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## **Securing the Right to Strike for Workers in Essential Services in Kenya**

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### **I Introduction**

#### **Rationalizing the need for the Right to Strike in Essential Service**

The capitalistic nature of the world's economy has largely shaped labour relations between employer and employee. The employment relationship often manifests the working out of an unequal power balance and subordination of one party to the other.<sup>1</sup> The employee is more often than not the weaker party in the employment relationship while the employer wields a higher bargaining power. This is because the employer controls or is in ownership of the capital and the productive resources made available to the employee.<sup>2</sup> The power balance tilts towards the employer who can arbitrarily exercise it to the detriment of the employee's welfare.

Workers, viewed through the lens of capitalism, are regarded as a means to an end. Employers seek to maximize the labour services they offer in a bid to make a higher profit margin. This aim is in most cases pursued to the disadvantage of the employee. This is the case even for workers in essential services. Consequently, the employee is susceptible to abuse and it is no surprise, the numerous instances of employers infringing on the fundamental rights of their employees. Cases of overworking, payment that is not commensurate to the work done, poor working conditions and harassment characterize the employment relations within the labour market.<sup>3</sup>

This predicament necessitates a mechanism through which the power dynamics in the labour relations between the employer and employee can be

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<sup>1</sup> Bess Nkabinde, *The Right to Strike as an essential component of Workplace Democracy: Its Scope and Global Economy* (2009) 24 Md. J. Int'l. (2009) 270.

<sup>2</sup> Ac Basson, *The Labour Appeal Court and the Right to Strike*, S. Afr. Mercantile L. J. (1994).

<sup>3</sup> Nkabinde (n 1).

balanced. It is important for employees to be able to voice out the grievances which arise in their places of work and defend the protection of their labour rights. This need is fueled by the debate to view labour rights as human rights thus necessitating a higher threshold for their protection.<sup>4</sup>

The freedom of association as applied in labour law<sup>5</sup> led to right of workers to form and join trade unions. This right became the foundation of effective collective bargaining<sup>6</sup> and a means through which employment rights can be enforced.<sup>7</sup> Collective bargaining provides the concerted effort needed to counter the employer's position of power.<sup>8</sup> It is considered as an enabling right through which other labour rights can be secured by the workers.<sup>9</sup> Parties to the employment relationship initiate collective bargaining processes due to dissatisfaction in their work place.<sup>10</sup> Through this process, parties can negotiate better terms and conditions of employment<sup>11</sup> and the maintenance of industrial peace is achieved.<sup>12</sup> The process of collective bargaining, though often considered of utmost importance to the employees through their trade unions, is equally important

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<sup>4</sup> Valerio De Stefano, Non-Standard Work and Limits on Freedom of Association: A Human Rights- Based Approach, *Ind. Law J* (2017).

<sup>5</sup> Urmila Bhoola, National Labour Law Profile: South Africa (2002).

<sup>6</sup> Tamara Cohen, Limiting Organizational Rights of Minority Unions: POPCRU v LEDWABA 2013 11 BLLR 1137 (LC) PER/PELJ (2014).

<sup>7</sup> M. O' Sullivan et al., Is Individual Employment Law Displacing the Role of Trade Unions? (2015) 44 *ILJ* 222-45.

<sup>8</sup> Basson (n 2).

<sup>9</sup> Claire La Hovary, Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike, *Ind. Law J* (2013) 42 (4) 338.

<sup>10</sup> MM Botha, In Search of Alternatives or Enhancements to Collective Bargaining in South Africa: Are Workplace Forums a Viable Option? PER/PELJ 2015 (18) 5.

<sup>11</sup> Esser I, Stakeholder Protection: The Position of Employees, THRHR (2007) 407 – 426.

<sup>12</sup> Godfrey S, Theron J and Visser M, The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining (Development Policy Research Unit, University of Cape Town 2007) .

to the employers' through their organizations.<sup>13</sup> It is therefore a mutual process for both parties to reach mutual agreements on the issues raised.<sup>14</sup> Central to the process of collective bargaining is the right to strike.<sup>15</sup> The right to strike plays the role of an effective economic weapon to strengthen the worker's position thus acting as a balance to the power relations of employer and employee.<sup>16</sup> This right pertains to the individual worker but is exercised collectively. Through the withdrawal of their labour services, workers can mount pressure on their employers to address their complaints and uphold their labour rights.<sup>17</sup> The right to strike further enables employees to exercise their bargaining power as against the employers and secure better working conditions. As such, without this right to strike, collective bargaining is largely compromised.<sup>18</sup>

The significance of the right to strike cannot be over emphasized given the central role it plays in effective labour relations.<sup>19</sup> This explains its regard as an important component of any democracy and its inclusion in the Constitutions of some countries.<sup>20</sup>

Kenya, in recognition of its duties under International Labour Law and having ratified a number of labour conventions under the International

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<sup>13</sup> Sunday Samson Babalola and Ajibola Ishola, Perception of Collective Bargaining and Satisfaction with Collective Bargaining on Employees' Job Performance, Corporate Ownership and Control/ (2017) Volume 14, Issue 2.

<sup>14</sup> Cloutier J, Denis P.L and Bilodeau H, Collective Bargaining and Perceived Fairness: Validating the Conceptual Structure, Relations Industrielles/Industrial Relations, (2012) 67 (3), 398-425.

<sup>15</sup> Black Allied Workers Union v. Prestige Hotels CC t/a Blue Waters Hotel (1993) ILJ 963 (LAC) at 971J-9724.

<sup>16</sup> BTR Dunlop Ltd v. National Union of Metalworkers (2) 1989 10 ILJ 701 (IC).

<sup>17</sup> Mario E. Ackerman, The Right to Strike in Essential Services in MERCOSUR Countries, Int'l Lab Rev, (1994) 385.

<sup>18</sup> Ernest Manamela and Mpfari Budeli, Employees' Rights to Strike and Violence in South Africa, Comp. & Int'l L. J. S. Afr. (2013) 308.

<sup>19</sup> Tamara Cohen and L. Matee, Public Servants' Right to Strike in Lesotho, Botswana and South Africa- A Comparative Study PER/PELJ 2014 (17) 4.

<sup>20</sup> Nkabinde (n 1).

Labour Organization (ILO), provides for this right in its Constitution.<sup>21</sup> Article 41 of the Kenyan Constitution provides for the rights which are protected in the labour relations with sec. 41 (2) (d) particularly stating that every worker has the right to go on strike. The Labour Relations Act of Kenya which aims at ‘promoting sound labour relations through the protection and promotion of freedom of association and the encouragement of effective collective bargaining’ provides for the participation in strikes by employees.<sup>22</sup> Accordingly, the purpose of the Act is to provide for organizational rights for trade unions, facilitate collective bargaining within the work place and to regulate the right to strike.

Kenya has made attempts to protect the workers’ labour rights particularly the right of workers to strike through its legislative framework. Ideally, the right to strike should be freely exercised by all employees in all working areas but as analysed below, this is not the case in the Kenyan Context

## **II The Kenyan Context of The Right To Strike For Workers’ In Essential Services Limitation of the Right to Strike for Workers’ in Essential Services in Kenya**

Having rationalized the importance with which the right to strike should be regarded in the labour relations, it is needful to equally note the fact that strikes do have an adverse impact not only the economic interests of the employer but also third party rights.<sup>23</sup> These third parties are usually the consumers of the services offered by the workers. It is in appreciation of this fact that a limitation on the right to strike is often sought by States.

The Constitution of Kenya provides for the limitation of the rights enshrined in its Bill of rights indicating that the worker’s right to strike is not absolutely guaranteed.<sup>24</sup> However, any such limitation of a right or fundamental freedom has to be by law and only to the extent that it is reasonable and

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<sup>21</sup> The Freedom of Association and Protection of the Right to Organize, Convention 87 of 1948 and the Convention on the Right to Organize and Collective Bargaining, Convention 98 of 1949.

<sup>22</sup> Labour Relations Act 2007, S 76.

<sup>23</sup> Horsten D and Le Grange C, The Limitation of the educator’s right to strike by the child’s right to basic education, Southern African Public Law (2012) 27 (2): 509 -538.

<sup>24</sup> Constitution of Kenya 2010, Art. 24.

justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>25</sup> Consequently, any limitation of the right to strike which does not meet this threshold is unlawful and robs workers of an effective bargain tool thus contributing to the suppression of workers.<sup>26</sup> This means that there should not be an arbitrary usurpation of workers' right to industrial action without legitimate reasons including those engaged in essential services.

In the case of Kenya, the right to strike for workers in general is limited. This is the case given that sec. 76 of the Labour Relations Act lays out the conditions under which one may participate in a strike or lock-out. These conditions are;

- i. The trade dispute which forms the subject of the strike must concern terms and conditions of employment or the recognition of a trade union.
- ii. The trade dispute remains unresolved after conciliation under the Act or as specified in a registered collective agreement which provides for the private conciliation of disputes.
- iii. There needs to be a seven days written notice of the strike given out to other parties and to the Minister by the authorized representative of the trade union.

The fulfillment of these conditions qualifies the strike as protected under the law and employees can lawfully participate in it. The employees who participate in a protected strike are exempted from and dismissal, disciplinary action or the institution of civil proceedings against them. Sec. 78 of the Labour Relations Act on the other hand provides for certain circumstances where strikes are prohibited. These circumstances include;

- i. Where any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute

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<sup>25</sup> Ibid.

<sup>26</sup> Carole Cooper, *Strikes in Essential Services*, Indus. L. J. Juta (1994) 903.

- ii. In the event that the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement bonding on the parties to the dispute
- iii. Where the parties have agreed to refer the trade dispute to the Industrial court or to arbitration
- iv. Where the trade union has referred the dispute to the Industrial Court.
- v. Where the trade dispute was not referred for conciliation in terms of the Act or a collective agreement providing for conciliation
- vi. In the event that the employer and employees are engaged in an essential service
- vii. Where the strike is not in furtherance of a trade dispute
- viii. Where the strike constitutes a sympathetic strike

Any employee who takes part in or incites others to participate is a prohibited strike breaches the employee's contract and is liable to disciplinary action and is not entitled to any payment or benefit under the Employment Act during the period he or she participated in the strike.<sup>27</sup> While these provisions may be deemed as having a limiting effect on the right to strike for workers in Kenya, a number of employees can still engage in strikes as long as they meet the laid down requirements.

However, this is not the case for workers engaged in essential services. The Labour Relations Act provides for an absolute prohibition of the right to strike for those who work in essential services. Sec. 81 (3) states that there shall be no strike or lock-out in an essential service. This means that such workers cannot join the rest in advancing their interests in the workplace through industrial action.

The act defines 'essential services' as a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.<sup>28</sup> What constitutes an essential or a non-essential service would depend on a country's need and is best interpreted from a case to case basis. However, in its decision to designate a service as essential or

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<sup>27</sup> Labour Relations Act 2007, s 80 (1) (a) and (b).

<sup>28</sup> Ibid, s. 81.

not, a country should take into account the objective criteria in the definition.<sup>29</sup>

The definition of what constitutes an essential service is partially exclusive in and of itself: Not every service fits into this definition. There should be a reasonable causative link rather than a ‘mere possibility’ between the interruption of the service and the danger which such interruption would pose to the population. The requirement that this interruption endangers the life, personal safety or health of the population is also restrictive on three grounds. First, it excludes mere hardship or inconvenience that may be experienced by the withdrawal of these services. Secondly, it is the life, personal safety and health of the population which must be affected and not their economic, proprietary or pecuniary interests. Lastly, it is the people who are envisaged as the population which must be affected therefore withdrawal of services which would negatively affect plants or animals may not be considered as essential.

The inherently exclusive nature of the definition of an essential service guards against a blanket classification of most services as essential. This is important considering the effect of such classification on the labour rights of the workers in these services. A general classification would unnecessarily restrict the right to strike of workers employed in these services.

### **The Designation of a Service as Essential in Kenya**

The International Labour Organization (ILO) has held essential services to include the hospital sector, water supply, air traffic control and telephone services.<sup>30</sup> Kenya seems to have borrowed from the ILO with regard to the designation of services as essential. In Kenya, these services are;

- i. Water Supply Services.

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<sup>29</sup> International Labour Organisation (ILO) Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 5<sup>th</sup> ed. (ILO Geneva 2006) (581).

<sup>30</sup> ILO: Freedom of Association. Digest of decisions and principles on the Freedom of Association Committee of the Governing Body of the ILO, 3<sup>rd</sup> Edition, Geneva 1985, (409), (410), (412) and (427).



- ii. Hospital Services.
- iii. Air Traffic Control Services and Civil Aviation Telecommunication Services.
- iv. Fire Services of the Government or Public Institutions.
- v. Posts Authority and Local Government Authorities.
- vi. Ferry services.<sup>31</sup>

The Minister in consultation with the National Labour Board may amend the list of essential services as listed out in the Fourth Schedule of the Labour Relations Act.<sup>32</sup> He or she may also declare any other service as essential where a strike is so prolonged as to endanger the life, person or health of the population or any part of the population.<sup>33</sup>

It should be noted though that the concept of essential services is not an absolute one neither should it be. A non-essential service could become essential if the duration and extent of its withdrawal by workers endangers the life, health and safety of the population. An essential service may equally cease to be so with increasing technological advancements and changes in geographical location or timing.

The enlisting of services as essential has been ineffective in deterring the workers engaged in these services from striking. In Kenya, despite the fact that hospital services has been listed as essential and therefore no strike is legally permissible for those who offer such services, there has been reoccurring strikes over the years in the medical field by both doctors and nurses. One would question the efficacy of prohibiting the right to strike for workers in essential services when they still resort to industrial action. Is the prohibition justifiable? Are there other means to advance the cause of the workers in essential services and address their grievances? If these mechanisms were effective enough, workers in essential services would not risk the consequences of participating in prohibited strikes.

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<sup>31</sup> Labour Relations Act 2007, Fourth Schedule.

<sup>32</sup> Ibid, s 81 (2) (a).

<sup>33</sup> Ibid, s 81 (2) (b).

### III The Limitation of the Right to Strike for Workers in Essential Services in Kenya: Is it Justifiable?

For the limitation of any right in Kenya's bill of rights to be legitimate, there is laid down a criterion of relevant factors which should be taken into account as listed by the limitation clause enshrined in the Constitution. One should consider the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, the relation between the limitation and its purpose and finally whether there is a less restrictive means to achieve the purpose of the limitation.<sup>34</sup> These factors are analysed below in the specific context of Kenya's limitation of the right to strike for workers in essential services to assess whether the prohibition of their right to strike is justifiable.

#### i) The Nature of the right

Rights are generally classified into derogable and non-derogable rights.<sup>35</sup> Derogable rights are those which can be limited in certain circumstances.<sup>36</sup> Non-derogable rights on the other hand should not be restricted, suspended or limited by States.<sup>37</sup> In Kenya, the fundamental rights and freedoms which may not be limited are;

- i. The freedom from torture, cruel, inhumane or degrading treatment or punishment,
- ii. The freedom from slavery or servitude
- iii. The right to a fair trial
- iv. The right to an order of *habeas corpus*<sup>38</sup>

The right to strike has not been listed as a non-derogable right under Article 25 of the Kenyan Constitution. It is evident that the inclusion of the right to

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<sup>34</sup> Constitution of Kenya 2010, Art 24 (1).

<sup>35</sup> Riccardo Pisillo Mazzeschi, 'Distinctions Between Human Rights Categories.' *International Human Rights Law*. Springer, Cham, 2021. 237-252.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

<sup>38</sup> Constitution of Kenya, Art. 25.

strike in Constitution shows the high regard with which this right is held particularly as a ‘weapon in collective bargaining’<sup>39</sup> However, as it has been established this right is not absolute in the Kenyan context.<sup>40</sup> There is currently no legal system which upholds an unrestricted right to strike despite its inclusion in the relevant Constitution.<sup>41</sup> The Constitution provides that the rights contained in its bill of rights are subject to the limitation clause in Article 24. As such, the limitation clause extends to all rights in the bill of rights including the right to strike.<sup>42</sup> The right to strike can therefore be limited on reasonable and justifiable grounds.

### **ii) The Importance of the Purpose of the Limitation**

The limitation of the right to strike for workers in essential services stems from the nature of the services they offer. Essential services are necessary to ensure the protection of people’s health, lives and safety. It is the service in itself that is essential, neither the worker nor the industry. An interruption or withdrawal of these services then adversely affects the health and wellbeing of the society at large. The damage done in such instances is irreparable in comparison to pecuniary losses sustained by either the worker or the employee during the striking period.

In the case of medical services for instance which are designated as essential, strikes of doctors or nurses have often resulted to the death of many patients and the hampering of health care systems. In 2017, the doctors’ strike which lasted 100 days had detrimental effect on the health of many patients in Kenya. A majority were turned away from public hospitals and those who could afford resorted to private hospitals. Pregnant mothers, terminally ill

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<sup>39</sup> Bob Hepple, ‘The Freedom to Strike and its Rationales’ in Bob Hepple, R. Le Roux and S. Sciara (eds), *Laws against Strikes. The South African Experience in an International and Comparative Perspective* (Milano: Franco Angeli 2015).

<sup>40</sup> Lisa Rodgers, *Public Employment and Access to Justice in Employment Law*, Ind. Law. J. 43 (2014) (4): 373.

<sup>41</sup> H. Cheadle ‘Constitutionalizing the Right to Strike’ in Bob Hepple, R. LeRoux, S. Sciara (eds), *Laws against Strikes. The South African Experience in an International and Comparative Perspective* (Milano: Franco Angeli 2015).

<sup>42</sup> IM Rautenbauch , *The Limitation of Rights in Terms of Provisions of the Bill of Rights Other than the General Limitation Clause: A Few Examples* , J. S. Afr. L. (2001) 617.

patients such as those with cancer, accident victims and those in need of emergency treatment were denied medical attention and some lost their lives.<sup>43</sup>

One may rightly argue then that this limitation is done in the interest of the general public. Undoubtedly, it is in the public interest for instance to ensure that health services are made available and accessible to all and at all times. This is because the right to health is closely linked to one's personal well-being and forms an integral part of the right to life which is in fact a non-derogable right. Kenya is therefore obligated to guarantee its citizens' right to the highest attainable standards of health care. This includes ensuring that there is a proper health care system where patients receive health care services when needed. It is important therefore to put measures in place limiting obstructions or interruptions of these services to the consumers. The purpose of limitation may be the need to ensure that the enjoyment of rights and fundamental freedoms by the workers does not prejudice the rights and fundamental freedoms of third party consumers in this case the patients which also a factor to be considered when limiting a right. These measures therefore attempt to strike the delicate balance between the workers' right to industrial action through downing their tools and the general public interest in the availability of essential services.<sup>44</sup>

### **iii) The Nature and extent of the Limitation.**

The right to strike for workers in essential services in Kenya is absolutely prohibited. Sec. 81 (3) which states that there shall be no strike or lock-out in an essential service absolutely limits this right, neither are there any exceptions under the Kenyan law where a strike in an essential service may be legally permissible. The absolute prohibition of this right however derogates from the essential content of the right and operates to negate it altogether. Kenya's approach is unnecessarily rigid and a less restrictive means to achieve the purpose of limitation should be sought.

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<sup>43</sup> Vera Okeyo and Elizabeth Merab, Doctors' Strike is over but the pain, Deaths and costs will be felt for many years, (2017).

<sup>44</sup> Andrew Hodge 'Strikes in Essential Services- Balancing Essential Interests' *Law & Just, Christian L. Rev.* (1990).

**iv) The Relation between the limitation and its purpose**

As highlighted, there is a need to have continual availability and accessibility of essential services due to the drastic effect that a withdrawal of these services would have on the health, lives and personal safety of the consumers. This need justifies the limitation on the right to strike for workers in this sector. The limitation achieves the purpose pursued given that the legal backing which characterizes this limitation ensures legal certainty and assurance to the consumers that these services will not be unnecessarily withdrawn.

**v) The Availability of a less restrictive means to achieve the purpose.**

It is undisputed that workers in essential services still need an avenue to air their grievances despite the fact that one would rationalize the limitation of their right to strike. They need a mechanism that would be coercive enough to counter the employer's status and set in motion the resolution of their disputes. The designation of a service as essential has been viewed as a constitutional violation because it infringes on the workers' right to strike.<sup>45</sup> On the other hand, the grave consequences on the lives and health of people which occasions a withdrawal of these services during a strike period cannot be ignored. There needs to be a way in which the purpose of this limitation is met in consideration of the right of workers in essential services to strike.

In *Okiya Omtatah Okoiti v AG & 5 Others*<sup>46</sup>, the issue of limiting the right to strike for workers in essential services formed the core of the case. The Kenya National Union of Nurses (KNUN) had issued a 21 days strike notice for nurses to commence the strike. The strike notice was prompted by the Government's failure to sign and facilitate registration of the negotiated Collective Bargaining Agreement and to confirm into permanent and

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<sup>45</sup> Sandile July and Bradley Workman, *The Right to Strike: Essential Services and Minimum Service Agreements*, (2013).

<sup>46</sup> Petition 70 of 2014, (2015) eKLR available at [kenyalaw.org/caselaw/cases/view/117680/](http://kenyalaw.org/caselaw/cases/view/117680/) accessed on 25/01/2019.

pensionable terms of service all nurses on contract. The Petitioner moved to court seeking;

- i. A declaration that the impugned pending strike by KNUN was illegal.
- ii. A declaration to be issued for the state to enact a legal and policy framework to secure the rights of workers in essential services,
- iii. A mandatory order to the permanent secretary labour, permanent secretary health, permanent secretary devolution and the Public Service

The court acknowledged the fact that workers in essential services are 'left to their own devices' to address their grievances. They resort to strikes due to the lack of legislation and policies which safeguards their rights and provides for an effective mechanism to resolve disputes in essential services. The court also pointed out that the limitation in Sec. 81 (3) of the Labour Relations Act is absolute and derogates from the core of the right to strike. It seeks to nullify the constitutional provision of the right to strike under Art. 41 (2) (d). The court found that the limitation did not meet the threshold laid out in Article 24 (2) (c) which touches on the nature and extent of limiting a right.

The petition was dismissed on other grounds. However, the Court held that Sec. 81 (3) was inconsistent with the constitutional provisions on the right to strike and was of the view that the legislature needs to relook the provision and align it with the Constitution.

#### **IV Minimum Services Agreement: The Less Restrictive Means to Achieve The Purpose of Prohibiting the right to Strike for Workers in Essential Services**

There is indeed a less restrictive means through which the purpose of this limitation can be achieved. Instead of a total prohibition of strikes for all workers in an essential service, a maintenance of limited staff of workers to provide minimum services to the public in an effort to prevent harm to life, safety and health of the population may be negotiated.<sup>47</sup> These workers

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<sup>47</sup> Gernigo B, Odero A and Guido H, ILO Principles Concerning the Right to Strike, (ILO Geneva 2000) available at <http://www.ilo.org/wcmsp5/groups/public/--->

providing the minimum services will be the only ones prohibited from striking. The other workers engaged in the wider essential service are then allowed to exercise their right to strike without occasioning great harm to the consumers of the services offered.

The two parties, employer and employees, have to negotiate and conclude a minimum services agreement through which these terms and conditions are agreed upon. This agreement is a collective agreement which provides for the maintenance of minimum services in an essential service as a prerequisite to the exercise of the right to strike by the workers.<sup>48</sup> The use of Minimum Services agreements for workers in essential services is an approach which Kenya can borrow from South Africa.

#### **V Minimum Services Agreements: The South African Approach**

South Africa is one of the few African countries which provides for minimum services agreements as part of its labour law to ameliorate the limitation of the right to strike for workers in essential services.<sup>49</sup> Its Labour Relations Act provides for the entering of minimum services agreements between the workers and their employers in essential services. Minimum services, though previously not defined in the principal Act, may be inferred to refer to services which are adequate to ensure that during an industrial action, no harm is occasioned to one's life, personal safety or health. The South Africa's Labour Relations Amendment Bill of 2017 proposed a definition<sup>50</sup> to the extent that a 'ratified minimum service' or a 'determined minimum service' should mean the minimum number of employees in a designated essential service who may not strike in order to ensure that the life, personal safety or health of the whole or part of the population is not

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*ed\_norm/--normes/documents/publication/wcms\_087987.pdf*. accessed on 25 September 2018.

<sup>48</sup> Labour Relations Act of South Africa 1995 s. 72.

<sup>49</sup> A Jacobs, 'The Law of Strikes and Lock-outs' in R Blainpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2010) (44-46).

<sup>50</sup> Hogan Lovells Publications, Employment News Letter 'Change is as good as the 2017 LRA Amendments' available at <https://www.hogan.lovells.com/en/publications/the-2017-lra-amendments>, accessed on 3 October 2018.

endangered.<sup>51</sup> What constitutes a minimum service varies from each sector and is a matter which requires the consent of both parties. The minimum services agreed upon are to be regarded as the essential service by the employer and employee.<sup>52</sup>

Through a minimum service system, the Government can ensure that the consumers' basic needs are met and facilities continue to operate without disruption.<sup>53</sup> A service must meet a two-fold criteria to be considered as minimum. First, it should 'genuinely and exclusively be a minimum service'<sup>54</sup> This means that it must be restricted to functions which are necessary to meet the basic needs of the public at large. Secondly, the employees' organization should be part and parcel of the defining process as to what constitutes minimum services as their bargaining power has already been limited.<sup>55</sup>

In a minimum services agreement, the parties should take into account factors such as the instances in which the service can be interrupted without grave danger to the life, health or personal safety of people, the duration of striking by workers in the service, which parts of the service should be considered as basic and minimum to require their provision during a strike, the categories of workers who should provide the minimum services and the number of these employees.<sup>56</sup>

Where there is contention as to what constitutes a minimum service in any essential employment, such a dispute should be settled by an independent body. The minimum services agreement can therefore be regarded as a tool to balance the right of essential workers to strike and the right of the

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<sup>51</sup> South Africa's Labour Relations Amendment Bill 2017 available at <https://www.parliament.gov.za/storage/app/media/Docs/bill/927d3cbc-ec26-4a68-82f3-438b6d815fd3.pdf>, accessed on 3 October 2018.

<sup>52</sup> Labour Relations Act of South Africa, 1995 s. 72 (a).

<sup>53</sup> ILO: Freedom of Association and Collective Bargaining (General Survey by the Committee of Experts on the Application of Conventions and Recommendations), International Labour Conference, 81<sup>st</sup> Session, 1994, Report III (Part 4B).

<sup>54</sup> *Ibid.*, (162).

<sup>55</sup> *Ibid.*

<sup>56</sup> Dhaya Pillay, *Essential Services: Developing Tools for Minimum Service Agreements*, ILJ (2012) 801.



consumers at large to access the essential services. It serves as an alternative or a compromise as it were to the exercise of the right to strike by this particular group of workers. This mechanism meets the threshold of a less restrictive means to achieve the purpose of limiting the right to strike of workers' in essential services.

## **VI Recommendations: Lessons Kenya can Borrow from South Africa**

The Kenyan approach to the extent of limiting the right to strike for workers in essential services differs from that of South Africa. Kenya's Labour law provides for an absolute prohibition of this right for those engaged in a service determined to be essential.<sup>57</sup> This is different from the South African context where workers in essential services may still exercise their right to strike on condition of a ratification of a minimum services agreement with their employers.<sup>58</sup> Kenya does not envision this exception in its legal framework for labour.

The absolute prohibition, apart from being an unnecessary infringement of the workers' right to strike, has not deterred Kenyan workers in essential services from downing their tools. Kenya has most recently and in the past experienced protracted strikes particularly in its health sector which is an essential service.<sup>59</sup> In this regard, South Africa is a step ahead of Kenya in ensuring there is a balance between the right to strike and the need to avail essential services for the protection of the life, personal safety and health of the public. An absolute prohibition of the workers' right to strike as in the Kenyan context only fuels the frustration levels of these workers particularly where there are inadequate mechanisms for redressing the disputes which may arise in their employment relationship.

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<sup>57</sup> S. 81 (3) of Kenya's Labour Relations Act states that 'There shall be no strike or lock-out in an essential service.'

<sup>58</sup> Lovemore Madhuku, *The Right to Strike in Southern Africa*, Int'l Lab. Rev. (1997) 509.

<sup>59</sup> Nasibo Kabale 'Doctors' Strikes cripples services at Kenya National Hospital' available at <https://www.standardmedia.co.ke/article/2001275767/doctors-strike-cripples-services-at-kenyatta-national-hospital>, accessed on 5 October 2018.

Kenya should consider adopting the South African system of concluding minimum services agreements between workers and employers in essential services. This move should be informed by the pivotal role that the right of workers to strike plays in labour law and the need to ensure its accessibility to most if not all workers in essential services.

Kenya through its legislature should put in place a comprehensive legal and policy framework that will address the state of workers in essential services and secure their rights.

The Labour Relations Act should also be modified to ensure its alignment with the Constitution. Its absolute prohibition of the right to strike for workers in essential services goes against the constitutional right to strike as was noted in *Okiya Omtatah Okoiti v AG & 5 Others*. The provision should be considered null and void to the extent of its inconsistency.<sup>60</sup>

In Kenya, the process of designating a service as essential legally is not as comprehensive and inclusive of all relevant stakeholders as is the case in South Africa. This mandate in Kenya is left to the Minister who must only consult with the National Labour Board. The employers or employees in the services which may be proposed as essential are not involved in the process. However in South Africa, the body obligated with this designation is required to consult widely and all relevant stakeholders including the public in general can participate in the process.

The Essential Services Committee which is created under South Africa's Labour Relations Act, is tasked with the determination as to whether any other service should be categorized as essential.<sup>61</sup> The committee in carrying out this function must give a notice in the *Government Gazette* of any investigations it undertakes as to whether a part or the whole of a service is essential.<sup>62</sup> The notice should include the specific service which is to be

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<sup>60</sup> Constitution of Kenya, 2010 Article 2 (4)

<sup>61</sup> Labour Relations Act of South Africa 1995.

<sup>62</sup> *Ibid*, s 71 (1).

subject of the investigation and invite interested parties within a specified period to make written or oral representations before the committee.<sup>63</sup>

The interested parties are granted opportunity to inspect the written representations which have been submitted and are to be provided with a certified copy of these representations upon payment of the required fee.<sup>64</sup> The committee must consider the written and oral representations of the parties and thereafter determine whether the part or whole of the service should be designated as essential.<sup>65</sup> A notice of any such designation must then be published in the *Government Gazette*.<sup>66</sup>

## VII Conclusion

Kenya acknowledges the significance of the right to strike as is evident by the inclusion of this right in its bill of rights. However, the absolute prohibition of this right for workers in essential services needs to be addressed. It is possible to have a balance between the need to ensure availability of essential services and the need to protect the right to strike for workers in the essential services. The adoption of the minimum services agreements is the mechanism through which this balance can be met and the right to strike for workers' in essential services in Kenya revived.

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<sup>63</sup> Ibid, s 71 (2).

<sup>64</sup> Ibid, s 71 (3) and (4).

<sup>65</sup> Ibid, s 71 (7).

<sup>66</sup> Ibid, s 71 (8).

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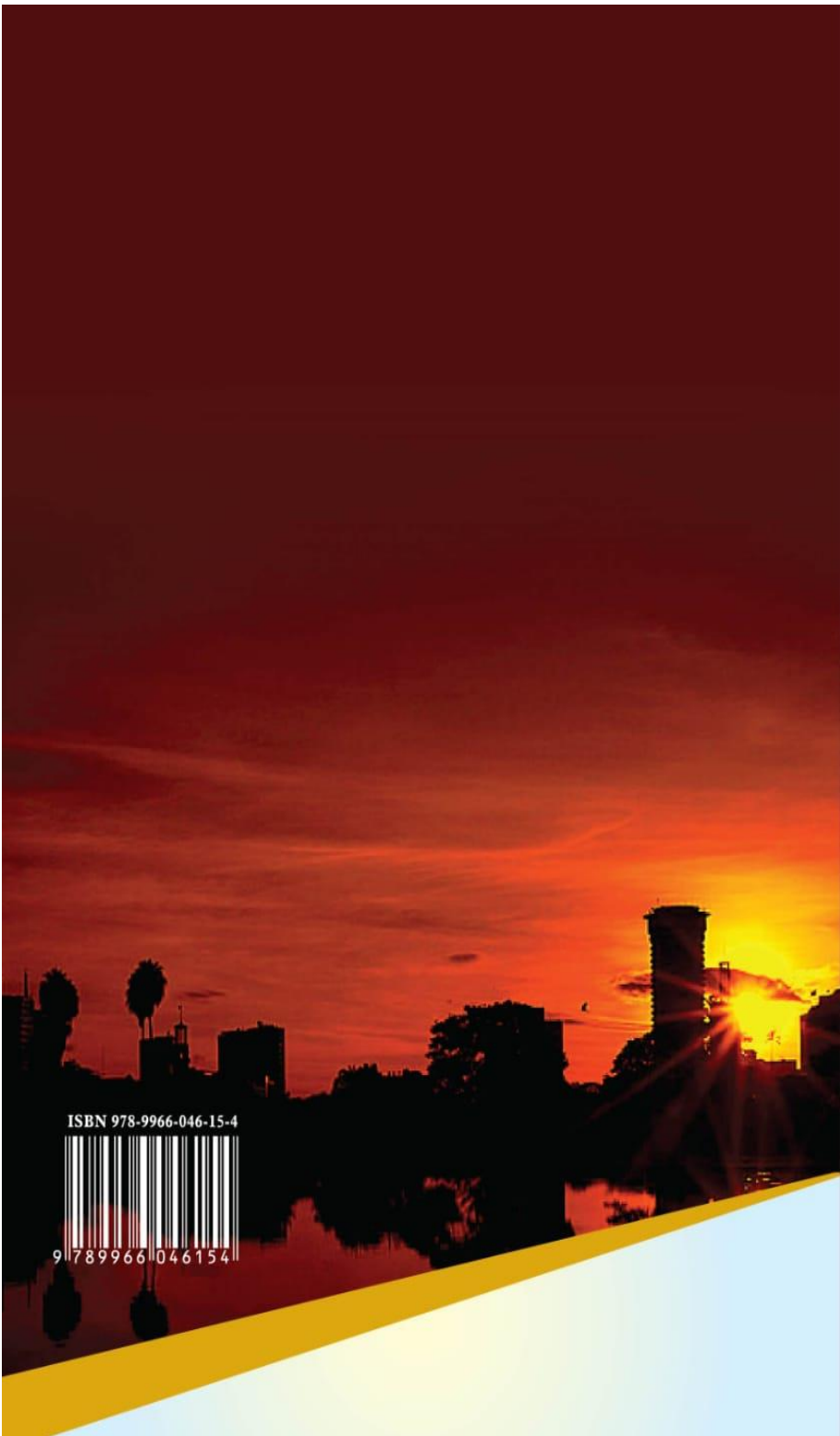
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