

TEACHERS' RIGHT TO STRIKE VIS-A-VIS LEARNERS' RIGHT TO EDUCATION – JUSTICE FOR ONE IS AN INJUSTICE FOR THE OTHER.

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Abstract

The teachers' salary strike, which occurs almost annually in South Africa, is so widespread that it seems to have gained public toleration if not complete acceptance. However, the strike may have a lasting and devastating impact on the teachers' as well as the learners' discipline, motivation and morale, with the learners being the hardest hit. The strike has a negative impact on the learning and teaching culture and on the learners' academic performance. Although the teachers' strike is about salaries and salary-related matters, all too often, debates about it shift from the strike to the tension between the teachers' right to strike and the learners' right to receive education. This study endeavours to fathom the truth about the two rights, to establish whether they can stand side by side without contradicting each other, and to study their implications.

Keywords: constitution; bill of rights; limitation; justice; injustice; strike; essential service.

1. BACKGROUND AND INTRODUCTION

The establishment of teachers' organisations which represent teachers' views is a common phenomenon in any country, worldwide. The South African Democratic Teachers' Union (SADTU) was formed by amalgamating several small black teachers' unions in 1990 (Louw, 1991: 17). Long before the establishment of this union there were several teachers' organisations in South Africa, but unlike SADTU, they were not politically active and militant. Louw (1991: 17) claims that in 1990 the former government of South Africa unbanned all political organisations, released political prisoners and abolished many apartheid laws; this liberalising action by government caused trade unions to take root in education in a militant form. SADTU demanded recognition from the Department of Education and Training (the former Education Department for black people) through strikes, marches, and other forms of demonstrations which culminated in the Department of Education succumbing and granting it recognition in 1992.

The teachers' strikes continued even after the recognition of their union, and they ultimately made schools difficult for principals and the Department of Education to manage. The strikes encompassed several issues, including improved work conditions, salaries and better school facilities (Masitsa 1995: 90). Discipline among the teachers deteriorated; their morale was badly weakened and the teaching culture seriously eroded (Louw, 1991:19).

The magnitude of the teachers' strike was unprecedented and the consequences dire. The teachers' strike continued even after the inception of the new government in 1994, and the adoption of the new Constitution in 1996 (Bray, 2000:6).

Because the new Constitution of South Africa was adopted in 1996, the author argues that the jurists who drafted it were well aware of the devastating impact the teachers' strike had on education. However, they enshrined the teachers' right to strike in the Bill of Rights, in Section 23(1) of the Constitution. This implies that awarding the teachers the right to strike was not an oversight. Thus, against this background, the author wishes to argue and interrogate the relationship between the teachers' right to strike and the learners' right to receive education; to establish whether or not there is a conflict between the two rights, and whether or not the two rights can exist side by side.

2. STATEMENT OF THE PROBLEM

Scores of primary and secondary schools continue to experience the poor scholastic preparedness of teachers and learners. Systemic evaluation in the primary schools has revealed the magnitude of the problem. A report (Free State Department of Education, 2005:x–xi, 46, 110) of the systemic evaluation of Grade 6 learners in the Free State Province published in 2005, revealed the following: learner achievement scores for each learning area were relatively poor, with learners obtaining a provincial average of 39% in Language, 31% in Mathematics and 44% in Natural Sciences. The situation is very similar in other provinces. This indicates that a poor academic foundation is laid in primary schools. Poor teaching and learning take place, resulting in poor academic performance, particularly in Grade 12. Poor teaching is aggravated by the teachers' strikes. According to the Mail and Guardian (2010:1) the percentage of learners who obtained university entrance certificates in the entire country in 2008 and 2009 were 19.5% and 19.8% respectively. Despite the poor academic results in both primary and secondary schools, teachers still engage in repeated salary strikes, which are suspected to be aggravating the poor academic situation in schools.

The teachers' salary strike, which occurs almost annually in South Africa, is so widespread that it seems to have gained public toleration if not complete acceptance. Year after year the intensity of the strike increases by leaps and bounds and this also applies to its negative impact on teaching and learning. Although the Teachers' Unions and the Department of Education are aware of the devastating impact of the strike on the learning and teaching culture in schools, and on the motivation and discipline of both teachers and learners, nothing concrete has been done by either party to solve the impasse. The Department of Education and the Teachers' Unions constantly blame each other for the strike.

The teachers' strike is about salaries and salary-related matters; however, every time there is a strike, debates about it shift to the teachers' right to strike and the learners' right to receive education. The justification of the teachers' right to strike often comes under the spotlight.

The South African Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid and obligations imposed by it should be fulfilled. The Bill of Rights contained in the Constitution defines the rights of people and regulates how and when the rights may be limited. The limitation of rights ensures that there is no conflict between the rights or it harmonizes the relationship between the rights. The Bill of Rights sets out the rights of individuals vis-à-vis the state and the rights of individuals vis-à-vis the rights of other individuals (Bray, 2000:10). This study endeavours to clear the paradox, if there is any, between the teachers' right to strike and the learners' right to education.

3. ARGUMENT AGAINST THE TEACHERS' RIGHT TO STRIKE

The teachers' right to strike presupposes that their unions' negotiations with their employer (Department of Education) may fail to achieve the desired results, thus prompting a strike. The author argues that the unions' negotiators may deliberately lead the negotiations to a deadlock, thus compelling teachers to strike, because they know that the disruptive consequences of a strike would compel the employer to negotiate in their favour. The unions are less concerned about the negative impact of the strike on the learners. On the other hand, the Department of Education is more concerned about the financial implications of the negotiations on its budget, than about the impact of the teachers' strike on the learners. The Department of Education will only show concern about the plight of the learners when negotiations with the unions have failed, and a strike has been called. This implies that during the teachers' strike it is primarily the innocent learners who suffer.

Masitsa (2011:166) posits that the learner has the right to a safe school milieu which the school should provide. Teachers, by virtue of their profession and by law, are obliged to maintain discipline at school and to act in loco parentis in relation to the learner. Priso (2005:10) states that the functions that educators should fulfil in terms of the common law principle, in loco parentis, include the right to maintain authority and the obligation to exercise caring supervision of the learner. Taking cognizance of foregoing, it is reasonable to argue that when teachers go on strike they abdicate their pedagogical and legal responsibilities to exercise caring supervision and to maintain authority over the learners. Stated differently, they abandon the learners. Township schools, which are vulnerable to unsafe conditions and threads of violence (Xaba, 2006:566), are affected the most by the teachers' strikes.

Section 17 of the Bill of Rights states that, everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present a petition (or simply to strike). This implies that the right to perform these actions is qualified – they must be performed peacefully and by unarmed people. Thus, if the teacher's strike is not peaceful and/or the strikers are armed their strike will be illegal. Common sense and conventional wisdom suggest that rights and responsibilities go hand in hand. All too often the teachers strikes are characterized by the intimidation of the non-striking colleagues, implying that they are not peaceful and thus can be classified as illegal. Because it is difficult for the police to force the strikers to obey Section 17 of the Bill of Rights, as this may compel them to use force and to arrest non-complying strikers, intimidation of non-striking teachers goes on unabated and the strikers are complacent. From an educational and a moral point of view when striking teachers intimidate the non-striking ones, they set a poor example particularly to the learners who are entrusted to their care and who are influenced by their behaviour. Teachers are expected to set an example of good conduct to the learners.

When people engage in a strike it implies that they have exhausted their ability to think and reason. The question may be asked: can we have teachers who will sometimes lose their ability to think and reason? The teachers' right to strike is not a privilege if striking means losing the ability to think and reason. Anything achieved through a strike cannot be regarded as a good achievement. Think of medical students who would achieve good academic results at the end of the academic year because of a strike they were engaged in.

Last but not least, it is difficult to dispute the fact that teachers, like nurses, perform a service so extremely important to the entire nation that it should be classified as essential. The author holds the view that the views expressed in this exposition provide convincing argument against the teachers' right to strike.

4. RESEARCH AIM

The fundamental aim of this study is to investigate whether or not there is a conflict or a contradiction between the teachers' right to strike and the learners' right to receive education. The study sets out to explore the following research question: Is there a conflict or a contradiction between the teachers' right to strike and the learners' right to receive education?

5. RESEARCH DESIGN AND METHODOLOGY

5.1 Research paradigm

This study follows a constructivist or an interpretive paradigm. The basic assumption guiding this paradigm is that knowledge is socially constructed by people active in the research process, and researchers should attempt to understand the complex world of lived experience from the point of view of those who live in it (Schwandt, 2000 as cited in Mertens, 2010:16).

The constructive paradigm further emphasizes that research is the product of the values of researchers and cannot be independent from them. Thus, constructivist's approaches to research have the intention of understanding the world of human experience (Mertens, 2010:19).

5.2 Methodology

Prominent methods of research employed in the constructive paradigm include interviews, observations and document reviews. The latter being the method used in this study. Mertens (2010:19) states that the constructivist approach is sometimes described as hermeneutical and dialectical because efforts are made to obtain multiperspectives that yield better interpretation of meanings. Interpretivism is rooted in hermeneutics, the study of the theory and practice of interpretation (Nieuwenhuis as cited in Maree, 2007:58). Hermeneutic theorists such as Schleiermacher and Dilthey consider understanding as a process of psychological construction, wherein the reader reconstructs the original intention of the author. This implies that the text is the expression of the thoughts of the author, and interpreters should put themselves within the author's 'horizon' in order to reconstruct the intended meaning of the text (Nieuwenhuis as cited in Maree, 2007:59).

In this study, when the two rights under investigation are interpreted cognizance is taken of the interpretation clause of the Bill of Rights. Terre Blanche, Durrheim and Painter (2010:274) posit that there are two key principles of interpretive research: one involves understanding meaning in context and the other positions the researcher as the primary "instrument" by means of which information is collected and analysed. Henning, van Rensburg and Smit (2004) state that an interpretive paradigm encourages a variety of data, different sources and analyses methods in order to strive for validity. It is characterised by intensive study, a description of events and an interpretation of meanings (Pintrich and Schunk, 1996:11-12). Thus, when using an interpretive paradigm the researcher has to guard against subjectivity.

The ultimate aim in this study is to provide an insight into and elucidate the meanings and implications of the two rights under study viz, the teachers' right to strike and the learners' right to receive education. To establish whether the two rights can stand side by side or whether there is a conflict between them. To achieve the aim of the study, the researcher used a comprehensive literature study as a data gathering method. He conducted an objective, analytic and critical analysis of the literature. The literature study was done thematically and includes the study of original and secondary sources. It focused on the relationship between the teachers' right to strike and the learners' right to receive education. Data on these rights were amassed, analysed and interpreted. Subsequently, deductions were made and conclusions drawn.

6. SUBJECTING THE RELATIONSHIP BETWEEN THE TEACHERS' RIGHT TO STRIKE AND THE LEARNERS' RIGHT TO EDUCATION TO CAREFUL SCRUTINY

In order to undertake a thorough investigation of the research problem, of especially the relationship between the two rights under scrutiny, a thorough study should be conducted on the South African Constitution and particularly the Bill of Rights, the limitations of rights, of what a strike is and of the implications of the teachers' right to strike and the learners' right to education. This scrutiny commences with an analysis of the interpretation clause of the Constitution and the Bill of Rights.

6.1 Interpretation of the Bill of Rights

The interpretation of the Bill of Rights is contained in section 39 (1-3) of the Constitution and states that when interpreting the Bill of Rights a court, tribunal or forum must:

- promote the values that underlie an open and democratic society based on human dignity, equity and freedom;
- consider international law; and
- may consider foreign law.

When interpreting any legislation, and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purpose and object of the Bill of Rights. Bray (2000:18) elucidates this further by stating that when interpreting a specific right, the values of openness, democracy, freedom, equality and human dignity must be promoted. However, he notes that in some instances, these values may be in conflict with one another and the courts therefore, have to balance conflicting values. The author argues that the conflict of values referred to here does exist between the teachers' right to strike and the learners' right to education. This study attempts to identify and illuminate this conflict.

6.2 The status of the Constitution and the Bill of Rights

The South African Constitution and the Bill of Rights contained in it confirm the status, value and supremacy of the Constitution. Section 2 of the South African Constitution stipulates that the Constitution is the supreme law of the Republic and any law contradicting it is unconstitutional. Oosthuizen (2003: 21) states that the South African Constitution contains the Bill of Rights in which the state guarantees the protection of the individual's fundamental rights. Section 7(1-2) declares that the Bill of Rights is the cornerstone of democracy in South Africa and that the state must respect, protect and fulfil the rights in it. Section 9(1) stipulates that everyone is equal before the law and has the right to the equal protection and benefit of the law.

Bray (200:11) states that a right is stronger than a privilege; it is more in the nature of an entitlement which is capable of being enforced. He further states that the provisions of the Constitution are entrenched (guaranteed) and may be changed only by parliament following a prescribed procedure. The fundamental rights are justifiable and according to Bray (2003:9) enforceable, because the courts exercise control to ensure that they are observed. It is, therefore, reasonable to argue that because the teachers' right to strike and the learners' right to education are parts of the Bill of Rights, they are equal in status, value and supremacy. As with all rights in the Bill of Rights they must be equally respected, protected and fulfilled by the state. The next paragraph will address the problem of whether or not rights in the Bill of Rights can be limited.

6.3 Limitation of Rights

Section 36(1) of the Constitution stipulates clearly that rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable, based on human dignity, equality and freedom and taking into account all relevant factors such as:

- the nature of the right;
- the importance of the nature of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

Thus, all rights in the Bill of Rights, may be limited in accordance with the law. Bray (2000:31) states that "a right may be limited only in terms of the law of general application" thereby implying that there must be an Act or a legal rule that provides that a right may be limited. This Act or legal rule that authorises the limitation must be applied nationally, and must comply with the five factors mentioned above. The courts have the judicial authority to adjudicate whether the limitations or infringements of rights are in accordance with the law (Smit, 2008:214). Oosthuizen, Rossouw and de Wet (2004:22) state that the basic purpose of the limitation clause is to weigh citizens' rights and interests against each other in a fair manner within the framework of democratic values, so that rights can be exercised with due regard for the rights for the rights of others. The author contends that thus far, no Act or legal rule exists that may limit teachers' right to strike or learners' right to receive education. Therefore, teachers have the right to participate in a legal strike. The next paragraph elucidates what a strike entails.

6.4 What is a strike?

Section 23 (c) of the Constitution grants all employees the right to strike. The Labour Relations Act of 1995, Section 213, describes a strike as a powerful tool that employees use to compel the employer to listen or accede to their

grievances and meet their employment demands (Squelch 2005:105-106). The strike must meet certain requirements and procedures, which are:

- a partial or complete refusal to work.
- a partial or complete retardation or obstruction of work.
- by persons who are or have been employed by the same or different employers.
- for the purpose of remedying a grievance or solving a dispute in respect of any mutual interest between the employer and the employee.

These requirements make it abundantly clear that teachers who are on strike ensure that their actions retard or obstruct academic activities at their schools. This is a pity because their action inconveniences the learners far more than it may inconvenience the employer. Their action also inconveniences the teachers themselves, because after the strike is over, teachers will be compelled to do extra work at a much faster pace and ensure that learners learn much quicker.

A strike may be legal (protected) or illegal (unprotected). A protected strike complies with the provisions of Chapter IV of the Labour Relations Act, whereas an unprotected strike does not (Squelch, 2005: 106; Oosthuizen, 2003:168-169). For the sake of brevity, the requirements of a legal and an illegal strike will not be discussed. Oosthuizen (3003:169-170) lists the following consequences of participating in a protected strike:

- participation does not constitute a delict;
- employees are not in breach of their contracts of employment;
- the employer may not apply for an interdict to stop the strike, unless damage is caused;
- the employer may not institute civil legal proceedings to claim compensation for lost production;
- the employer is not obliged to pay the strikers for the period they are on strike; and
- the employees may not be dismissed for participating in a strike.

6.5 Teachers' right to strike

Section 23(1-2) of the Bill of Rights stipulates that everyone, (including a teacher), has the right to fair labour practices, and every worker has the right to form or join a union, to participate in the activities and programmes of the union and to strike. The Labour Relations Act of 1995 also grants the employee the right to strike (Squelch 2005:105), and this adds weight to their right to strike. These laws prove that the teachers' right to strike is unquestionable and indisputable. According to Squelch (2005:111), employees employed in essential and maintenance services do not have the right to strike, and must settle their dispute using alternative procedures.

Teaching has not been designated as an essential service in terms of section 71 of the Labour Relations Act. This dispels the argument that teachers are performing an essential service and therefore should not have the right to strike. Although this argument may be beside the point, it is true to an extent, but the services teachers render are not, by law, classified as essential. In fact, one could argue that there are many employees who perform an essential service but who have the right to strike. Such as, municipal employees responsible for the supply and maintenance of water and electricity, repair of sewage system and refuse removal, and Eskom employees responsible for the supply and maintenance of electricity. The services I have identified, are not only essential, but indispensable to the entire community or society.

6.6 Regulations regarding the role of principals prior and during the strike action

In an attempt to lessen the negative impact of the teachers' strike on the learners, the Department of Education promulgated the following regulations:

- notwithstanding their right to participate in strike action and other trade union activities, principals must, in the performance of their management responsibilities, communicate in advance their intention to participate in such action in order to enable the Department of Education to make arrangements to meet its obligation to provide education.
- the principal who does not participate in a strike must continue to perform his/her normal designated functions.
- the principal has the responsibility to ensure the functioning of the school during the strike (RSA, 2000).

These regulations, although well-intended, are of no avail because the principal cannot ensure that effective teaching and learning take place when scores of teachers are not at school, and when teachers and learners who want to go to school are being intimidated. Teaching and learning can only occur in a secure and peaceful environment, in an environment conducive to teaching and learning.

6.7 Learners' right to education

The Bill of Rights, section 29(1a), stipulates that everyone has the right to basic education, including adult basic education. This right is not unlimited as it is limited only to basic education; however, this section unequivocally endorses a learner's right to education. According to Oosthuizen et al. (2004:20), in the current dispensation, basic education for children is limited to education up to the age of 15 years. It is important to note that basic education does not imply free education. The learners' right to basic education implies that they are entitled, by the Constitution, to receive basic education and are entitled to receive education undisturbed.

Thus, adherence to this right implies that the state will ensure that learners always receive education which is physically, emotionally and mentally undisturbed or unhindered. To all intents and purposes, a teachers' strike will wittingly or unwittingly deny the learners their right to receive education or to exercise this right.

Section 28(2) of the Bill of Rights which deals with children's rights stipulates that a child's best interests are of paramount importance in every matter concerning the child. In this regard, Bray (2000: 65) points out that the "best interests of the child" is a controversial topic because it has not yet provided a reliable and determinate standard. These views are endorsed by Oosthuizen et al. (2004:56) who claim that the best interests of the child still have to be provided by the courts. Currently, to a large extent, the issue is at the discretion of educators, but it remains important that the principle be taken into serious consideration. The author finds it reasonable and logical to extrapolate and infer that there are two constitutional stipulations protecting the child's rights: the child's right to education and the child's best interests and these are paramount in any matter concerning the child. Nevertheless, they do not, as they currently stand, limit or supersede the teachers' right to strike. The courts still have to provide guidelines regarding the implications of the best interests of the child.

7. CONCLUSIONS

Within the limits of this study and from evidence presented in it, the following conclusions have emerged:

The teachers' right to strike and the learners' right to education are similarly protected by the Bill of Rights – the cornerstone of democracy in South Africa. Therefore, the two rights are equal as far as their status, importance and value are concerned. According to the Constitution, these rights must be equally respected, protected, promoted and fulfilled by the state. The Constitution does not make provision for the limitation of these rights. With regard to the child's rights; namely, that a child's best interests are of paramount importance in every matter concerning the child, the researcher found that guidelines to determine the best interests of the child are not provided and still have to be decided by the courts. Currently, a decision about what constitutes the best interests of the child is left to the discretion of the teachers. Therefore, the author concludes that the two rights, namely: the child's right to education and the child's best interests are paramount in every matter concerning the child do not, as they stand, limit or supersede the teachers' right to strike.

The author has uncovered the following contradiction or conflict between the teachers' right to strike and the learners' right to receive education. If teachers lawfully exercise their right to strike, for the duration of the strike, they limit or deny learners their right to receive education.

Conversely, if teachers are not allowed to strike, they will be denied their constitutional right to strike (and this will be illegal), but learners will be afforded their right to receive education. Therefore, if justice is done to the teachers by allowing them their right to strike, an injustice is done to the learners because the teachers' strike denies them their right to receive education. If justice is done to the learners by denying the teachers their right to strike, an injustice will be done to the teachers. The author comes to this ultimate conclusion: there is a conflict or contradiction between the teachers' right to strike and the learners' right to receive education. A balancing mechanism or process of the two rights is required. This study provides answers to the aim of research and the research question.

8. RECOMMENDATIONS

The author contends that the resolution of the problem interrogated in this study can be achieved by the courts resolving the conflict or contradiction that exists between the teachers' right to strike and the learners' right to education, and/or by seriously addressing factors that lead to the teachers' strike or that cause teachers to strike. Since the former is the responsibility of the courts or in some cases of parliament, it will not be discussed further. However, the Department of Education is urged to try and bring about a resolution or balance between the two conflicting rights by making use of the relevant courts.

Regarding the latter, a review of the salary negotiations strategies and procedures between teachers' unions and the employer is suggested. Currently precious time is squandered by protracted salary negotiations between the teachers' unions and the employer which often fail to achieve an agreement. More often than not, the employer appears to negotiate in bad faith; this is evidenced by the many concessions that the employer is often willing to make during the negotiations and sometimes changing negotiators. To negate the employer's negotiation strategies, teachers' unions at times turn to negotiate in bad faith as well. Therefore, a genuine salary negotiation strategy where teachers' unions engage in salary negotiations with high ranking officials in the Department of Education, who will most likely be conversant with their plight and circumstances, is recommended.

Repeated teachers' salary strikes may indicate that something is amiss with their salary scales prompting the adage: 'There is no smoke without fire'. The Department of Education should engage in a reassessment of teachers' salary scales and ensure that they are on par with those of their counterparts with similar academic and professional qualifications in other sectors of the South African economy, including those in government. It is ludicrous and shortsighted to compare the South African teachers' salaries with the salaries of teachers in other African states. The government should not regard insufficient financial resources as an excuse not to pay teachers appropriately.

Instead, the government should seriously curtail or halt rampant state corruption in the country because it squanders the money that should be utilised to pay teachers and other civil servants. The government should consider classifying teaching as an essential service, so that teachers are not granted the right to strike. However, this should not be a smokescreen for not paying teachers appropriately.

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