, looting, vandalism and intimidation must face criminal charges for their actions.
- Severe penalties – such as stiff fines – must be imposed on unions if their members engage in violence, looting, vandalism and intimidation.

The bill also includes an alternative model of teacher/government labour relations that entails:¹⁷⁴

- The legislation of a negotiation cycle that will see bargaining tak[ing] place in June and July once every three years. The agreement would specify three-year-long wage scales with steady and predictable increases.
- The creation of a federation that includes the 13 trade unions and professional associations in the education sector. This body could develop a charter of values and craft a robust system of self-regulation. This is the hallmark of a mature, professional sector, and something that unions should enthusiastically embrace.
- The introduction of regulations that seek to link teacher performance to pay levels. This would help to promote quality teaching through financial incentives.

171 Malherbe 2008 *TSAR* 285.

172 James 2011 <http://www.da.org.za>.

173 James 2011 <http://www.da.org.za>.

174 James 2011 <http://www.da.org.za>.

Although the paying of fines for bad behaviour is a good suggestion, the fact that strikes keep occurring, creating an opportunity for this kind of behaviour to exist and still rob children of quality learning time, is still a problem. It seems that the regulations and the alternative model the DA propose are somewhat contradictory. If bargaining only takes place every three years, which is a very good suggestion, why the need for regulation of strikes, unless the idea is to only allow a strike every 3 years between June and July with the approval of all of the above mentioned parties. While approval between these parties is a plausible idea, a very concerning aspect of the first regulation proposed by the DA, is that the parties that need to approve strikes do not include children themselves.

Verheyde¹⁷⁵ classifies the child's right to education, as contained in the CRC, under three headings namely, "the right TO education, IN education and THROUGH education." The child's right IN education includes all protection and participation rights entrenched in the CRC.¹⁷⁶ This fact can be directly applicable when the best interest of the child principle is read together with everyone's (including children's) right to freedom of expression contained in section 16 of the Constitution. Realising the child's right to freedom of expression is important for building and sustaining peace, democracy and respect in a country.¹⁷⁷ It is thus clearly not only in the best interest of the child, but also in South Africa's best interest to allow children to be heard. And children are speaking up: In a recent country-wide televised news broadcast, senior learners from various schools in the Eastern Cape were sharing their fears about not passing their matric exams due to all the time they will lose because of the current 'go-slow.'¹⁷⁸ These children's best interests will be served when their opinions are valued, respected and positively acted upon by the government, educators and unions, through deciding to sort out their differences without harming pupils by striking.

175 Verheyde "Article 28 – The right to education" 6.

176 Verheyde "Article 28 – The right to education" 7.

177 WACC 2012 <http://www.waccglobal.org>.

178 SABC 2012 <http://www.sabc.co.za>.

4.2 Other legislation

4.2.1 The child's right to education

The *Education Laws Amendment Act*¹⁷⁹ sets out a minimum package of resources to which every learner is entitled.¹⁸⁰ It has further made several changes to the *South African Schools Act*¹⁸¹ with regards to aspects of infrastructure. It also sets out identifiable standards for learner achievement. This progressive move by legislation addresses infrastructure backlogs, holds principals accountable for performance, increases funding for previously disadvantaged schools and focuses on teacher development and remuneration.¹⁸² Section 11 makes it clear that the Head of Department must protect the safety of the learners and the staff of any public school.¹⁸³ It also deals with situations in which there has been a serious breakdown in the way the school is managed or governed which is prejudicing the standards or performance of the school.¹⁸⁴ If such a situation occurs, the Head of Department must issue a written notice to the school which informs it that it must provide the Head of Department with a plan for correcting the situation.¹⁸⁵ It is clear that educator strikes cause serious breakdowns that affect school governance and learners' performance. Serious breakdowns are usually the result of poor work performance, which in turn, is caused by factors like strikes.¹⁸⁶ It is thus clear that educator strikes can be classified as situations that need to be corrected. In section 11(5), the act further states that the Head of Department may implement

179 31 of 2007.

180 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 115.

181 84 of 1996.

182 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 115.

183 *Education Laws Amendment Act* 31 of 2007.

184 *Education Laws Amendment Act* 31 of 2007.

185 Section 11(2) and (3) of the *Education Laws Amendment Act* 31 of 2007.

186 Cardy *Performance management: Concepts, skills and exercises* 48.

the incapacity code, as well as procedures for poor work performance in terms of the *Employment of Educators Act*.¹⁸⁷

According to section 17 of the *Employment of Educators Act*¹⁸⁸ (with regard to the specific outcomes of this study), an educator shall be guilty of misconduct if he/she fails to obey the act under discussion or any other act with regard to education; performs an act which is prejudicial to the administration, discipline or efficiency of any department of education, departmental office or any educational institution; is negligent or indolent in the carrying out of his/her duties; behaves in a disgraceful, improper or unbecoming manner, or, while on duty is discourteous to any person; is absent from office or duty without leave or any valid reason; disobeys, disregards or wilfully defaults in carrying out a lawful order given to the educator or an authoritative person or displays insubordination in his/her word or conduct. It is clear that the conduct of striking educators discussed in chapter 2, entirely corresponds to the above mentioned unlawful behaviour. According to section 20, an educator may, in response to his/her unlawful conduct and after certain processes have been followed, be suspended from his/her duties.¹⁸⁹ Striking educators may, according to law, thus be fired.

Another act applicable to this study is the *South African Schools Act*.¹⁹⁰ Part of the preamble of this act reads as follows:

Whereas this country requires a new national system for schools which will redress past injustices in educational provision, *provide an education of progressively high quality for all learners* and in so doing lay a strong foundation for the for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, *contribute to the eradication of poverty and the economic well-being of society*, protect and advance our diverse cultures and languages, *uphold the rights of all learners, parents and educators*, and *promote their*

187 76 of 1998.

188 76 of 1998.

189 *Employment of Educators Act* 76 of 1998.

190 84 of 1996.

acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State...¹⁹¹

It is obvious that the striking of educators cannot provide an education of progressively high quality for all learners. Further, instead of contributing to the eradication of poverty and the economic well-being of society, striking educators do the opposite. It has been reported by various authors that the strike of 2010 will have an extremely negative impact on the South African economy.¹⁹² The same applies to the strike of 2007. The estimated cost of the lost productivity is 3 billion rand and the effect of higher wages could cause a rise in inflation and interest rates.¹⁹³ In taking striking action educators are not upholding the rights of learners as well as the country as a whole, and not showing any sign of the acceptance of an inherent or prescribed responsibility.

Supplementary to the above mentioned act is a General Notice, namely the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners.¹⁹⁴ This code expressly states that learners have the right to the absence of harassment in attending classes and in writing tests and examinations.¹⁹⁵ It is obvious that the conduct of teachers mentioned in chapter 2 does not conform to these regulations.

Section 4 of the *National Education Policy Act*¹⁹⁶ further states that South Africa's education policy must be directed at the:

advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter [2] of the Constitution, and in terms of international conventions ratified by Parliament, and in particular the right... of every person to basic education and equal access to education institutions; of every child in respect of his/her education... enabling the

191 Emphasis own.

192 Baldauf and Kwinika 2010 <http://www.csmonitor.com>; Cohen and Seria 2010 <http://www.businessweek.com>.

193 Fin24 2007 <http://www.fin24.com>.

194 Gen Not 776 in GG 18900 of 15 May 1998.

195 Gen Not 776 in GG 18900 of 15 May 1998, par 4.6.

196 27 of 1996.

education system to contribute to the full personal development of each student, and to the moral, social, cultural, political and *economic development* of the nation at large, including the advancement of democracy, human rights and the *peaceful resolution of disputes*; promoting a culture of *respect for teaching and learning in education*.¹⁹⁷

The right to basic education is stressed again, and particularly the child's right to this important service. Again reference to the role of educators with regard to the economic growth of our country is made. If the above mentioned circumstances of violence against children and other teachers are taken into account, it is blatantly clear that the peaceful resolution of disputes, as mentioned by the act, does not take place in current striking events. Along with this sad fact it is also true that educators' conduct does everything but create a natural respect for the teaching profession. A shocking disregard for our country's educational laws and policies is the direct result of the contemporary striking teacher.

4.2.2 *The educator's right to strike*

The most important legislation with regards to the right to strike is the *Labour Relations Act*.¹⁹⁸ According to the LRA, there are prescribed procedures with which strikes must comply to enjoy the protection of the Act, namely that the issue in dispute must be referred to a council or the CCMA, a certificate stating that the dispute remains unresolved has been issued (or a period of 30 days has passed since the referral was received by the council or CCMA) and the employer must receive forty-eight hours' written notice of the commencement of the strike.¹⁹⁹ Where the state is the employer (which is the case in the education sector) the required notice period in respect of strikes is seven days.²⁰⁰ These requirements, however, do not apply in the case of educator strikes, since most educators are members of bargaining councils, which deal with the disputes in

197 Emphasis own.

198 66 of 1995 (henceforth LRA).

199 S 64 of the LRA.

200 S 64(1)(d) of the LRA.

accordance with their respective constitutions.²⁰¹ Most educator strikes therefore also qualify as protected strikes, due to educators' membership of various bargaining councils.²⁰²

Section 67 of the LRA lists the consequences of protected strikes: Educators may not be dismissed due to their participation in a strike; participation in a strike does not constitute in breach of contract or a delict, unless if an educator's conduct comes down to criminal action; employers are not obliged to pay educators participating in a strike; educators participating in a strike may be dismissed due to misconduct; educators participating in a strike may be retrenched due to their participation; no civil action may be constituted against an educator participating in a strike; if regulations contained in the *Basic Conditions of Employment Act*²⁰³ are disobeyed it doesn't constitute a criminal offence. Special attention needs to be given to the fact that striking educators may be dismissed due to misconduct and prosecuted due to conduct that constitutes a delict.

Assault and intimidation are examples of misconduct.²⁰⁴ Both examples of misconduct as well as trespassing and vandalising could also attract criminal and civil liability.²⁰⁵ In chapter 2 it has been shown that many striking educators are guilty of the above mentioned offenses and they should thus be held accountable for their conduct on a criminal and/or civil level. Unfortunately, educators who misbehave or make themselves guilty of criminal offences in this regard usually do not get prosecuted to the full extent of the law, making educator strikes scenes of chaos instead of reasonable petitions for educators' rights.

There is however, a policy consideration underlying the BCEA that certain types of disputes are better suited to resolution by a third party than by industrial

201 S 64(3)(a) of the LRA.

202 Du Plessis en Fouche `n *Praktiese Handleiding tot Arbeidsreg* 363.

203 75 of 1997 (henceforth BCEA).

204 Grogan *Workplace Law* 132.

205 Du Toit *et al Labour Relations Law* 295.

action.²⁰⁶ These disputes are commonly referred to as ‘rights disputes’ because they usually involve claims that are based on alleged legal rights.²⁰⁷ These rights can be better determined by the application of objective standards.²⁰⁸ Although the legal rights referred to in these particular circumstances are employment rights conferred by the LRA and the BCEA, it is submitted that a broader interpretation of ‘legal rights’ and ‘rights disputes’ should be allowed to include the rights of third parties (in this case the millions of children who are negatively affected by educator strikes) that could be subjected to infringement in cases of disagreements between employers and employees. It is also submitted that the most appropriate third party to adjudicate situations where rights are in conflict (as with regard to the child’s right to education, the best interests of the child and the educator’s right to strike) would be South African courts. The next chapter contains a discussion on the role of South African courts. In the first sub-section, however, both national and foreign case law will be discussed. The discussion will illustrate how both national and foreign courts have interpreted and applied their respective constitutions and legislation pertaining to educator strikes, as well as the applicable issues related to these strikes.

5 Applicable case law and the role of South African courts

5.1 Case law

5.1.1 National case law

5.1.1.1 Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC)

Although this case does not deal with the right to education directly, it is important for the purposes of this study, because of the interrelatedness and

206 Du Toit *et al Labour Relations Law* 307.

207 Du Toit *et al Labour Relations Law* 307; Grogan *Workplace Law* 381.

208 Du Toit *et al Labour Relations Law* 307.

indivisibility of all rights in the Bill of Rights - including socio-economic rights.²⁰⁹ In this key case, the respondents had been evicted from their informal settlements on private property.²¹⁰ They applied to the High Court for an order to obligate the government to provide them with suitable shelter or housing until they could find permanent accommodation.²¹¹ The Court ordered that the appellants provide the respondents (some of which were children) and their parents with shelter.²¹² The appellants appealed against the decision of the High Court.²¹³

Because of the fact that the rights in section 28(1)(c) of the Constitution are textually unqualified, it would have appeared that they should have been directly and immediately enforceable against the state, but the Constitutional Court in this case placed its own limitations on the interpretation of these rights.²¹⁴ The judgement was focused on access to suitable housing (section 26 of the Constitution), but part of the case dealt with the child's right to shelter as protected by section 28(1)(c). The court's findings had a severe impact on children's socio-economic rights as a whole.²¹⁵ According to the Court's decision, the obligation placed on the state by section 28(1)(c), can only be correctly understood in context of the rights (and specifically the obligations) that are created through sections 25(5), 26 and 27 of the Constitution and it should thus be borne in mind that these rights are subject to the internal limitation clause.²¹⁶

The respondents argued that in the absence of a limitation clause, as is the case with section 28(1)(c), the basic socio-economic rights of children place a direct and immediate burden on the state to provide children with basic social

209 Olivier "Regional Social Security" 122.

210 *Grootboom v Oostenberg Municipality* 2000 JDR 0074 (C) 1.

211 *Grootboom v Oostenberg Municipality* 2000 JDR 0074 (C) 2.

212 *Grootboom v Oostenberg Municipality* 2000 JDR 0074 (C) 26.

213 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 48D.

214 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 48D.

215 Pieterse-Spies 2009 SA Public Law 577-578.

216 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 81B-D.

services.²¹⁷ There is a visible overlap between the rights set out in sections 26 and 27 that are there for *everyone*, including children and rights that are only available/guaranteed to children according to section 28.²¹⁸ There is also an obvious overlap between basic and qualified socio-economic rights.²¹⁹ The court consequently found that section 28(1)(c) does not provide separate and independent rights for children.²²⁰

The court held that the state's duty, with regards to children in terms of socio-economic rights, must be interpreted in light of the internationally binding obligations on the South African state, which *inter alia* places a duty on the state to ensure that the rights of children are protected. Section 28 is one of the measures used to ensure that this duty is complied with, due to the fact that it requires of the state to ensure that children's rights are taken into account. The state does this by ensuring that, through legislation and common law, an obligation rests on parents to fulfil their responsibilities with regard to their children and it reinforces the fulfilment of these responsibilities through civil and criminal law as well as through programmes by social services.²²¹

The court also states that sections 28(1)(b) and (c) must be read together,²²² finding that alternative care is only provided in the absence of parental care. The primary duty to provide the rights listed in section 28(1)(c) are primarily the responsibility of a child's parents. Only when no parents are available to provide does the primary responsibility shift to the state.²²³

217 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 80E-G; Stewart 2008 SAJHR 473.

218 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 81B-D; Pieterse-Spies SA Public Law 578.

219 Stewart 2008 SAJHR 473.

220 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 81B-D; Pieterse-Spies SA Public Law 578.

221 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 81D-E.

222 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 81H.

223 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 81H.

The indivisibility and interrelatedness of all socio-economic rights could lead to an interpretation that would result in section 29(1)(a) most probably being limited by section 29(1)(b). Section 29(1)(b) states that education must be made available progressively through reasonable measures. The judgement in *Grootboom*, however, emphasises what the text of the Constitution clearly points out, namely, that the right to basic education cannot be limited like other socio-economic rights with the clause “within available resources,” even if the Bill of Rights has to be read as a whole. The court held that socio-economic rights are justiciable and that budgetary limitations are no excuse for not implementing these rights,²²⁴ making this judgement even more applicable in context of section 29.

The court further reasons that international law is also applicable to the right to education.²²⁵ As illustrated above, it is clear from international law that children’s right to basic education is not being fulfilled in the case of educator strikes. It has also been illustrated that the state has begun to fulfil its duty with regard to the implementation of the relevant legislation as has been discussed in chapter 4 above. Our country’s law on education does not leave room for the misconduct and negative consequences that accompany an educator strike. There thus rests a further responsibility on the state to comply with international law relating to education by ensuring that the applicable legislation is enforced.

5.1.1.2 *B and Others v Minister of Correctional Services and Others* 1997 6 BCLR 789 (C)

In *B and Others v Minister of Correctional Services and Others*,²²⁶ the four applicants were inmates in Pollsmoor Prison outside Cape Town. All four were HIV-positive.²²⁷ They sought an order declaring that they, as well as all HIV-positive prisoners, were entitled to adequate and appropriate medical care and

224 *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 par 20.

225 *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 par 26.

226 *B and Others v Minister of Correctional Services and Others* 1997 6 BCLR 789 (C) par 1.

227 *B and Others v Minister of Correctional Services and Others* 1997 6 BCLR 789 (C) par 2.

treatment on the grounds of their HIV status. The order was sought to state that those prisoners who have reached the symptomatic phase be given, at state expense, anti-viral medication including AZT.²²⁸

The court found that, according to section 35(2)(e) of the Constitution (which gives prisoners the right to adequate medical treatment), the two of the applicants to whom AZT was prescribed by medical doctors were entitled to receive it free of charge from the state.²²⁹ AZT was not prescribed by medical doctors to the other two applicants and the court found that it was not at liberty to compel doctors to prescribe a certain drug by making the general order that *all* prisoners who have symptoms of HIV are entitled to being provided anti-viral drugs.²³⁰

The court did make a few statements in this case that are just as applicable to the right to basic education as a socio-economic right as they are to the right to adequate health care for prisoners. The court argued that budgetary constraints are no excuse for not providing a prisoner with a severe illness with the medication that will work for him/her.²³¹ Authorities have no defence in saying that they cannot afford to pay for the medication, because prisoners have a constitutional right to be provided with adequate medical treatment.²³² Because the child's right to education is not limited by the fact that there has to be adequate resources to fulfil it, it can be argued that, just as a shortage of monetary resources is not an excuse to provide prisoners with health care, a shortage of human resources (teachers) is also not an excuse to for the denial of children's right to basic education. As Liebenberg and Quinot state:²³³

228 *B and Others v Minister of Correctional Services and Others* 1997 6 BLCR 789 (C) par 2.

229 *B and Others v Minister of Correctional Services and Others* 1997 6 BLCR 789 (C) par 61.

230 *B and Others v Minister of Correctional Services and Others* 1997 6 BLCR 789 (C) par 62.

231 *B and Others v Minister of Correctional Services and Others* 1997 6 BLCR 789 (C) par 49.

232 *B and Others v Minister of Correctional Services and Others* 1997 6 BLCR 789 (C) par 49.

233 Quinot and Liebenberg 2011 *Stellenbosch Law Review* 651.

A failure to use available resources optimally or efficiently should be strong indicators of unreasonableness in the context of socio-economic rights adjudication.

While it is submitted that educators should not be permitted to strike, this judgement could be used in favour of educators in, for instance, alternative dispute resolution (that will be referred to later) when they are not being treated fairly by the state. Monetary shortages are no excuse for not providing educators with adequate salaries, because these human resources are essential in providing children with a basic education that have to be obtained and maintained on a continuous basis. This leads to a basic chain reaction: Educators may not strike, because they are a basic human resource in the process of education. In turn the state may not deny teachers fair salaries because educators are a necessary human resource that has to be taken care of in order to provide basic education. In this way children will not be denied their right to basic education as provided for by section 29(1)(a) of the Constitution and teachers will not be denied their right to fair labour practices.²³⁴

5.1.1.3 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC)

The case of *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*²³⁵ revolved around the question of whether people have the right to demand education in their home language. While an in-depth discussion of the case is not necessary for purposes of this study, the court did however make an important statement with regard to the right to education in general. The court implied that the interpretation of section 32(c) of the interim Constitution²³⁶ (which states that every person shall have the right to a basic education) places positive obligations on the state. This is derived from the fact that the grammatical and

234 Section 23(1) of the *Constitution of the Republic of South Africa*, 1996.

235 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) par 6.

236 *Constitution of the Republic of South Africa*, 1993.

linguistic structure of section 32 supports its own context. This section creates a positive right:²³⁷

that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.

It is thus clear that educators who strike not only fail to provide children with the basic education to which they are entitled to as well as so desperately need, but they go so far as to obstruct children in pursuing this right. This shows their blatant disregard for the judgement of the Constitutional Court.

5.1.1.4 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N)

In the case of *Acting Superintendent-General of Education v Ngubo*²³⁸ various college campus students staged a sit-in to demonstrate against the quality of educator training. They did not, however, act according to section 17 of the Constitution that gives everyone permission to assemble and demonstrate *peacefully*. In a similar manner to the striking educators discussed in section 2, they intimidated other students, disrupted classes and vandalised college property.²³⁹ This led to the college authorities applying for an interdict against these students, who, in turn, protested that it would violate their right to assemble and demonstrate.²⁴⁰ In the court's judgment, however, Hurt J stated that these students acted beyond the scope of their rights in terms of section 17 and that it interfered with the normal and orderly conduct of educational activities.²⁴¹ Of specific importance here is the way in which the court described the conduct of the offenders. It said that their intent was to use disruption of the College "as a

237 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) par 9.

238 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 369.

239 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 369.

240 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 369-370.

241 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 370.

lever to attract the serious attention of the authorities.”²⁴² They ignored the important distinction between actions aimed at getting their message across with actions aimed at achieving the subject-matter of the message.²⁴³ The same can be said for striking educators who use matric exams, violence and degradation as a lever to attract authority attention.

The court was also very firm about the fact that the right to assemble and demonstrate is not without limits. Other rights fix the bounds of any individual right.²⁴⁴ The court thus limited the respondents’ right in terms of section 17 and granted the interdict against them.²⁴⁵ It can thus be derived from this case that the parameters of the right to strike can be determined by the child’s right to education, not to mention all of the other rights of children that are not discussed in this study, such as the right to be protected from maltreatment, neglect, abuse and degradation²⁴⁶ and the right to freedom of movement,²⁴⁷ all of which are infringed by die conduct of striking teachers described in chapter 2.

5.1.1.5 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 8 BCLR 761 (CC)

The case of *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others*²⁴⁸ is an appeal case against a High Court decision²⁴⁹ which authorised the eviction of a public school conducted on private property. The South African Schools Act²⁵⁰ requires that an agreement, setting out the tenancy terms and conditions, should be concluded when a public school

242 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 377.

243 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 377.

244 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 375.

245 *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 377.

246 S 28(1)(d) of the Constitution.

247 S 24 of the Constitution.

248 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 8 BCLR 1 (CC).

249 *Ahmed Asruff Essay NO and Eight Others v The MEC for Education KwaZulu-Natal and Four Others*, Case No 10230/2008 2009, unreported.

250 84 of 1996, s 14(1).

is run on private property.²⁵¹ The Member of the Executive Council for Education failed to conclude such an agreement.²⁵² The High Court granted the owner of the private property (the Juma Masjid Trust) an eviction order, which was followed by an unsuccessful attempt to appeal to the Supreme Court of Appeal.²⁵³

The case was recently brought before the Constitutional Court where three key issues were addressed namely: whether the obligations placed on the council of education with regard to the child's right to basic education had been fulfilled in the current situation; whether the trustees who are responsible for the private property have any constitutional obligation with regard to the child's right to basic education; and lastly, if the applicable common law remedy in this case should be developed when an eviction will ultimately infringe the child's right to basic education.²⁵⁴ What these aspects boil down to in the end is a balancing of conflicting rights, namely the right to basic education,²⁵⁵ the fact that the child's best interest are paramount²⁵⁶ and property rights.²⁵⁷

Addressing the first matter, the court found that the primary positive obligation to provide the child with a basic education rests on the MEC.²⁵⁸ For a long period of time, the owners of the private property were willing to stay in agreement with the Department of Education, but received no cooperation on financial level or

251 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 8 BCLR 1 (CC) par 1.

252 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 8 BCLR 1 (CC) par 1.

253 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 1.

254 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 7.

255 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 7.

256 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 31.

257 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 7.

258 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 57.

with regard to negotiation processes.²⁵⁹ It is thus clear that the MEC did not fulfil its constitutional obligations in this regard. The Constitutional Court hence found that the owners of the private property acted reasonably in seeking an eviction order.²⁶⁰ Although the conduct of the owners of the private property was reasonable, the question as to whether they had any constitutional obligations with regard to the child's right to basic education still remained. This was the second matter with which the Constitutional Court had to deal.

The Constitutional Court commented on the error of the High Court to grant an eviction order based on outdated common law principles. The High Court did not take into account section 8 of the Constitution that deals with the application and binding nature of the Bill of Rights.²⁶¹ Section 8(2) specifically states that any provision in the Bill of Rights can bind a natural or juristic person if, and to the extent that, it is applicable taking into account the nature of the right and the duty it imposes. In this particular case section 8(2) thus prescribes that the nature of the right of the child to a basic education and the duty imposed by that right be taken into account when determining whether the child's right to basic education binds the owners of the property.²⁶² The Constitutional Court stressed that the purpose of section 8(2) of the Constitution is to prevent private parties from interfering with or diminishing the enjoyment of a certain right.²⁶³ The same court thus concluded on this second matter that, although the owners of the private

259 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 63.

260 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 65. Also see par 61-65 of this case for a full discussion on the effective use of the reasonableness model with regard to socio-economic rights as discussed in chapter 5.2.

261 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 56.

262 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 57.

263 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 58.

property acted reasonably in seeking an eviction order, they do have a negative constitutional obligation not to impair the child's right to basic education.²⁶⁴

From the fact that both the MEC and the owners of the private property have an obligation with regard to the child's right to basic education, the aspect of the best interests of the child arises and, related to this, the third issue namely, whether the common law had to be developed in this case.²⁶⁵ The Constitutional Court stated that the High Court has failed to give effect to sections 29(1)(a) and 28(2) of the Constitution.²⁶⁶ The court quoted extensively from *S v M*²⁶⁷ to clarify the role of section 28:²⁶⁸

The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.

S v M, quoting from Sloth-Nielsen²⁶⁹ to provide an even deeper understanding of this particular section, also stated:

The inclusion of a general standard ('the best interest of a child') for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives.

The Constitutional Court in *Juma* confirmed that the applicants in this case acted in the best interests of children, something the High Court neglected to do in

264 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 60.

265 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 65.

266 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 66.

267 *S v M* 2008 3 SA 232 (CC).

268 *S v M* 2008 3 SA 232 (CC) par 15.

269 Sloth-Nielsen 1996 *Acta Juridica* 25, as quoted in *S v M* 2008 3 SA 232 (CC) par 15.

granting an order for eviction.²⁷⁰ The High Court also privileged property rights above the child's right to a basic education and did thus not accord sufficient weight to the infringed rights of the child and to the paramount importance of his/her best interest.²⁷¹ The Constitutional Court did, however, grant an eviction order, following a provisional order stating that the owners of the private property and the MEC should conclude an agreement to keep the school open and running. The final eviction order was believed to be a just and equitable remedy for various reasons, *inter alia* because the MEC stated that it planned to close the school at the end of 2010 and relocate learners to other schools after it had been reported that there was indeed room for them there.²⁷²

From the provisional order it can be concluded that the Constitutional Court would not have made a final order for eviction if the MEC had not made acceptable alternative arrangements for the children involved. This means that the child's right to education is indeed counted by the Constitutional Court as a right that should enjoy special attention in constitutional matters, being a higher priority to fulfil than, in this case, property rights. Further the court has also stressed that the child's best interest are indeed paramount when it comes to education.

If this is the Constitutional Court's stance with regards to the importance of education, it can safely be assumed that it will not lower its standards when it comes to the matter of educator strikes. The motivation for the owners of the private property to approach the court was most probably the fact that they were losing money due to the fact that the state did not compensate them for the contribution that they were making to education (in the form of property) and that the founding of a private school would be a more fruitful venture. The court does,

270 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 68.

271 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 71.

272 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 2011 8 BCLR 1 (CC) par 74-77.

to some extent, consider the loss of money an important factor in determining reasonableness²⁷³ in circumstances where the child's right to education is also at risk of being infringed, but only on the condition that children can receive a good basic education elsewhere. Educator strikes in turn, are also based on the issue of money. If teachers strike, children however, have nowhere else to turn for a basic education. Few people have the needed skills to be able to teach children well. Allowing educator strikes will diminish the fact that a child's interest is paramount also in this situation. Thus, following the example set by the Constitutional Court, it is submitted that an educator's monetary issues are not a valid reason to leave children uneducated, because of the fact that a basic education cannot be provided via other sources.

5.1.2 *Foreign case law*

5.1.2.1 Introduction

Section 39(1)(c) of the Constitution states that courts may consider foreign law when they are interpreting the Bill of Rights. Since most court cases with regard to the educator strikes in South Africa only dealt with the financial aspects thereof²⁷⁴ and did not even touch on the child's right to basic education, consideration can be taken of foreign court cases (particularly those from the United States of America), dealing with similar circumstances. These cases have delivered judgment on the importance of education as opposed to the option of granting educators the right to strike. Even though the US does not guarantee the right to education or have a directive principle relating to education like South Africa does,²⁷⁵ it places a high priority on the education of its youth, as can be clearly seen from one court's judgement, stating that nothing may hinder

273 For a discussion on how the reasonableness test was used in Juma see chapter 5.2.

274 See *SAOU and Another v The Head of Department, Gauteng Department of Education and Others* J2468/10.

275 Calderhead *The Right to an 'adequate' and 'equal' education in South Africa: An analysis of s 29(1)(a) of the South African Constitution and the right to equality as applied to basic education* 21.

a child from receiving a good education.²⁷⁶ Just as in South Africa, America has been confronted with striking educators on numerous occasions. The “biggest teachers’ strike” in US History hit America in 1962 in which 40 000 New York educators participated.²⁷⁷ A more recent example is the Detroit teachers’ strike in which 6000 teachers, responsible for over 100 000 students, embarked.²⁷⁸ The way American courts handled these strikes constitute good examples that can be followed by South African courts. Calderhead²⁷⁹ states the reason for using American court cases as help with the interpretation and solution of South African problems as follows:

As importantly, and bearing in mind the [Constitutional Court’s] expression of caution, in *Grootboom, TAC and Mazibuko*, about its own institutional limitations regarding social and economic rights, the fact that dozens of courts in the U.S. have waded deeply into the details of public schooling in America, *despite* very similar (and, if anything, even more deeply held) institutional concerns, can and should be used as a way of assuaging the fears of those within the Constitutional Court who may still have doubts about the viability of robust adjudication regarding the right to a basic education.

It is thus at this point quite appropriate to briefly discuss various US court cases.

5.1.2.2 *School Committee of the Town of Westerley v Westerley Teachers Association* 1973 299 A.2d 441

In the case of *School Committee of the Town of Westerley v Westerley Teachers Association*,²⁸⁰ teachers of Westerley, Rhode Island, refused to return to school after the summer holidays because they were dissatisfied with their wages. An

376 *School Committee of the Town of Westerley v Westerley Teachers Association* 1973 299 A.2d 443.

277 Time Magazine 1962 <http://www.time.com>.

278 Regalado and Lare 2007 <http://www.solidarity-us.org>.

279 Calderhead *The Right to an ‘adequate’ and ‘equal’ education in South Africa: An analysis of s 29(1)(a) of the South African Constitution and the right to equality as applied to basic education* 26; Also see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 72 (CC) and *Mazibuko and Others v City of Johannesburg and Others* 2010 3 BCLR 239 (CC).

280 *School Committee of the Town of Westerley v Westerley Teachers Association* 1973 299 A.2d 442.

ex parte temporary restraining order enjoined the strike and ordered all educators to return to their work.²⁸¹ The court ruled that the state has a compelling interest in its children and that they²⁸²

have the opportunity to drink at the fountain of knowledge so that they may be nurtured and develop into the responsible citizens of tomorrow. No one has the right to turn off the fountain's spigot and keep it in a closed position.

The court continued its judgment by stating that the equal protection offered by the fourteenth amendment²⁸³ doesn't guarantee perfect equality and that there are differences between private and public employees (among them, teachers).²⁸⁴ Teachers have a very important role in helping the state to fulfil its constitutional responsibilities, and in order to prevent "governmental paralysis" a distinction has to be drawn between the two sectors. Although there exists no constitutional right to strike in this state,²⁸⁵ the court's ruling gives a much needed perspective on the importance of the distinction between the private and public sector and stresses the fact that children's right to basic education must continuously be realised.

5.1.2.3 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34

The educators in the case of *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County*²⁸⁶ all signed contracts with the

281 *School Committee of the Town of Westerley v Westerley Teachers Association* 1973 299 A.2d 442.

282 *School Committee of the Town of Westerley v Westerley Teachers Association* 1973 299 A.2d 443.

283 The fourteenth amendment is part of the Constitution of the United States of America and prescribes that no state may deny any person within its jurisdiction the equal protection of the law.

284 *School Committee of the Town of Westerley v Westerley Teachers Association* 1973 299 A.2d 443.

285 *School Committee of the Town of Westerley v Westerley Teachers Association* 1973 299 A.2d 443.

286 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34 1.

government in which they accepted service for the remuneration that was above the prescribed minimum. The Board's (respondent) salary schedule could not be adopted until a few days before the start of the new school year due to excusable administrative delays.²⁸⁷ Although no complaints were received by the appellant on the signing of the educators' contracts, by the time the salary schedule was adopted, it was suddenly declared that the schedule was unacceptable regardless of increases in all categories.²⁸⁸ The appellant threatened that educators would refuse to attend classes when the schools reopened a few days later.²⁸⁹ The respondent obtained an injunction²⁹⁰ that prohibited the educators from striking.²⁹¹ The court was asked to review the decree that prohibited the strike in this appeal case.

The court ruled that the contracts that the educators had concluded with the Board, as well as the prohibiting decree, were valid and binding.²⁹² The court cited the words and shared the view of President Franklin D Roosevelt that:²⁹³

Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

Educators were given the choice to either continue to work in accordance with the valid contracts that they had concluded with the government or to terminate their contracts legally or illegally "and suffer the results thereof," but they could

287 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34 1-2.

288 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34 2-3.

289 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34 3.

290 An injunction is a court order that requires a person to do or not to do something. SA law does not make use of injunctions, although Hiemstra and Gonin describe them as being very similar to interdicts. US Legal describes it as an "extraordinary remedy that courts utilise in special cases where preservation of the *status quo* or taking some specific action is required in order to prevent possible injustice."

291 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34 3.

292 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34 3.

293 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34 4.

not “strike against the government and retain the benefits of their contract positions.”²⁹⁴ The court concluded that government officials and in this case, specifically teachers, have no right to strike because it would permit the breakdown of governmental functions and sanction it for private gain.

Although a total prohibition of the right to strike on all government workers is unthinkable in South Africa today, the principles of this case are directly applicable to teachers due to the important (and essential) role they play in the logistics of section 29 of the South African Constitution. The court accurately described educator strikes as paralysing a nation in order to benefit a selected few.

5.1.2.4 *Jefferson County Board of Education v Jefferson County Education Association* 1990 393 S.E.2d 653

The case of *Jefferson County Board of Education v Jefferson County Education Association*²⁹⁵ has similar facts to *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County*.²⁹⁶ A record of the facts is thus not necessary. The court made the following statement, once again, ruling that a strike by public sector employees is unlawful:²⁹⁷

Since legislative bodies are responsible for public employment decision-making, granting public employees the right to strike would afford them excessive bargaining leverage, resulting in a distortion of the political process and an improper delegation of legislative authority. Finally, public

294 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34 4.

295 The following cases all centred around illegal educator strikes where the courts ruled that educators did not have the right to strike: *Jersey Shore Area School District v Jersey Shore Education Association* 1988 548 A.2d 1202; *Norwalk Teacher Association v Board of Education of City of Norwalk* 1951 83 A.2d 482; *Passaic Township Board of Education v Passaic Township Education Association* 1987 536 A.2d 1276 and *Anderson Federation of Teachers v School City of Anderson* 1969 251 N.E.2d 15.

296 *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* 1968 214 So.2d 34.

297 *Jefferson County Board of Education v Jefferson County Education Association* 1990 393 S.E.2d 653 6.

employees provide essential public services which, if interrupted by strikes, would threaten the public welfare.

Again the term 'essentiality' is mentioned. As already stated, since the term has already been explained, using it in a possible solution in the South African context will be considered in the next chapter.

5.1.3 Summary

It is clear from the above mentioned discussion of court cases that most American courts do not grant educators the right to strike due to the fact that it is both a public and essential service, while the issue of educator strikes has, up until this point, evaded South African courts. What the South African courts have made clear however, is that a shortage of resources is no excuse for depriving people of certain socio-economic rights. It is submitted that the right to education falls within this group. Further, the *Ngubo* and *Juma* cases have shown that certain rights can be limited when they infringe others' right to education. Thus, this possibility has to be explored in further detail in the context of striking educators.

5.2 *The role of South African courts*

It is suggested that courts, the state and other interested parties (which in this case will most likely be the various unions) work together to provide a remedy for the current failure to provide an adequate basic education for all children.²⁹⁸ Section 172(1)(b) of the Constitution gives courts the freedom to make any order that is just and equitable. This type of approach that searches for appropriate constitutional remedies for constitutional violations can be described as a theory of experimental constitutionalism, which, according to Woolman and Fleisch,²⁹⁹

298 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 115.

299 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 115-116.

consists of four parts, namely empiricism (the evaluation of social norms and institutional arrangements against practical experience), the reciprocal effect (the fact that social norms, institutional arrangements and their legal framework are interdependent), reflexivity (the examination of ourselves as well as social change) and destabilisation. The last element requires further discussion.

Destabilisation recognises that social norms create structures that are supposed to promote their own continued existence.³⁰⁰ The problem is that these structures can prevent meaningful attempts at change. Destabilisation then changes hierarchies in such a manner that members of a political community can pursue new possibilities with regard to the way things are done. When the above mentioned parts are combined, the goals of experimental constitutionalism are to make social norms and institutional arrangements more open to revision and to make the revision thereof result in the use of the best practice (which is established through extensive study of laws and policies).³⁰¹

From the above exposition, it can be derived that the right to strike is a widely accepted social norm. When evaluated in light of the experiences of South African children, it is clear that this particular social norm is highly disruptive and, as seen, it infringes upon various rights that children have with regard to education. In terms of the reciprocal effect it can be seen that the right to strike is dependent on the legal framework of which it is part and can thus be limited just like all other rights. With regard to social change, it is important to keep in mind that South Africa still experiences the negative effects that years of apartheid had on the education system. As has been shown, children in schools are performing dismally and in that light it is clear that an educator's right to strike can under no circumstances be placed above children (who are in dire need of strong academic guidance) right to basic education. We can also see that the

300 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 116.

301 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 116.

right to strike in essence promotes its own continued existence. After the major strike in 2007, came an even worse one in 2010. What educators gain by striking today, will be the topic of unhappiness tomorrow and these circumstances make positive and sustainable change and growth almost impossible. Destabilisation should thus take place and room should be made for a new way of resolving disputes that involves the state, educators, unions and courts.

Our courts are in the position to create open-ended norms with the assistance of proper stakeholders.³⁰² In this instance the court plays three distinctive roles.³⁰³ First and foremost they determine the contours of the general norm. This means that courts should establish what the right to a basic education means and establish the entitlements that should flow to the beneficiaries, in this case, children.³⁰⁴ Secondly, courts must determine whether the prerequisites for the realisation of the right to basic education are in place. This is done with the help of various role players such as the state, unions, teachers, parents, provincial departments, local communities, experts and *learners*.³⁰⁵ This means that in a situation where a case of educators striking comes before the court, the court is obliged to take the viewpoints of all the mentioned parties into account before coming to a decision. In this regard the best interest of the child principle (section 28(2) of the Constitution) should be kept in mind. The third role of the courts is closely connected with the second. Our courts are in the unique position to create a space for sustained discourse with regards to those practices that work best when the topic of the realisation of an adequate education is in issue.³⁰⁶ Courts must therefore give orders³⁰⁶ that compel all relevant stakeholders

302 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 109.

303 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 113.

304 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 113.

305 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 113.

306 Woolman and Fleisch *The Constitution in the Classroom: law and education in South Africa, 1994-2008* 114.

to report back on a regular basis to make sure that not only all parties are protected, but that the best interests of the child with regard to his/her basic education is the conducting norm.

Though the courts, especially the Constitutional Court, are in the position to identify these norms, the question is how they will go about doing so. Quinot and Liebenberg³⁰⁷ indicate that there can be a unified model of reasonableness review across cases with regard to socio-economic rights:

The various reasonableness standards found in distinct provisions of the Bill of Rights can be interpreted in a way that promotes a coherent model of review. In terms of this model, reasonableness under the various provisions overlap, but do not duplicate the same function. There is rather an interaction between these standards that promote the core advantages of reasonableness as a model of review.

The ideal reasonableness review-model is a contextual inquiry which means that the level of scrutiny will be determined by factors surrounding the normative and factual context of a specific case.³⁰⁸ The normative context includes all the applicable constitutional provisions, which in this case will be the child's right to basic education, the best interests of the child, and the worker's right to strike. This model allows a court to decide whether a decision is reasonable with regard to the merits of the case. The applicable constitutional provisions (or normative context) determine the court's options. In this instance it should be determined whether this is a case of a breach of a positive or negative duty imposed by the relevant socio-economic right³⁰⁹ (the child's right to basic education). There is clearly a positive duty on the state to provide the child with basic education³¹⁰ and thus the court must "subsume all aspects of the reasonableness analysis within this right".³¹¹ In this case the focus will be more on the justificatory analysis than on the substantive content of the right. It is however important to

307 Quinot and Liebenberg 2011 *Stellenbosch Law Review* 661.

308 Quinot and Liebenberg 2011 *Stellenbosch Law Review* 661.

309 Quinot and Liebenberg 2011 *Stellenbosch Law Review* 661.

310 Veriava and Coomans "The right to education" 57-83.

311 Quinot and Liebenberg 2011 *Stellenbosch Law Review* 661.

remember that the first step of the model is still to give content to the relevant right before a justification analysis is done; in this particular case, in terms of the general limitation clause analysis under section 36 of the Constitution.³¹² The Constitutional Court has expressed its preference for the use of this section when the child's right to basic education absolutely has to be limited.³¹³ Giving reference to the substance of the right to basic education as well as everyone's right to strike, narrows the "band of options". After that, the state's conduct is analysed against these options.³¹⁴ It can't be stressed enough, however, that courts should give all substantive rights provisions (in this case section 29(1)(a)) their full content before it considers the justificatory factors in section 36.³¹⁵ This has, however, not been done in previous cases that deal with socio-economic rights. This higher standard of review (higher than the standard in terms of international limitations) obliges the state to implement the necessary measures to give effect to the child's right to basic education "as a matter of absolute priority."³¹⁶

However, all the above mentioned steps that courts could take will not become reality if bodies like NGO's do not launch constitutional litigation to ensure children access to a basic education.³¹⁷ Our courts may have the final say, but there remains a moral burden on the society as a whole to address this very pressing problem.

312 Quinot and Liebenberg 2011 *Stellenbosch Law Review* 662.

313 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 8 BCLR 761 (CC) par 37.

314 Quinot and Liebenberg 2011 *Stellenbosch Law Review* 662.

315 Calderhead *The Right to an 'adequate' and 'equal' education in South Africa: An analysis of s 29(1)(a) of the South African Constitution and the right to equality as applied to basic education* 34.

316 Veriava and Coomans "The right to education" 62.

317 De Vos 2011 <http://constitutionallyspeaking.co.za>.

6 Conclusion and recommendations

It has been shown that strikes negatively influence children on physical and psychological level, which is directly linked to their educational environment. For a long time the position has been that children have had to suffer where conflicting situations involving their rights existed.³¹⁸ This can no longer be tolerated.

What is thus, based on this study, the solution for this situation and how can the worker's right to strike be limited by the child's right to education? The suggestion is made that the educator's right to strike be eliminated by declaring education an essential service. The DA has already submitted an application to this effect to the Essential Service Committee (which falls under the CCMA at the labour department) in February 2010.³¹⁹ Although education is not an essential service at the moment, the ILO makes it clear that non-essential services can be transformed into essential services depending on the effects of a strike.³²⁰ The crippling effects of educator strikes, as shown in chapter 2, points directly to the fact that education needs to be declared an essential service.

Very important to keep in mind though, is that if the educator's right to strike is taken away, the educators concerned should be afforded "compensatory guarantees"³²¹ in the form of conciliation and mediation processes.³²² If these processes lead to a deadlock, arbitration (using machinery that both parties find reliable³²³) must follow. Both educators and the state should be able to participate in determining and implementing the procedure, "which should provide sufficient guarantees of impartiality and rapidity."³²⁴ The awards of the

318 As seen in chapter 2.

319 SAPA 2010 <http://www.news24.com>.

320 As seen in chapter 3.

321 ILO 2001 <http://www.ilo.org>.

322 As seen in chapter 4.

323 ILO 2001 <http://www.ilo.org>.

324 ILO 2001 <http://www.ilo.org>.

arbitration should be binding³²⁵ on the state and educators and should be rapidly and completely implemented.³²⁶

If education is not declared an essential service, organisations that pride themselves in fighting for children's rights, should approach the courts on this matter. The courts in turn must take the initiative to, like in the instance of *Ngubo* and *Juma*, use the relevant model of reasonableness, as discussed in chapter 5. The state has not been complying with its duties and the muscles of the civil and criminal (for example, seeing that educator offenders of the mentioned legislation in chapter 4 are prosecuted) law aspects of the right to education remain unflexed.

325 Du Toit et al *Labour Relations Law* 314.

326 ILO 2001 <http://www.ilo.org>.

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