

The labour rights of educators in South Africa and Germany and quality education: An exploratory comparison

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OPSOMMING

Die Arbeidsregte van Opvoeders in Suid-Afrika en Duitsland en Kwaliteit- onderwys: 'n Verkennende Vergelyking

Die aandrag op toegang tot onderwys vir almal soos vergestalt in die *Education for All*-beweging van die 1990s het deur die jare verander in 'n aandrag op toegang vir almal tot kwaliteit basiese onderwys soos beoog in die *Dakar Framework for Action Education for All: Meeting Our Collective Commitments*. Wêreldwyd was daar al etlike pogings om kwaliteit-onderwys te definieer en dit word telkens in verband gebring met onder meer die kwaliteit van onderwysers en die gehalte van hulle opleiding, hoewel geen reglynige verhouding aangedui kan word nie. Die *UNESCO/ILO Recommendation concerning the Status of Teachers* van 1966 gaan van die standpunt uit dat opvoeders toegang tot bepaalde regte, insluitende arbeidsregte, moet hê om hulle werk om kwaliteit-onderwys te voorsien behoorlik te kan doen. In Suid-Afrika het opvoeders volle eenvormige toegang tot die volledige reeks arbeidsregte in die Grondwet en ander wetgewing terwyl daar in Duitsland twee stelsels arbeidsregte vir opvoeders geld. Baie navorsing is nog nodig oor die verhouding tussen opvoeders se arbeidsregte (en die gebruik en misbruik daarvan) en die kwaliteit van onderwys en ons voer aan dat beperkings op fundamentele arbeidsregte en volle en onbeperkte toegang tot arbeidsregte sonder om enige ander faktore rakende kwaliteit-onderwys in ag te neem beide problematies is.

1 Introduction

Education for All (EFA) has been the focus of international education agencies for the past two decades. It involved providing education to everyone of appropriate age by 2015, thereby satisfying everyone's right to access to education. The challenge has been to simultaneously maintain and enhance the quality of education in schools across the globe. Howie¹ says that, after decades of deprivation in many contexts,

1 Howie expert lecture presented at the University of Pretoria on 2011-08-04.

it is important to not only discuss and reflect on how achievable quality education for all is, but also, what the cost is of not doing so. The concern about the quality of education has overtaken concerns about access to education and can be accompanied by questions about the status, rights, responsibilities and behaviour of teachers.

EFA was launched at the World Conference on Education held in Jomtien in Thailand in 1990. It was followed by a Mid-Decade Conference held in Amman in Jordan in 1996 and the World Education Forum held in Dakar, Senegal in 2000 where the *Dakar Framework for Action Education for All: Meeting Our Collective Commitments* was adopted. This document committed governments to achieving quality basic education for all by 2015 and represents both an up scaling of the Jomtien document (the word “quality” was added) and a down scaling (it is now “basic” education for all).²

Studies to measure the achievement of the goals of EFA and the *Framework* abound at both the international and national levels. PISA (the Programme for International Student Assessment), PIRLS (the Progress in International Reading Literacy Study), TIMSS (the Trends in International Mathematics and Science Study), SACMEQ (The Southern and Eastern Africa Consortium for Monitoring Educational Quality) and ANA (Annual National Assessment) are examples that come to mind.

PISA, TIMSS and PIRLS are international studies. South Africa does not participate in PISA but Germany does. SACMEQ is a regional study in Eastern and Southern Africa. ANA is a South Africa only national assessment of Grade 3 and Grade 6 learners’ performance in language, literacy, numeracy and mathematics. The 2011 ANA study found the following national average performance levels: in Grade 3: literacy 35% and numeracy 28%; in grade 6: languages 28% and mathematics 30%.³ South Africa has not done particularly well in any of the other studies and Germany does not top any of them either – the first results of PISA published in Germany in 2001⁴ shocked the public and since then all new PISA results have been subjects of vibrant public debates in Germany.

In light of the above it is not surprising that there is a wide-spread effort to ensure the provision of quality education to all children.⁵ Teachers are very important actors in regard to the quality and results of school education and one has to observe their role very carefully.

Because many role players impact the quality of education, one should guard against assuming a very direct causal relationship between the work of educators and the performance of learners. However, one may

2 Education for All http://www.unesco.org/education/efa/ed_for_all/ (accessed 2011-07-29).

3 In some instances teachers were not able to complete the papers intended for the students successfully.

4 Baumert *et al* *PISA 2000 Basiskompetenzen von Schülerinnen und Schülern im internationalen Vergleich* (2001).

5 Fredriksson *Quality Education: The Key Role of Teachers* (2004).

identify conditions that are more or less important beneficial for the performance of teachers in schools. These conditions include the following:

i A common understanding and expectations of teachers' professionalism

The basis for any description of the role of teachers is a common understanding of their professionalism and of the expectations of, and the necessary conditions for their work as educators of the youth. Professionalism involves the behaviour, values and convictions shared by teachers.

ii Teacher education

The understanding of teachers' professionalism must also have an impact on teacher education. Of vital importance regarding teacher education are issues such as how one finds and attracts the most gifted future teachers, how the selection processes at universities must be organised to achieve the aim of finding the best human capital for the profession and how the content of teacher training as well as the practical component of university preparation for the teaching profession reflects an understanding of teachers' professionalism.

iii Understanding of teachers' status

The professionalism of teachers must be supported by the definition of teachers' status ie the (legal) rules describing the concrete rights and duties of teachers particularly in regard to their employment conditions. When looking at the concrete obligations of teachers one may ask if teachers are primarily "ordinary" employees with all the rights and duties laid down in normal labour law or whether there should be any restrictions, enhancements or embellishments of their labour rights because of their particular role and function as educators of the youth in a public school system.

These three ideas also suggest a certain sequential developmental dimension regarding teachers' professionalism:⁶ An awareness of their professionalism, efforts to provide suitable teacher education (including further education and professional development) and the creation of conditions of service to support teachers to perform their primary task namely the education of learners optimally. The notion of a developmental dimension seems to be supported by the sequencing and structuring of the presentation of the rights of teachers in the *UNESCO/*

6 This notion was suggested to one of the authors by Dr Muavia Gallie, education consultant and one of the drafters of the framework for the continuing professional development of teachers in South Africa.

*ILO Recommendation on the Status of Teachers*⁷ (the *Recommendation*) which was the first multi-national reflection on and articulation of the rights and status of teachers and which remains an important entry point into the debate on these two issues.

Clause 5 of the *Recommendation* provides that “[w]orking conditions for teachers should be such as will best promote effective learning and enable teachers to concentrate on their profession” while clause 79 provides that the

participation of teachers in social and public life should be encouraged in the interests of the teacher’s personal development, of the education service and of society as a whole.

These clauses would seem to suggest that the drafters of the *Recommendation* linked teacher performance and their labour rights.

In the foregoing paragraphs we referred to increasing international insistence on the provision of quality education to all. We pointed out that teachers are assumed to play a vital role in the provision of education and that they seem to require access to certain labour rights in order to perform their task satisfactorily. The question then arose as to whether the nature of educators’ work is such that it could justify measures to curtail or even withdraw some or all of their labour rights should they not contribute adequately to the provision of quality education or should they abuse their labour rights.

The above are the questions that we will examine in this article. In the paragraphs below we will provide an international perspective on some of the issues by referring to a number of provisions of the *Recommendation*, followed by an examination first of the situation as it obtains in South Africa and second of the *status quo* in Germany. We decided to compare South Africa and Germany for a number of reasons, among others the facts that:

- (i) They are both constitutional democracies.
- (ii) Teachers are employed by provinces or Länder.
- (iii) Both countries have recently had to integrate disparate systems, and
- (iv) Their education systems are performing differently in terms of international assessments.

In conclusion we will present tentative answers to our questions.

⁷ Adopted by the Special Intergovernmental Conference on the Status of Teachers, Paris, 19661005. See below in the section on international perspectives.

2 International Perspective

Education International⁸ points out that the *Recommendation* is the only international standard applicable:

[t]o all teachers in both public and private schools up to the completion of the secondary stage of education whether nursery, kindergarten, primary, intermediate or secondary, including those providing technical, vocational or art education.

The *Recommendation* consists of 146 clauses that set standards particularly in the following fields: Preparation for the profession, further education for teachers, employment and career, entry into the teaching profession, advancement and promotion, security of tenure, disciplinary procedures related to breaches of professional conduct, the rights and responsibilities of teachers, conditions for effective teaching and learning, teachers' salaries, and teacher shortages.

The *Recommendation* does not necessarily imply that teachers move hierarchically from the recognition of one category of rights to the next until they enjoy a complete set of working conditions and a status that "will best promote effective learning and enable teachers to concentrate on their professional tasks".⁹ Although a developmental dimension is not spelt out explicitly, its existence whether categorical or implied is worth considering. The notion that teachers may have to earn the rights implied in the *Recommendation* sequentially may fly in the face of entitlement in terms of fundamental rights paradigms but one cannot escape the possibility that teachers might gain access to rights which they are not ready to exercise. In South Africa all teachers (including those that had been disadvantaged before) received the full array of labour rights referred to in the *Recommendation* in a single package in the wake of the 1994 transformation: Labour rights, rights to suitable professional preparation, the right to be heard, the right to professional development. The question arises as to whether such allocation has contributed to the delivery of quality education or whether the absence of some links in a chain has not negatively affected their service delivery.

It bears repeating that the link between quality education and the labour rights and status of teachers is not to be viewed naively and in an unsophisticated manner. Even though the *Recommendation* puts forward compelling arguments in favour of more rights for the majority of teachers in the world, it is still largely unimplemented in many corners of the globe and it would be wrong to suggest that all teachers across the world have access to all the rights, but the nexus between teachers' rights and educational quality seems firm and questions about the feasibility and viability of unbridled rights that may impair service delivery seem apposite.

8 Brochure on the 1966 UNESCO/ILO *Recommendation on the Status of Teachers* (2006).

9 *Recommendation* C1 8.

In this contribution we will focus on teachers' labour rights. We will begin our discussion by examining the position in South Africa.

3 South Africa

The situation in South Africa is at the same time unique and new. The majority of teachers were deprived of many rights under the previous regime and all teachers instantaneously got access to all the fundamental rights entrenched in the Bill of Rights in chapter 2 of the Constitution, including the labour rights. Section 23 of the Constitution provides that:

- (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.

It should be noted that the Constitution refers to "workers" and not "employees". Teachers are therefore "workers" before the law and the decision to be classified as such was a conscious one and also displayed solidarity with the workers with whom the biggest South African teachers' union (the South African Democratic Teachers' Union (SADTU)) is in alliance.¹⁰ Not all teachers' organisations are comfortable with the views and strategies of SADTU, which is often described as a hard line union, but in order to represent their members in negotiations and consultations they have no choice but to register as unions and take part in bargaining and negotiations even if they are more closely aligned to what might be called professional teachers' associations.

SADTU is a member of the Confederation of South African Trade Unions (COSATU) which is the largest union grouping in the country. Furthermore, COSATU is a member of the tripartite alliance which has united to form one group at the ballot box and it is, therefore, with the South African Communist Party an alliance which rules the country with the African National Congress (ANC) as ruling party. This situation where a trade union is part of government is unique and contradicts in many ways the notion that trade unions should primarily guard and promote their members' rights and interests.

The fact that teachers are at the same time employers and rulers is not without problems. For one thing, the governing party seems very hesitant to act against teachers who do not perform their duties as expected for fear of reprisals at the ballot box. One result is that protracted strikes (protected and unprotected) are the order of the day

¹⁰ This applies to teachers in the public and independent sectors alike. Unlike Germany (see below) South African law only recognises one group of teachers in the public sector.

and that the interests of children often play second fiddle to those of the teachers.

There is compelling anecdotal and other evidence that SADTU in particular is playing a disruptive role in schools predominantly serving poor communities. Motsosi refers to the debilitating and corrosive influence of SADTU.¹¹ Among the accusations levelled at SADTU are the following:¹²

- (i) They place principals under enormous pressure and intimidation when they try to enforce normal learner and educator discipline.
- (ii) They purport to be able to forbid principals to inspect teachers' work planning and to enter their classes.
- (iii) It does not honour agreements to which it was a party.
- (iv) They exert such pressure on principals that oppose them that such principals sometimes resign from education.
- (v) They divide schools along party-political and union alliance lines and non-ANC and non-SADTU members are victimised. This includes fabricating rumours and charges of nepotism, financial and other mismanagement, racism and corruption.
- (vi) They organise protests and force teachers and learners to participate in union activities which are sometime unauthorised and infringe on teaching time.
- (vii) They close ranks when members are accused and found guilty of misconduct so that neither the principal nor the education authorities can or want to act against them.

If all of these allegations are true, it is clear that teachers' labour rights, if abused, may have an adverse effect on the quality of education and also on the management of educational institutions.¹³ The situation is compounded by the fact that teachers chose not to get education declared as an essential service, which would have curtailed their labour rights to some degree. Although it is possible to limit teachers' labour rights in light of, and in accordance with section 36 of the Constitution and other legal principles, it would take exceptionally courageous political leadership to do so.¹⁴

11 "The corrosive influence of unions on SA schools" at http://education.ukzn.ac.za/News/11-08-22/The_corrosive_influence_of_unions_on_SA_schools (accessed 2011-09-01). See also "Lummel Sadou swaai die rottang in onderwys" at <http://152.111.1.87/argief/berigte/rapport/2011/07/26/R2/III/24julonderwys.html> (accessed 2011-09-15.)

12 Some would argue that SADTU is allowed to do certain things not because it is so strong but because the leadership in schools is poor.

13 At the moment there is a lack of large scale rigorous research to investigate the allegations of abuse of teachers' labour rights. However, allegations and anecdotes are persistent.

14 In a keynote address at the conference of the Distance Education and Teachers' Training (DETA) conference held in Maputo on 2011-08-2-5 the Vice-Chancellor of the University of the Free State and well-known

In South Africa one could argue that initial teacher education in South Africa is not in place yet as the *Policy on the Minimum Requirements for Teacher Education Qualifications*¹⁵ has just been published. It provides “a basis for the construction of core curricula for initial teacher education, as well as for Continuing Professional Development (CPD) programmes¹⁶ that accredited institutions must use in order to develop their programmes leading to teacher education qualifications. The tone of the *Policy* suggests that the teacher education contemplated must still happen and that teachers’ rights to such education exist but have not been given full expression as yet. It would seem anomalous then to award teachers the right to continuing professional development, which is by nature focused on honing already-acquired competencies, skills, knowledge and values as a teacher, at the time of the release of this future-oriented statement on the rights of educators. The *Policy* also intimates that the right to initial teacher education precedes the right to continuing education and that continuing education in the form of re-skilling should normally not be used a way to rectify dysfunctional or ineffective training. Yet the *National Policy Framework for Teacher Education and Development* (NPFTED) of 26 April 2007 makes provision for a national system of Continuing Professional Teacher Development (CPTD). The issue was again debated comprehensively at the national Teacher Development Summit held from 29 June to 2 July 2009.

The foregoing paragraphs suggest therefore that there may be grounds for limiting teachers’ rights including their labour rights on the basis of the current stage of development of teaching as a profession. The argument departs from the *Recommendation*’s separation of four types of teachers’ rights, namely those regarding initial teacher education, professional registration, professional development and participation in negotiations (through unions). The above paragraphs propose that one needs to examine the labour rights of teachers more closely in light of teaching’s incomplete compliance with the characteristics of a profession as set out in the *Recommendation* and in light of the poor performance of the South African education system.

The graph in Figure 1 depicts the minimum standards for primary teaching and number of teachers who met them in Sub-Saharan Africa in 2006.¹⁷ International Standard Classification of Education (ISCED) 2 represents 8-9 years of schooling; ISCED 3 represents 12-13 years of

educational and social commentator, ascribed the very poor performance of South African education to the absence of such leadership in education and in politics in the country.

15 Department of Higher Education and Training *Policy on the Minimum Requirements for Teacher Education Qualifications* GN 583 GG 34467 of 2011-07-15.

16 *Idem* 8.

17 Global Campaign for Education “Teachers For All: what governments and donors should do. Policy briefing of the Global Campaign for Education” 30-33 at http://www.vsointernational.org/Images/GCE_Teachers_For_All_tcm76-22710.pdf (accessed 2011-07-12).

schooling (upper secondary); ISCED 4 represents bridging education between secondary and post-secondary education; and ISCED 5 represents 2 – 3 years post-secondary education.

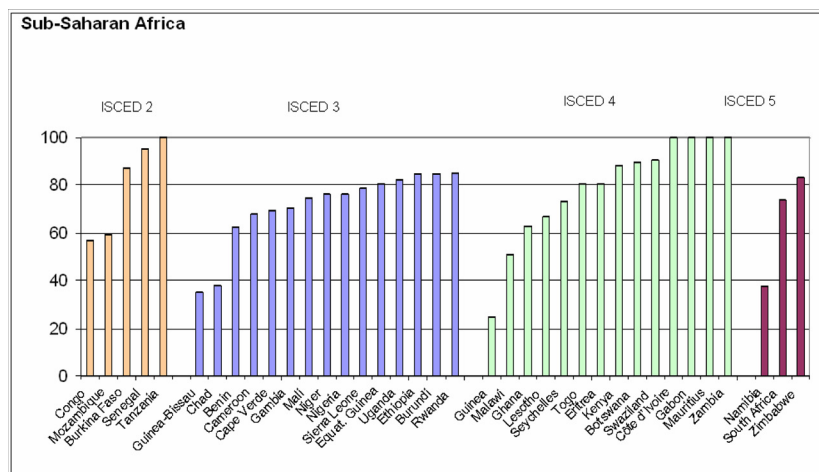


Figure 1: Minimum standards for primary teaching and number of teachers who met them in Sub-Saharan Africa in 2006 (Global Campaign for Education, 2006)

South Africa has the second highest number of teachers meeting ISCED in Sub-Saharan Africa and expectations that the national education system will perform well in comparison with other countries in the region are therefore justified.

We will now proceed to a discussion of South African teachers' labour rights.

4 Labour rights of South African teachers

4.1 Labour Relations Act

The Labour Relations Act¹⁸ (LRA) was promulgated among others to give effect to the public international law obligations of the Republic relating to labour relations,¹⁹ to give effect to section 23 of the Constitution; to promote and facilitate collective bargaining at the workplace and at sectoral level; to promote employee participation in decision-making

¹⁸ 66 of 1995.

¹⁹ This seems to bring teachers' labour law rights within the ambit of the *Recommendation* although it does not enjoy the status of international law acceded to by member countries.

through the establishment of workplace forums; and to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration (CCMA) is established), and through independent alternative dispute resolution services accredited for that purpose. The LRA specifically protects employees against unfair dismissals.

Teachers therefore have access to collective bargaining, to participation in decision making and to conciliation, mediation and arbitration for the resolution of labour disputes. In terms of Item 3(2) of Schedule 1 to the LRA the Education Labour Relations Council (ELRC) (established by section 6(1) of the Education Labour Relations Act)²⁰ is deemed to be a bargaining council established in terms of section 37(3)(b) of the LRA. The agreements adopted by this council are binding on employers and employees.²¹

4 2 Employment of Educators Act

The Employment of Educators Act²² (EEA) provides for the employment of educators by the State, for the regulation of their conditions of service, for discipline, for retirement and for the discharge of educators.²³ The EEA defines who educators and employers are²⁴ and it thus very clear to whom the rights contained in this law accrue.

A number of regulations have been published under the EEA including Conditions of Service of Educators, Determination of Salary Adjustments for Educators, Personnel Administration Measures (PAM), Regulations to Provide for Interim Measures according to which Rationalisation in Education in terms of Resolution 3 of 1996 and Other Related Agreements of the Education Labour Relations Council can be completed, the Role of Managers Prior to Strike Action and Regulations regarding the Staffing of Rationalised Educational Institutions. All of these create enforceable rights and obligations of teachers.

Section 2 of the EEA provides that the EEA applies to the employment of educators at (a) public schools; (b) further education and training institutions; (c) departmental offices; and (d) adult basic education centres. Section 3 spells out who the employers of specific categories of employees are for all purposes of employment as well as for the purposes

20 This Act was replaced by the Educators Employment Act, 1994 which was superseded by the Employment of Educators Act 76 of 1998.

21 S 23 of the LRA.

22 76 of 1998.

23 Teachers enjoy such comprehensive protection against amongst others unfair labour practices through a wide array of legislation that disciplinary action against them presents a serious challenge to managers. It is not impossible that some teachers may indeed consider themselves beyond the reach of the law. Also see Motsöhi *op cit* above.

24 S 1 EEA.

of determining the salaries and other conditions of service of educators and for the purposes of creating posts.

Chapter 3 of the EEA deals with the appointments, promotions and transfers of educators and section 6 provides for the powers of employers. Section 6(1)(b) provides that the appointment, transfer or promotion of an educator in the service of a provincial department shall be made by the provincial Head of Department (HoD). Section 3(a) provides that such appointment, promotion or transfer may only be made on the recommendation of the governing body (SGB) of the public school. Section 3(b) contains instructions with which governing bodies should comply when considering applications with a view to preparing recommendations for the employer. Section 6(3)(c) provides that the governing body must submit, in order of preference to the HoD, a list of – (i) at least three names of recommended candidates; or (ii) fewer than three candidates in consultation with the HoD.

Sections 6(3)(d) to (g) outline the responsibilities of the HoD in considering and dealing with the recommendations contemplated in sections 6(3)(a) to (c). Section 3(f) provides that, despite the order of preference in paragraph (c) and subject to paragraph (d), the HoD may appoint any suitable candidate on the list. Section 3(g)(iii) provides that, when an HoD declines a governing body recommendation he or she must, despite section 6(3)(a), appoint a suitable candidate temporarily or re-advertise the post.

The power given to an HoD to appoint someone despite the SGB's recommendations may constitute a violation of the rights of both SGBs and teachers. The courts do not seem to view the power as a *carte blanche* given to HoDs. In *Settlers Agricultural High School v Head of Department: Department of Education, Limpopo Province*²⁵ the SGB of the school had recommended the appointment of a candidate as principal. The HoD rejected the recommendation and appointed another candidate in the post. The school and its SGB successfully obtained the overturning of that decision by the court and the respondents appealed for leave to appeal the overturning.

Without making a finding Bertelsmann J²⁶ stated the following:

It might possibly be argued ... that the provisions of section 7(1)(b) indicate that a candidate from a previously disadvantaged community ought to be preferred in cases where the evaluation of such candidate and a competitor from a previously privileged group leads to a comparative parity in the assessment of their suitability for the post. But where the difference in the respective suitability for the post is, in the opinion of an interviewing committee which honestly applies the agreed procedure, as substantial as is the case here, neither the Constitution nor the statute or the equity plan [in terms of the Employment Equity Act 55 of 1998] demand the preferring of

25 [2002] JOL 10167 (T).

26 22-26.

the candidate who belongs to a group which was previously discriminated against.

But the Constitution also entrenches the right to proper education and provides specific protection for children. Section 28(2) of the Constitution reads as follows:

'A child's best interests are of paramount importance in every matter concerning the child.'

As important as the rights of educators, and in particular those belonging to previously disadvantaged communities are, the paramountcy of children's rights and interests must not be overlooked. I am of the view that the first respondent [the HoD of the particular provincial department of education] would not be entitled to substitute his own choice for that of the interviewing committee and the school governing body, but would have to refer the matter back to the interviewing committee and the school governing body with the instruction to apply the law properly.²⁷ Section 6(3)(c) of the [Employment of Educators] Act appears to be clear in this regard.

Bertelsmann J consequently refused the leave to appeal with costs.²⁸ It seems then that in this instance the court upheld the rights of the teacher concerned to just administrative action. In this regard Section 33(1) of the Constitution reads as follows: "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." The action of the HoD in question was also not in line with section 6 of the EEA.

One other example will suffice to illustrate the protection that teachers enjoy against arbitrary limitations of their labour. In *Head of Western Cape Education Department v Governing Body of Point High School*²⁹ Hurt AJA commented that, if the HoD "considers that the governing body has performed its functions properly, the HoD must attribute substantial weight to the recommendations submitted to him".³⁰ In this case the HoD of the Western Cape Department of Education declined the recommendations of the SGB for the school regarding the appointments of a principal and deputy-principal respectively. Hurt AJA commented that the assumption that the scope of the discretion of the HoD had been broadened was obviously correct but noted that this did not excuse him from "having to furnish acceptable reasons for his decision".³¹

It is worth noting that the candidates recommended by the SGB and those appointed by the HoD were all white males, a group over-represented in the Western Cape at the respective post levels. The two candidates recommended by the SGB were both from the KwaZulu-Natal

27 This aspect of the EEA was later amended materially, as the wording of s 6(3)(f) clearly shows, "... despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list".

28 26.

29 [2008] ZASCA 48.

30 12.

31 13.

province. When the SGB asked for reasons why their recommendation for deputy-principal had not been appointed, the Department responded as follows in a letter dated 4 December 2006:³²

As you are aware, there is an over-representation of males at post level three in the WCED. The appointment of any of the nominees would not have promoted or improved the [Employment Equity] targets of the WCED, therefore the appointment of Mr Swanepoel was approved.

The Department argued that if they appointed a person from the Western Cape, vacancies would arise which could be used for EE purposes.³³ The judge pointed out that:

[the HoD] failed, signally, to perform the balancing exercise referred to in *Bata Star* by weighing the (somewhat obscure) employment equity considerations which had occurred to him, against the disparity and suitability between the candidates recommended by the Governing Body and the candidates whom he decided to appoint.

He went on to point that employment “equity provisions should only prevail where there is approximate equality between the ability or ability of the two cases”.³⁴ The judge consequently set aside the HoD’s decisions:

[o]n the broad ground of unreasonableness as contemplated in s 6(2)(h) [of the EEA]. In my view the HoD proceeded without a proper understanding of the discretion which he was called upon to exercise.³⁵

Although we explore, in this article, the possibility that South African educators’ full array of labour and other rights may not be justified and may be counterproductive in regard to quality education because of their abuse by educators, some of them do positively contribute to quality education and need to be applauded. The cases discussed above are cases in point where the application of the law probably ensured that the best possible candidates for specific posts were appointed.

In addition to a myriad of disputes brought before the labour dispute resolution mechanisms of mediation and arbitration, the CCMA, the Labour Court and the Labour Court of Appeal, there are many other examples of cases in which various teachers’ rights were adjudicated, including:³⁶

- (i) *Mangela v MEC, Department of Education, EC*³⁷ (termination of employment of a temporary educator).

32 7.

33 9.

34 In this case there was clearly no approximate equality of ability as appeared from the evidence put forward by the SGB.

35 18.

36 Information obtainable on the website of the Federation of South African Schools (FEDSAS) (www.fedsas.org.za (accessed 2011-07-12)) whose summary of the litigation in question we have used.

37 [2006] ZAECHC 41.

- (ii) *Nakin v MEC, Department of Education, Eastern Cape Province*³⁸ (transfer of principal).
- (iii) *Phenithi v Minister of Education*³⁹ (dismissal of educator).
- (iv) *Reddy v KZN Department of Education and Culture*⁴⁰ (unfair labour practice).
- (v) *MEC for Education, Western Cape Province v Strauss*⁴¹ (injury on duty).
- (vi) *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*⁴² (intended termination of services of temporarily-employed expatriate teachers).

After discussing the rights and status of teachers in South Africa in the wake of the new political dispensation after 1994, we will now make some broad comments on the quality of education available to the country's children since 1994.

4 3 The Quality of Education in South Africa After 1994

Despite the significant number of rights which teachers have gained since 1994, no significant advances in education quality (especially for the poorer parts of the population concentrated in rural areas) since then can be indicated. Spaul⁴³ points out that, given the racial dimension of poverty, and that the poor are more likely to be black, it appears that, on average, black students receive an inferior quality of education to their white peers. He comments that the fact that this "is the reality 17 years on from apartheid is particularly disconcerting." Especially for black children in rural areas, 17 years of comprehensive teacher rights have not changed their plight.

Even more disconcerting is the representation by Taylor *et al*⁴⁴ of South Africa's mathematics performance in TIMMS 2002.⁴⁵ The graph in Figure 2 requires no elucidation.

38 [2008] ZAECHC 13.

39 [2003] ZACC 16.

40 [2003] ZALAC 7.

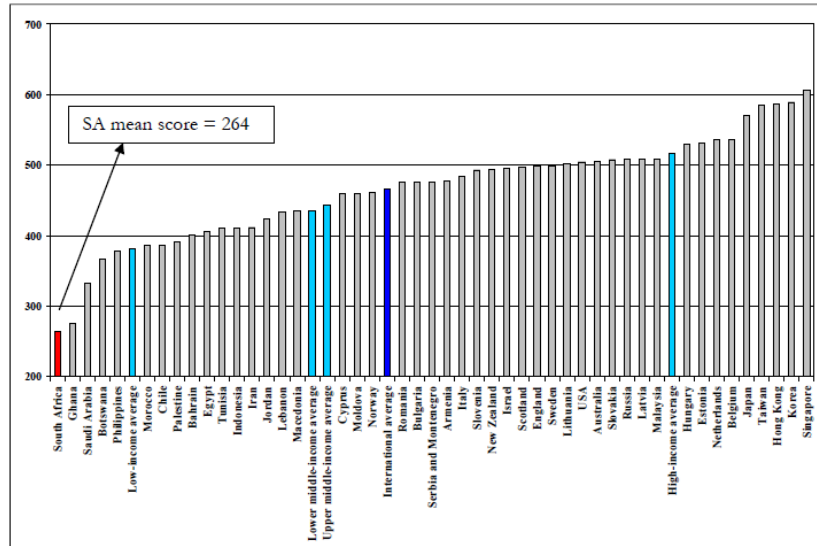
41 [2007] ZASCA 155.

42 [1997] ZACC 16.

43 Spaul *A Preliminary Analysis of SACMEQ III South Africa* (2011).

44 Taylor, Van der Berg, Reddy and Janse van Rensburg *How well do South African schools convert grade 8 achievement into matric outcomes?* (2011) 7.

45 6 African countries were included in the 2002 TIMMS survey.



Note: The TIMSS scores are scale average scores set to have an international mean of 500 and standard deviation of 100.

Figure 2: South Africa's mathematics performance in TIMSS 2002⁴⁶

Taylor, Van der Berg, Reddy and Janse van Rensburg point out that in the 2000 and 2007 SACMEQ surveys of reading and mathematics, South African children performed below average in comparison with other Southern and East African countries.⁴⁷ Given that South Africa has more qualified teachers, lower pupil-to-teacher-ratios and better access to resources, one would expect that South African students would perform at the top of the regional distribution. Unfortunately this is not the case. In a league table of student performance,⁴⁸ South Africa ranks 10th out of the 15 SACMEQ countries for student reading performance and 8th out of 15 for student maths performance.⁴⁹ Spaul⁵⁰ points out a SACMEQ result which is hard to comprehend:

[s]ince the teacher tests contained many of the same questions as the student tests, one would expect all teachers to score almost full marks on the teacher test. This was certainly not the case.

46 Taylor *et al* 7.

47 Spaul 24

48 23.

49 Spaul 23-24.

50 22

One wonders if South African teachers have fully achieved the first requirement of the status recommendation, namely that of having adequate professional qualifications.

Spaull⁵¹ concludes:

While the constitution promises equal access to education, it cannot promise an equal quality of education. Until such a time as the primary education system in South Africa is able to offer *a quality education to all students*,⁵² not only the wealthy, the existing levels of educational inequality will remain.

Taylor⁵³ poses a question embedded in a statement that echoes Spaull's assessment of the quality of education:

Inequity in the quality of education has proved a more enduring problem. For many poor children, who are predominantly located in the historically disadvantaged part of the school system, this *low quality of education* acts as a poverty trap by precluding them from achieving the level of educational outcomes necessary to be competitive in the labour market. An important question is the extent to which this low quality of education is attributable to poverty itself as opposed to other features of teaching and management that characterise these schools.

The substantial increase in resources invested in the historically disadvantaged parts of the school system has unfortunately not produced a commensurate improvement in education quality. This is clearly evident in the test scores of South African students in numerous surveys [such as TIMMS, PIRLS and SACMEQ] of educational achievement that have been carried out in recent years. These surveys have unequivocally shown that *the overall level of achievement amongst South African children is extremely low*.⁵⁴

Taylor's question leads to other questions. Among these are: If the status and rights of teachers do not seem to be contributing to providing quality education to all the learners, should such rights and status be examined with a view to such adaptation as might facilitate the improvement of the quality of education. We will attempt a provisional answer in the conclusion of this contribution.

First we will now sketch the situation regarding teachers' rights and status in Germany.

51 26.

52 Our emphasis.

53 Taylor *Uncovering indicators of effective school management in South Africa using the National School Effectiveness Study* (2011) 3-4.

54 Our emphasis.

5 Germany

5.1 Introduction⁵⁵

In Germany the responsibility for the education system is part of the authority of the sixteen regions or *Länder*.⁵⁶ The Federation or *Bund* only provides the framework for the legislation of the regions. Therefore the status of the teachers is ruled by regional law: Teacher education takes place in terms of regional law, the recruitment of teachers is the task of the regional Ministries of Education, the allocation of teachers is organised by these regional Ministries and their subunits and teachers are remunerated out of the budgets of the regions.

The federal framework for the action (authority) of the regions is primarily provided by the Federal Basic Law or *Grundgesetz*. On the one hand civil rights limit the actions of the regions and on the other hand some areas of legislative competence (authority) is the responsibility of the Federation on the basis of a common and nationwide equal ruling.⁵⁷ The legal status of teachers is regulated by federal as well as regional law.

5.2 Kinds of legal status of teachers

In Germany all teachers at public schools are civil servants, but there are two different kinds of legal status for teachers: as public officers (*Beamte*) and as employees (*Beschäftigte*). The legal status of the first group is defined by public law and that of the second group of teachers by civil- and labour law.

Which of these two different kinds of legal status is “right” and “adequate”? That question is first and foremost a constitutional one to be decided in terms of the rules of the *Grundgesetz*. Article 33 Paragraph 4 of the *Grundgesetz* reads as follows in this regard:

The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.

This juridical question is therefore whether or not teachers exercise sovereign authority and whether or not they stand in a relationship of service and loyalty to the state as defined by public law.

55 Quotations from the German *Grundgesetz* are from official translations into English; all other translations by the authors.

56 See Art 70 Par 1 *Grundgesetz*: “The *Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation”.

57 See Art 72 Par 2 *Grundgesetz*: “The Federation shall have the right to legislate on matters ... if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest”.

If it can be said that teaching of the youth is of exceptional importance to society and that the state depends on a well-educated population and that the task of preparing the youth to be good citizens can only be fulfilled in a relationship of service and loyalty to the state and must be understood as a means of exercising sovereign authority. This would also be true of teachers in private schools who must then be regarded as public officers because they also educate citizens.

The difficulties associated with this broad interpretation of the exercising of sovereign authority have led to a reduction of the role of teachers, confining it to the ends of learners' school-careers during examinations. It is argued that examinations and their results are of such importance to the youth and their future life that only the state can be allowed to decide on a matter like this. If teachers are involved in decisions in these matters their acts must be qualified as exercising sovereign authority. Teachers are therefore regarded as public officers under the public law regime. As in most juridical debates this position is not acknowledged by all. The German Courts have not given a ruling on this dispute yet.

If one introduces European law and the jurisdiction of the European Court of Justice into the debate, it seems that the general understanding of exercising sovereign authority does not capture and describe the essence of teachers' work and profession adequately. In terms of European law only the work done by officials (bureaucrats) in state departments as well as the police and other state agencies falls within the ambit of exercising of sovereign authority. How far the broader European understanding of legal constructs may or could influence the German national interpretation of concepts is a legal question that has also not yet been resolved.

Because of the juridical indecision the question regarding the "right" and "adequate" status for teachers is decided by other criteria – financial ones. As has already been mentioned, both groups of teachers (the *Beamte* and the *Beschäftigte*) are employed and paid by the regional governments. They pay teachers' salaries and, as long as teachers are public servants, their contributions towards their retirement pensions are also paid by the regions. If teachers are employed under a civil/labour law dispensation, the pensions for the retired people will be paid by special entities, the social security institutions, and not by the regions. That means that teachers employed under labour law attract less government expenditure in the long run than the teachers who are public servants. So the open juridical question is decided by financial arguments.

There is a common understanding that regional governments are more concerned about money and finances than upholding constitutional aspects especially in cases where legal answers and interpretations are not very clear as in this case. When deciding on the legal status of teachers, governments of regions tend to be dictated to by financial matters as one can see in the regions of the eastern part of

Germany, the former German Democratic Republic, where most of the teachers do not have the status of public servants (except for headmasters and headmistresses).

As the legal debate has not been resolved, both forms of status are accepted – and often teachers with different legal status work together in the same school, some with the status of public officers (*Beamte*) and some with the status of employees (*Beschäftigte*) doing the same work. This confirms again that finances tend to have a stronger influence than the law on decisions regarding the status of teachers.

The fact remains that the majority of teachers are public officers (*Beamte*) with rights and duties laid down in public law but the Region of Berlin, for instance, is no longer employing new teachers as public officers. Consequently applicants move or migrate towards regions where they still enjoy the status as public officers (*Beamte*).

5 3 The Legal Status of Teachers as Public Officers (*Beamte*)⁵⁸

5 3 1 Federal Constitutional Conditions

The general framework for the legal status of public officers in Germany – and this includes teachers - is described in Article 33 Paragraph 5 of the *Grundgesetz*:

The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional public service.

This rule is understood and applied in three manners: legislative demands are formulated, the system of public officers (*Beamte*) as such is guaranteed by the *Grundgesetz* and this clause may also limit rights of public officers.

The *Grundgesetz* assigns the competence to regulate the general conditions of rights and duties of public officers to the Federation.⁵⁹ The Federal Act on the Status of Public Officers (*Beamtenstatutsgesetz*) was enacted in terms of this competence but this federal law is only the framework for the Acts on Public Officers of the Regions (*Landesbeamtengesetz*).

The School Acts of the regions elaborate more on teachers' duties. The legal structure underpinning the legal status of teachers can therefore be depicted as follows:

58 See also Füssel "Nichtvermögenswerte Rechte der Lehrkräfte" in *Schulrecht* (eds Avenarius & Füssel) (2010) 634ff.

59 Art 74 Par 1 No 27 *Grundgesetz*.

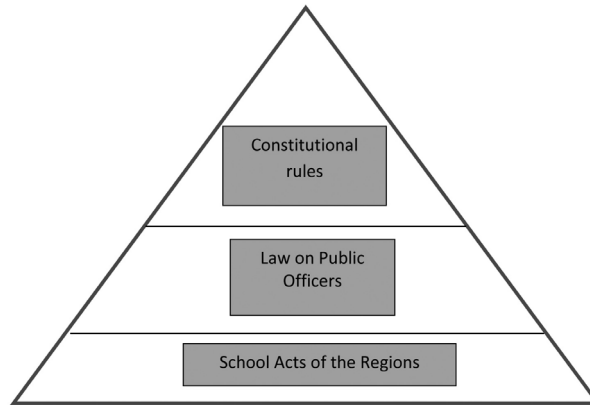


Figure 3: Pyramid of legal rules determining the status of German teachers as Public Officers (*Beamte*)

The constitutional clause on “the traditional principles of the professional public service” has been developed over time by the courts. In terms of the law a restriction of the fundamental rights of Public Officers is acceptable as long and insofar as these limitations are necessary and justifiable in the context of their special tasks and obligations in the service of the public. For example: the *Grundgesetz* guarantees the freedom of expression in Article 5 Paragraph 1 but using this general right may cause problems regarding the interests of the public demanding neutrality of public officers. So a restriction of the freedom of expression is accepted by referring to Article 33 Paragraph 5 of the *Grundgesetz*. The Federal Constitutional Court is enjoined to find a solution for conflicts like these by way of “practical concordance/agreement” which means that, in each specific case, ways of accepting/reconciling the different interests must be developed by looking for solutions that comply with both clauses as far as possible.

What a “practical concordance/agreement” may look like can be seen in the clauses of the Federal Act on the Status of Public Officers dealing with fundamental rights.

5 3 2 Federal Act on the Status of Public Officers⁶⁰

In regard to the resolution of conflict between the freedom of expression and the duties of Public Officers by using the principle of practical concordance one may consult Paragraph 33 of the Federal Act on the Status of Public Officers which provides that:

60 Dated 2008-06-17/2009-02-05 (BGBl.2008 I S. 1010; BGBl. I 2009 I S. 160).

Public servants must exercise care in political acting in a way of moderation and restraint which follows out of their position in direction of the common public and in respect of the duties of their functions

and

Paragraph 34 of the Federal Act on the Status of the Public Servants which requires: “The behaviour of public servants ... [to] reflect the respect and the reliability which are necessary to fulfil the duties of their profession”.

Both clauses must be understood as an attempt to constitute a general rule for dealing with the conflict between the fundamental right to freedom of expression as laid down in Article 5 Paragraph 1 of the *Grundgesetz* on one hand and the limitation set by the “traditional principles of the professional public service” (Article 33 Paragraph 5 of the *Grundgesetz*) on the other hand. This regulation applies to all public officers, to persons working in the ministries, to policemen and also to teachers.

The general phrasing of the above clauses suggests that they could also be used to solve other conflicts concerning fundamental rights, for instance disputes in regard to freedom of religion or freedom of assembly.

5 3 3 Acts on Public Officers of the Regions

As has already been indicated teachers are employed and remunerated by the regions. Therefore their rights and duties are determined by the law enacted by the regions, especially the Acts on Public Officers of the Regions. In terms of the framework of the Federal Law the regions are, however, bound regarding their legislation by the concrete rules of the Federal Law; so the regional Acts on Public Officers generally echo what has been said already in the Federal Law.

5 3 4 School Acts of the Regions

It is not only the general regulations for Public Officers that apply to teachers of that status but the School Acts of the Regions (*Landesschulgesetze*) also embody further regulations concerning the behaviour of teachers.

In terms of the regional School Acts schools have to comply with the principles of neutrality and tolerance. Teachers’ conduct in schools must therefore be informed by neutrality and tolerance. In teaching and educating young persons on the principles of neutrality and tolerance teachers must act as models of these concepts, so that pupils can also learn these general aspects in their daily school life.

A rule like Paragraph 67 of the School Act of Berlin⁶¹ which provides that:

[t]eachers have, beside their right to voice their own opinion while teaching, also to ensure that other opinions, which are of importance to education and to the tasks of the school, are heard; any one-sided manipulation of the pupils is forbidden

is legally acceptable even if it restricts the personal fundamental rights of a teacher. The justification for that restriction can be found in the general task of the school namely to educate young persons.

This restriction of the action and conduct of teachers also seems to be appropriate in light of the principle of neutrality and tolerance⁶² necessary for schooling. It is therefore not only the balancing of legal aspects that constrains teacher conduct and necessitates the acceptance of limitations of their fundamental rights but also relevant pedagogical aspects.

5 3 5 The Legal Status of Teachers as Employees (Beschäftigte)⁶³

As has already been pointed out above the legal status of teachers in Germany may also be that of as employees; hence labour- and civil law applies to them. The concrete duties and rights of teachers in terms of such status follow their working contracts which are embedded in general Labour Law regulations and especially the Collective Labour Agreements for Civil Servants concluded between the regions as employers and the unions in the public sector.⁶⁴ There are general provisions on the duty of employees to act in loyalty to their employer and that rule includes the duty to accept the principle of neutrality and tolerance in schools.⁶⁵

The School Acts of the Regions do not distinguish between the different types of teacher status; so the clauses quoted already are also applicable in the Regions.

5 4 Case Law

It is to be expected that the definition of concrete rights and duties of teachers has been developed by the courts. We refer to some of the important cases below.

61 Dated 2004-01-26/2011-07-13 (GVBl: 2004, S, 26 / GVBl: 2011, S,347).

62 See Federal Constitutional Court decision dated 1979-10-16 (BVerfGE 52, 223 (247)).

63 See also Füssel 732ff.

64 "Tarifvertrag für den öffentlichen Dienst" (2011-03-10).

65 See Federal Administrative Court decision dated 1981-01-19 (BVerwGE 81, 212).

5 4 1 Freedom of Assembly

The right to freedom of assembly (Article 8 of the *Grundgesetz*) includes the right to decide where and when an assembly should or may take place. An assembly might clash with the duties of teachers to stay on the school grounds during times scheduled for teaching. Here the courts have ruled that participating in assemblies is normally only possible in times outside the working time of teachers – in these cases the “practical concordance” implies that the right of assembly as such is accepted for teachers too but the right to decide at which time an assembly will or may take place is limited.⁶⁶

5 4 2 Freedom of Association

The freedom of association in terms of Article 9 of the *Grundgesetz* includes in Paragraph 3 “[t]he right to form associations to safeguard and improve working and economic conditions [for] every individual and every occupation or profession”.

The clause is interpreted in a manner that includes the rights to go on strike.⁶⁷ This suggests that teachers also have a right to go on strike. In terms of a strict interpretation of the clause “every occupation or profession” all teachers should be included. However, in light of the abovementioned constitutional clause that the law of public officers should be “regulated with due regard to the traditional principles of the professional public service” (Article 33 Paragraph 5 of the *Grundgesetz*) the courts have ruled and accepted that in general public officers do not have the right to go on strike,⁶⁸ and that includes teachers as far as they are public officers under the Law on Public Servants regime. However, for contract teachers (employees) the right to go on strike is not limited. One can therefore not categorically claim that, because of the general tasks of schooling, teacher strikes are generally prohibited.

5 4 3 Multiple Roles of Teachers

The above examples of the juridical interpretation of the status of teachers in Germany can also be construed to imply that the status and work of as public officers (*Beamte*) are less important than the educational mission / assignment of the teacher. On the contrary, being an employee (*Beschäftigte*) may signify that teachers’ educational mission is of no consequence or special importance; their legal status is comparable with any worker in an office or a factory in terms of the law. One would have thought that the government would make a decision in favour of either *Beamte* or *Beschäftigte* on constitutional or legal grounds.

66 See Administrative High Court of Northrhine-Westfalia decision dated 1995-05-17 (SPE nF 395 No 2).

67 Federal Constitutional Court decision dated 1993-03-02 (BVerfGE 88, 103).

68 Federal Constitutional Court decision dated 1951-10-23 (BVerfGE 8, 1); Federal Constitutional Court decision dated 1997-03-30 (BVerfGE 44, 249); Federal Administrative Court decision dated 1980-12-03 (BVerwGE 73, 97)

However, governments seem to make decisions in this regard on fiscal reasons only: They accept the different kinds of status for teachers which are not system based and for which there are no legal reasons.

The results of Large Scale Assessments like PISA and TIMSS in the schools of the regions where this seemingly anomalous situation of different teacher statuses even in the same school exists are in general not worse or better than in other parts of the country. It would therefore seem that status does not impact the results of teaching and learning significantly.

A by-product of these different forms of status accorded to teachers in general is a degree of competition between the regions for the services of teachers. Different regions may not only offer a different status to teachers but the salaries (and the pensions) may also be different. This problem will become more serious in the future and may cause serious problems for the poorer regions in recruiting teachers. A shortage of teachers is likely to impact the results of teaching and learning negatively.

It appears that in Germany the “right” balance between the role of teachers as educators in state-run schools and their acting in the public interest on one hand and the status of teachers as either public officers (with limited rights) or as “ordinary” employees (with full rights) on the other hand is not yet clearly defined. Perhaps a kind of “double role” of teachers needs to be considered and accepted including that the roles should be equally important and that one should not be subject to the other. As far as the general task of schooling, namely education as performed is concerned, it appears that the balancing of interests in light of the principles of neutrality and tolerance can also be interpreted as a form of education, as education by example. Debates about the “right” legal status of teachers must also be seen in this light and be cognisant of the fulfilment of the school’s tasks and aims.

It seems that a general solution of the conflicts contemplated in the *UNESCO/ILO Recommendation* is not attainable in Germany, perhaps because the importance of the various conflicts is beyond the reach of general regulation.

6 Conclusion

We set out to look for a link between the rights of teachers and the quality of education. In Germany teachers employed by the same regional government may work side by side in the same public school but under two inexplicably different employment regimes save for fiscal reasons⁶⁹ – one group having access to more rights (including the right to strike) than the other (who may even be paid less). We found that, in Germany,

69 In South Africa, with its understandable obsession with equality and the prevention of unfair discrimination, such a dispensation is unconscionable.

the existence of two employment regimes (even in the same public school) does not appear to have a significant impact on the quality of education and no differentiations of results could be linked to different rights regimes. The German approach seems to pursue a balancing of rights rather than the total or partial limitation or rescinding of rights.

South African educators have almost unconditional access to the fullest possible labour and other rights subject to restriction in terms of constitutional provisions. This recently-gained access to the full range of rights with an enormous increase in resources has not been accompanied by a demonstrated improvement in the quality of education to the country's children. Van der Berg⁷⁰ summarises the views of a number of commentators succinctly:

Despite narrowing attainment differentials, unprecedented resource transfers to black schools and large inflows of black pupils to historically white schools, studies have shown that historically white and Indian schools still far outperform black and coloured schools in matriculation examinations and performance tests at various levels of the school system. Moreover South African educational quality lags far behind even much poorer countries, as has been demonstrated by a number of international tests, including MLA, TIMSS and now SACMEQ II. Educational quality in historically black schools – which constitute 80 per cent of enrolment and are thus central to educational progress – has not improved significantly since political transition.

If it is not possible to indicate that teachers' rights can be positively linked to the quality of education, it seems that the way some of the rights are used or abused amongst others, by unions to usurp management functions may militate against quality. A posting on a blog on the website of the Eastern Cape Education Department states unequivocally that teacher absenteeism leads to lower learner performance.⁷¹ The posting points out that there is national and international statistical evidence that learners whose teachers miss more days of class have lower scores on achievement tests. In other words the learners' learning is disrupted and jeopardised.

Twenty to 24 days are lost per teacher per year in South Africa whereas in the United States teachers are absent from the classroom for an average of 14 days per year.⁷² Teachers are entitled to different types of leave and principals must monitor the implementation of legislation in this regard. The most harmful form of teacher absence is of course strikes and protected and unprotected strikes are not uncommon in South Africa.

Furthermore, a media release by the Human Sciences Research Council⁷³ reports on the gaps between policy and practice regarding the

70 Van der Berg *How effective are poor schools? Poverty and educational outcomes in South Africa* (2006) 3.

71 http://www.ecdoe.gov.za/blog_topic/403/Teacher-absenteeism-leads-to-lower-learner-performance, (accessed 2011-08-15).

72 *Ibid.*

time teachers spend on teaching. An average of 16 hours per week is spent teaching (or 3.2 hours per day) out of an expected range of between 22½ to 27½ hours per week.

In South Africa it would therefore seem that efforts to get teachers (back) in the class for more hours would not be misguided. One way of doing this could be to declare teaching an essential service and to take away or seriously reduce certain labour rights. Having well-qualified and committed and skilful educators in class is a *sine qua non* for the provision of quality education. It seems that teachers' rights to initial teacher education and continuous professional development should be preeminent and could take precedence over rights regarding for example professional control, organisational rights and the right to co-control education (have a voice in education).

Neither South Africa nor Germany provides conclusive evidence of a causal link between teachers' rights and the quality of education. The evidence does invite reflection on assumptions underlying the awarding of labour and other rights to teachers and on views of the nature of teaching. A full prohibition of fundamental rights seems as unacceptable as the full enforcement of fundamental rights without regard to any other considerations.

73 http://www.hsrc.ac.za/Media_Release-254.phtml#mediaRelease (accessed 2011-08-17).