

The possibility of declaring education as an essential service in terms of the Labour Relations Act

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Abstract

In South Africa teachers are currently allowed to strike. This leads to numerous problems, as learners are left without an educator and their Constitutional right to basic education is infringed upon. This has an impact on university acceptance and impairs the socio-economic growth in the country, especially when taking into account the history of prejudice as regards education in South Africa. This dissertation considers whether or not education should be declared as an essential service in terms of the *Labour Relations Act* 66 of 1995, as sectors declared as such are not awarded the right to strike. In order to determine whether education should be designated as an essential service, the right to strike and the right to education as enshrined in the Bill of Rights in the *Constitution of the Republic of South Africa*, 1996, have to be balanced or weighed up against each other. By declaring education as an essential service it will ensure that the latter right is more adequately realised, in turn having a positive impact on the development of South Africa. In declaring education an essential service, educators will not be left without remedy as other remedies (which do not impair the rights of learners) do indeed exist and will be available to said educators in accordance with relevant legislation and provisions.

Key words

Right to strike, right to education, essential services, socio-economic rights

Opsomming

In Suid-Afrika beskik onderwysers tans oor die reg om te staak. Die posisie lei na talle probleme, aangesien leerders sonder 'n onderwyser gelaat word en daar inbreuk op hulle Grondwetlike reg tot onderwys gemaak word. Dit het ook 'n effek op universiteitsaanvaardings en kniehalter sosio-ekonomiese voortuigang, met die inagnome van die historiese benadeling wat beleef is ten aansien van die reg op onderwys. Dit sal oorweeg word of onderwys as noodsaaklike diens verklaar behoort te word ingevolge die *Wet op Arbeidsverhoudinge*, 66 van 1995, omrede sektore wat as noodsaaklike dienste verklaar word nie oor die reg om te staak beskik nie. Om te bepaal of onderwys as 'n noodsaaklike diens verklaar moet word sal die reg om te staak en die reg tot onderwys, wat in die Handves van Menseregte in die *Grondwet van die Republiek van Suid-Afrika*, 1996, uiteengesit word, balanseer moet word. Deur onderwys as 'n noodsaaklike diens te verklaar, sal dit verseker dat die reg op onderwys verwesenlik word en dit sal uiteindelik 'n positiewe effek hê op die ontwikkeling van Suid-Afrika. Indien onderwys as 'n noodsaaklike diens verklaar word sal onderwysers steeds ander remedies (wat nie sodanig inbreuk maak op die regte van leerders nie) tot hul beskikking hê.

Trefwoorde

Reg om te staak, reg op onderwys, noodsaaklike dienste, sosio-ekonomiese regte

Abbreviations

CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
HC	High Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
LRA	<i>Labour Relations Act 66 of 1995</i>
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
SPCA	Supreme Court of Appeal

1 Introduction and problem statement

According to former President Nelson Mandela “*Education is the most powerful weapon which you can use to change the world.*” This powerful weapon has, however, been ineffective due to the recent strikes by educators. In South Africa, as in many developing countries worldwide, the importance of the right to education cannot be overemphasised. Consequently section 29 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*) makes provision for this essential weapon by ensuring that every person in South Africa has a right to basic education. This right is perceived to be a socio-economic right denoting that it is positive in nature; thus it is a right which imposes positive obligations on government, rendering the latter obliged to realise the right progressively.¹

In South Africa rights are not absolute and may be limited by section 36 of the *Constitution* (better known as the limitation clause). This is not the only threat in light of the right to education, as rights in the *Constitution* constantly need to be balanced and weighed up against each other so as to ensure that no individual’s right or rights are unjustly infringed upon. This balancing act often becomes problematic because violation of or encroachment upon one right in order to respect and realise the other is very often unavoidable. In light of the topic at hand, section 23(2) of the *Constitution* states that every worker has the right to form and join a trade union, to participate in the activities and programs of a trade union and to strike. Taking into account the above mentioned sections of the *Constitution* it is clear that these rights will need to be balanced when educators are allowed to strike and pupils are denied their right to a basic education. This situation is not unheard of in the South African context and over the last decade there have been numerous accounts of teachers exercising their section 23 right while learners have to cope with this direct infringement upon their section 29 right.

1 Brand and Heyns *Socio-economic rights in South Africa* 1.

The *Constitution* makes provision for both these fundamental rights and in addition to them being enshrined in the Bill of Rights they are also embodied in national legislation as envisaged in section 23(5). Legislation, for example the *Labour Relations Act* 66 of 1995 (hereafter the LRA), which encompass the position regarding essential services and the right to strike must also be considered as it gives effect to the right to strike.

The *Constitution* is, however, the supreme law in South Africa and all other acts and legislation are subject thereto; any limitations to the above mentioned fundamental rights must, therefore, comply with section 36 of the *Constitution*. However, in order to balance the rights in question properly it is important that the nature and scope of these rights be taken into account. The LRA, *South African Schools Act*,² International Law and other relevant sources need to be considered.

Chapter 2 of the LRA echoes the provisions that allow employees to form and join a trade union while Chapter 4 enables a worker to strike. The right to strike may be limited in certain cases as provision may be made for collective agreements which will regulate the different issues that employees will be allowed to strike about.³ There are certain cases where an employee will be denied the right to strike, as seen in section 65(1) of the LRA where it is stated that no person that is engaged in an essential service, among others, may take part in a strike.

Various aspects will be taken into account in order to establish whether designation of education as an essential service is a possibility in South Africa. In order to give adequate consideration to this possibility it is necessary to take into account the socio-economic circumstances in South Africa as the history of the country is unique. Mention need also be made that, as in many cases, the legal framework should be used to redress inequalities that existed historically. The past inequalities also need to be corrected when it comes to education. When any right is limited, the question

2 84 of 1996.

3 Section 65 of the LRA.

remains as to whether such a limitation is permissible in terms of section 36 of the *Constitution*.

Thus this study aims to investigate the possibility of declaring education an essential service in terms of the LRA. The stance of strikes in the education sector in South Africa will firstly be elaborated upon in order to provide the reader with the necessary context as regards strikes in South Africa, its consequences and affected parties. A general overview of Constitutional provisions in terms of the South African *Constitution* will, thereafter, be given followed by an in depth analysis of Section 36, the limitation clause. The right to education in the South African context will also be duly elaborated upon in addition to expounding on the global perspective as regards education as enshrined in several international instruments and conventions. Relevant terminology and concepts pertaining to the right to strike, the right to education and essential services will be discussed in order to provide the reader with a clear understanding of the scope of the limitation and the provision made for their application. The constitutional and statutory framework as regards strikes will be put forth next, in particular focusing on the right to strike and requirements for a protected strike in South Africa. Essential services in terms of the LRA will also be discussed in depth, in particular focusing on the procedure and manner in which a service is designated as an essential service in terms of the applicable legislation. Lastly possible alternative remedies available to educators in this context will be considered where after the summary will conclude the study.

2 The stance of strikes in the education sector in South Africa

On the 17th August 2010 about 1.3 million members of the National Education, Health and Allied Workers Union (hereafter NEHAWU), the Health and Other Services Personnel Trade Union of South Africa (hereafter HOSPERSA), the Public Servants Association (hereafter PSA), the Democratic Nursing Organisation of South Africa (hereafter DENOSA) and the South African Democratic Teachers Union

(hereafter SADTU) waged a nationwide strike.⁴ This occurrence took place after the government rejected and refused to concede to the union's demand for an 8.6% salary increase and a R1 000.00 housing allowance and instead offered a 7% salary increase and R700.00 a month housing allowance.⁵ Employees including teachers, nurses and the judiciary exercised their right to strike. On the third day of the strike an interdict was granted by the Labour Court that forced doctors, nurses and other essential services staff members to return to work. This court order was however defied.⁶ On the seventh day of the strike, the President of the Police and Prison Civil Rights Union (hereafter POPCRU) broadcasted a message on national television to the remaining 145 000 striking employees declaring that the strike violated the rights of citizens as regards access to basic services and the right to be free from all forms of violence and intimidation.⁷

Therefore, one should try to establish whether the right to strike violates a child's right to a basic education in terms of the *Constitution* and if this is the case one should determine whether education should be declared an essential service in terms of the LRA so as to ensure that educators are not afforded the right to strike. Two weeks into the strike a new offer made by the government, a 7.5% salary hike and a R800.00 a month housing allowance, was accepted summarily and the strike was called off.⁸ In particular the education and health sectors were seriously affected by this conduct.

During these strikes in the education sector many pupils were left without a teacher and consequently they could not attend classes; some children even took on the role of teachers in trying to prepare other learners for their examinations.⁹ Classes were disrupted by striking educators and in some cases the South African Police Service were required to protect non-striking educators, seeing as teachers were literally

4 Mle 2012 *Journal of Public Administration* 292.

5 Mle 2012 *Journal of Public Administration* 292.

6 Mle 2012 *Journal of Public Administration* 292.

7 Mle 2012 *Journal of Public Administration* 292.

8 Mle 2012 *Journal of Public Administration* 293.

9 Mle 2012 *Journal of Public Administration* 293.

thrown out of their offices and teachers who were caught in classrooms were attacked by striking fellow educators.¹⁰ In Gauteng, KwaZulu-Natal, the Eastern Cape, Free State, Northern Cape as well as the North West matric examinations had to be postponed due to the fact that pupils were not adequately prepared on account of strikes by educators.¹¹ The decision to postpone the examinations was made on the eve of the matric examinations and obviously could have had a serious bearing on University admissions, as well as bursary decisions by different institutions.

Through this strike, attention is drawn to the lack of trust between the union members as employees and the government as employer.¹² It can be said that unions have a societal role to play and they have an obligation to take notice of the interests of the society. The fact that the strikers intimidated and assaulted non-striking employees is also a direct infringement on section 12(1)(c) of the *Constitution* which ensures that every person has the right to freedom and security of person and to be free from all forms of violence originating from either private or public sources. Striking employees did not only infringe upon the rights of children to a basic education in this particular case; other constitutional rights were also infringed upon.

During the 2010 *State of the Nation Address*, President Zuma emphasised the importance of education. Negotiations were concluded with a number of unions, including NAPTOSA, SADTU and SAQU so as to ensure an improved matric pass rate.¹³ It is inconsistent that these unions aim to increase the pass rate but still encourage teachers to strike. When the legitimacy of strikes and the expansion of the definition of an essential service are discussed one should take the interest of the public at large into account. One should also consider the issue of unemployment in South Africa and how this is partly affected by insufficient education and inadequate development of the youth. In a number of sectors in the economy a skills shortage is already being experienced because employees do not have sufficient training.

10 Mle 2012 *Journal of Public Administration* 293.

11 Mle 2012 *Journal of Public Administration* 293.

12 Nel *et al South African employment relations theory* 132.

13 Mle 2012 *Journal of Public Administration* 294.

In *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 8 BCLR 761 (CC) the applicant appealed against the judgement of the High Court which held that a public school had to vacate the private premises on which it was located. In this case the Constitutional Court (hereafter CC) had to consider if a child's right to a basic education had been infringed upon. This required the court to balance the right to property and the rights set out in section 29 of the *Constitution*. This judgement will be discussed in detail below.

Education is not currently deemed to be an essential service in South Africa. The negative effect of strikes on the education sector will nevertheless have to be considered when constitutional provisions are balanced. The legitimacy of strikes in the education sector will have to be considered whilst taking into account the current socio-economic circumstances in South Africa while attempting to expand the definition of an essential service. Finally one should consider what the impact of declaring education as an essential service will be and if this can be seen as reasonable. Alternative remedies, as opposed to strikes, will also be discussed in determining whether a limitation of the right to strike in the education sector will be seen as reasonable. It should also be taken into account that the socio-economic circumstances in South Africa differ from those in other countries worldwide due to the fact that segregation affected the majority of our population and that equal opportunities as regards education were not accorded to the different groups in the South African society. Emphasis must, therefore, be placed on the right to education to ensure the proper development of the country at a social as well as an economic level. The rights that are entrenched in our *Constitution* will now be discussed in order to balance these rights properly and to enable a consideration of the legitimacy of the limitation of the right to education.

3 The *Constitution* of the Republic of South Africa

3.1 A general overview of *Constitutional provisions*

Human rights can be seen as falling into two, or possibly three categories, comprising of: 1) first generation rights which are seen as civil and political rights including the right to freedom, equality, life, fair trial and integrity;¹⁴ 2) second generation rights comprising of social and economic rights like the right to work, eat, health care, housing and education imposing an obligation on the state;¹⁵ and 3) third generation rights or solidarity rights which are “people-centred” and include the right to development and the right to peace.¹⁶ In certain cases first generation rights are likely to be more justiciable than second generation rights (including the right to education), while third generation rights are aspirational rather than actual.¹⁷ Within the South African legal framework the right to education is seen as a socio-economic right and all rulings regarding socio-economic rights and the realisation of these rights will, therefore, also apply to the right to education.

In South Africa the Bill of Rights is seen as the cornerstone of democracy.¹⁸ It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. According to section 7(2) of the *Constitution* the state must respect, protect and fulfil the rights in the Bill of Rights, subject to the limitations in section 36 of the *Constitution*. It should also be mentioned that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. Therefore, it is clear that the rights entrenched in the Bill of Rights need to be progressively realised. The *Constitution* in South Africa is known for its entrenchment of a range of socio-economic rights including among others

14 Currie and De Waal *The Bill of Rights Handbook* 567.

15 Christie 2010 *International Journal of Educational Development* 5 & Currie and De Waal *The Bill of Rights Handbook* 567.

16 Ife “Human rights beyond the Three Generations” 31.

17 Christie 2010 *International Journal of Educational Development* 5.

18 Preamble of the *Constitution*.

environmental rights and rights to land, housing, health care, water, food, social assistance and education.¹⁹

Section 23 of the *Constitution* especially makes provision for labour law rights, as it contains the right to fair labour practises, the right to join a trade union and participate in activities and programmes of a trade union, as well as the right to strike.²⁰ Many other rights support the labour law rights, including the right to equality,²¹ the right to human dignity,²² and the right to privacy.²³ As seen in the *Government of the Republic of South Africa v Grootboom*,²⁴ these rights are interlocking, also in the employment sphere.²⁵ In the latter case it was decided that it was the duty of the state to take into account internationally binding obligations as regards children and their socio-economic rights so as to ensure that the rights of children are protected through legislation and common law.²⁶ It is important to realise that these rights may also be limited by the LRA or section 36 of the *Constitution*. In *Mzoku v Volkswagen SA (Pty) Ltd*²⁷ it was held that it was justifiable to limit these rights.²⁸

Section 2 of the *Constitution* provides that the *Constitution* is the supreme law in South Africa and that any law or conduct that is inconsistent with it will be deemed invalid. This section also states the obligations imposed by the *Constitution* must be fulfilled. In accordance with this section a positive obligation is placed on the courts in the realisation of the rights that are entrenched in the *Constitution*. Section 7(2) of the *Constitution* places both a positive and a negative obligation on the state regarding the realisation of rights, as it provides that the state must protect, promote, respect

19 Brand and Heyns *Socio-economic rights in South Africa* 1.

20 Section 23(1)-(2) of the *Constitution*.

21 Section 9 of the *Constitution*.

22 Section 10 of the *Constitution*.

23 Section 14 of the *Constitution*.

24 2001 1 SA 46 (CC) (hereafter the *Grootboom*-case) par 23.

25 *Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and another* 1997 (12) BCLR 1655 (CC).

26 *Grootboom*-case par 81D-E.

27 2001 5 BLLR 587 (LAC).

28 2001 5 BLLR 587 (LAC) par 78.

and fulfil the rights in the *Bill of Rights*. Section 8 of the *Constitution* deals with the application of the *Bill of Rights* and provides:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

On account of globalization the importance of international law has increased dramatically over the past few years especially in the context of labour law and in South Africa where the *Constitution* provides that international law must be considered in section 39. Section 39 of the *Constitution* stipulates:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum—
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

There is much debate in South Africa relating to the protection which the law provides specifically concerning labour law as protection is limited to the employer-employee relationship as seen in the LRA, BCEA and EEA. The tripartite nature of the ILO has contributed to keeping labour standards on the international agenda.²⁹ In 1994 South

²⁹ Tripartite nature is where representatives of governments, workers and employers sit on all committees and structures. Erasmus and Jordaan 1994 *SAYIL* 68.

Africa re-joined the ILO and is bound to the ILO *Constitution* and other existing Conventions.³⁰ Such international instruments must, therefore, also be taken into account by the legislature when interpreting the Bill of Rights. Section 231 of the *Constitution* determines that it is the responsibility of the national executive to negotiate and sign all international agreements.³¹ These international agreements will only bind the Republic after it has been approved by resolution in both the National Assembly and the National Council of Provinces.³² When any international agreement is enacted into law by national legislation it becomes law, but in the case of a self-executing provision of an agreement that has previously been approved by the Parliament it will become law unless it is inconsistent with the *Constitution* or an Act of Parliament.³³ Section 231(5) of the *Constitution* provides that the Republic is bound by international agreements which were binding on the Republic when the 1996 *Constitution* came into effect. Unless customary international law is inconsistent with the *Constitution* or an Act of Parliament it will be considered as law in the country.³⁴

The *Constitution* also provides that when interpreting legislation, every court in South Africa must prefer any reasonable interpretation of the legislation that is consistent with international law, over an alternative interpretation that is inconsistent with international law.³⁵ Section 33 of the *Constitution* provides that everyone has the right to reasonable and fair administrative action, while section 34 makes provision for access to the courts. If any provision in legislation covering labour relations or any other right envisaged in the *Constitution* does not adhere to the *Constitution*, the provision in question will be accepted as invalid. In South Africa only the CC may

30 Erasmus and Jordaan 1994 SAYIL 84.

31 Section 231(1) of the *Constitution*.

32 Unless it is an agreement that is referred to in subsection 3; Section 231(2) of the *Constitution*.

33 Section 231(4) of the *Constitution*.

34 Section 231(2) of the *Constitution*.

35 Section 233 of the *Constitution*.

decide whether the president or the parliament has failed to comply with a duty bestowed upon them in terms of the *Constitution*.³⁶

Other institutions like the *South African Human Rights Commission* (hereafter the SAHRC) also play a role in the enforcement, monitoring and protection of constitutional provisions. The functions of the SAHRC are set out in section 184 of the *Constitution*, and these functions include: to promote respect for human rights and the culture of human rights;³⁷ to promote the protection, development and the attainment of human rights;³⁸ and lastly to monitor and assess the observance of human rights.³⁹ As seen in the provisions mentioned above the importance of international law cannot be overemphasised and the relevance thereof is prominent in many CC cases. Due to these provisions it is necessary to consider briefly the right to strike, the right to education, as well as the position regarding essential services in international law. When looking at the right to education it is apparent that there is a positive duty on the state to realise this right.⁴⁰ Section 3 of the *South African Schools Act*⁴¹ provides:

(1) Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.

In South African legislation school attendance will be compulsory from the age of 7 until the age of 15 or the ninth grade, the *Schools Act* goes further and states that:

(3) Every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by subsections (1) and (2).

36 S 167(4)(c). By virtue of s 172(1)(a), the CC may make an order “suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.” See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC); 1998 1 All SA 268 (CC); 1998 1 SA 765 (CC).

37 Section 184(1)(a) of the *Constitution*.

38 Section 184(1)(b) of the *Constitution*.

39 Section 184(1)(c) of the *Constitution*.

40 Section 29(1)(b) of the *Constitution*.

41 84 of 1996 (hereafter the *Schools Act*).

(4) If a Member of the Executive Council cannot comply with subsection (3) because of a lack of capacity existing at the date of commencement of this Act, he or she must take steps to remedy any such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so.

A positive duty rests upon a Member of Executive Council and, therefore, the state to ensure that there are schools to fulfil the needs of children. It would, however, be senseless if there were schools and no educators. As already stated, socio-economic rights should be progressively realised within the reasonable resources of the state. In *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the RSA, 1996*⁴² it was held that the inclusion of socio-economic rights may result in courts making orders which have a direct impact on budgetary matters. It was held that these rights are justiciable. This is reiterated in section 2(1) of the *Constitution*. Therefore, a compromise needs to be made and in the case of reasonable demands by unions, methods should be created to adhere to requests. The budget of the state should make proper provision for ensuring the right to education.

The fact that this can only be achieved progressively does not limit the obligation on the state to take these steps as soon as possible. The standard of reasonableness should be used by the courts and the state has the discretion to decide how it is to go about realising the socio-economic rights.⁴³ The fact that resources are scarce does not release the state from its obligation to realise the rights progressively. In the *Grootboom*-judgment, a ground-breaking decision on socio-economic rights, it was found that the formulation of the socio-economic rights delimits the state's positive obligations by qualifying them.⁴⁴

The legislative program as well as the implementation thereof should be evaluated. Regarding progressive realisation it was found in *Soobramoney v Minister of*

42 1996 4 SA 744 (CC).

43 *Grootboom*-case par 74.

44 *Grootboom*-case par 45.

*Health*⁴⁵ that given the lack of resources and the significant demands on the state, an unqualified obligation to meet these needs would not presently be realistic or possible. In the case of *Minister of Health v Treatment Action Campaign*⁴⁶ it was held that budgetary reasons cannot be used as an excuse not to supply people with necessary resources. The limitation clause forms an integral part of this study as the right to strike and the right to education will be balanced throughout. In other words, effectively realising the right to education might possibly result in an assault or more accurately an infringement on the rights enshrined in section 23 of the Constitution, hence a delicate balance must be struck between these respective rights in order to ensure that optimal protection and realisation of rights is ensured; thus supporting a position that is in line with the spirit and letter of the *Constitution*.

3.2 Section 36: the limitation clause

The rights enshrined in the *Constitution* should not be read in isolation, as they are all interlinked and have the potential to impact each other. As mentioned all the rights in the *Constitution* are subject to limitation and therefore it is necessary to make mention of section 36 of the *Constitution*, as it provides:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the *Constitution*, no law may limit any right entrenched in the Bill of Rights.

Limitation in this case may be seen as an “infringement” or even a “justifiable infringement.”⁴⁷ However, not all infringements will be deemed as unconstitutional,

45 1998 1 SA 765 (CC) par 11.

46 2002 5 SA 721 (CC) par 15.

47 Currie and de Waal *The Bill of Rights Handbook* 164.

seeing as the reason for the infringement may be justifiable in an open and democratic society based on the values of equality, human dignity and freedom.⁴⁸ It should be emphasised that the fact that a general limitation clause is provided for does not mean that the rights in the Bill of Rights can be limited for any reason. This is not simply a question of determining whether the benefits of a limitation to others or the public interest will outweigh the impact on the right-holder.⁴⁹

The South African *Constitution* differs from many other legal frameworks and international instruments.⁵⁰ In the United States of America the *Constitution* makes no provision for a limitation clause.⁵¹ The German Bill of Rights does not have a general limitation clause, but attaches specific limitation provisions to many of the fundamental rights.⁵² The position in Germany is the one that is set out in many international instruments.⁵³ The principal model on which the South African model is based, is that of the *Canadian Charter of Rights and Freedoms* that consists of a list of rights and a general limitation clause that governs the limitation of the rights in question.⁵⁴ Taking into account the South African position all rights in the Bill of Rights, including the right to strike and the right to education, are subject to the limitation clause and may be limited, should such a limitation be deemed reasonable. As regards the possibility of declaring education as an essential service in terms of the LRA the right to strike will have to be limited and a Court will have to see this limitation as reasonable and justifiable in an open and democratic society.

The fact that rights may be limited in South Africa should not be abused, for if rights can be overridden simply on the basis that general welfare will be served by the restriction then “there is little purpose in the constitutional entrenchment of rights”.⁵⁵

48 Preamble of the Constitution.

49 Currie and de Waal *The Bill of Rights Handbook* 164.

50 Currie and de Waal *The Bill of Rights Handbook* 165.

51 Woolman “Limitations” par 12-1.

52 Currie and de Waal *The Bill of Rights Handbook* 165.

53 *Covenant on Civil and Political Rights*, 1966 and *the European Convention on Human Rights*.

54 Woolman “Limitations” par 12-6.

55 Currie and de Waal *The Bill of Rights Handbook* 164.

For the limitation to be justifiable there needs to be a very good reason, as seen in *S v Manamela*⁵⁶ where it was held as follows:

It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.

When taking into account this case it can be established that rights may only be limited if there is no other “realistically available” way to ensure that the intended purpose can be achieved. When it comes to the right to strike it can be argued that this is not the only way available to teachers to so ensure that their demands are met; it is but one alternative as other, less drastic, remedies may exist. Other remedies will be discussed in order to determine whether these remedies will have the same detrimental effect on the right to education as strikes or if these remedies will be viable to ensure that optimal realisation of the right to education will take place.

4 The right to education

4.1 The South African position

As mentioned above the right to education is one of the socio-economic rights enshrined in the South African *Constitution* which, according to latter, must be progressively realised by the State; these rights place a positive duty on government to protect, preserve and realise them. The right to education is a fundamental human right which is internationally recognised and emphasised. According to paragraph 1

⁵⁶ *S v Manamela and others* 2000 5 BCLR 491 (CC) par 32.

of the General Comment Number 1 by the United Nations Committee on Economic, Social and Cultural Rights:

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 marginalised 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 recognised 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.

Education plays a vital role in the lives of people and the society as a whole and, therefore, it can be regarded as an essential fundamental right that is entrenched in section 29 of the *Constitution*. The section reads as follows:

- (1) Everyone has the right-
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Of particular importance is section 29(1) that states that the right to education needs to be progressively realised within reasonable measures. However, as already concluded the right to education goes further than education itself; it is also used in ensuring and pursuing equality and human dignity. The former is another aspect that must to be considered when the right to education is limited. In accordance with the *Grootboom*-case, budgetary constraints should not be used as an excuse for not progressively realising rights enshrined in the *Constitution*. When taking into account section 8(2) of the *Constitution*, a negative obligation is created by section 29(1)(a) not to impair the rights of the learners to a basic education. Another aspect of the section that needs to be highlighted is section 29(2)(c) which states that when it comes to the right to education the state must consider the need to redress the results of South African historic legal framework that permitted discriminatory laws and practices. By accentuating the previous injustices it can be seen that equal

opportunities regarding education were previously not granted to everyone in South Africa. In order to ensure that discriminatory laws of the past are redressed it is important that the right to education will not be unnecessarily infringed upon.

In the *Grootboom*-case the right to education is never directly pronounced upon; yet the judgement is relevant on account of the fact that all rights, including socio-economic rights, are interrelated and indivisible. In this case the respondents were evicted from informal settlements on private property and, therefore, applied to the High Court (hereafter HC) to grant an order providing them with suitable housing or shelters until permanent accommodation could be found.⁵⁷ It was ordered by the HC that the appellants provide the respondents and their children with shelter; the decision was, however, taken on appeal.⁵⁸

The rights in section 28(1)(c) of the *Constitution* are not qualified and would consequently have to be directly and immediately enforceable against the state.⁵⁹ The CC placed limitations on these rights.⁶⁰ In this case focus was placed on the right to suitable housing entrenched in section 26 of the *Constitution*, as well as the child's right to shelter in terms section 28(1)(c). The court held that the obligation of the state in terms of section 28(1)(c) should be understood in the context of the rights in section 25(5), 26 and 27 of the *Constitution* and that these rights are subject to the internal limitation clause.⁶¹ The respondents were of the opinion that in the absence of an internal limitation clause (as seen with section 28(1)(c)), a direct burden will be placed on the state to provide the children in this case with basic social services, although the court held that this section does not provide independent and separate rights for children.⁶²

57 *Grootboom*-case par 1-2.

58 *Grootboom*-case par 26;48D.

59 *Grootboom*-case par 48D.

60 *Grootboom*-case par 48D.

61 *Grootboom*-case par 81 B-D.

62 *Grootboom*-case par 80-81.

It was also decided that it was the duty of the state to take into account internationally binding obligations with regards to children and their socio-economic rights so as to ensure that the rights of children are protected through legislation and common law.⁶³ The court held that there is an obligation on parents to fulfil their responsibilities and that there is a possibility of enforcement through criminal and civil law, as well as social services programmes.⁶⁴ The court also came to the conclusion that this responsibility shifts to the state when a child has no parents.⁶⁵ It was found that socio-economic rights are justiciable and that budgetary limitations are no excuse when these rights are not implemented.⁶⁶ If one takes into account the fact that these socio-economic rights are interrelated and indivisible, as previously mentioned the rights entrenched in section 29(1)(a) should be realised progressively within reasonable measures. As stated in this case, international law must be taken into account by the court. In terms of international as well as South African law, a child should not be withheld from his or her right to basic education; obviously this right is infringed upon when an educator is equipped with the right to strike. It could be argued that if education is declared an essential service in terms of the LRA, teachers will no longer have the right to strike and the child's right to education will not be unjustifiably infringed upon.

Another interesting judgment is *B and Others v Minister of Correctional Services and Others*⁶⁷ where the four applicants were inmates in Pollsmoor Prison outside Cape Town.⁶⁸ The applicants were all HIV-positive and sought an order to declare that they, as well as all other HIV-positive prisoners were entitled to appropriate and adequate medical care treatment because of their HIV status.⁶⁹ The applicants relied on section 35(2)(e) of the *Constitution* which provides that every person has the right to adequate medical treatment. Through this order the applicants sought to receive

63 *Grootboom*-case par 81D-E.

64 *Grootboom*-case par 81D-E.

65 *Grootboom*-case par 48H.

66 *Grootboom*-case par 20.

67 1997 6 BCLR 789 (C) (hereafter the *B and Others*-case).

68 *B and Others*-case par 1.

69 *B and Others*-case par 2.

anti-viral medication including AZT⁷⁰ at state expense, and also that all prisoners who reach the symptomatic phase of the disease be awarded similar treatment and care.⁷¹ The court found that two of these applicants were entitled to receive AZT from the state free of charge, seeing as this treatment was prescribed by a medical practitioner.⁷² Concerning to the other two applicants the court held that it was not at liberty to compel medical doctors to prescribe a certain drug by granting an order that provides that all prisoners who have reached the symptomatic phase of HIV are entitled to being provided with anti-viral drugs.⁷³

Some of the statements made by the court are also applicable to the right to a basic education as a socio-economic right as in the case of the right to adequate health being relevant to prisoners. In this case the court concluded that budgetary constraints are not an excuse for not providing severely sick prisoners with medication.⁷⁴ Therefore, the authorities have no defence in saying that they cannot afford to provide medication to inmates as they have a constitutional right to be provided with adequate medical treatment.⁷⁵ The child's right to education cannot be limited due to the fact that the state does not have adequate resources. One can argue that just as in the case of the prisoners, the lack of monetary resources is not an excuse in not providing them with adequate health care. A shortage of human and or financial resources should not be an excuse to deny a child the right to a basic education. By declaring education as an essential service, teachers will be denied the right to strike and a child's right to an education will not be infringed upon. According to Liebenberg and Quinot:⁷⁶

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

70 Azidothymidine (hereafter AZT).

71 *B and Others*-case par 2.

72 *B and Others*-case par 61.

73 *B and Others*-case par 62.

74 *B and Others*-case par 49.

75 *B and Others*-case par 49.

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

Monetary shortages should be no excuse for providing educators with adequate salaries, as these human resources are necessary to provide children the right to a basic education. Therefore, it is debateable whether educators should be allowed to strike, seeing as they are a necessary human resource to ensure the right to education and in turn the state may not deny teachers fair salaries. Section 34 of the *Schools Act* states as follows:

(1) The State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.

(2) The State must, on an annual basis, provide sufficient information to public schools regarding the funding referred to in subsection (1) to enable public schools to prepare their budgets for the next financial year.

Yet again a positive obligation is placed on the state to fund public schools on an equitable basis; this should be done to ensure that the learners' right to a basic education is not infringed upon. It is also stated that past inequalities in education must be redressed by the state. By providing sufficient information regarding the funding on an annual basis schools should be able to draw up proper budgets, in so doing ensuring that staff will be appropriately compensated. The appointment of staff will be subject to the budget and educators will be aware of their salaries prior to acceptance of an offer of employment. These terms and salaries can be set out in collective agreements that prohibit the right to strike. This will ensure that that section 29(1)(a) of the *Constitution* is adhered to and that teachers will not be denied their right to fair labour practices in terms of section 23(1) of the *Constitution*.

The *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*⁷⁷ judgment dealt with the issue of whether people have the right to demand education in their home language.⁷⁸ This case will not be discussed at length although an important statement made by the court concerning the right to education in general

77 1996 3 SA 165 (CC) (hereafter the *Gauteng Legislature-case*)

78 *Gauteng Legislature-case* par 2.

will be briefly touched upon. According to section 32(c) of the *Interim Constitution*: “Every person shall have the right to a basic education”.⁷⁹ In this case the court held that this section places a positive obligation on the state.⁸⁰ The court held that this is derived from the fact that the linguistic and grammatical structure of section 32 supports its own context. The court stated that this section creates a positive right

[t]hat 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.⁸¹

From this statement one can conclude that the right to a basic education should not be obstructed; however, this will inevitably happen if teachers are permitted to strike. In *Acting Superintendent-General of Education v Ngubo*,⁸² various college students staged a sit-in to strike against the quality of the training of educators.⁸³ These students failed to comply with section 17 of the *Constitution* which accords everyone the right to assemble and demonstrate peacefully. They intimidated other students, disrupted classes and vandalised college property.⁸⁴ These acts by the students can in turn be compared to the way educators acted during certain education strikes. The college authorities applied for an interdict against the protesting students, but the students were of the opinion that this would infringe upon their constitutional right to assemble and demonstrate.⁸⁵ The court however held that the students acted beyond the scope of rights that were inferred to them by section 17 of the *Constitution*, and that their actions interfered with the normal and orderly conduct of educational activities.⁸⁶

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

80 *Gauteng Legislature*-case par 6.

81 *Gauteng Legislature*-case par 9.

82 1996 3 BCLR 369 (N) (hereafter the *Ngubo*-case).

83 *Ngubo*-case 369.

84 *Ngubo*-case 369.

85 *Ngubo*-case 369-370.

86 *Ngubo*-case 370.

Emphasis is placed on the way in which the court described the conduct of the offenders. The court held that it was the intent of the students to use the disruption of the College “as a lever to attract the serious attention of the authorities”.⁸⁷ The important distinction between actions aimed at getting their message across and action aimed at achieving the subject-matter of the message was ignored.⁸⁸ Concerning these actions, the same can be said for striking educators who use violence and degradation as a lever to attract the attention of the authorities. It was also determined that the court was firm about the fact that the right to assemble and demonstrate is not absolute.⁸⁹ The court, therefore, limited the right to assemble and demonstrate provided for in section 17 and granted an interdict against the students. From this case it can be derived that the parameters of the right to strike can be determined by or drawn from the child’s right to education, not to even mention the other constitutional rights that will be violated when teachers are awarded the right to strike.

Lastly, the *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others*⁹⁰ case ended up in the CC and in this case the court had to balance the right to property and the right to education. The facts of this case will be briefly discussed as it is necessary to consider the background of the case. This case dealt with an Islamic school established in 1957 as a government-aided school. During 1997 the Trust that owned the property permitted the provincial DEA to enlist this school as a public school with Islamic ethos.⁹¹ However no section 14(1) agreement in terms of the *South African Schools Act*⁹² was concluded and in terms of said section “a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the private property”. In this case the

87 *Ngubo*-case 377.

88 *Ngubo*-case 377.

89 *Ngubo*-case 377.

90 2011 (8) BCLR 761 (CC) (hereafter the *Juma*-case).

91 *Juma*-case 762.

92 84 of 1996.

trust continued to pay for the expenses associated with the running of the school, whilst under the belief that the DEA would reimburse it.⁹³

In 2002 the Trust informed the DEA that it wanted to establish an independent school on the property, and that notice would be given to the Department to close the existing school on the property. The Department replied that they will either relocate the existing school or close it, and in 2004 notice was given to terminate the DEA's right of occupation. The DEA refrained from vacating the premises and the school continued to operate and the Trust continued to pay the expenses.⁹⁴ In 2007 the Department undertook to pay rentals backdated to 1998, but failed to do so; they also did not reimburse the Trust for expenses that were incurred.⁹⁵ In 2008 the Trustees launched a HC application for the eviction of the school and the MEC did not oppose this eviction. The MEC agreed to pay nominal rent, arrear rentals and contribute to the payment of rates to the trust, seeing as no section 14(1) agreement was finalised.

The MEC also stated that an investigation was launched and it was found that there were no alternative vacant school buildings to accommodate all the learners.⁹⁶ The parents of the pupils in the school applied for leave to intervene the eviction application as they contended that the MEC had abdicated her constitutional responsibility of ensuring that due consideration was given to the children's best interests. The HC rejected this argument by the parents and an eviction order was granted against the governing body of the school and the MEC.⁹⁷ The court held that the Trust owed no constitutional obligation to the Department or to the learners. The Trust was also guaranteed the constitutional right to its property in terms of section 25 of the Bill of Rights.⁹⁸

93 *Juma-case 762.*

94 *Juma-case 762.*

95 *Juma-case 762.*

96 *Juma-case 762.*

97 *Juma-case 762.*

98 *Juma-case 762.*

The court, furthermore, held that the obligation to provide compulsory education was that of the DEA and leave to appeal was refused by both the HC and the Supreme Court of Appeal (hereafter SCA).⁹⁹ In 2010 the CC was approached, as the applicants contended that the common law should have been developed and that proper consideration was not given to the impact of the decision on the rights of the learners to basic education.¹⁰⁰ The Centre for Child Law and the Socio-Economic Rights Institute of South Africa were admitted as *amici curiae* and they contended that a negative duty not to impair existing access to basic education had bound the Trust and, therefore, its decision to evict was unjustifiable.¹⁰¹ In 2010 the CC provisionally set aside the eviction order, and held that the order had an impact on the learners' right to a basic education entrenched in section 29(1) of the *Constitution* and the learners' best interest under section 28 of the *Constitution*. The MEC had a positive obligation to provide access to schools and to respect the learners' right to a basic education, and the Trustees had a negative obligation in terms of section 8 of the *Constitution* not to infringe on this right.¹⁰²

In 2010 the CC made a provisional order that directed the MEC to engage meaningfully with the Trustees so as to ensure continued operation of the school and if this should fail, the MEC was to take steps to ensure that the learners were placed in other schools.¹⁰³ The MEC also had to file a report stating the steps that were taken by her to ensure that the right to a basic education was respected.¹⁰⁴ The evacuation of the school became inevitable and the MEC submitted a further report where she ensured that accommodation had been made to ensure that the learners'

99 *Juma-case 762.*

100 *Juma-case 763.*

101 *Juma-case 763.*

102 *Juma-case 763*; In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 ZACC 26; 1996 10 BCLR 1253 (CC); 1996 4 SA 744 (CC) the court stipulated that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion.

103 *Juma-case 763.*

104 *Juma-case 763.*

right to education was protected.¹⁰⁵ After this report was filed a final eviction order was granted to ensure that the private premise was vacated.¹⁰⁶

In this case the court considered the nature of section 29(1)(a) that provides a right to a basic education and its importance for the transformation of society. The court mentioned that the MEC had failed to fulfil her constitutional obligation in section 8(1) of the *Constitution* that placed a positive obligation on the MEC to “respect, protect, promote and fulfil” the learners’ right to a basic education. The CC also held that the HC failed to consider the best interests of the learners properly as provided by section 28(2) of the *Constitution* as well as section 29(1). The court additionally made mention of section 8(2) that is binding on natural and juristic persons where that provision was applicable “taking into account the nature of the right and the nature of any duty imposed by the right”.¹⁰⁷ There was not necessarily a primary positive obligation on the Trust to provide basic education to the learners, but the court held that socio-economic rights, such as the right to a basic education, could be negatively protected from improper invasion.¹⁰⁸ The court held:

Breach of that negative obligation occurred directly when there was a failure to respect the right, or indirectly, when there was a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. The purpose of section 8(2) of the *Constitution* was not to obstruct private autonomy or to impose on a private party the duties of the State, but rather to require private parties not to interfere with or diminish the enjoyment of a right. The Trust had a negative constitutional obligation not to impair the learners’ right to a basic education.¹⁰⁹

The trust was consequently entitled to seek an eviction order but they still had a constitutional obligation to minimise the impairment of the learners’ right to a basic education.¹¹⁰ The CC held that in the HC judgement the right to property was privileged over the learners’ right to a basic education and by doing so the court

105 *Juma-case 763.*

106 *Juma-case 763.*

107 *Juma-case 763.*

108 *Juma-case 763.*

109 *Juma-case 764.*

110 *Juma-case 764.*

failed “to accord sufficient weight to the entrenched rights of the learners and to the paramount importance of their best interests.” Thus the order of the HC was set aside.¹¹¹ Also especially significant in this context is the court stating that “unlike some of the other socio-economic rights, this right is immediately realisable”.¹¹²

As previously mentioned section 3(1) of the *Schools Act* makes school attendance compulsory for learners from the age of seven until fifteen, or when the learner reaches the ninth grade, whichever one of the above criteria occurs first.¹¹³ By allowing a teacher to strike one does not only violate the *Constitution* but also key provisions in other applicable legislation. Whether it is logical to compel learners to attend school whilst educators are permitted to strike is questionable. International instruments were also taken into account by the court, and focus was placed on the fact that the *International Covenant on Economic, Social and Cultural Rights* which monitors socio-economic rights, in their General Comment 13, states:

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 marginalised 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 exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial 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.¹¹⁴

Taking into account the historical context of South Africa, especially as regards Apartheid and educational segregation, one cannot overlook the importance of the right to a basic education; it is in effect the basis for societal and individual development in our current democratic dispensation. The lasting effect of the said segregation is still prominent in the current educational system as the consequences

111 *Juma-case* 765.

112 *Juma-case* par 37.

113 *Juma-case* par 38.

114 ICESCR Committee General Comment 13 (21st Session, 1999) “*The Right to Education (art 13)*” UN Doc E/C.12/1999/10 at par 1.

of inadequate facilities and other discrepancies are still felt by a majority of learners. The right to strike can be viewed as one of these discrepancies; however, this can possibly be altered by declaring education as an essential service. The right to education as a socio-economic right is aimed at promoting and developing a child's talents, personality, as well as physical and mental abilities.¹¹⁵ By developing a child it will provide the foundation for learning and work opportunities that will eventually have a positive effect on the economy and the socio-economic circumstances in South Africa.

In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*,¹¹⁶ the court held that it is not necessary or desirable to define the content of section 28(2) of the *Constitution*, but that the right:

Imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions.¹¹⁷

The common law should be developed in a manner which protects and favours the advancement of the interests of children. However, when balancing rights, the court considered the case of *Port Elizabeth Municipality v Various Occupiers*¹¹⁸ where it was held that the judicial function was not to establish a "hierarchical arrangement between the different interests", but to balance out and reconcile the opposed claims whilst taking into account all the relevant interests and factors of the specific case. In this case an order was given to vacate the premises as alternative arrangements were made for the learners, not because the right to property was deemed more important than the right to a basic education.¹¹⁹ In the context of this particular case the court found that the right to a basic education was more important than the right

115 *Juma*-case par 43.

116 2009 ZACC 8; 2009 (7) BCLR 637 (CC); 2009 4 SA 222 (CC) par 73.

117 See also *Centre for Child Law v Minister for Justice and Constitutional Development and Others* (NICRO as amicus curiae) 2009 ZACC 18; 2009 (11) BCLR 1105 (CC); 2009 (6) SA 632 (CC) par 25–27 where this Court, held that the protections in section 28 are not merely "interpretive guides", nor "advisory" nor are "they exhortatory . . . [but] . . . are enforceable precepts determining how officials and judicial officers should treat children."

118 2004 ZACC 7; 2004 12 BCLR 1268 (CC); 2005 1 SA 217 (CC) par 23.

119 *Juma*-case par 88.

to private property. Thus socio-economic rights should enjoy more focus in a country like South Africa, especially if one takes into account the historical context at hand.

Therefore it is submitted that it should be considered that by taking into account all the factors, the right to a basic education should trump the right to strike and that this could be accomplished successfully by declaring education as an essential service in terms of the LRA. In doing so, educators will still have other remedies available against any form of exploitation regarding salaries and/or their conditions of employment. As already mentioned the *Constitution* makes provision for the consideration of international law and this position is reiterated in case law, like for example in the *Grootboom*-case. Therefore, the international position as regards the right to strike and the right to education will now briefly be elaborated upon.

4.2 The global perspective

The Committee on Economic, Social and Cultural Rights states that the right to education “is of vital importance”, and “epitomizes the individuality and interdependence of all human rights”.¹²⁰ Education can be seen as a human right in itself but it can also be regarded as an “indispensable means of realising other human rights”.¹²¹ By taking this into account it is no wonder that education came to be recognised as a fundamental human right in international law. The *Universal Declaration of Human Rights*, 1948 (hereafter the UDHR) proclaims the right of everyone to education and it goes so far as to state that elementary education will be compulsory, while higher education must be equally available to all on the basis of merit.¹²² Article 16(2) of the UDHR provides as follows:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or

120 General comment no 11 para 2, no 13 para 1; and see 2.

121 General comment no 11 para 2, no 13 para 1; and see 2.

122 Article 26(1) of the UDHR.

religious groups, and shall further the activities of the United Nations for the maintenance of peace.

The principles that were set out above are also reiterated in the International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR) in article 13. The *Convention on the Rights of the Child* of 1990 (hereafter the CRC) confirms the right to education of the child and states that parties must “promote and encourage international cooperation in matters relating to education”.¹²³ The CRC also states that special efforts must be made to accommodate the needs of developing countries.¹²⁴ South Africa can be seen as one of the developing countries, thus special efforts must be made to accommodate the development of the educational needs of the country. It is also pertinent to keep in mind that the needs will differ from country to country, seeing as different resources are available. In developed countries strikes by teachers are unheard of and pupils are rarely, if ever, deprived of their right to education. In South Africa resources are limited and, therefore, provisions must be set into place so as to ensure that the right to education is not infringed upon. Mention need also be made of the fact that in many other countries it is unnecessary to declare education as an essential service, as teachers do not strike in these countries and learners’ rights in this regard will therefore not be infringed upon. Thus taking into account the history of strikes by teachers in South Africa, the prevalence thereof and the current stance of education in the country, a more comprehensive legal framework must be set into place so as to ensure that the right to education is progressively realised.

Closer to home the *African Charter on the Rights and Welfare of the Child*, 1990 (hereafter the CRC)¹²⁵ endorses the principle of free and compulsory education and the principles¹²⁶ set out in this Charter have been endorsed by the South African

123 Article 28(3) of the CRC.

124 Article 28(1)(a) of the CRC.

125 *African Charter on the Rights and Welfare of the Child* para 11(3)(a), OAU Doc CAB/LEG/24.9/4928 (1990) (entered into force 1999-11-29).

126 Article 11 of the *Child Welfare Charter* provides for “the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential”; “[f]ostering respect

CC.¹²⁷ Numerous Conventions and Covenants¹²⁸ have been ratified by the South African government without reservation, showing that much value is attached to the right to education. One can conclude that South Africa is duty-bound to uphold the principles proclaimed in all the international instruments outlined above. It is clear that in the international as well as the South African legal framework the right to education is seen as integral to the development of the country; consequently better provision needs to be made in order to ensure that this right is not infringed upon. Thus declaring education as an essential service will possibly ensure that the right to education enjoys more protection and realisation and will additionally be in alignment with the above mentioned instruments and undertakings.

5 Constitutional and statutory framework concerning strikes

5.1 The right to strike

According to section 23 *Constitution*:

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right-
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.

As one can see the right to strike is entrenched in the *Constitution*, although it is limited by the LRA. In section 65(1)(d)(i) of the latter the right to strike is somewhat restricted, as this section makes provision for the fact that no person may take part in a strike or in any conduct in contemplation of furtherance of a strike or a lock-out if

for human rights and fundamental freedoms'; and 'the development of respect for the environment and natural resources'.

127 *Governing Body of the Juma Masjid Primary Schools v Essay* 2011 8 BCLR 761, note 38 (CC).

128 South Africa furthermore ratified the *Convention on the Rights of the Child* on 16 June 1995, the Covenant on Civil and Political Rights (ICCPR) on 10 December 1998, the African Charter on the Rights and Welfare of the Child on 7 January 2000, and the UNESCO Convention against Discrimination in Education of 9 March 2000. It did so in all instances without reservation.

said person is engaged in an essential service. Strikes occur when teachers' unions and the Department of Education (hereafter DEA or Department) are unable to reach an agreement relating educators' salaries and working conditions. Collective bargaining and agreements concluded during collective bargaining will be considered as alternatives to the right to strike later on as the trade union system in South Africa is based on the principle of collective bargaining.

The definition of a strike can be found in section 213 of the LRA, where it is stated that:

'strike' means 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 purpose 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;

The elements that are enclosed in this definition set warrant further elaboration. Firstly there should be a disruption or stoppage of work- this principally requires that workers refuse to do the work they are contractually obliged to complete, but it can also be constituted by employees who work at a slower pace than usual or by any form of sabotage.¹²⁹ If employees refuse to perform overtime work it may also constitute a strike, whether this overtime is voluntary or prescribed by a collective agreement or contract.¹³⁰ The extent or the duration of the stoppage of work is deemed to be irrelevant and a strike will be considered to have started at the beginning of the partial stoppage.¹³¹ It is, furthermore, necessary to specify that the work in question must be lawful.

129 Grogan *Collective Labour Law* 147.

130 *Ford Motor Co of SA (Pty) Ltd v National Union of Metalworkers of SA & others* 2008 29 ILJ 667 (LC).

131 *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others* 1996 17 ILJ 1094 (LAC).

The strike should be constituted by joint action seeing as the definition refers to the term “persons” as well as the notion of “concerted”; thus action taken by individual employees will not fall within the scope of the definition.¹³² The number of employees engaged in the stoppage of work is irrelevant, although a strike by a group of employees over the grievances of a single employee will also constitute a strike.¹³³ Another requirement that has to be adhered to is that a strike must be against the employer. It is essential that the employees must have a grievance or dispute with the employer and that this grievance will only come to an end if the employer complies with the requests of the employees.

The final aspect of the above definition set is that the strike should be for a recognised purpose that existed when the job stoppage occurred, and that the strike must be aimed at remedying the grievance that previously existed.¹³⁴ Mere refusal to comply with demands set by the employer does not constitute a strike as a demand by the employees needs to exist.¹³⁵ A strike can take place over any matter of mutual interest between the employer and employee; this means that it should fairly and reasonably be calculated to promote the well-being of the particular trade.¹³⁶ Thus the above definition includes several aspects that must be considered when determining if a strike is protected or as unprotected in terms of the LRA. Seeing as this definition, in combination with sections 64 and 65 of the LRA, sets out the different grounds, procedures and requirements for a strike to be considered as lawful. A brief discussion will now follow expounding upon and drawing a clear distinction between when strikes are lawful and when they fall outside the ambit of a protected strike.

132 *Schoeman & another v Samsung Electronics SA (Pty) Ltd* 1997 18 ILJ 1098 (LC).

133 *National Education Health & Allied Workers Union & another v Public Health & Welfare Sectoral Bargaining Council & others* 2006 27 ILJ 1892 (LC).

134 *Grogan Collective Labour Law* 155.

135 *Food & Allied Workers Union & others v Rainbow Chicken Farms* 2000 21 ILJ 615 (LC).

136 *Grogan Collective Labour Law* 155.

5.2 Requirements for a protected strike

In the statutory scheme relating to strikes one should distinguish between strikes that comply with the provisions of the LRA and ones that do not. During a protected strike employees who strike enjoy immunity from civil action and the strikers may not be dismissed for striking.¹³⁷ When an unprotected strike takes place employees can be dismissed, interdicted or sued for damages in relation to a breach of contract during the strike.¹³⁸ There are, however, exceptions and in certain cases it may be possible that a strike is not procedurally correct in terms of section 64 of the LRA, and yet not necessarily prohibited. An example of a strike that was not procedurally correct is the case of *Food & Allied Workers Union & others v Earlybird Farm (Pty) Ltd*¹³⁹ where the court referred to three types of strikes, namely: “those that are protected; those that are prohibited; and those that are neither.” When determining the fairness of dismissals during strikes it is important to consider those cases where the strike falls between a protected and an unprotected one.

Procedural requirements must be examined so as to establish whether a strike is protected or not. The procedures set out in section 64 of the LRA must be followed unless other procedures were agreed upon in the collective agreement between the parties. These procedural requirements set out conditions that are precedent to the right to strike; thus failure to comply with the LRA does not necessarily render a strike prohibited. The procedure set out in section 64 consists of two steps: firstly, that the dispute be referred to the CCMA or bargaining council; and secondly, that a strike notice be issued.

As seen in section 64(1)(b) the prospective strikers or their union should give at least 7 days’ notice before the strike commences. The statutory procedure does not apply when the parties to the dispute are members of a bargaining council and the dispute

137 This can be seen as misconduct in regards to section 68(5) of the LRA.

138 This can be seen as misconduct in regards to section 68(5) of the LRA.

139 2003 24 ILJ 543 (LC).

in question has been dealt with in its constitution. A strike will have to be protected in order to ensure that employees will not be dismissed. However, giving notice or the fact that a strike is protected will not minimise the effect of the strike, as pupils will still be left without a teacher as no provision can currently be made for the replacement of teachers at the drop of a hat.

Finally, in considering the *Employment of Educators Act*¹⁴⁰ no reference is made concerning strike action, indicating that the LRA and its provisions as regards strikes should be consulted in all matters regarding industrial action by educators. According to Neal,¹⁴¹ the industrial mode of collective bargaining and in particular labour strike should never have been transferred to the public sector, as monopoly government services are essential to the safety, health and welfare of the public. He is also of the opinion that strikes are economic weapons that are inappropriate to employment in the public sector. Strikes by educators should be seen as strikes against the South African community as a whole; therefore, strikes in the public sector do not serve the same purpose as strikes in the private sector.¹⁴² It can be said that when teachers strike there is not an equal relationship between the economic gains for the educators that are on strike and the damage that this inflicts on the citizens of South Africa.¹⁴³ To limit the damage that is inflicted one should seriously consider the possibility of declaring education as an essential service.

6 Essential services

6.1 The notion of essential services in South Africa

Section 213 of the LRA defines an essential service as:

140 76 of 1998.

141 Neal *The Alliance Against Education Reform* 25.

142 Neal *The Alliance Against Education Reform* 25.

143 Neal *The Alliance Against Education Reform* 26.

- (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
- (b) the Parliamentary service;
- (c) the South African Police Service;

Section 70 of the LRA currently regulates the declaration of essential services in South Africa. This section is, however, currently under revision in the *Labour Relations Amendment Act, 2014*. Sections 70A, 70B, 70C, 70D, 70E and 70F have been added to the LRA, the aim of these sections being to limit the amount of strikes by providing better regulation in this regard. More elaborate provisions have been set out regarding the composition of the Essential Services Committee, as well as the powers and functions of the committee leading to more certainty.¹⁴⁴ Currently, according to section 70 of the LRA the *Minister* must, after consulting with *NEDLAC* and in consultation with the Minister for the Public Service and Administration, establish an essential services committee under the auspices of the Commission and appoint to that committee, on any terms that the Minister considers fit, persons who have knowledge of and experience in labour law and labour relations¹⁴⁵ and designate one of the members as the chairperson.¹⁴⁶ The functions of the essential services committee are also listed in section 70. These functions include the conducting of investigations as to whether or not the whole or a part of any service is an essential service, and then eventually deciding whether or not the whole or a part of that service should be designated as an essential service.¹⁴⁷ The functions also include the settling of disputes as to whether or not the whole or part of any service is an essential service¹⁴⁸ or a maintenance service.¹⁴⁹ At the request of a bargaining council, the essential services committee must also conduct an investigation in terms of section 70(2)(a).¹⁵⁰ The process falls outside the scope of this study and will therefore not be discussed.

144 Sections 70A, 70B, 70C, 70D, 70E and 70F of the *Labour Relations Amendment Act, 2014*.

145 Section 70(1)(a) of the LRA.

146 Section 70(1)(b) of the LRA.

147 Section 70(2)(a) of the LRA.

148 Section 70(2)(b) of the LRA.

149 Section 70(2)(c) of the LRA.

150 Section 70(3) of the LRA.

6.2 Designating a service as an essential service

The process of designating a service as an essential service is set out in section 71 of the LRA. Notice should be given in the Government Gazette by the essential services committee of any investigation that it will conduct to determine whether the whole or a part of a service is an essential service.¹⁵¹ This notice should indicate the part of the service or the service that will be investigated and should invite interested parties to submit written representations and to indicate whether they want to make oral representations within a period stated in the notice.¹⁵² Parties who are interested may inspect any written representations made pursuant to the notice at the Commission's offices.¹⁵³

A certified copy or extract from any written representations should then be provided by the Commission to any person who has paid the prescribed fee.¹⁵⁴ The committee must advise parties who wish to make oral representations of the place and time where they may be made, and these representations should be made in public.¹⁵⁵ The essential services committee will then decide whether or not to designate the whole or part of the service as an essential service, after considering any written or oral representations.¹⁵⁶ If the committee designates the whole or a part of a service as such, it must publish a notice to that effect in the Government Gazette.¹⁵⁷ By following the provisions in sections 71(1)-(8) the committee may similarly vary or cancel the designation of the whole or a part of a service as an essential service.¹⁵⁸

Any party to dispute may refer issues to the committee in writing and the essential services committee is tasked with the function of determining whether a service is an

151 Section 71(1) of the LRA.

152 Section 71(2)(a)-(b) of the LRA.

153 Section 71(3) of the LRA.

154 Section 71(4) of the LRA.

155 Section 71(5)-(6) of the LRA.

156 Section 71(7) of the LRA.

157 Section 71(8) of the LRA.

158 Section 71(9) of the LRA.

essential services and whether an employee is engaged in service designated as an essential service.¹⁵⁹ These disputes should be determined as soon as possible.¹⁶⁰ The committee will have to determine whether education may be declared as an essential service, while taking into account the importance of the education sector in the development of South Africa and the improvement of socio-economic circumstances in the country. The likely impact of declaring education as an essential service will be discussed by considering alternative remedies that are available to educators, instead of resorting to strikes.

7 Possible alternative remedies available to educators

The entirety of the possibility of declaring education as an essential service rests upon the balancing of rights. The right to strike will have to be limited if education, as many other public services, is declared to be an essential service. As pointed out above, rights may only be limited if there is no other “realistically available” way to ensure that a certain objective or goal is reached. This means that there should not be any other plausible or effective remedies available to teachers to ensure that their demands are met. The right to strike causes a dramatic infringement on the right to education while alternative measures are indeed available which will result in minimal, if any, infringement on the right to education. These alternatives will now be discussed and it is emphasised that they will remain available to teachers, even if the right to education is declared as an essential service.

Firstly, teachers may resort to collective agreements as the objective of collective bargaining between management and organised labour is to reach certain agreements in terms of which relationships are formalised and remuneration, conditions of service and other mutual interests are regulated for a certain period of time.¹⁶¹ These agreements are made between an employer or a group of employers

¹⁵⁹ Section 23(1)(a)-(b) of the LRA.

¹⁶⁰ Section 23(3) of the LRA.

¹⁶¹ Grogan *Collective Labour Law* 123.

and a representative of a group of employees where uniform terms and conditions are established for all employees falling within the scope of the agreement.¹⁶² Section 23(1) of the LRA provides that statutory force be given to all collective agreements, irrespective of the consent of the employees, provided that they are members of the signatory parties. It is not necessary for individual consent in order to be bound by collective agreements. In *National Union of Metal Workers of South Africa and others v Hendor Mining Supplies A Division of Marschalk Beleggings (Pty) Ltd*,¹⁶³ it was held that a collective agreement may preclude employees from striking. So even if education is not declared as an essential service, the right to strike may be precluded, as this is the case in other sectors. Collective agreements may also make provision for remedies available to employees and may not preclude the right to private arbitration, the right to refer disputes to the Labour Court or to the CCMA. Collective agreements may eventually limit, if not remove completely, the need for strikes as terms and conditions will be set for a said duration of time for example making provision of the compulsory arbitration of interest disputes involving salary and conditions of employment.

Section 1(d)(iv) of the LRA states that one of the primary objectives of the LRA is the “effective resolution of labour disputes; to ensure this, voluntary collective bargaining is encouraged in order to ensure collective and individual justice. Legislation, therefore, makes provision for alternative methods and procedures to resolve disputes without the parties resorting to industrial conflicts including strikes. Grogan¹⁶⁴ is of the opinion that industrial action should be reserved for disputes of interest, denoting those disputes that arise from “frustrated wants of perceived needs to which employees are not legally entitled”. The LRA provides for conciliation, adjudication and arbitration as alternatives to industrial action. Institutions like the

162 Grogan *Collective Labour Law* 123.

163 2007 28 ILJ 1278 (LC).

164 Grogan *Workplace Law* 426.

CCMA, bargaining councils and the Labour Courts are also established to guide management and to correct the effects of illegal and unfair practices.¹⁶⁵

Section 74 of the LRA makes provision for disputes in essential services. Therefore, if education is declared as an essential service, educators will not be left without a remedy. Section 74(1) provides that because a party is engaged in an essential service it may refer a dispute in writing to a council (if the parties to the dispute fall within the registered scope of the particular council),¹⁶⁶ or to the Commission if no council has jurisdiction.¹⁶⁷ In case of a referral the party who refers the particular dispute must satisfy the council or the Commission in question that all the parties to the dispute have been served with the referral.¹⁶⁸ After this requirement has been satisfied the Commission or council must resolve the dispute through conciliation.¹⁶⁹ Should the dispute remain unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the Commission or council.¹⁷⁰

An arbitration award made by the Commission or the council in respect of the State having financial implications becomes binding within 14 days after the award was given, unless a Minister tables the award in Parliament within the prescribed period.¹⁷¹ This award will also become binding 14 days after it was tabled, unless the Parliament has passed a resolution declaring that the award is not binding.¹⁷² Should Parliament pass a resolution determining that the award is not binding, the dispute must be referred back to the council or Commission for “further conciliation between the parties to the *dispute* and if that fails, any party to the *dispute* may request the Commission to arbitrate”.¹⁷³ If parliament is not in session on the expiry

165 Grogan *Workplace Law* 426.

166 Section 74(1)(a) of the LRA.

167 Section 74(1)(b) of the LRA.

168 Section 74(2) of the LRA.

169 Section 74(3) of the LRA.

170 Section 74(4) of the LRA.

171 Section 74(5)(a) of the LRA.

172 Section 74(5)(b) of the LRA.

173 Section 74(6) of the LRA.

of the 14 day period, the period or balance of that period will only start running from the beginning of the next session of Parliament.¹⁷⁴

Section 135 of the LRA which deals with resolution of disputes through conciliation provides that the Commission can appoint a commissioner to attempt to resolve the dispute through conciliation.¹⁷⁵ This section also provides that if a dispute about a matter of mutual interest was referred to the Commission and the parties to the dispute are engaged in essential services, the parties will be able to consent, within seven days of the date that the referral was received, to the appointment of a specific commissioner who will attempt to resolve the dispute through conciliation.¹⁷⁶ The parties will also be able to consent to the terms of reference of the commissioner.¹⁷⁷ Should the parties not consent to the matters mentioned above within the seven-day period the Commission must appoint a commissioner to attempt to resolve the dispute and determine the terms of reference as soon as possible.¹⁷⁸

If the Act requires a dispute to be resolved through arbitration, the provisions set out above in section 135(6) will apply, “read with the changes required by context, to the appointment of a commissioner to resolve the dispute through arbitration”.¹⁷⁹ In cases where a dispute about a matter of mutual interest proceeds to arbitration and any party to the dispute is engaged in an essential service, the commissioner must complete the arbitration and issue an arbitration award, including brief reasons signed by that commissioner, within 30 days of the date of certificate, or within a period agreed to by the parties.¹⁸⁰ After an award has been given the Commission must serve a copy of the award to each party, or the person who represented a party during the arbitration proceedings.¹⁸¹ The award in question must be filed with the

174 Section 74(7)(b) of the LRA.

175 Section 135(1) of the LRA.

176 Section 135(6)(a)(i) of the LRA.

177 Section 135(6)(a)(ii) of the LRA.

178 Section 135(6)(6)(i)-(ii) of the LRA.

179 Section 136(6) of the LRA.

180 Section 139(1) (a) of the LRA.

181 Section 139(1) (b) of the LRA.

registrar of the Labour Court.¹⁸² No order for costs in arbitration proceedings may be given by the commissioner, unless a party or his representative acted in a “frivolous or vexatious” manner in its conduct during the arbitration proceedings.¹⁸³

Thus as attested to above, there is a vast array of remedies available to employees with grievances. It should be stated that by declaring education as an essential service and not allowing teachers to strike will by no means leave them remediless; additionally the above discussed alternatives will have a less drastic impact on society as a whole. Seeing as teachers will still have the abovementioned remedies at their disposal, it is safe to conclude that it will not be unreasonable or unjustifiable to limit their right to strike; there are indeed other realistic possibilities available which can serve to ensure that their rights are duly protected.

8 Conclusion

One must yet again consider the statement by former President Nelson Mandela: “*Education is the most powerful weapon which you can use to change the world*”. In South Africa it is an essential weapon in ensuring that socio-economic development takes place. As attested to above, strikes in the education sector are already a serious problem in South Africa. Strike action by educators does not only affect a single employer but is detrimental to all learners who certainly also outnumber the teachers. This is a noteworthy problem in South Africa as strikes by educators influences various other sectors in the economy and society. Consider for example the consequences resulting from situations where pupils are not properly prepared for examinations or examinations are postponed which will have an effect on college and university admissions. This could potentially result in employees being unable to join the workforce at the correct time.

182 Section 139(1) (c) of the LRA.

183 Section 139(2) of the LRA.

Numerous academics are of the opinion that the concept of a strike should never have been transferred to the public sector, as the largest part of government services are essential to the health, safety and welfare of the public. It can even be argued that strikes are an inappropriate weapon in the public sector. This is essentially motivated by the constitutional duty on the state to provide an effective public service. Strikes by educators should be seen as a strike against the entire South African community, as this will influence pupils, their parents as well as other sectors in the society. Strikes in the public sector do not necessarily serve the same purpose as strikes in the private sector. When assessing the right to strike and balancing this right it is evident that strikes by teachers evaluated against the right to basic education cannot be regarded as an equal trade; the possibility of economic gains for educators has overbearing negative impacts on the community and causes damage to be inflicted on South Africans.

In light of the above discussed South African case law, progressive realisation is a key aspect as regards socio-economic rights in South Africa. In various cases it was held that the issue of budget constraints will not be an adequate excuse in a situation where the state fails to comply with its duties or infringes on the rights of its citizens. Both a positive and a negative duty rests on the state in the realisation of rights. The right to education is not a right which should be “progressively realised” but one that requires immediate and constant attention. The right to education in South Africa is interlinked with the right to integrity of one’s person as well as the right to a life that is worth living; this is because education is essential in the development of South Africa at a social and economic level, being the only mechanism capable of providing learners with the opportunity to rise above the circumstances they are currently living in and struggling with.

As regards international law, it is understandable that needs concerning education and strikes will differ from country to country, seeing as different resources are available, different socio-economic factors prevail and different historical backgrounds apply. In developed countries there is no tendency for teachers to

strike and students are rarely, if ever, deprived of their right to education. In South Africa, resources are limited and legal provisions must, therefore, be introduced which ensures that the right to education is not infringed upon.

When balancing the right to education and the right to strike it was stated that a right should only be limited if it is deemed reasonable and if there are no other realistic ways to ensure that the desired purpose is achieved. When looking at the right to strike by teachers it is clear that striking can in no way be seen as the only remedy and that the LRA makes provision for numerous procedures and institutions to prevent that disputes result in industrial action.

When weighing these rights up against each another it is my submission that given the historic framework of South Africa, the right to education should weigh heavier than the right to strike, as alternative measures may be taken by teachers in order to satisfy their needs. By making use of these alternative options the infringement on the right to education will be non-existent. The impact of declaring education as an essential service will be enormous as regards the realisation of the right to education, as this right will no longer be infringed upon and although the right to strike will be limited, teachers will still be able to resort to other remedies, making this limitation reasonable and justifiable in light of section 36 of the *Constitution*. Taking into account the prevalence of strikes by teachers in South Africa, a more comprehensive legal framework must be set into place which will ensure that the right to education is not infringed upon. By declaring education as an essential service, education as a public sector service will be elevated and it will only then be in a position where one can rightly argue that, in agreement with former President Nelson Mandela, it is “the most powerful weapon which you can use to change the world”.

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