

# **Finding a Legal Balance between the Right to Strike and Right to Education in Kenya**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School

By

Vicky Kadiga Aridi

094008.

Prepared under the supervision of

Ms. Anne Kotonya.

14 April 2020

Word count: 11351

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## **Acknowledgments**

I wish to express my genuine gratitude to my supervisor Ms. Anne Kotonya for the constant guidance and insights that she has accorded to me for this dissertation from the first chapter to the last one. Her invaluable insights and constructive criticism are the main contributions that have ensured the completion of this dissertation.

I would also like to thank Cecil Abungu Yongo for his adept advice on the research area of the paper during the initial stages of research. Lastly, I would also like to thank my fellow classmates who have provided me with insights as to how to tackle some of the fundamental parts of this dissertation.

## **Declaration**

I, ARIDI VICKY KADIGA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date: **14 April 2020.**

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Ms. Anne Kotonya.

## **Abstract**

The teachers' right to strike and the children's right to education are both essential rights recognised by Kenya's legal framework. Despite this fact, there are instances where conflicts arise between these two rights. The courts in Kenya have a mandate to balance competing human rights in instances of conflict. However, whenever there has been a conflict between these two rights, the courts have issued injunctions that require teachers to suspend their strike.

By doing so, the courts are implying that the children's right to education is paramount to the teacher's right to strike yet both these rights can be limited by law. The law further does not explicitly provide for a hierarchy of rights. However, despite these realities, the courts still leave teachers with no effective alternative mechanism to address their pertinent needs. There is therefore a need for a balance to be established in instances where there is a conflict between these two rights.

The pertinent question of how a balance between the teachers' right to strike and the children's right to education in Kenya can be attained is thus an essential concern that is at the focal point of this paper. In a bid to address this question, Kenya's legal framework is analysed to reveal Kenya's position on the two rights. Moreover, this study analyses how the courts in Kenya have dealt with the conflict between the two rights and the various balancing approaches available.

This study has mainly been conducted through case law analysis and research based on secondary sources of literature such as books, journals and scholarly articles.

## **List of Abbreviations**

ACmHPR African Commission on Human and People's Rights

CESCR Committee on Economic Social and Cultural Rights

KNUT Kenya National Union of Teachers

TSC Teachers Service Commission

USA United States of America

## **List of Cases**

### **Kenyan Case Law**

*Teachers Service Commission v Kenya National Union of Teachers (2012) eKLR.*

*Teachers Service Commission v Kenya National Union of Teachers and another (2013) eKLR.*

*Teachers Service Commission v Kenya National Union of Teachers & 2 others (2015) eKLR.*

*Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch) (2015) eKLR.*

*Teachers Service Commission v Kenya National Union of Teachers (KNUT); Ministry of Labour & Social Protection (Interested party) (2019) eKLR.*

### **Foreign Case Law**

#### **South African Case Law**

*Port Elizabeth Municipality v Various Occupiers, (2004), Constitutional Court of South Africa.*

*S v M (2007), Constitutional Court of South Africa.*

*Eskom Holdings Ltd v National Union of Mineworkers and others (2011), Supreme Court of Appeal of South Africa.*

#### **United States of America Case Law**

*Gillette v United States (1971), The Supreme Court of the United States.*

*Bullock v Carter (1972), The Supreme Court of the United States.*

*School Committee of the Town of Westerley v Westerley Teachers Association (1973), Supreme Court of Rhodes Island.*

*Jefferson County Board of Education v Jefferson County Education Associaton (1990), Supreme Court of Appeals of West Virginia.*

*Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County (1968), Florida Supreme Court.*

*Pickering v Board of Education (1968), Supreme Court of the United States.*

#### **African Commission on Human and People's Rights**

*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, ACmHPR 155/96 (2001).*

## **List of Legal Instruments**

### **Acts of Parliament**

Constitution of Kenya (2010).

Labour Relations Act, (No. 14 of 2007).

Children's Act, (No. 8 of 2001).

Employment Act (Act No.1 of 2007).

Basic Education Act (No.14 of 2013).

### **International Instruments**

International Covenant on Economic, Social and Cultural rights (1976).

International Covenant on Civil and Political rights (1976).

International Labour Organization Convention (No.87 of 1948).

Right to Organise and Collective Bargaining Convention (No. 98 of 1949).

The Abolition of Forced Labour Convention (No. 105 of 1957).

Voluntary Conciliation and Arbitration Recommendation (No.92 of 1951).

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

Convention on the Rights of the Child (1990).

Labour Relations Act (South Africa).

### **UN Documents**

*CESCR General Comment No 23, The Right to just and favourable conditions of work (article 7 of the International Covenant on Civil and Political Rights), 7 April 2016.*

*CCPR General Comment No 31, Nature of the general legal obligation imposed on state parties to the covenant, 28 July 1994.*

*CESCR General Comment No 13, the right to education (article 13), 8 December 1999.*

*Committee on the Rights of the Children, General Comment No.14 on the right of the child to have his or her best interest taken as primary consideration, 29 May 2013.*

## Chapter One: Introduction

### 1.1 Background

On one hand, every employee in Kenya is entitled to enjoy the right to strike as espoused in Article 41 of the Constitution of Kenya.<sup>1</sup> Section 2 of the Labour Relations Act defines a strike as a mechanism of pushing for dispute resolution by the employees.<sup>2</sup> Moreover, the right to strike serves as an essential mechanism to defend and ensure just conditions for employees.<sup>3</sup>

On the other hand, Article 53 of the Constitution of Kenya provides that every child has the right to an education.<sup>4</sup> The Constitution further provides, that the best interest of the child should be given paramount importance with regard to any matter touching on children's rights.<sup>5</sup> Both these rights are not absolute and can be limited as per the confines of the law under Article 24 of the Constitution of Kenya.<sup>6</sup>

Currently, teachers exercise the right to strike to compel their employers to address their pertinent needs, such as their need for an increase in remuneration.<sup>7</sup> However, these strikes result in a limitation to the children's fundamental right to education. This, contravenes the best interest principle of the child. In January 2009, a landmark teachers' strike resulted in the closure of schools and affected the right to education of about eight million children.<sup>8</sup> Further, in September 2015, twenty eight thousand teachers went on strike which further prevented children in public schools from exercising their right to education.<sup>9</sup>

In an attempt to resolve conflicts between the teachers' right to strike and the children's right to education, the courts, in cases like *Teachers Service Commission v Kenya National Union of Teachers & 2 others* have issued injunctions.<sup>10</sup> These injunctions not only prevent teachers

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<sup>1</sup> Article 41(1) (d), *Constitution of Kenya*, (2010).

<sup>2</sup> Section 2, *Labour Relations Act*, (No. 14 of 2007).

<sup>3</sup> CESCR *General Comment No 23, The Right to just and favourable conditions of work (article 7 of the International Covenant on Civil and Political Rights)*, 7 April 2016, 2.

<sup>4</sup> Article 53 (1) (b), *Constitution of Kenya*, (2010).

<sup>5</sup> Article 53 (2), *Constitution of Kenya*, (2010).

<sup>6</sup> Article 24, *Constitution of Kenya*, (2010).

<sup>7</sup> Mugho M S, 'Causes of the recent teachers' strikes in Kenya' 2 *Journal of Public Policy and Administration* 2, 2017, 37.

<sup>8</sup> Koross K, 'History of teachers' strike since independence' The Star, 3 September 2012, [https://www.the-star.co.ke/news/2012/09/03/history-of-teachers-strikes-since-independence\\_c672487](https://www.the-star.co.ke/news/2012/09/03/history-of-teachers-strikes-since-independence_c672487) on 20 February 2019.

<sup>9</sup> Country reports on Human rights practices for 2016 United States department of State, *Kenya 2016 Human Rights report*, 2016, 20.

<sup>10</sup> (2015) eKLR.

from exercising their fundamental right to strike but also require them to continue teaching so as to ensure that children enjoy their right to education.<sup>11</sup>

When issuing injunctions, the courts prevent teachers from exercising this fundamental right to strike as employees, the main arsenal they have against their employers. Usually, employees resort to strikes as a dispute resolution mechanism to unlock an impasse in the collective bargaining process.<sup>12</sup>

The injunctions granted by the court usually leave the employees at the mercy of the employer.<sup>13</sup> Teachers are therefore left without an effective dispute resolution mechanism when their right to strike is limited by the children's right to education, yet in certain instances the right to strike is in line with the best interest principle of the child.

## **1.2 Statement of the Problem**

The teachers' right to strike and the children's right to education are both fundamental rights provided for by the Constitution of Kenya. In September 2015 there was a teachers' strike that prevented twelve million students in public schools including one million four hundred thousand candidates from exercising their right to education.<sup>14</sup> This scenario shows that there are instances that arise where there can be a conflict between the teachers' right to strike and children's right to education.

On one hand, the Labour Relations Act recognizes that teachers have the right to strike.<sup>15</sup> On the other hand, the Children's Act stipulates that every child has the right to education.<sup>16</sup> The Children's Act further provides that the courts of law shall rely on the best interest principle of the child as the primary consideration for any matter touching on children's rights.<sup>17</sup> However, these two rights can be limited.<sup>18</sup> Moreover, the law does not expressly state that the right to education is paramount to the right to strike. This leads the courts to face a dilemma on how to strike a balance between the teachers right to strike that affects the best interest principle of the child while ensuring the children's right to education in Kenya.

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<sup>11</sup> *Teachers Service Commission v Kenya National Union of Teachers & another* (2013) eKLR.

<sup>12</sup> *Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch)* (2015) eKLR.

<sup>13</sup> Frankfurter F and Greene N, *the Labor Injunction*, Macmillan Company, New York, 1930,201.

<sup>14</sup> Wanzala O and Ondieki E, 'Back to class as unions call off teachers' strike following court order' Daily Nation, 3 October 2015 <https://www.nation.co.ke/news/Knut-calls-off-teachers-strike/1056-2896670-hpcb9/index.html> on 6 February 2019.

<sup>15</sup> Section 76, *Labour Relations Act*, (No. 14 of 2007).

<sup>16</sup> Section 7, *Children's Act*, (No. 8 of 2001).

<sup>17</sup> Section 4, *Children's Act*, (No. 8 of 2001).

<sup>18</sup> Article 24, *Constitution of Kenya*, (2010).

In instances where there is a conflict between the two rights, as in the case of *Teachers Service Commission v Kenya National Union of Teachers, Ministry of Labour and Social Protection (Interested party)*, the courts have sacrificed the teachers' right to strike for the right to education.<sup>19</sup> This is because they provide that the exercise of the right to education is more essential by virtue of the best interest principle of the child.<sup>20</sup> This raises a fundamental concern, as teachers are prevented from exercising their collective bargaining right to strike leaving them with hardly any other options to negotiate for their material needs.

### **1.3 Statement of Objectives**

The specific objectives of this study are to:

- (a) Analyse the legal framework governing the teachers' right to strike in Kenya.
- (b) Analyse the legal framework governing the children's right to education in Kenya.
- (c) Examine instances when the children's right to education conflicts with the teachers' right to strike in Kenya's legal framework.
- (d) Investigate how a balance between the teachers' right to strike and the children's right to education in Kenya can be attained.

### **1.4 Research Questions**

The research questions that this study seeks to address include:

- (a) What is Kenya's legal position on the teachers' right to strike?
- (b) What is Kenya's legal position on the children's right to education?
- (c) Which instances does the legal framework provide whereby the children's right to education conflicts with the teachers' right to strike?
- (d) How can a balance between the teachers' right to strike and the children's right to education in Kenya be attained?

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<sup>19</sup> (2019) eKLR.

<sup>20</sup> (2019) eKLR.

## **1.5 Hypothesis**

To ensure a right balance to both the right to strike and the right to education in Kenya the court should use an approach that allows not only teachers to exercise their right to strike but also children to enjoy their right to education.

## **1.6 Justification of the Study**

With the frequency of teachers' strikes in Kenya and the dilemma the court faces with regard to balancing the children's right to education and the teachers' right to strike there is a need for establishing a more appropriate way of balancing these rights. This study is thus essential as it intends to investigate how a balance between the teachers' right to strike and children's right to education within Kenya's legal regime can be attained.

This study is also beneficial for various stakeholders in the education sector such as teachers and students in Kenya as the focal point of the study is focused on addressing a pertinent issue which touches on their rights. Moreover, this study intends to add to the existing body of knowledge on balancing the right to strike and right to education in Kenya by suggesting possible solutions to address this issue.

## **1.7 Literature Review**

Professor Ben Sihanya, in his article, public participation and public interest lawyering under the Kenya Constitution: Theory, process and reforms, provides that there is an apparent conflict between the teachers' right to strike and the children's right to education.<sup>21</sup> This article alludes to the conflict of rights which is at the focal point of this study.

In *TSC v KNUT*, the court provided that in order to respect the right to education, the teachers' right to strike shall only be exercised once they have exhausted all other mechanisms of dispute resolution.<sup>22</sup> Further, Professor Ben Sihanya in another article on devolution and education law and policy in Kenya, analysed the various issues affecting the right to education in Kenya including the exercise of the teachers' right to strike. He provided in this article that the courts have begun to grant injunctions which suppress the main means that teachers have to bargain for their needs.<sup>23</sup>

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<sup>21</sup> Sihanya B, 'Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms' 9 *Law Society of Kenya Journal* 1, 2013, 7.

<sup>22</sup> (2012) eKLR.

<sup>23</sup> Sihanya B, 'Devolution and education law and policy in Kenya' Kenya Human Rights Commission (KHRC) workshop on Devolution in Kenya at Palacina Hotel, Nairobi, 18 April 2013, 27.

Frankfurt and Greene, in their book *the Labor Injunction* focused on the labour injunction granted by the courts and the impact of this injunction on employees. They further, provide that by the courts granting injunctions to limit the right to strike, they are leaving employees incapable of doing anything for their self-protection.<sup>24</sup> The Kenyan courts, by granting injunctions which prevent the teachers from exercising their right to strike are therefore leaving the teachers at the mercy of their employers with no means for ensuring that their needs are realized.

Further, Sachs J, a renowned judge from South Africa, provides that, in instances where two rights are in conflict, the court is not meant to rank the competing human rights.<sup>25</sup> By virtue of the courts granting injunctions they are implying that the right to education supersedes the right to strike. There is therefore a need for a balance to be struck by the courts with regards to teachers' right to strike and children's right to education.

Moreover, Huscroft, Miller and Webber, in their book entitled *Proportionality and the rule of law* studied the limitation of human rights and the use of proportionate measures to limit these rights. They have authoritatively provided that the advantageous effects of the limitation on the right must outweigh the detrimental effects of the limitation. There also must be a fair balance between the competing rights.<sup>26</sup> These authors highlight the need for the study that is at the focal point of this dissertation.

It is imperative to refer to the obligatory framework of states with respect to human rights whenever these rights are in conflict. The obligatory framework requires states to respect, protect and fulfil human rights.<sup>27</sup> The obligation to respect, entails that states should not directly interfere with the right holders exercise of their rights.<sup>28</sup> It further, requires states to respect the right holders' freedoms that they are entitled to enjoy under law.<sup>29</sup> The state therefore has a duty to ensure that both the teachers' right and children's right are respected.<sup>30</sup>

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<sup>24</sup> Frankfurter F and Greene N, *the Labor Injunction*, Macmillan Company, New York, 1930,201.

<sup>25</sup> *Port Elizabeth Municipality v Various Occupiers*, (2004), Constitutional Court of South Africa.

<sup>26</sup> Huscroft G, Miller B & Webber G, *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press, Cambridge, 2014, 6.

<sup>27</sup> *CCPR General Comment No 31, Nature of the general legal obligation imposed on state parties to the covenant*, 28 July 1994, 3.

<sup>28</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACmHPR 155/96 (2001), 44.

<sup>29</sup> Jallow B Hassan, *The Law of the African (BANJUL) Charter on Human and People's Rights*, Trafford Publishing, Canada, 2007,176.

<sup>30</sup> *CESCR General Comment No 13, the right to education (article 13)*, 8 December 1999, 2.

Further, Patrick Odhiambo in his thesis on the limitation of rights under the Kenyan Constitution, provides that there is a need to ensure that a balance is struck between the rights to be limited and the enjoyment of those rights by any individual.<sup>31</sup> Thus, in instances where there is a conflict of rights, there is a need for the state to provide a balance for these rights.<sup>32</sup> This thesis recognizes that there is a need for a balance when human rights are in conflict it however does not investigate how a balance can be attained between the conflicting rights at the focal point of this paper.

Based on the existing literature review there has hardly been investigation on how a balance between the teachers' right to strike and the children's right to education in Kenya can be attained. This is the research gap that this dissertation intends to study.

### **1.8 Research Design and Methodology**

The method of research applied for this dissertation is qualitative research that is desk based. The research relies on desktop-based research and library research. The research analyses primary sources of literature such as statutes and case law. It also consults secondary sources of literature such as journal articles from online databases such as Jstor, books, scholarly articles and dissertations. By analysing this literature, the study will have met its research objectives.

This method of research is the most suited for the pertinent research question at the focal point of this dissertation which is looking at how a balance can be attained between the teachers' right to strike and the children's right to education. It is further, the most relevant method of research as it entails analysis of the legal framework and literature in Kenya which is fundamental for achieving the research objectives at the centre of this dissertation.

### **1.9 Assumptions**

(a) Access to information on the subject matter shall not be problematic.

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<sup>31</sup> Odhiambo B P, 'The limitation of rights under the Kenyan Constitution' Published LLM Thesis, University of Pretoria, Pretoria, 64.

<sup>32</sup> Reaume D, 'Limitations on constitutional rights: The logic of proportionality', Social Science Research Network, 2009, 11.

## **1.10 Chapter Breakdown**

This paper is divided into 5 Chapters.

### **Chapter 1: Introduction**

This chapter introduces the topic of the study. It contains a background to the study, statement of problem, statement of objectives, research questions, hypothesis, justification of the study, literature review, research design and methodology, assumptions, limitations of the study and the timeline of execution.

### **Chapter 2: Theoretical Framework**

This chapter provides the theoretical framework which grounds the discussion at the centre of this paper. The theoretical framework is based on the balancing competing interests' theory.

### **Chapter 3: Legal Framework**

This chapter examines and provides an in-depth analysis on the current legal framework on both the teachers' right to strike and the children's right to education. It also looks at the instances where there is a conflict between the teachers' right to strike and the children's right to education.

### **Chapter 4: Balancing Competing Interests: The Teachers' Right to Strike vs The Children's Right to Education**

This chapter responds to the problem statement at the heart of this paper on finding a legal balance between the teachers' right to strike and the children's right to education. This chapter further, looks at the challenges that Kenyan courts face in interpreting the best interest principle of the child. It also highlights the challenges faced by USA and South Africa when balancing these two rights. This chapter has selected USA and South Africa as suitable countries because both countries have faced similar challenges when balancing these two rights. Thus, they are suitable for comparing with Kenya to see whether Kenya can borrow balancing approaches from them that will ensure a legal balance between the two rights.

Moreover, South Africa is one of the most progressive states in Africa with regards to attainment of human rights and has greatly influenced Kenya's Bill of rights. This chapter then examines various approaches that can be employed to ensure a legal balance between the two rights.

## **Chapter 5: Conclusion and Recommendations**

This chapter concludes the dissertation and provides recommendations on balancing the two competing rights.

## **Chapter Two: Theoretical Framework**

### **2.1 Introduction**

This chapter covers the theoretical framework for this paper. It delves into the Balancing Competing Interests theory. This theory serves as the lens that this dissertation shall use to address the crux at the focal point of this paper with regards to balancing the teachers' right to strike and children's right to education.

### **2.2 Balancing Competing Interests Theory**

With the enactment of the Universal Declaration of Human Rights in 1948, courts have perennially been faced with the challenge of balancing competing interests whenever a conflict arises between two human rights.<sup>33</sup> These conflicts between various competing human rights led to the development of the balancing competing interests' theory in a bid to advocate for the need for the balance of competing interests. However, it still appears that the courts today in various jurisdictions including Kenya are still faced with this challenge.<sup>34</sup>

The main advocates for the balancing competing interests' theory are scholars from the sociological school of thought. One of the main proposers of this theory is Roscoe Pound. He defines an interest as a claim of a human being or group of human beings in which the human being or group needs to satisfy and which a democratic society must take into account.<sup>35</sup> He further expounds that in any society there are three main legal interests which include public, individual and societal.<sup>36</sup>

Roscoe Pound defines societal interests as needs of a social group which must be satisfied and which any democratic society must consider.<sup>37</sup> The societal interests as outlined by Roscoe Pound are the interests which are at the focal point of this paper. The teachers' right to strike and the children's right to education are both interests that any democratic society needs to consider.

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<sup>33</sup> Brems E, *Conflict between fundamental rights*, Intersentia, Poland, 2008, 3.

<sup>34</sup> Kenya National Commission on Human Rights, *Making the Bill of Rights Operational: Policy, Legal and Administrative priorities and considerations*, 2011, 31.

<sup>35</sup> McLean B E, 'Roscoe Pound's Theory on Interests and the furtherance of Western Civilization' 41 *II Politico* 1, 1976, 12.

<sup>36</sup> McLean B E, 'Roscoe Pound's Theory on Interests and the furtherance of Western Civilization' 41 *II Politico* 1, 1976, 2.

<sup>37</sup> Pound R, 'A survey of social interests' 57 *Harvard Law Review* 1, 1943, 1.

In addition, he states that there are instances where conflicts arise between two competing societal interests. A conflict of interests arises whereby two social groups are pursuing different ends, whereby each end is in favour of one social group but disadvantages the other group.<sup>38</sup> Whenever such conflict arises there is a general disposition for the courts to rule in favour of the weightier interest.<sup>39</sup> He expressly implies therefore, that the courts in Kenya have erred in favouring the children's right to education over the teachers' right to strike. Thus, there is a need for there to be a semblance of balance whenever such conflicts arise.<sup>40</sup>

He further, maintains that in instances where there are competing societal interests, the state should ensure a balance that will eliminate friction between the societal interests and not harmfully affect enjoyment of these interests.<sup>41</sup> William James, concurs with Roscoe Pound and asserts that when the state is satisfying various interests there should be very minimal sacrifice of interests whenever a conflict arises.<sup>42</sup> There is therefore a need for a balance to be attained whenever there is a discord between the teachers' right to strike and the children's right to education. Moreover, the courts should ensure that there is minimal sacrifice of interests particularly the teachers' right to strike whenever a clash ensues between these two fundamental rights.

In the same vein, Rudolf Von Jhering, states that law is meant to advance the interests of social groups in the society.<sup>43</sup> Wesley Hohfeld further pronounces that the law contains both rights and duties. Moreover, for every right or interest there is a corresponding duty.<sup>44</sup> Social groups have various rights or interests in any society. The courts therefore have a duty to honor these societal interests and to ensure that these societal interests are respected and protected.<sup>45</sup>

Rudolf Von Jhering further agrees with Roscoe Pound and articulates that where there is a conflict between societal interests the state is required to employ strategies that will ensure a balance between these interests.<sup>46</sup> Similarly, Professor Chafee affirms that in order to achieve

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<sup>38</sup> Benditt M T 'Law and the balancing of interests' 3 *Social Theory and Practice* 3, 1975, 328.

<sup>39</sup> Pound R, *An introduction to the philosophy of law*, Yale University Press, New Haven, 1930, 45.

<sup>40</sup> Nabaladian E, 'Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests and Jural Postulates' 5 *Mizan Law Review* 1, 2011, 144.

<sup>41</sup> Pound R, 'A survey of social interests' 57 *Harvard Law Review* 1, 1943, 2.

<sup>42</sup> Patterson W E 'Roscoe Pound on Jurisprudence' 60 *Columbia Law Review* 8, 1960, 1128.

<sup>43</sup> Nabaladian E, 'Introductory Concepts on Sociological Jurisprudence: Jhering, Durkheim, Ehrlich' 4 *Mizan Law Review* 2, 2010, 351.

<sup>44</sup> Hohfeld W, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', 26 *Yale Law Journal* 1, 1917, 710.

<sup>45</sup> Antieau J C, 'The Jurisprudence of interests as a method of constitutional adjudication' 27 *Case Western Reserve Law Review* 4, 1977, 866.

<sup>46</sup> Hampstead L, *Introduction to Jurisprudence*, 3<sup>rd</sup> ed, Stevens and Sons, London, 1972, 335.

a balance for competing interests the societal interests need to be determined and understood by the court.<sup>47</sup> However, judges are sometimes faced with a challenge when balancing competing interests as they have to consider how the societal interests are ranked in the society which may lead them to favour one interest over the other.<sup>48</sup>

In addition, Plamentaz builds on Roscoe Pound and Rudolf Von Jhering's view and propounds that for balancing competing societal interests there may be a need to have a compromise. This compromise involves finding a solution that is acceptable to both social groups which will help reconcile the differences between them.<sup>49</sup> However, he provides that some people are of the notion that when balancing competing interests the weightier interest tends to be given more importance than the less weighty interest.<sup>50</sup> This view point fails to consider the harm that they can cause to the beneficiaries of the less weighty interest.

Additionally, when balancing competing interests the courts can only favour one interest over the other in circumstances whereby limiting one societal interest will not adversely affect the social group whose interests have been limited.<sup>51</sup> The courts can also favour one interest in cases whereby there exists alternatives for the social group whose interests have been limited.<sup>52</sup>

However, in the Kenyan context of balancing the teachers' right to strike and the children's right to education, the courts, limit the teachers' right to strike in a manner that adversely affects them as a social group. The Kenyan courts also fail to recognize that the teachers have no robust alternative mechanisms to attain their societal interest.

Moreover, Howbeit Kwasi, expresses that the main purpose of a limitation clause is to limit government regulation.<sup>53</sup> This clause is therefore not meant to be used as a tool by the state to prevent individuals such as teachers from exercising their main arsenal against their employers. Rather, the limitation clause is meant to regulate the government's exercise of their power to limit individual's rights for example the teachers' right to strike.

Sarah Abiola, alludes to the fact that where constitutions of states guarantee certain rights with limitation clauses, then such states have a mandate to ensure that when a right is to be limited

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<sup>47</sup> Chafee Z, *Free Speech in the United States*, Havard University Press, Cambridge, 1967, 32.

<sup>48</sup> Cardozo B, *The nature of the judicial process*, Yale University Press, New Haven, 2010, 113.

<sup>49</sup> Benditt M T 'Law and the balancing of interests' 3 *Social Theory and Practice* 3, 1975, 328.

<sup>50</sup> Benditt M T 'Law and the balancing of interests' 3 *Social Theory and Practice* 3, 1975, 329.

<sup>51</sup> *Gillette v United States* (1971), The Supreme Court of the United States.

<sup>52</sup> *Bullock v Carter* (1972), The Supreme Court of the United States.

<sup>53</sup> Prempeh K H, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' 80 *Tulane Law Review* 4, 2006, 78.

the means used to limit the right should be the least restrictive means.<sup>54</sup> This notion, points to a pertinent question on whether the limitation of the teachers' right by injunctions granted by courts is the least restrictive measure that can be employed to limit their right.

In addition, the purpose of the law is not to limit human rights but to provide a framework for balancing conflicting societal interests.<sup>55</sup> Mutakha Kangu, also emphasizes that states are also obliged to ensure a balance between the competing interests in instances where two individual socio-economic rights are in conflict.<sup>56</sup> Similarly, Justice Sachs provides that in balancing competing interests, the state and the courts should always try to reconcile the competing societal interests, keeping in mind the specific circumstances of every case.<sup>57</sup>

Professor Waldron, further asserts that, where there is a conflict of individual rights it is of utmost importance to determine the weight of the two rights. Furthermore, he provides that when balancing competing rights there should be no ranking system that depicts one human right as superior to another.<sup>58</sup> Further, when there is a conflict of human rights a trade-off of the exercise of one right for the exercise of another right should not be undertaken.<sup>59</sup> The courts by granting injunctions to prevent teachers' from exercising the right to strike are implying that the children's right to education is superior to the teachers' right to education. Moreover, the courts are trading off the exercise of the teachers' right to strike for the children's right to education.

This theory alludes to the fact that in instances where there is a conflict between rights such as the right to strike and the right to education a balance should be ensured so as to achieve a win-win situation for both parties.

### **2.3 Critiques of the Balancing Competing Interests Theory**

The main strength of this theory is that it ensures a win-win situation for both social groups whose societal interests are in conflict. Despite this main advantage there are few critiques in respect to this theory that have arisen.<sup>60</sup> One of the critiques has been given by Ronald Dworkin

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<sup>54</sup> Abiola S, 'Limitation clauses in national constitutions and international human rights documents: scope and judicial interpretation', Harvard University, 2010, 8.

<sup>55</sup> Seagle W, 'Rudolf Von Jhering: Or Law as a means to an end', University of Chicago Law Review, 2009, 78, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2396&context=uclrev> on 15 September 2019.

<sup>56</sup> Kangu M, 'The theory and design of limitation of fundamental rights and freedoms' 1 *Law Society of Kenya Journal* 1, 2008, 18.

<sup>57</sup> *Port Elizabeth Municipality v Various Occupiers*, (2004), Constitutional Court of South Africa.

<sup>58</sup> Waldron J, 'Rights in Conflict' 99 *Ethics* 3, 1989, 517.

<sup>59</sup> Xu X and Wilson G, 'On conflict of Human rights' 5 *University of New Hampshire Law Review* 1, 2006, 49.

<sup>60</sup> Möller K, 'Proportionality: Challenging the Critics' 10 *International Journal of Constitutional Law* 3, 2012, 709.

through his theory rights as trumps whereby he states that individual competing interests and competing societal interests cannot be balanced against each other.<sup>61</sup> Moreover, some of the critiques are of the view that the term balancing is vague and needs to be redefined before courts can claim to balance competing interests.<sup>62</sup>

#### **2.4 Justification of the use of the Balancing Competing Interests Theory**

The key problem that this paper seeks to study is on how a balance can be attained whenever there is a discord between the teachers' right to strike and the children's right to education. Both rights are essential societal interests. The courts in Kenya constantly issue injunctions whenever the teachers' strike.<sup>63</sup> The courts by doing so prevent the teachers' from exercising their collective bargaining right to strike leaving them with hardly any mechanisms to negotiate for their pertinent needs.

Moreover, the Balancing Competing interests' theory is the most relevant theory to address the fundamental research objectives at the centre of this paper. It is integral as it relates to each of the research objectives. It relates to the first and second objectives of this research paper on analysing the legal framework of the teachers' right to strike and the children's right to education. This is because it requires the individual societal interests to be first analysed before determining how they should be balanced.

Secondly, this theory relates to the third research objective on examining instances where the children's right to education conflicts with the teacher's right to strike in Kenya's legal framework. It relates to this objective as it deems it necessary for the conflict between societal interests to be identified before balancing can be done.<sup>64</sup>

Moreover, this theory is essential as it particularly speaks to the research objective on investigating how a balance can be attained whenever a conflict arises between the two rights at the focal point of this dissertation. This is because, this theory, advocates for the balancing

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<sup>61</sup> Weinrib J, 'When Trumps Clash: Dworkin and the Doctrine of Proportionality' Social Science Research Network, 2016, 3.

<sup>62</sup> Möller K, 'Proportionality: Challenging the Critics' 10 *International Journal of Constitutional Law* 3, 2012, 715.

<sup>63</sup> *Teachers Service Commission v Kenya National Union of Teachers & another* (2013) eKLR.

<sup>64</sup> Alexy R, *A Theory of Constitutional Rights*, Oxford University Press, New York, 2010, 69.

of competing societal interests such as the teachers' right to strike and the children's right to education especially by the courts whenever a conflict arises between societal interests.<sup>65</sup>

In conclusion, it is clear to affirm that the Balancing Competing Interests theory is the most suited for this study. This is because it relates to the research objectives at the focal point of this paper and advocates for a win-win situation for both social groups whenever societal interests are in conflict.

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<sup>65</sup>Webber N C G, 'Proportionality, Balancing and the Cult of Constitutional Rights Scholarship' 23 *The Canadian Journal of Law and Jurisprudence* 1, 2010,182.

## **Chapter Three: Legal Framework**

### **3.1 Introduction**

This chapter covers the legal framework for the question at the focal point of this thesis. It analyses the legal framework governing the teachers' right to strike and the children's right to education in Kenya. It further highlights the various instances where the children's right to education conflicts with the teachers' right to strike in Kenya's legal framework. Moreover, this chapter emphasizes the need for a balance between the two competing human rights at the centre of this thesis.

### **3.2 Right to Strike in Kenya**

#### **3.2.1 History of Teachers' Right to Strike in Kenya**

Kenya has experienced a series of teachers' strikes over the years. Teachers have had a series of strikes to address their fundamental concerns and needs such as low wages, inadequate staffing and resources in schools, salary increments, just to mention a few. Teachers from 1962 when the first strike occurred have thus used strikes in a bid to press the government to address these fundamental concerns and needs.<sup>66</sup>

After the first teachers' strike in 1962, the next strike was still in 1962 as the teachers' felt that the government had not adequately addressed their fundamental needs concerning having one body to handle teachers' employment, that they had tabled to them during the previous strike.<sup>67</sup> The third strike took place in 1966. This strike led to the enactment of the Teachers Service Commission. The aim of creating this commission was to ensure that teachers were able to collectively address their concerns with ease. Moreover, the government hoped that the commission would help reduce the number of national strikes that were rampant.<sup>68</sup>

The Teachers Service Commission appeared to be effective as for the next thirty-one years after 1966 there was no other teachers' strike. However, in 1997 the teachers went on strike again and this time they were pushing for a pay increment of 300 per cent. They also threatened to stifle the children's examinations.<sup>69</sup> The presidential committee in a bid to end the strike in 1997 provided that they would ensure that the teachers' interests would be met. However, in

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<sup>66</sup> Polo R, *Strengthening Kenya's Education Sector: A Focus on Teachers' Strike 2015*, 2015, 4-5.

<sup>67</sup> Jonyo O D and Jonyo O B, 'Teacher Management: Emerging Issues in Kenya' 4 *European Journal of Educational Sciences* 1, 2017, 34.

<sup>68</sup> Maangi N E, 'The changing trends in the development of teacher education in Kenya: The role of the Teachers Service Commission' 3 *Journal of Research on Humanities and Social Sciences* 19, 2013, 82.

<sup>69</sup> Human rights watch, *Spare the Child: Corporal punishment in Kenyan schools*, 1999, 20.

1998 and even in 2002 this issue of pay increment had not been addressed which resulted in the teacher's taking to the streets once more.<sup>70</sup>

From the strike in 2002, it was not until 2009 when the country experienced another teachers' strike. The impact of this strike was quite phenomenal such that it was dubbed by KNUT as "the mother of all strikes." This strike gravely affected not only the right to education of about eight million students across the country but also about nineteen thousand primary schools countrywide.<sup>71</sup> Moreover, the teachers' during this strike pressed the government to pay them about nineteen billion. The government then made a counter offer to the teachers' of seventeen billion claiming that the country was facing economic challenges which limited the government's ability to meet the teachers' demands.<sup>72</sup>

In 2010, about one thousand five hundred teachers organised a strike demanding the government to pay them their fourteen years deficit.<sup>73</sup> Moreover, in 2011 and 2012 the teachers' in public schools throughout the country went on strike due to understaffing.<sup>74</sup> They further provided that this understaffing made them unable to effectively educate students given that there was a rapid increase in the number of students due to the introduction of free primary education.<sup>75</sup> In 2012 particularly, the teachers demanded 300 per cent salary increment with a responsibility allowance of 50 per cent for principals and deputy principals, 40 per cent for senior teachers and 30 per cent for heads of department.<sup>76</sup>

Another significant teachers strike took place in 2013 after the general elections. This strike affected children's education in Kenya as school opening dates had to be pushed by three weeks.<sup>77</sup> The government in 2013 had provided that they would pay the teachers twelve million commuter allowance in two phases whereby they would pay some of it in 2013 and the

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<sup>70</sup> Mugho M S, 'Causes of the recent teachers' strikes in Kenya' 2 *Journal of Public Policy and Administration* 2, 2017, 30.

<sup>71</sup> Ogol O J and Chui M M, 'Critical analysis of influence of teacher management on learners academic performance in public primary schools in Kenya' 5 *International Journal of Education and Research* 2, 2017, 32.

<sup>72</sup> Jonyo O D and Jonyo O B, 'Teacher Management: Emerging Issues in Kenya' 4 *European Journal of Educational Sciences* 1, 2017, 35.

<sup>73</sup> Ministry of Education, Science and Technology, *Facts about government position on teachers strike*, 2015, 8.

<sup>74</sup> Munene A, 'The Right to strike-sustainable constitutional reform: Comparative case studies of workers' strikes in the Kenyan public sector' 37 *Hastings International and Comparative Law Review* 1, 2014, 163.

<sup>75</sup> Polo R, *Strengthening Kenya's Education Sector: A Focus on Teachers' Strike 2015*, 2015, 5.

<sup>76</sup> Emoja M M, 'Job satisfaction and teacher turnover intervention in secondary schools in Kakamega Central district in Kenya' 4 *International Journal of Education and Research* 3, 2016, 86.

<sup>77</sup> Sihanya B, 'Devolution and education law and policy in Kenya' Kenya Human Rights Commission (KHRC) workshop on Devolution in Kenya at Palacina Hotel, Nairobi, 18 April 2013, 28.

remainder in 2014. Despite this offer, KNUT National Executive Council not only rejected this offer but also required the government to include a housing allowance of twenty nine billion.<sup>78</sup>

The strikes were becoming more frequent over the years to the extent that a year could not elapse without the teachers taking to the streets. The veracity of this statement can be seen through the teachers' strike of 2015. In 2015, the teachers went on strike because the government did not meet Justice Nduma Nderi's 50-60 per cent pay.<sup>79</sup> This strike like previous strikes limited the essential right to education of children for five weeks.<sup>80</sup>

2016 marked a dawn of a new era for the teachers' right to strike as Teachers Service Commission entered into a collective bargaining agreement with KNUT and Kenya Union of Post Primary Education Teachers. This agreement led to KNUT declaring that there would be no strikes till 2020.<sup>81</sup> However, in 2019 they acted contrary to this declaration as they declared a national strike over alleged infringement of teachers' fundamental rights by the government.<sup>82</sup>

The right to strike is indeed an essential right for teachers. This is evident as this right has been used by teachers from 1962 up to date as an essential mechanism to advocate and press the government to address their pertinent needs.

### **3.2.2 International Legal Framework**

The Constitution of Kenya provides that the general rules of international law and any treaty ratified by Kenya shall form part of the applicable legal framework of Kenya.<sup>83</sup> The right to strike has been recognized by a number of International Statutes such as the International Covenant on Economic, Social and Cultural rights<sup>84</sup>, International Covenant on Civil and

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<sup>78</sup> Polo R, *Strengthening Kenya's Education Sector: A Focus on Teachers' Strike 2015*, 2015, 5.

<sup>79</sup> Jonyo O D and Jonyo O B, 'Teacher Management: Emerging Issues in Kenya' 4 *European Journal of Educational Sciences* 1, 2017, 35.

<sup>80</sup> Mugho M S, 'Causes of the recent teachers' strikes in Kenya' 2 *Journal of Public Policy and Administration* 2, 2017, 30.

<sup>81</sup> Nyassy D T, 'No teachers' strike for 4 years says KNUT' Daily Nation, 23 June 2016 <http://www.nation.co.ke/news/no-teachers-strike-for-four-years--says-Knut/1056-3262512-jr12ey/index.html> on 20 September 2019.

<sup>82</sup> Wamuswa N, 'Why teachers will not go back to class in January 2019' Standard, 20 December 2018 <https://www.standardmedia.co.ke/article/2001306881/teachers-to-go-on-strike-in-january-2019> on 21 September 2019.

<sup>83</sup> Article 2 (5) and (6), *Constitution of Kenya* (2010).

<sup>84</sup> United Nations Human Rights Office of the High Commissioner, *UN rights expert: Fundamental right to strike must be preserved*, 2017, 1.

Political rights<sup>85</sup>, International Labour Organization No. 87<sup>86</sup>, just to mention a few. This right to strike also appears to be under customary international law.<sup>87</sup>

Internationally, Kenya has ratified several treaties to regulate labour relations. One of these treaties is the Right to Organise and Collective Bargaining Convention which provides employees like teachers with the right to employ appropriate machinery for example strikes to safeguard their right to organise for teachers unions.<sup>88</sup> Moreover, the Abolition of Forced Labour Convention which Kenya has duly ratified prohibits using forced labour to punish employees such as teachers for using strikes to agitate for their pressing needs.<sup>89</sup> Further, the Voluntary Conciliation and Arbitration Recommendation affirms that the provisions of this framework shall not limit the right to strike.<sup>90</sup>

Moreover, emphasis for the need for governments to respect the right to strike of employees such as teachers has been done through various conferences.<sup>91</sup> One of the key conferences at the international level was the international labour conference of 1947 where the discussions concerned freedom of association and industrial relations. During this conference deliberations on the importance of the right to strike were at the centre of the discussions.<sup>92</sup>

### **3.2.3 Domestic Legal Framework**

At the domestic level in Kenya the right to strike has been enshrined extensively in its legal framework. The Constitution of Kenya in Article 41 provides that every employee including teachers have the right to strike.<sup>93</sup> The Employment Act further goes ahead in Section 2 to define a strike. It affirms that a strike is a mechanism of pushing for dispute resolution by the employees.<sup>94</sup> This definition has further been reiterated in Section 2 of the Labour Relations Act.<sup>95</sup>

Further, during teachers' strikes one of the most common issue raised is the infringement of the right to a just wage as provided for in the grund norm.<sup>96</sup> The right to just wages is therefore

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<sup>85</sup> Article 8, *International Covenant on Economic, Social and Cultural rights* (1976).

<sup>86</sup> Article 22, *International Covenant on Civil and Political rights* (1976).

<sup>87</sup> Article 8, *International Labour Organization Convention* (No.87 of 1948).

<sup>88</sup> Article 3, *Right to Organise and Collective Bargaining Convention* (No. 98 of 1949).

<sup>89</sup> Article 1, *The Abolition of Forced Labour Convention* (No. 105 of 1957).

<sup>90</sup> Para 7, *Voluntary Conciliation and Arbitration Recommendation* (No.92 of 1951).

<sup>91</sup> International Labour Conference, *Freedom of Association and Collective Bargaining*, 1994, 63.

<sup>92</sup> International Labour Conference, *Freedom of Association and Industrial Relations*, 1947, 30-31.

<sup>93</sup> Article 41 2(d), *Constitution of Kenya* (2010).

<sup>94</sup> Section 2, *Employment Act* (Act No.1 of 2007).

<sup>95</sup> Section 2, *Labour Relations Act* (Act No. 14 of 2007).

<sup>96</sup> Article 41 2(a), *Constitution of Kenya* (2010).

always at the focal point of the teachers' right to strike. Karol Wojtyla states that it is of utmost importance for employees like teachers to be paid just wages to enable them to cater for their everyday demands.<sup>97</sup> Javier Hervada further propounds that justice entails giving to each one what is due to them according to their dignity.<sup>98</sup> The legal framework allows the teachers to exercise the right to strike so as to push employers to give them their due.

Moreover, the Labour Relations Act provides that any person can engage in either a strike or a lockout.<sup>99</sup> Teachers can only participate in a strike if they meet the three step criteria outlined under this Act.<sup>100</sup> The first step requires that the subject matter of the trade dispute should either concern their employment terms or trade union registration.<sup>101</sup> The second step requires that teachers can only engage in a strike if the disagreement cannot be resolved either by means provided for under the law or under a registered collective agreement.<sup>102</sup> The last step allows teachers to go on strike if they have given due notice of seven days to their employers and to the Minister of the authorised representative of their intention to go on strike.<sup>103</sup>

The Labour Relations Act further gives circumstances whereby strikes are prohibited.<sup>104</sup> The first circumstance is if the law, court award or any collective agreement prohibits teachers from carrying out a strike.<sup>105</sup> The second circumstance is if the subject matter of the strike is regulated by a particular collective agreement binding on both the teachers and their employers.<sup>106</sup> The next circumstance refers to cases whereby the parties have agreed to use alternative dispute resolution mechanisms as opposed to going on strike.<sup>107</sup>

Moreover, strikes are prohibited if the employers and employees are engaged in an essential service.<sup>108</sup> An essential service is any service if interrupted will probably endanger the life of the population.<sup>109</sup> The essential services recognized under the Labour Relations Act include: water supply services, hospital services, air traffic control services and civil aviation

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<sup>97</sup> II Paul J, 'Centesimus Annus', Liberia Editrice Vaticana, 1991, 8.

<sup>98</sup> Hervada J, *A Critical Introduction to Natural Law*, Pamplona, University of Navarra, 1987, 1.

<sup>99</sup> Section 76, *Labour Relations Act* (Act No. 14 of 2007).

<sup>100</sup> Section 76, *Labour Relations Act* (Act No. 14 of 2007).

<sup>101</sup> Section 76 (a), *Labour Relations Act* (Act No. 14 of 2007).

<sup>102</sup> Section 76 (b), *Labour Relations Act* (Act No. 14 of 2007).

<sup>103</sup> Section 76 (c), *Labour Relations Act* (Act No. 14 of 2007).

<sup>104</sup> Section 78, *Labour Relations Act* (Act No. 14 of 2007).

<sup>105</sup> Section 78 1(a), *Labour Relations Act* (Act No. 14 of 2007).

<sup>106</sup> Section 78 1(b), *Labour Relations Act* (Act No. 14 of 2007).

<sup>107</sup> Section 78 1(c), *Labour Relations Act* (Act No. 14 of 2007).

<sup>108</sup> Section 78 1(f), *Labour Relations Act* (Act No. 14 of 2007).

<sup>109</sup> Section 81, *Labour Relations Act* (Act No. 14 of 2007).

telecommunications services, fire services of the government or public institutions, ferry services and post authority and local government authorities.<sup>110</sup>

However, there is a Labour Relations Amendment bill that was proposed in parliament in March this year in an attempt to amend this provision on essential services so as to allow employees in essential services to participate in strikes for a period of five days. This suggestion has emerged because the Constitution only gives a limitation for the right to strike. It does not provide for total prohibition of this fundamental right.<sup>111</sup>

In addition, strikes are declared void if the strike is not advancing a trade dispute and if it is a sympathetic strike.<sup>112</sup> If any strike falls under any of these categories above then the Industrial Court has the mandate to make determinations for such cases.<sup>113</sup>

By virtue of the provisions above teachers have the right to strike. They are thus only barred from participation in strikes in cases whereby the issue in dispute falls under the circumstances highlighted above. Moreover, the services that teachers provide does not fall under the list of essential services. Hence, teachers can enjoy this right provided they do so within the confines of the law.

From the findings above, one can deduce that the right to strike is an integral right. Governments therefore have a duty to protect and uphold this right for employees such as teachers within their states.

### **3.3 Children's Right to Education in Kenya**

#### **3.3.1 International Legal Framework**

The children's right to education is enshrined in various conventions that Kenya has ratified at both the regional and international level. At the regional level, the African Charter on the Rights and the Welfare of the Child recognizes the right of every child to access education.<sup>114</sup> This Charter further affirms that countries shall maintain appropriate mechanisms to fulfil the realization of the children's right to education within their states.<sup>115</sup>

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<sup>110</sup> Fourth Schedule, *Labour Relations Act* (Act No. 14 of 2007).

<sup>111</sup> <https://kenyaemploymentlaw.com/2019/07/29/new-bill-alert-those-in-essential-services-to-strike-for-only-5-days/> on 25 November 2019.

<sup>112</sup> Section 78, *Labour Relations Act* (Act No. 14 of 2007).

<sup>113</sup> Section 77, *Labour Relations Act* (Act No. 14 of 2007).

<sup>114</sup> Article 11, *African Charter on the Rights and Welfare of the Child* (1990).

<sup>115</sup> Article 11 (3), *African Charter on the Rights and Welfare of the Child* (1990).

Similarly, at the international level, the Convention on the Rights of the Child gives states the duty to respect and promote the children's right to education.<sup>116</sup> Governments are also required to ensure that children enjoy equitable opportunities to access education.<sup>117</sup> Moreover, this convention encourages countries to co-operate in matters relating to education so as to allow every child to enjoy this right.<sup>118</sup> In addition, the best interest principle of the child shall be the primary consideration for any authorities carrying out any acts that affect the rights of children.<sup>119</sup>

### 3.3.2 Domestic Legal Framework

The Constitution of Kenya affirms that every child has the right to free and mandatory education.<sup>120</sup> Education has been defined as the giving of intellectual, moral, spiritual training and any other training to a child.<sup>121</sup> Article 28 of the Basic Education Act provides that the Cabinet Secretary of Education shall ensure that children have access to education.<sup>122</sup> The Cabinet Secretary for Education shall further necessitate the achievement of this right by governing the establishment of public schools.<sup>123</sup> Moreover, the Cabinet Secretary is mandated to ensure that special and integrated schools are established for children living with disabilities in Kenya.<sup>124</sup>

The Basic Education Act further affirms that the government must ensure that the schools are adequately staffed and have adequate financial resources.<sup>125</sup> Moreover, one of the guiding principles of the national child protection system framework is that it is of utmost significance to ensure children's protection by protecting their essential rights such as their right to education.<sup>126</sup> The Children's Act in the same vein as the Basic Education Act states that it is the government and children's parents have an obligation to respect the right to education of children.<sup>127</sup>

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<sup>116</sup> Article 28, *Convention on the Rights of the Child* (1990).

<sup>117</sup> Article 28 1(c), *Convention on the Rights of the Child* (1990).

<sup>118</sup> Article 28 (3), *Convention on the Rights of the Child* (1990).

<sup>119</sup> Article 4, *African Charter on the Rights and Welfare of the Child* (1990); Article 3, *Convention on the Rights of the Child* (1990).

<sup>120</sup> Article 53 1(b), *Constitution of Kenya* (2010).

<sup>121</sup> Section 2, *Children's Act* (No.8 of 2001).

<sup>122</sup> Section 28 (1), *Basic Education Act* (No.14 of 2013).

<sup>123</sup> Section 28 (2), *Basic Education Act* (No.14 of 2013).

<sup>124</sup> Section 28 (2)(d), *Basic Education Act* (No.14 of 2013).

<sup>125</sup> Section 39, *Basic Education Act* (No.14 of 2013).

<sup>126</sup> National Council for Children's Services, *The Framework for the National Child Protection System for Kenya*, 2011, 10.

<sup>127</sup> Section 7, *Children's Act* (No.8 of 2001).

In addition, Article 53 of the Constitution of Kenya provides that the best interest of the child is paramount for any matter concerning the child.<sup>128</sup> The Basic Education Act further reiterates this best interest principle where it gives the Management Committees of pre-primary institutions<sup>129</sup> and the Board of Management of schools the mandate to respect and promote the best interest of the child.<sup>130</sup>

Similarly, the national child protection system framework asserts that the best interest of the child is one of the fundamental guiding principles and values of social protection.<sup>131</sup> The government through the Ministry of Planning is required to take into account this principle when planning at both the national and county level.<sup>132</sup>

Section 4 of the Children's Act further avers that for any action to be taken by any institution or body, the best interest of the child must be given paramount consideration.<sup>133</sup> Moreover, the Children's Act alludes to the fact that institutions and courts of law must always safeguard, promote and conserve children's education and welfare in light of the best principle of the child.<sup>134</sup>

The children's right to education is thus a fundamental right that must be protected and respected by the government. When cases arise concerning the right to education the law seems to suggest that the best interest principle of the child should be considered. However, the law does not define what the best interest principle of the child is and what actions should be undertaken to achieve this principle.

### **3.4 Conflict between the Teachers' Right to Strike and Children's Right to Education in the Legal Framework**

The legal framework particularly through case law provides that there is indeed a conflict between the teachers' right to strike and the children's right to education in Kenya. A pertinent question that arises whenever this conflict occurs is whether the legal framework provides instances where one right can be deemed to supersede the other.

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<sup>128</sup> Article 53 (2), *Constitution of Kenya* (2010).

<sup>129</sup> Section 58 1(h), *Basic Education Act* (No.14 of 2013).

<sup>130</sup> Section 59 (a), *Basic Education Act* (No.14 of 2013).

<sup>131</sup> National Council for Children's Services, *The Framework for the National Child Protection System for Kenya*, 2011, 10.

<sup>132</sup> National Council for Children's Services, *The Framework for the National Child Protection System for Kenya*, 2011, 19.

<sup>133</sup> Section 4 (2), *Children's Act* (No.8 of 2001).

<sup>134</sup> Section 4 (3), *Children's Act* (No.8 of 2001).

According to the Constitution of Kenya both the teachers' right to strike and children's right to education are not absolute.<sup>135</sup> They can be limited as per the confines of the law outlined in Article 24 of the Constitution of Kenya. Article 24 of the Constitution expressly alludes to a three part test for the limitation of any human right. The first part of the test requires the limitation to be prescribed by law. The second part of the test determines whether the limitation of the right is necessary and proportionate in a democratic society. The final part of the test determines whether the limitation is done in pursuit of a legitimate aim.<sup>136</sup>

The three part test outlined in Article 24 of the Constitution serves as a guide for authorities when they are limiting citizens' rights such as teachers' right to strike and children's right to education. Article 24 does not further provide a hierarchy for the rights which can be limited. Thus, all rights to be limited must follow this three part test.

There have been a number of cases where the courts have seemed to rule in favour of the children's right to education over the teachers' right to strike. An example of such a case is *TSC v KNUT & another* whereby the applicants pressed the court to issue an injunction to prevent the teachers' from exercising their right to strike. The applicants provided that the teachers had organized the strike in bad faith as they intended to prevent schools from opening which contravened the students' rights to education. The applicants further affirmed that this strike was going against the best interest principle of the child.<sup>137</sup>

The court in *TSC v KNUT & another* granted the injunction and stated that in order to protect the right to education, the teachers can only exercise their right to strike when they have exhausted all other dispute resolution mechanisms. The court further agreed with the applicants by alluding to the best interest principle of the child. The court affirmed that limiting the right to strike was ensuring that the children would be able to enjoy their right to education. This is because the best interest principle of the child required the courts to always take into consideration what is best for the child.<sup>138</sup>

The court in the case above through their decision illustrates that the children's right to education is superior to or supersedes the teachers' right to strike whenever there is a clash between these two rights. Moreover, the courts in this decision provided that the best interest principle shall have paramount consideration for any matter concerning the children's right to

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<sup>135</sup> Article 24, *Constitution of Kenya* (2010).

<sup>136</sup> Article 24, *Constitution of Kenya* (2010).

<sup>137</sup> (2012) eKLR.

<sup>138</sup> (2012) eKLR.

education. This leaves teachers at a disadvantage as they are left with hardly any appropriate means to address their pertinent needs.

Moreover, in *TSC v KNUT & another* the courts yet again issued injunctions which prevented the teachers' from exercising their right to strike. The courts reiterated the judgment made in 2012 and affirmed that the best interest principle of the child must be applied for any matter concerning the children's right to education.<sup>139</sup>

Similarly, in *TSC v KNUT & 3 others* the applicants petitioned the court to issue an injunction to prevent the teachers from exercising their right to strike. The applicants informed the court that the teachers' nationwide strike would paralyze the education system in the nation. The courts in this case issued an injunction which prevented teachers' from exercising their right to strike.<sup>140</sup>

In addition, in *Teachers Service Commission v Kenya National Union of Teachers, Ministry of Labour and Social Protection (Interested party)* the courts limited the teachers' right to strike as they provided that the children's right to education is more fundamental by virtue of the best interest principle of the child.<sup>141</sup>

The courts in the cases above have ruled in favour of the children's right to the detriment of the teachers' right. The courts have implied that by virtue of the best interest principle of the child, the children's right to education can override the teachers' right to strike. The courts have further implied a sort of hierarchy whereby the children's right is superior to the teachers' right.

Moreover, a fundamental question arises as to whether the best interest principle of the child connotes that the children's right to education should be held superior to the teachers' right to education. The law does not explicitly aver that this principle allows authorities in making determinations concerning the children's right to education to always allow this right to trump over any right it is in conflict with.

In addition, many scholars have provided that there is a challenge in the interpretation of the best interest principle of the child. Philip Alston states that this principle is subjective and its interpretation and application is discretionary.<sup>142</sup> Robert Mnookin, agrees with Philip Alston

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<sup>139</sup> (2013) eKLR.

<sup>140</sup> (2015) eKLR.

<sup>141</sup> (2019) eKLR.

<sup>142</sup> Alston P, 'The best interest principle: towards a reconciliation of culture and human rights, reconciling culture and human rights' 8 *International Journal of Law, Policy and the Family* 1, 1994, 4.

and provides that there is no clear agreement on the values that determine what is best for the child.<sup>143</sup> From this it is clear to see that there is no precise definition of what amounts to the best interest principle of the child. Hence, courts should not presume that this principle demands that the teachers' right should be limited if it conflicts with the children's right.

Furthermore, the purpose of the law is to ensure justice which entails giving to each one what is due to them.<sup>144</sup> By limiting the teachers' right to strike, the teachers are left with hardly any means to address and press for their important needs. This contravenes the principle of justice. Moreover, the Basic Education Act in Section 39 requires the government to ensure that schools are adequately staffed and given the resources they require.<sup>145</sup> Several complaints during teachers' strikes are in respect to being understaffed. The teachers should therefore be allowed to strike to be able to agitate the government to respect their duty that they have towards teachers.

In conclusion, the law does not expressly provide that the children's right to education is superior to the teachers' right to strike. However, whenever a conflict arises the courts in relying on the best principle of the child seem to always limit the teachers' right to strike. Teachers are thus left with hardly any robust mechanisms to negotiate for their pertinent needs. There is therefore a need to find a legal balance for cases that arise whereby the children's right to education and teachers' right to strike conflict.

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<sup>143</sup> Mnookin R, *In the interest of children: Advocacy, Law Reform and Public Policy*, Program on Negotiation, Cambridge, 1985, 17.

<sup>144</sup> Rawls J, *Theory of Justice*, Harvard University Press, Cambridge, 1971, 207.

<sup>145</sup> Section 39, *Basic Education Act* (No.14 of 2013).

## **Chapter 4: Balancing Competing Interests: The Teachers' Right to Strike vs Children's Right to Education**

### **4.1 Introduction**

From the previous chapter there is indeed a conflict between the teachers' right to strike and the children's right to education. Whenever such a conflict arises the courts issue injunctions which prohibit teachers from exercising their main mechanism to agitate the government for their essential needs.<sup>146</sup> The courts usually rely on the best interest principle of the child to limit the teachers' right to strike.<sup>147</sup> There is therefore a need to look at the challenges of interpreting the best interest principle of the child. Moreover, there is an imminent need to study various balancing approaches that can be used whenever a conflict occurs.

This chapter thus covers the challenges in interpretation of the best interest principle of the child. It further studies the various balancing approaches that the courts can apply whenever a conflict between the teachers' right to strike and the right to children's education occurs.

### **4.2 Challenges in Interpretation of the Best Interest Principle of the Child**

In instances whereby a conflict arises between the teachers' right to strike and the children's right to education, courts are faced with the task of balancing these competing interests. The courts in Kenya have therefore resorted to relying on the best interest principle of the child whenever they are tasked with balancing these two competing rights at the focal point of this paper.<sup>148</sup>

However, there are certain concerns that have been raised by various scholars concerning the challenges in interpretation of the best interest principle of the child. Scholars like Aron Degol and James Himes highlight that one of the challenges is that the Convention on the rights of the child does not define the best interest principle.<sup>149</sup> Moreover, other scholars like John Elster affirm that this principle is obscure in nature.<sup>150</sup> In addition, what amounts to the best interest principle of the child differs from one country to another based on the level of development.<sup>151</sup>

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<sup>146</sup> *Teachers Service Commission v Kenya National Union of Teachers & another* (2012) eKLR.

<sup>147</sup> Jarso F J 'Implementing the children's right agenda in Kenya: Taking stock of the progress, hurdles and prospects' 27 *American University International Law Review* 3, 2012, 692.

<sup>148</sup> *Teachers Service Commission v Kenya National Union of Teachers & 3 others* (2015) eKLR.

<sup>149</sup> Degol A and Dinku S 'Notes on the principle "Best interest of the child": Meaning, history and its place under Ethiopian Law' 5 *Mizan Law Review* 2, 2011, 324.

<sup>150</sup> Elster J, *Solomonic judgments: Studies in the limitation of rationality*, Cambridge University Press, Cambridge, 1989, 5.

<sup>151</sup> Commissioner for Human Rights Council of Europe, *The principle of the best interest of the child what it means and what it demands from adults*, 2008,4.

Robert Mnookin further builds on Aron's and James argument and alludes to the fact that the Convention on the rights of the child does not also provide a set of guidelines to be followed by the courts when determining what amounts to the best interest of the child.<sup>152</sup> This lack of guidelines leads courts to make varied subjective decisions on what elements must be considered when deciding what amounts to the best interest of the child.<sup>153</sup> This leads to issues for individuals or groups like teachers whom the courts seem to rule against whenever their right to strike is in conflict with the children's right to education.<sup>154</sup>

Moreover, in light of the lack of guidelines to be used in the application of the best interest principle by the courts, scholars like Rayner affirm that there are indeed no rules when applying this principle.<sup>155</sup> In a bid to resolve this challenge the United Nations High Commissioner for Refugees in 2018 enacted guidelines on assessing and determining the best interest of the child.<sup>156</sup> However, these guidelines have limited application in that they only apply for cases concerning child protection cases for refugees.<sup>157</sup> These guidelines therefore cannot be applied in cases whereby there is a conflict between the teachers' right to strike and the right to children's education.

In addition, there are guidelines for the best interest principle that several scholars like Yvette Brown and Kimberley Jolson have alluded to. However, yet again these guidelines have limited application in that they can only be applied for custody cases. These guidelines are also not binding on the courts.<sup>158</sup> These guidelines thus cannot be relied on for cases whereby there are two competing societal interests such as the teachers' right to strike and the children's right to education.

These challenges in the interpretation of the best interest principle of the child are not only faced by Kenya but also other jurisdictions like South Africa and USA. This thesis highlights the challenges faced in South Africa and USA because the challenges are similar to the ones

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<sup>152</sup> Mnookin R, 'Child custody adjudication: Judicial functions in the face of indeterminacy' 39 *Law and Contemporary Problems* 3, 1975, 260.

<sup>153</sup> Skivens M, 'Judging the child's best interests: Rational reasoning or subjective presumptions' 53 *Acta Sociologica* 4, 2010, 339.

<sup>154</sup> Piper C 'Assumptions about the child's best interests' 22 *Journal of Social Welfare and Family Law* 3, 2010, 264.

<sup>155</sup> Rayner M, 'Protection and promotion of the best interests of the child' Paper children's rights: The Next Step conference, Brisbane, 4 April 1997, 9.

<sup>156</sup> UN High Commissioner for Refugees, *Guidelines on assessing and determining the best interests of the child*, 2018, 10.

<sup>157</sup> UN High Commissioner for Refugees, *Guidelines on assessing and determining the best interests of the child*, 2018, 17.

<sup>158</sup> Brown M Y and Jolson A K, 'Chief Justice O'Connor juvenile justice jurisprudence: A consistent approach to inconsistent interests' 48 *Akron Law Review* 1, 2015, 67.

experienced in Kenya. Thus, it would be imperative to study what balancing approaches they have employed when balancing these two competing rights. This is because it would advance the study at the heart of the paper as it would be beneficial to determine which balancing approaches from the two nations that Kenya could employ when faced with the conflict between these two rights. Moreover, South Africa is one of the most progressive countries in Africa with regards to attainment of rights and has greatly influenced Kenya's Bill of rights.

In South Africa in *S v M* the court expressly stated that the best interest of the child shall take precedence for any matter or case concerning children's rights.<sup>159</sup> However, in *Port Elizabeth Municipality v Various Occupiers* the court provided that whenever two human rights are in conflict the court should not favour one right over the other. The court further affirmed that in these instances' courts should adhere to a balancing competing interests approach.<sup>160</sup> This balancing competing interests approach is therefore an approach that Kenya can borrow. This is owing to the fact that it ensures that both the children's interests and the teachers' interests are justly met whenever there is a conflict between the two competing rights.

Similarly in USA in *School Committee of the Town of Westerley v Westerley Teachers Association* the teachers in Westerley went on strike as they provided that they were not being paid just wages. The court in this case issued an injunction requiring the teachers to end their strike and return to their respective schools immediately. Moreover, the court affirmed that the teachers were going against the best interest principle of the child. This is because their strike prevented the children from exercising their right to education.<sup>161</sup>

The courts in *Jefferson County Board of Education v Jefferson County Education Association* also stated that teachers' strikes are detrimental to the public welfare and the welfare of the students.<sup>162</sup> In addition, the Benton County Superior Court in USA issued an injunction which put an end to the Kennewick teachers' strike that was affecting the children's education in Kennewick district.<sup>163</sup>

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<sup>159</sup> *S v M* (2007), Constitutional Court of South Africa.

<sup>160</sup> *Port Elizabeth Municipality v Various Occupiers*, (2004), Constitutional Court of South Africa.

<sup>161</sup> *School Committee of the Town of Westerley v Westerley Teachers Association* (1973), Supreme Court of Rhodes Island.

<sup>162</sup> *Jefferson County Board of Education v Jefferson County Education Association* (1990), Supreme Court of Appeals of West Virginia.

<sup>163</sup> Probert C, 'It is done! Kennewick teachers, administrators reach tentative agreement to end strike' Tri-City Herald, 29 August 2019, <https://www.tri-cityherald.com/news/local/education/article234536177.html> on 10 November 2019.

USA has employed a similar approach like Kenya in dealing with this discord. Both USA and Kenya need to be guided by the balancing competing interests' theory as propounded by Roscoe Pound. This is because this theory is essential in resolving the challenge at hand as it provides that whenever there is a clash between rights the state should undertake measures to maintain a balance between the conflicting rights.<sup>164</sup>

From the evidence above it is thus clear to affirm that there are indeed challenges in interpreting the best interest principle of the child. Furthermore, there are no defined guidelines or factors which the courts are required to rely on when deciding cases where the children's right to education conflicts with other rights such as the teachers' right to education. There is therefore an urgent need to look at the possible balancing approaches that can be employed whenever there is a conflict between the teachers' right to strike and the children's right to education.

### **4.3 Balancing Approaches**

In a bid to resolve the conflict between the teachers' right to strike and the right to children's education, there have been two main balancing approaches. The first approach is whereby the weightier interest always prevails whenever there is a conflict between the two rights.<sup>165</sup> The second approach is whereby states try to balance the two competing interests whenever a conflict arises between the teachers' right to strike and children's right to education.<sup>166</sup>

#### **4.3.1 Weightier Interest Prevails Approach**

This approach provides that whenever two societal interests such as the teachers' right to strike and the children's right to education are in conflict then the weightier interest shall prevail.<sup>167</sup> The courts in this approach usually compare the two competing societal interests so as to determine which interest is weightier.

In instances whereby there has been a conflict between the teachers' right to strike and the children's right to education various nations have applied this approach in several ways. The first way is whereby states like Kenya and USA have deemed the children's right to education as weightier than the teachers' right to strike by virtue of the best interest principle of the

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<sup>164</sup> Pound R, 'A survey of social interests' 57 *Harvard Law Review* 1, 1943, 2.

<sup>165</sup> Muñoz P C, 'Should education be designed as an essential service' ALACIP Conference, Montevideo, 27 July 2017, 2.

<sup>166</sup> Tangwe N M, Tanga T P and Tanyi L P, 'Teachers' strikes and the right of learners to education: A critical literature review' *Academia.edu*, 2015, 240.

<sup>167</sup> Luizzi V, 'Balancing of interests in courts' 20 *Jurimetrics* 4, 1980, 378.

child.<sup>168</sup> The courts have therefore resorted to granting injunctions whenever these two rights are in conflict.<sup>169</sup>

The second way is whereby states have deemed education to be an essential service so as to limit the teachers' right to strike. By doing so they limit the teachers' exercise of the right to strike and allow the weightier interest which is the children's right to education to prevail. An essential service is any service if interrupted would harm the population.<sup>170</sup> In many countries such as Kenya certain services have been declared essential. However, education is not an essential service in Kenya.<sup>171</sup>

Employees providing essential services are only allowed limited exercise of their right to strike.<sup>172</sup> This is because of the potential adverse effects that these employees' strikes would have on the population.<sup>173</sup> Furthermore, in certain states within Canada such as Quebec and British Columbia, teachers have been barred from exercising their right to strike as education has been deemed to be an essential service.<sup>174</sup> Moreover, jurisdictions like, Australia have petitioned the government to declare education as an essential service in a bid to resolve the unending conflict between these two rights.<sup>175</sup>

Scholars like Horsten and Le Grange advocate for education to be regarded as an essential service. They provide that lack of education could cause deleterious effects to the population.<sup>176</sup> MacFarlane builds on Horsten's viewpoint and affirms that teachers' strikes limit the right to education of students which causes them to miss classes. Furthermore, he propounds that as a result of teachers missing classes, students' access to future opportunities is negatively affected. Thus, harming the students and their families who are part of the population.<sup>177</sup>

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<sup>168</sup> *Teachers Service Commission v Kenya National Union of Teachers & 3 others* (2015) eKLR.

<sup>169</sup> *Pinellas County Classroom Teachers Association v Board Public Instruction Pinellas County* (1968), Florida Supreme Court.

<sup>170</sup> Gernigon B, Odero A and Guido H, 'ILO principles concerning the right to strike' 137 *International Labour Review* 4, 1998, 20.

<sup>171</sup> Fourth Schedule, *Labour Relations Act* (Act No. 14 of 2007).

<sup>172</sup> Section 81, *Labour Relations Act* (Act No. 14 of 2007).

<sup>173</sup> Muñoz P C, 'Essential Services, worker's freedom and distributive justice' 40 *Social Theory and Practice* 4, 2014, 649.

<sup>174</sup> Muñoz P C, 'Should education be designed as an essential service' ALACIP Conference, Montevideo, 27 July 2017, 2.

<sup>175</sup> Calitz K and Conradie R, 'Should teachers have the right to strike? The expedience of declaring education as an essential service' 24 *Stellenbosch Law Review* 1, 2013, 131.

<sup>176</sup> Horsten D, 'The limitation of the educator's right to strike by the child's right to basic education' 27 *Southern African Public Law* 2, 2012, 521.

<sup>177</sup> MacFarlane L J, *The Right to Strike*, Penguin Books, London, 1981, 140.

Moreover, strikes have been seen to cause further short term negative impacts on the students. For instance, strikes lead to a rise in the number of students retaking classes.<sup>178</sup> This is because their performances had plummeted due to the frequency of the teachers' strikes.<sup>179</sup> Thus, teachers' strikes cause both grave short term and long term harm to the population and in a bid to avoid this harm some jurisdictions have pressed for education to be deemed an essential service.<sup>180</sup> Further, by declaring education as an essential service, teachers' right to strike will be limited and teachers will be encouraged to use alternative dispute resolution mechanisms such as mediation.<sup>181</sup>

The main advantage of this approach is that it ensures that the best interest principle of the child is upheld in all circumstances. However, this approach is disadvantageous as it limits the teachers' right to strike. Thus, leaving the teachers with hardly any appropriate means to agitate the government for their fundamental needs.

In a bid to refine this approach, the minimum core service approach has been introduced for essential services in jurisdictions like South Africa.<sup>182</sup> The minimum core service concept provides that essential services employees are allowed to go on strike provided that while they are on strike the basic needs of their users are met.<sup>183</sup> This approach thus allows both the teachers' to exercise their right to strike as they still uphold the children's right to education. This approach could thus potentially assist in balancing the competing rights as it will allow for both teachers to exercise their right to strike and students to exercise their right to education.

In conclusion, this approach tends to favour the weightier interest. Thus, in cases whereby there is a clash between the teachers' right to strike and the children's right to education the courts in following this approach will always rule in favour of the children's right to education. This leaves teachers at a disadvantage as they are left with no robust mechanisms to press the government for their pertinent needs. There is therefore a need to refine this approach to ensure a balance between the competing interests. Moreover, states that have made education an

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<sup>178</sup> Belot M and Webbink D 'Do teachers strikes harm educational attainment of students' 24 *Labour* 4, 2010, 393.

<sup>179</sup> Johnson D R, 'Do strikes and work-to-rule campaigns change elementary schools assessment results' 37 *Canadian Public Policy* 4, 2011, 482.

<sup>180</sup> Muñoz P C, 'Essential Services, worker's freedom and distributive justice' 40 *Social Theory and Practice* 4, 2014, 661.

<sup>181</sup> Horsten D, 'The limitation of the educator's right to strike by the child's right to basic education' 27 *Southern African Public Law* 2, 2012, 524.

<sup>182</sup> Section 72, *Labour Relations Act* (South Africa).

<sup>183</sup> *Eskom Holdings Ltd v National Union of Mineworkers and others* (2011), Supreme Court of Appeal of South Africa.

essential service should therefore apply the minimum service approach which leans towards balancing the two competing interests.

#### **4.3.2 Balancing Competing Interests**

This balancing approach requires the courts to balance the two competing rights and not favour one right over the other when the teachers' right to strike and right to children's education are in conflict. This approach stems from the Balancing Competing Interests theory that has been propounded by various renowned scholars such as Roscoe Pound and Rudolf Von Jhering.<sup>184</sup>

This approach requires courts not to rank the competing societal interests when deciding cases regarding the two competing rights but rather to look at the interests of each of those groups and balance the interests against each other. Moreover, this approach advocates the courts to find a semblance of a balance whenever two rights such as the teachers' right to strike and right to children's education are in conflict.<sup>185</sup> In addition, in some states like USA the courts come up with a particular guiding factor to aid in the balancing of competing interests whenever human rights are in conflict.<sup>186</sup> However, these guidelines vary from case to case.<sup>187</sup> The Committee on the Rights of Children further advocated for this balancing competing interests approach for dealing with conflicts that arise between children's rights and other rights.<sup>188</sup>

Moreover, whenever there is a conflict between two competing interests and the courts need to limit one right then they should do so using the least restrictive means.<sup>189</sup> This raises an integral question as to whether the issuing of injunctions by the courts which prevent teachers from exercising their right to strike constitutes the least restrictive means. This is because when the courts issue injunctions they leave teachers with limited mechanisms to be able to advocate for their basic needs such as increase in wages from the government.

Further, Roscoe Pound through the balancing competing interests' theory which this approach is anchored on propounds that if there are competing rights then the courts should maintain a balance that will remove friction between these rights and not adversely affect the enjoyment of these rights.<sup>190</sup> Thus, in cases whereby there is a conflict between the teachers' right to strike

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<sup>184</sup> Benditt M T 'Law and the balancing of interests' 3 *Social Theory and Practice* 3, 1975, 328.

<sup>185</sup> *Port Elizabeth Municipality v Various Occupiers*, (2004), Constitutional Court of South Africa.

<sup>186</sup> *Pickering v Board of Education* (1968), Supreme Court of the United States.

<sup>187</sup> Luizzi V 'Balancing of interests in courts' 20 *Jurimetrics Journal* 4, 1980, 382.

<sup>188</sup> *Committee on the Rights of the Children, General Comment No.14 on the right of the child to have his or her best interest taken as primary consideration*, 29 May 2013, 10.

<sup>189</sup> Patterson W E 'Roscoe Pound on Jurisprudence' 60 *Columbia Law Review* 8, 1960, 1128.

<sup>190</sup> Pound R, 'A survey of social interests' 57 *Harvard Law Review* 1, 1943, 2.

and the children's right to education then the courts in Kenya should maintain a balance that will not greatly affect the enjoyment of either of the rights.

Moreover, Roscoe Pound further affirms that the purpose of law is to meet and advance the interests of the society it serves.<sup>191</sup> The balancing competing interests approach ensures that law serves this purpose as it urges the courts to ensure that both the teachers' right to strike and the children's right to education are respected and upheld.

Plamentaz further builds on Roscoe Pounds view and provides that when the courts are balancing competing interests they may sometimes have to find a middle ground. This middle ground helps them to find a solution which is acceptable to both social groups. Moreover, this compromise enables the two conflicting social groups to reconcile the differences between them.<sup>192</sup> The courts in Kenya usually do not find a compromise whenever a conflict ensues between the teachers' right to strike and the children's right to education. The courts in Kenya therefore need to work towards finding a middle ground that will ensure a balance between these two competing rights whenever a conflict arises.

In addition, Professor Waldron provides that when there is a conflict of human rights a trade-off of the exercise of one right for the exercise of another right should not be undertaken. The courts whenever a conflict occurs should rather try to find a balance between the competing interests.<sup>193</sup> The courts in Kenya should therefore not trade off the teachers' right to strike so as to allow the children to exercise their right to education.

Moreover, the main advantage of this approach is that it ensures a win- win situation. It does this by ensuring that the court balances both interests against each other and does not favour the weightier interest to the detriment of the other competing right. However, the main challenge with this approach is that the term balancing is vague. Thus, before the courts can claim to balance these competing interests there is a need for them to define what balancing entails.<sup>194</sup>

This approach would hence be a suitable approach for courts in Kenya to employ for cases whereby there is a conflict between the teachers' right to strike and the children's right to

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<sup>191</sup> Nabaldian E, 'Introductory Concepts on Sociological Jurisprudence: Jhering, Durkheim, Ehrlich' 4 *Mizan Law Review* 2, 2010, 351.

<sup>192</sup> Benditt M T 'Law and the balancing of interests' 3 *Social Theory and Practice* 3, 1975, 328.

<sup>193</sup> Xu X and Wilson G, 'On conflict of Human rights' 5 *University of New Hampshire Law Review* 1, 2006, 49.

<sup>194</sup> Möller K, 'Proportionality: Challenging the Critics' 10 *International Journal of Constitutional Law* 3, 2012, 715.

education. This is because this approach requires the courts not to declare that one right is superior to the other but rather to weigh and balance the competing interests against each other.

From the discussion above, there are indeed challenges faced by the courts in interpretation of the best interest principle of the child. Moreover, the balancing approaches particularly the approach on balancing competing interests is an ideal model as it allows for not only the teachers to exercise their right to strike but also the children to enjoy their right to education.

## Chapter 5: Conclusion and Recommendations

### 5.1 Introduction

This chapter concludes this dissertation whose focus was finding a legal balance between the teachers' right to strike and the right to children's education in Kenya. It further gives recommendations that can be employed by the courts to balance these competing rights.

### 5.2 Conclusion

Drawing evidence from the study above, the legal framework calls for respect and protection of both the teachers' right to strike and the children's right to education. However, the legal framework provides that both rights can be limited.<sup>195</sup>

Further, there are instances that occur in the legal framework whereby the two competing rights at the focal point of this paper are at conflict. Whenever these two rights are at conflict the courts tend to rule in favour of the children's right to education as opposed to the teachers' right to strike.<sup>196</sup> The courts usually issue injunctions which pulverize the teachers' right to strike which is the main means that they use to agitate for their pertinent needs.<sup>197</sup>

Furthermore, the courts when determining cases between these two competing human rights often rely on the best interest principle of the child. By relying on the best interest principle of the child, the courts tend to constantly rule in favour of the right to children's education over the teachers' right to strike.<sup>198</sup> The courts by doing so inadvertently imply that the children's right to education is superior to the teachers' right to strike, yet the legal framework does not provide for this.

Moreover, there are certain challenges that have been raised by several scholars concerning the interpretation of the best interest principle of the child. The main challenges that have been highlighted are that there is no definition on what amounts to the best interest principle of the child and there are no guidelines on what factors should be considered when dealing with cases where there is a conflict between children's rights and other societal rights.<sup>199</sup> These challenges hence pose a fundamental question as to whether courts should indeed always rule in favour of

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<sup>195</sup> Article 24, *Constitution of Kenya* (2010).

<sup>196</sup> *Teachers Service Commission v Kenya National Union of Teachers & another* (2012) eKLR.

<sup>197</sup> *Teachers Service Commission v Kenya National Union of Teachers & 3 others* (2015) eKLR.

<sup>198</sup> *Teachers Service Commission v Kenya National Union of Teachers, Ministry of Labour and Social Protection (Interested party)* (2019) eKLR.

<sup>199</sup> Mnookin R, 'Child custody adjudication: Judicial functions in the face of indeterminacy' 39 *Law and Contemporary Problems* 3, 1975, 260.

the children's right to education whenever a conflict arises between this right and other fundamental human rights.

Moreover, in a bid to address this conflict several approaches have been suggested. One of these approaches is whereby the weightier interest shall always prevail in cases whereby two human rights are in conflict. This approach favours one interest over the other and is hence not suitable for resolving the challenge at the heart of this paper.<sup>200</sup> The second approach is the balancing competing interests' approach whereby the courts are encouraged to look at the two competing rights and find a legal balance whenever a conflict arises.<sup>201</sup>

There is therefore a need to provide recommendations that could be employed to find a legal balance between the teachers' right to strike and the right to children's education whenever a conflict ensues.

### **5.3 Recommendations**

This dissertation recommends that first, a definition of what amounts to the best interest principle of the child be provided for in the Convention of the rights of the child as the current definition is vague. Secondly, this dissertation recommends that a set of guidelines for the best interest principle of the child should be enacted. These guidelines will enable the court to know how to apply the best interest principle in a manner that is just for cases whereby there is a human rights conflict such as the conflict between the teachers' right to strike and the right to children's education.

Lastly, this dissertation recommends that the courts should employ a balancing competing interests approach whenever a discord arises between the two rights. This balancing competing interest approach requires the courts not to rank the rights but rather to look at the interests of each group such as the teachers' interests and the children's interests and balance their interests against each other on a case by case basis.

In conclusion, whenever the teachers' right to strike and the children's right to education are in conflict, the court should not be quick to issue injunctions but rather they should compare the competing interests then proceed to balance them against each other.

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<sup>200</sup> *Eskom Holdings Ltd v National Union of Mineworkers and others* (2011), Supreme Court of Appeal of South Africa.

<sup>201</sup> *Luizzi V 'Balancing of interests in courts'* 20 *Jurimetrics Journal* 4, 1980, 383.

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