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The Delicate Balance: Exploring the Interplay Between the Right to Healthcare Services and the Right to Strike for Medical Practitioners in Kenya

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Abstract

The right to strike of medical practitioners under the Constitution of Kenya (2010), is the best tool that an employee has against non-performance by an employer, given that both parties have varying bargaining powers. There exists an endemic nexus between the right to healthcare services guaranteed by the Constitution of Kenya, the right to health as well as the right to strike for healthcare practitioners. This delicate relationship between these competing rights necessitates a harmonious balance between them that will achieve the greatest good. This article analyses the concept of essential services and the rights and limitations of those rights that medical practitioners have as essential service providers. It looks at how the Kenyan courts as well as different jurisdictions have handled the issue altogether, in an attempt to strike a balance between the two conflicting rights. While striking a balance between these two competing rights, the path that will lead to serving the best interest of the public, both in personam and in rem has to be taken not only by the courts and legislature but other relevant stakeholders including the medical practitioners and their employers. The steps taken thus far by the Employment and Labour Relations Court (ELRC) in adopting the concept of minimal service during strikes by medical practitioners, who are essential service providers, are notable but a lot is left to be desired to achieve legal certainty.

Keywords: *Right to Strike, Medical Practitioners, Essential Services, Minimum Service, Utilitarianism.*

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I. Introduction

Striking by medical practitioners has been a perennial issue in Kenya and has affected a majority of the members of the society for the longest time possible.[1] Between 1963-2000, the legacy of colonial biomedicine shaped medical professionalism and tension with a changing state. During the period between 2000-2010, there was a notable rise of corporate medicine as a form of organised resistance to state control where doctors took part in strikes in a bid to resist the move by the state.[2] This applied to situations where physicians formed a corporation to practice medicine.[3] This led to a disruption in the delivery of medical services by doctors, with attempts by doctors to ensure that they self-regulate and are not in any way controlled by the state.

Since 2010, some of the main reasons healthcare practitioners have gone on strike have been underpayment, poor working conditions, lack of medical facilities and understaffing.[4] These have been primarily occasioned by the devolution of healthcare services from the national government to county governments.[5] To buttress this, between 2010 and 2016 Kenya witnessed up to six nationwide strikes and several regional strikes.[6] This was predominantly because a critical part of healthcare provision functions were devolved to the County governments at a point when counties did not have the requisite administrative and economic capacities to handle them.[7] At that point, most of the counties were affected by among others capacity gaps, human resource deficiencies and

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1 Ong'ayo G and Ooko M *et al,* 'Effect of strikes by health workers on mortality between 2010 and 2016 in Kilifi, Kenya: a population-based cohort analysis' (2019) *7 The LANCET Global Health,* 1. *Available at -<https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(19)30188-3/fulltext>* Last accessed 13 January 2022.

2 Koon A, 'When Doctors Strike: Making Sense of Professional Organizing in Kenya.' 46 (4) *J Health Policy Law,* 2021, 1. Available at <https://doi.org/10.1215/03616878-8970867> last accessed 8 May 2023.

3 Online Black's Law Dictionary, 'CORPORATE MEDICINE Definition & Meaning - Black's Law Dictionary' (*The Law Dictionary*, 28 March 2013) <https://thelawdictionary.org/corporate-medicine/> accessed 8 July 2023.

4 Ombok S, 'Ethico-legal inquiry into strike action by doctors in Kenya' *Master of Science in Medicine: Bioethics and Health Law at the University of the Witwatersrand*, 2017, 15.

5 Tsofa B, Goodman C, Gilson L and Molyneux S, 'Devolution and its effects on health workforce and commodities management - early implementation experiences in Kilifi County, Kenya.' *16(169) International Journal for Equity in Health,* 2017, 2.

6 Ong'ayo G and Ooko M *et al,* 'Effect of strikes by health workers on mortality between 2010 and 2016 in Kilifi, Kenya: a population-based cohort analysis,' 2.

7 This is due to the fact that, in as much as it was not fully devolved to the County Governments, the health sector was the largest service sector to be devolved under that new governance arrangement. For more, see the Fourth Schedule to the Constitution of Kenya, parts 1 and 2.

financial incapacity.[8] This coupled with a lack of medical supplies and facilities has forced the Kenya National Union of Nurses (KNUN) to take the view that health functions should revert to the National Government, as the County governments have proven 'incapable of effectively managing' the sector.[9]

The latest and gravest incident of striking that almost paralysed healthcare services was in 2017, when the doctors engaged in industrial action for one hundred (100) days, followed by the nurses' strike which lasted for one hundred and fifty (150) days. During this period, services in almost all public health institutions were paralysed.[10] The main reason for the nurses' strike was that the government had failed to sign and implement the nurses' collective bargaining agreement (CBA) as had been agreed between the KNUN and the national and county governments in 2016 following a two-weeks' nurses strike.[11] The nurses had gone on strike to push the government to increase their quantum service allowance.[12] Since then, other strikes have been witnessed including during the prolonged Corona Virus Disease (COVID-19) pandemic.[13]

The effect of the strike cannot be overstated, having led to an increase in reported deaths after several patients, especially those who were in critical conditions, were left unattended.[14] This led to an indirect economic impact, forcing a number of patients to access medical services in private hospitals.[15] Several victims of the strikes are those who could not afford medication in private hospitals.[16] The impact of strikes by healthcare service providers thus

8 Kimathi L, 'Challenges of the devolved health sector in Kenya' XLII (2017) *Africa Development,* 55.

9 Mahandra C, 'Nurses now want health services reverted to back to National Government – Kenya News Agency' (22 August 2019). Available at<https://www.kenyanews.go.ke/nurses-now-want-health-services-reverted-to-back-to-national-government/> accessed 13 February 2023.

10 Ong'ayo G and Ooko M *et al,* 'Effect of strikes by health workers on mortality between 2010 and 2016 in Kilifi, Kenya.'

11 Waithaka D and Kagwanja N *et al,* 'Prolonged health worker strikes in Kenya- Perspectives and experiences of frontline health managers and local communities in Kilifi County' 23 *International Journal for Equity in Health,* 2020. Available at https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-020-1131-y, Last accessed 13 January 2022.

12 'KNUN Calls off Strike after Government Increases Nursing Allowances – MINISTRY OF HEALTH' <https://www.health.go.ke/knun-calls-off-strike-after-government-increases-nursing-allowances/> accessed 8 May 2023.

13 Waithaka D, *et al*, 'Prolonged health worker strikes in Kenya-perspectives and experiences of frontline health managers and local communities in Kilifi County' (2020) *19 International journal for equity in health*, 1-15.

14 Ombok S, 'Ethico-legal inquiry into strike action by doctors in Kenya,' 1 and 22.

15 Peralta E, 'The Doctors Aren't In At Kenya's Public Hospitals' *NPR* (5 January 2017) <https://www.npr.org/sections/goatsandsoda/2017/01/05/508369378/the-doctors-arent-in-at-kenyas-public-hospitals> accessed 8 July 2023.

16 Peralta D, 'The Doctors Aren't in At Kenya's Public Hospitals,' (2017). Available at https://www.npr.org/sections/goatsandsoda/2017/01/05/508369378/the-doctors-arent-in-at-kenyas-public-hospitals, Last accessed 9 February 2023.

exacerbated inequalities in terms of access to medical services due to the economic imbalance amongst different members of the community.[17]

This is in sharp contrast with the role and the ethical conduct of medical practitioners, who are at all times supposed to provide healthcare services as a form of their professional service to humanity, with financial and other gains being subordinate considerations.[18] This has been well captured under the Indian Medical Council Conduct Regulations, which state that:[19]

> 'The principal objective of the medical profession is to render service to humanity with full respect for the dignity of profession and man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion.'

Among many other provisions, the Indian Regulations ideally provide for the operational principles of the medical profession. As aforementioned, medical practitioners should always prioritise saving lives and treating patients, without placing primary regard to other secondary considerations.[20] This position is commendable and Kenyan regulations ought to mirror it since the same is not expressly contained in the Kenyan Code of Conduct for medical practitioners. It is worth noting that medical practitioners have often been urged not to be influenced by personal gain or profit when conducting their duties, to always respect human life and a patient's rights, and to provide emergency care as a humanitarian duty.[21]

The Constitution of Kenya (the Constitution) guarantees the right to participate in industrial action, allowing medical practitioners to go on strike within the confines of the law. Article 41 of the Constitution on labour relations states that 'every worker has the right to form, join or participate in the activities

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17 Scanlon M *et al,* "It was hell in the community': a qualitative study of maternal and child health care during health care worker strikes in Kenya' (2021) *Research Square,* 2. Available at -<https://doi.org/10.21203/rs.3.rs-581857/v1>.

18 Markose A, Krishnan R and Ramesh M, 'Medical ethics' *8 Journal of Pharmacy & Bioallied Sciences S1*, 2016, 3. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5074007/> accessed 6 May 2023

19 Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Regulation 1.2.1 (a). Electronic copy is available at https://wbconsumers.gov.in/writereaddata/ACT%20&%20RULES/Relevant%20Act%20&%20Rules/Code%20of%20Medical%20Ethics%20Regulations.pdf., Last accessed 9 February 2023.

20 Markose A. *et al*, 'Medical ethics' (2016).

21 See Dr. Andrew Were's foreward in *Kenya Medical Association President), 'Kenya Medical Association Professional Code of Conduct* (2021), 4. Electronic copy is available at https://kma.co.ke/images/KENYA_MEDICAL_ASSOCIATION_2021_Code_of_Conduct_Final.pdf (accessed 10 July 2023).

and programmes of a trade union, and to go on strike'.[22] Additionally, Article 37 guarantees every person 'the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.'[23]

On the other hand, the Constitution also provides under Article 43 that 'every person has a right to the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare'.[24] It further provides that 'a person shall not be denied emergency medical treatment'.[25] This right is guaranteed to every Kenyan citizen, and the state bears both a positive and a negative obligation in terms of not infringing on this right and providing sufficient recourses to ensure that these rights are fulfilled.[26] In addition to this, the Constitution guarantees everyone the right to life, whose deprivation can only be done in accordance with it.[27] The right to healthcare undoubtedly has a high bearing on the right to life.[28]

The doctors' strike, combined with the state's failure to fulfil its constitutional obligations regarding socio-economic rights, severely impacted the rights of many Kenyan citizens.[29] The state's inability to promptly address the doctors' demands directly affected the right to health, ultimately jeopardizing the right to life for some Kenyans and resulting in loss of lives.[30] It is appropriate to recognise that quality healthcare is a socio-economic right, dependent on the state's resources, particularly in a developing nation like Kenya. In the event that the resources are insufficient, then it is the duty of the State to show that that is the position and show what rights have been prioritised.[31] According to Article 21 (2), the state is obligated to take various measures, including legislative and

22 Article 43 (2) (c) and (d), *Constitution of Kenya* (2010).

23 Article 37, *Constitution of Kenya* (2010).

24 Article 43 (1) (a), *Constitution of Kenya* (2010).

25 Article 43 (2), *Constitution of Kenya,* (2010).

26 Article 43, *Constitution of Kenya,* 2010. See also generally *Mitu-Bell Welfare Society v Attorney General & 2 others* [2013] eKLR, and specifically paragraphs 55 and 56.

27 See Article 26 (1) and (3), *Constitution of Kenya,* (2010).

28 The General Comment No. 14 of the right to health under the International Covenant on Economic, Social and Cultural Rights (ICESCR). See also Fairweather M-M and others, 'A Right to Life Implications for Public Health Services' (*Lexology*, 11 June 2019), 4. <https://www.lexology.com/library/detail.aspx?g=913f5b7b-f7c7-4f88-8e36-208f3e1ed496> accessed 7 May 2023.

29 *Okiya Omtatah Okoiti & 2 others v Cabinet Secretary, Ministry of Health & 2 others; Kenya National Commission on Human Rights (Interested Party)* [2020] eKLR, Par. 150.

30 'Patients Dying during Kenyan Doctors' Strike – DW – 12/09/2016' (dw.com) <https://www.dw.com/en/hospitals-in-kenya-deserted-patients-dying-during-ongoing-doctors-strike/a-36698288> accessed 10 July 2023.

31 Article 20 (5), *Constitution of Kenya,* (2010).

policy actions, to realise the socio-economic rights outlined in Article 43.[32] The state, as a duty bearer, should not hinder the realisation of the right to health and must be seen to be actively working towards achieving it. This obligation is anchored on the state's duty to uphold the rights and fundamental freedoms in the Bill of Rights.[33] This duty not only requires the state to actively fulfil these rights but also forbids it from taking actions that undermine their enjoyment.[34]

The two rights – to healthcare which has a bearing on the right to life, and the right to strike – may thus conflict, with both rights enjoying constitutional protection. The courts as the arbiter of disputes have an important role to play in resolving such controversies and ensuring that there is harmony and the enjoyment of all the rights and guarantees of the constitution by everyone without any form of interference.[35] This paper posits that the Employment and Labour Relations Court has so far done a commendable job as far as resolving this conflict is concerned. By directing hospitals and doctors to retain a minimum service, the courts have to a larger extent offered guidance that will aid in resolving the conflict between *inter alia* these two conflicting rights and interests. The challenge that persists is however with the enactment of the Kenyan laws including the Labour Relations Act (LRA) to feature this, and coming up with a standardised procedure for establishing the minimum service threshold required for every hospital.

This paper contains six main sections. The next section is a theoretical framework, discussing utilitarianism theory and its relevance in addressing the issue of strikes by medical practitioners. The third and the fourth sections discuss the right to strike by medical practitioners as an employee's bargaining tool and as a fundamental human right and its limitations respectively. The fourth section mainly delves into the limitation of strikes by medical practitioners within their context as essential service providers, mainly looking at the jurisprudence from the Kenyan courts. The fifth section is a comparative study primarily looking into what has been done in India and in South Africa. The sixth and the seventh sections contain the recommendations and the conclusion respectively.

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32 Article 21 (2), *Constitution of Kenya,* (2010).

33 Article 21 (1), *Constitution of Kenya,* (2010).

34 *Mitu-Bell Welfare Society v Attorney General & 2 others*[2013] eKLR, par. 56.

35 Hon. Mr. Justice Alnashir Visram, 'Role and responsibility of the courts under the constitution of Kenya,' 2010, 7. Available at <http://kenyalaw.org/kl/index.php?id=1935> accessed 8 May 2023.

II. Theoretical Framework - Utilitarianism

The theory of utilitarianism was postulated by Jeremy Bentham and John Stuart Mill and requires that every act has to be for the general good of the society, and that the greatest happiness of the greatest number of people was the true goal of the society.[36] This is a welfarist theory and can be used to rank social alternatives based on their goodness. This theory will therefore rank y as better than x if the utility of y is greater than that of x.[37] This therefore presupposes that, in the case of the medical practitioners, they need to always and constantly pursue that which is good and beneficial to the general public as opposed to what is beneficial to them at the expense of the patients they have a responsibility towards.

Like utilitarianism, one of the goals of public health is to maximise the existence of a good, namely population health. The health policies implemented by a state initially attempt to achieve an effect at the population level rather than the individual level.[38] As a result, public health sometimes necessitates treatments that have a negative impact on some individuals while improving the overall health of the population. Thus, public health interventions are evaluated, at least in part, on the basis of the gains and losses they entail for population health.[39] As in utilitarian theory, repercussions are given significant consideration in this sector. Sometimes it appears that more attention is placed on the effects of a given act or intervention. At times, it appears that more attention is placed on the repercussions of the guidelines, rules of behaviour, or professional standards that will apply to a wide range of instances.

Utilitarianism can support the promotion and protection of a common or social good even when it means infringing on specific individual preferences or moral 'rights'.[40] Thus, a good example is utilitarianism may morally allow the recent events witnessed in Kenya in light of the COVID 19 pandemic. The forced quarantine of people that came into direct or indirect contact with the virus, the limitation of movement within counties as well as the exclusion of

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36 Curzon B, *Jurisprudence,* 2nd ed, 1995, 60. See also Wambui K, 'A critical analysis of the right to strike in Kenya,' 17.

37 Blackorby C, Bossert W, Donaldson D. 'Utilitarianism and the theory of justice. Handbook of social choice and welfare.' 2002 Jan 1;1:543-96.,1-2.

38 Nixon S and Forman L, 'Exploring synergies between human rights and public health ethics: A whole greater than the sum of its parts' 8(2) *BMC International Health and Human Rights*, 2008, 6.

39 Nixon S and Forman L, 'Exploring synergies between human rights and public health ethics: A whole greater than the sum of its parts', 6.

40 National Collaborating Centre for Healthy Public Policy, *Utilitarianism in Public Health*, January 2016, 4.

people who did not want to be vaccinated are all examples of maximising utility of a safer society while limiting some personal freedoms. Depending on one's point of view, this feature of utilitarianism can be viewed as a strength if one believes that the common good must sometimes supersede the individual's 'right' to autonomy or privacy. Conversely, it may be seen as a weakness if one believes that individuals should be better protected from constraints imposed on them in the name of the common good. For the purposes of this article, the strength of the former argument will be considered over the latter.

It is worth noting that while the principle of evaluating the different options that provide the most utility may be simple, implementation can prove a challenge. Indeed, to compute utility, one must identify, quantify, and evaluate the impacts of actions or laws on different goods that can differ substantially.[41] Added to the problems of comparing different goods are those of comparing different people, who may react differently to the same good or bad. The complexity of the utility deduction becomes apparent when comparing and analysing policy options that affect numerous individuals and touch on several aspects of their lives.

Whereas the medical practitioners deserve a pay rise which in most instances is the reason for going on strike, that has to be balanced against what good or bad the strikes occasion on the lives of the members of the community. This in effect will mean that they need to only go for strike as an option of the last resort. Being a consequentialist theory, the actions of medical practitioners should always be weighed against the consequences of the same. From a utilitarian view, therefore, medical practitioners' strike leads to more damage than good to the members of the community, since it has far-reaching consequences on their health and lives including leading to deaths. Most of the hospitals and health systems have been unable to effectively deal with these consequences and have been so costly with the aim of these strikes mainly being pay-rise not being achieved.[42]

However, utilitarianism has faced criticism for being too simplistic. For example, utilitarianism has frequently been chastised for disregarding the issue of what constitutes an equitable or fair distribution of what is good for all.[43] The conclusion that produces the most overall good may be distinct from the outcome whose distribution of goodness is most equitable or fair. The beneficence principle must therefore be evaluated against the justice principle.

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41 Daniels N, 'Equity and population health: Toward a broader bioethics agenda' in Dawson A, *Public Health Ethics: Key concepts and Issues in Policy and Practice,* Cambridge University Press, New York, 2011, 194.

42 Munyaradzi Mawere *et al*, 'Are physicians' strikes ever morally justifiable? A call for a return to tradition' (2010) 6 *Pan African Medical Journal,* 8.

43 Savulescu J, Persson I, Wilkinson D, 'Utilitarianism and the pandemic' 34(1) *Bioethics*, 2020, 621.

This will most certainly have to be done intuitively. The debate about what is just or fair i.e getting what is deserved or in more equal shares is a debate that would stretch the confines of this paper. The article will confine itself to the greatest good for those affected by medical strikes in order not to muddle the lines further. For the time being, however, it is necessary to stress that a utilitarian approach can justify taking action in circumstances where a 'minor' infringement of individual interests would result in considerable improvements in utility at the community level, among other things.[44]

It is the positive features outlined in the above discussion, along with utilitarianism's intuitiveness, that most likely explain the utilitarian perspective's appeal to public health actors and legislators.

III. Strike as an Employee Bargaining Tool and as a Fundamental Human Right

i. Strike as an employee's arsenal against employers' non-performance

The concept of a strike, as defined by both the Black's Law Dictionary[45] and the Employment Act[46] of Kenya, refers to employees collectively quitting their work to pressure their employer into meeting certain demands related to a trade dispute. This definition underscores the significant role strikes play in enabling employees to take action against their employers. This perspective aligns with a decision from the South African Court, *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto and Another*.[47] In this case, the court emphasised that the South African Constitution protects the right to strike, recognising the inherent imbalances in power between employers and employees.[48] Given the considerable power employers wield over individual workers, the right to strike serves as a tool for addressing this disparity in social and economic influence, ultimately aiming to level the playing field within these employment relationships.[49]

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44 Beauchamp T and Childress J, *Principles of biomedical ethics*, 4th ed, Oxford University Press, New York, 1994,

45 Campbell H., *Black's Law Dictionary* (4th Edn: West Publishing Co., 1951),1591.

46 Section 2, *Employment Act* (2007).

47 *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* (CCT128/11) [2012] ZACC 19, paras 56, 57 and 61.

48 *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another*, paras 56, 57 and 61.

49 *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* paras 56, 57 and 61.

Practically, there is an imbalance between an employer and an employee, which serves as the basis upon which strikes came to be.[50] Strikes are one of the best tools used by employees to advance their interests against their employers. The employers often have huge financial muscle, whilst the strength of the employees lie in their collectivism.[51] The primary objective of a strike is to halt an employer's operations until the employees' demands are satisfied.[52] Workers understand that their labour is vital for a company's productivity, and a strike disrupts work, resulting in reduced output, which adversely affects the company's viability.[53] This idea is rooted in the concept that an employee's main responsibility is to work, while an employer's primary duty is to compensate the employee as agreed upon. Ideally, these are reciprocal obligations.[54]

The right to strike is not an end in itself but a means to an end in that it serves as a means for employees to assert their position during collective bargaining. In other words, it is the sharp end of the stick of collective bargaining for the employees.[55] When an employer refuses to meet an employee's demands, one of the actions employees can take is to halt operations. This action hits the employer where it hurts the most- the company's finances. Consequently, no employer wishes to be in such a predicament, making it a powerful force that often compels employers to engage in negotiations.[56]

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50 Brand J, 'Strikes in essential services' paper presented to the South African Society for Labor Law (SASLAW) (2010) Available at -<http://www.saslaw.org.za/papers/Strikes%20in%20Essential%20Services.doc, last accessed 13 January 2022.

51 Manamela E & Budeli M, 'Employees' right to strike and violence in South Africa' 46 *CILSA*, 2013, 308.

52 Landman A, 'Protected industrial action and immunity from the consequences of economic duress' 22 *International Law Journal,* 2001, 1509.

53 Wambui K, 'A critical analysis of the right to strike in Kenya; the balancing act between the constitutional right to strike and the constitutional right to economic social rights' Published LLB dissertation Riara University School of law, 2018, 10.

54 *Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty)Limited,* Constitutional Court of South Africa, para 58.

55 *Re Certification of the Constitution of the Republic of South Africa 1996* (4) SA 744 (CC), Constitutional Court of South Africa. See also Joshua Malidzo Nyawa, 'Is the right to strike under a threat? : the ply of injunctions to pulverize teacher strikes in Kenya' (2019) ,6. Available at -<https://ssrn.com/abstract=3356249>, last assessed 11 January 2022.

56 McCrystal, Shae, 'Smothering the Right to Strike: Work Choices and Industrial Action. Australian Journal of Labour Law,' Vol. 19 (2), pp. 198-209, 2006, Sydney Law School Research Paper No. 08/03, 2. Available at SSRN: https://ssrn.com/abstract=1079885. See also 'Bargaining Impasses: Strikes, Lockouts & Other Consequences - Video & Lesson Transcript' (study.com) <https://study.com/academy/lesson/bargaining-impasses-strikes-lockouts-other-consequences.html> accessed 8 May 2023.

Strikes in the medical field are rather significantly different from those in traditional manufacturing sectors, which typically aim to disrupt production, resulting in financial losses for companies, and represent labour's potent tool against capital.[57] Such strikes primarily result in economic losses due to reduced or halted production, often stemming from work slowdowns or employee indifference, as well as damage to a company's reputation.[58]

In contrast, medical field strikes, while motivated by similar reasons, have a direct impact on public health, affecting the physical, emotional, and psychological well-being of individuals. In severe cases, these strikes can lead to deaths, permanent disabilities from the loss of body parts, or even damage to vital organs, surpassing the financial losses incurred by any entity. Unlike traditional strikes where losses can be recovered, the consequences of medical field strikes are irreversible. Once a life, limb, or any part of the body is lost due to a lack of medical attention, it cannot be restored.[59] However, these strikes prompt employers to respond promptly and address employees' demands. When doctors go on strike, patients are the ones who suffer the most, compelling the government to take action and meet the doctors' demands.[60] These strikes unavoidably expose patients to serious harm.[61]

Following from the utilitarianism theory,[62] this poses a challenge not only to the government but also to the entire community as medical practitioners' strikes have far-reaching consequences that cause great harm to the community instead of promoting the common good. Consequently, it becomes an ongoing responsibility for the government, hospitals, and medical practitioners to consistently find a balance. They must ensure that decisions regarding medical practitioners' strikes ultimately serve the common good of society. Given that doctors are held to higher ethical standards and healthcare is a collective responsibility of the state, healthcare institutions, doctors, and all other stakeholders are expected to prioritise actions that maximise the greater good for doctors and society as a whole. The challenge then lies in finding this balance to

57 Zeleza T, 'The strike movement in colonial Kenya: the era of the general strikes' 22 *Trans African Journal of History,* 1993, 2.

58 McHugh R., 'Productivity Effects of Strikes in Struck and Nonstruck Industries' 44 (4), 1991, 1-2. Available at https://www.jstor.org/stable/2524459.

59 See *S Raju v The Government of Andhra Pradesh* (2004) 2 ALT 2.

60 Gathongo J. and Ndimurwimo L., 'Strikes in Essential Services in Kenya: The Doctors, Nurses and Clinical Officers' Strikes Revisited and Lessons from South Africa' PER / PELJ 2020(23) – DOI http://dx.doi.org/10.17159/1727- 3781/2020/v23i0a5709.

61 Metcalfe D, Chowdhury R and Salim A, 'What are the consequences when doctors strike?' *British Medical Journal Clinical Research Paper*, 2015, 2.

62 Curzon B, *Jurisprudence,* 1995, 60.

ensure that society enjoys the right to health, doctors receive fair compensation, and medical practitioners can assert their rights without harming patients when their demands are not met.

ii. Strike as a fundamental human right

Strike is a fundamental human right recognised by progressive democracies,[63] distinguishing employment from slavery.[64] It is recognised in international law and municipal laws, subject to relevant limitations. Article 20 of the Universal Declaration of Human Rights (UDHR) grants individuals the right to freely form associations and not be forced to participate.[65] Article 29 of the UDHR limits the right to strike, stating that the exercise of one's rights and liberties are subject to legally formulated restrictions regarding the rights and liberties of third parties and the just demands of morality, public order, and public welfare in a democratic society.[66]

The International Labour Organization (ILO) has recognised the right to strike as part of the right to freedom of association.[67] The ILO's Committee on Freedom of Association acknowledges the right to strike as a means for employees and employers to promote and defend their economic and social interests,[68] including better working conditions and socio-economic needs.[69] The ILO however imposes limitations on the right to strike in the context of public services,[70] limiting it in essential services if it could cause serious hardship to the national community. The ILO committee defines essential services as those whose interruption can endanger the life, personal safety, or health of the population. Measures are also required to ensure minimal provision of services to avoid danger to public health and safety.[71]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) has recognised the right to strike,[72] with the International Covenant

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63 Metcalfe D et al, 'What are the consequences when doctors strike?' 2.

64 *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT14/02) [2002] ZACC 30, Constitutional Court of South Africa.

65 Article 20, *Universal Declaration of Human Rights* (UDHR), 1948.

66 Article 29, Universal Declaration of Human Rights (UDHR), 1948.

67 Janice B, 'The ILO and the right to strike' 153 *International Labour Review*, 2014, 29-70.

68 ILO, *Freedom of Association,* para 522.

69 ILO, *Freedom of Association*, para 526.

70 Digest of decisions and principles of the Freedom of Association Committee of the Governing Council of the ILO, 1996, Para 533. See also the fifth edition of the digest, 2006, Para 561 and 573.

71 ILO, *Freedom of Association,* para 573.

72 Article 8 (1) (d) of the *ICESCR* provides that 'the State Parties to the present Covenant undertake

on Civil and Political Rights (ICCPR) recognising the right to freedom of association[73] through forming and joining trade unions which are inextricably linked to strikes. The right to strike as a human right has thus been recognised in different forms both in international law and in various municipal laws.

The adoption of the Constitution in 2010 came with a guarantee of more protection of individual rights as enshrined in the Bill of Rights.[74] The drafters of the Constitution from the beginning intended to include a comprehensive Bill of Rights and an array of protections and freedoms, in line with the international Bill of Rights.[75] Medical practitioners have a constitutional right to fair labour practices.[76] Alongside that, the Constitution provides the medical practitioners with an array of rights, which include the right to fair remuneration, reasonable working conditions, to form, join or participate in the activities and programmes of a trade union, and to go on strike.[77]

Article 20 of the Constitution provides that no person may be denied the enjoyment of these fundamental rights and freedoms.[78] Article 21 additionally provides that the state and every state organ is strictly bound by the Constitution to observe, respect, protect, promote and fulfil all the rights and fundamental freedoms in the Bill of Rights, including the right to strike.[79] Furthermore, these rights and fundamental freedoms shall not be limited except by law, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors.[80] Thus, these rights and fundamental freedoms can be limited, but such a limitation has to be in accordance with the Constitution. The limitation of the right to strike is internationally recognised, including by the international human rights instruments which have been ratified by Kenya.[81]

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to ensure: (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country.'

73 Article 22 (1) of the *ICCPR* provides that 'everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.'

74 Chapter 4, *Constitution of Kenya* (2010).

75 Mutua M, *Kenya's quest for democracy: taming leviathan*, 2008, 168.

76 Article 41 (1), *Constitution of Kenya (*2010).

77 *The Constitution of Kenya, 2010,* Article 41 (2) (a)-(d).

78 Article 20 (2), *Constitution of Kenya* (2010).

79 Article 21 (1), *Constitution of Kenya* (2010).

80 *The Constitution of Kenya, 2010,* Article 24 (1).

81 See for example Article 8 (1) (d), *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1976 and Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR), 1976.

IV. Limitation of the Right of Medical Practitioners to Strike: Medical Services as Essential Services

i. The Kenyan position

The Constitution provides for the right to strike of every worker in Kenya.[82] It also entitles every worker to a right to reasonable working conditions,[83] and to form, join or participate in the activities of a trade union.[84] The Constitution only permits the limitation of the right to strike by the law, and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors.[85]

The right to strike is also provided for under the LRA of 2007. Just like the ILO and other international instruments, the Act provides for the right to strike, subjecting it to several limitations. The main reason limiting the strike by the medical practitioners under the LRA is the nature of the services they render, which are classified as essential services.[86] This is of particular import to the paper, more than the other limitations. On essential services, the Act prohibits participation in strikes if the employer and the employee are engaged in essential services.[87] The LRA defines an essential service 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'.[88] Section 81 (3) of the LRA expressly provides that 'there shall be no strike or lock-out in an essential service.'[89] Further, the LRA lists hospital services as essential services.[90]

Under the LRA, trade disputes are to be resolved by way of conciliation, with the Minister in the respective trade having a central role in the dispute resolution process.[91] If a dispute cannot be resolved by conciliation, it can be referred to the industrial court by a dissatisfied party in the case of any dispute.[92] For a dispute

82 Article 41 (2) (d), *Constitution of Kenya* (2010).

83 Article 41 (2) (b), *Constitution of Kenya* (2010).

84 Article 41 (2) (c), *Constitution of Kenya* (2010).

85 Article 24 (1), *Constitution of Kenya* (2010).

86 Sections 78 (1) (f) and 81(4), *Labour Relations Act (*2007).

87 Section 78 (1) (f), *Labour Relations Act (*2007).

88 Section 81 (1), *Labour Relations Act (*2007).

89 Section 81(3), *Labour Relations Act* (2007).

90 The Fourth Schedule, *Labour Relations Act (*2007). Section 81 (4) of the Act requires that any dispute on essential services may be adjudicated upon by the Industrial Court.

91 Sections 66-73, *Labour Relations Act (*2007).

92 Section 73 (1), *Labour Relations Act (*2007).

in essential services, however, it may also be referred to the industrial court by the minister.[93] This presupposes that when it comes to essential services, strikes can be reasonably restricted by law until all procedures available for negotiation, conciliation and arbitration have been exhausted.[94] Such a restriction ought to be duly accompanied by adequate, speedy and impartial conciliation and arbitration whereby the concerned parties can take part at every stage.[95] Additionally, any party to a dispute that has received a notice of strike may petition the industrial court to prohibit the strike as a matter of urgency if the strike is prohibited under the LRA, or the party that has issued the notice has failed to participate in the conciliation in good faith to resolve the dispute.[96]

A plain reading of section 78 of the Kenyan LRA shows that the right to strike for essential services is completely prohibited. This seems to be in contradiction with Article 41 of the Constitution, which provides a right to strike for "all workers". The conflicting provisions have seen a spike in the number of strikes since the adoption of the Constitution in 2010. This is because the doctors have constantly interpreted the provisions of Article 41 as granting them absolute rights to strike whereas the employer, the Kenyan government, uses the LRA to limit the right to strike of doctors.[97]

Following this contradiction, the courts have come in handy in providing a way of balancing the two competing rights in a way that and in effect partly addressing the conflict between the two laws.

ii. Jurisprudence from the Kenyan Employment and Labour Relations Court

The Employment and Labour Relations Court has played an important role in providing a way to harmonise the two conflicting provisions on the right to strike for medical service providers. It has aided in balancing the rights between the employer and the employee, allowing the doctors to legally go on strike provided

93 Section 73 (2), Labour *Relations Act (*2007).

94 Digest of decisions and principles of the Freedom of Association Committee of the Governing Council of the ILO, para 551.

95 Digest of decisions and principles of the Freedom of Association Committee of the Governing Council of the ILO, para 551.

96 Section 77 (1), *Labour Relations Act (*2007).

97 See generally D J McQuoid-Mason, 'What should doctors and healthcare staff do when industrial action jeopardises the lives and health of patients?' (2018) 108 (8) *South African Medical Journal.* See also Masika M, 'Why Kenya Has Been Unable to End a Two-Month Long Doctors' Strike' (The Conversation, 8 February 2017) <http://theconversation.com/why-kenya-has-been-unable-to-end-a-two-month-long-doctors-strike-72593> accessed 11 July 2023.

that there is a minimum level of services in any medical institution. This has been done by the courts because there is no clear legislation in Kenya that has been enacted to provide for the parameters of strikes by medical practitioners, save for the Kenyan *LRA* of 2007 which bars medical practitioners from engaging in strikes. The courts, as will be seen in this section, have had to step in and seal the loophole that the legislature has created by failing to enact a legislation that expressly provides for the mechanisms to be followed in ensuring that any matter between the medical practitioners and the government is amicably resolved. This is to ensure that the rights of individuals to healthcare, especially those in critical conditions are not jeopardised. This is commendable and is worth encouraging since it will serve the interests of the doctors, patients and the government.

The following are some of the notable judicial pronouncements illustrating how the Employment and Labour Relations Court has balanced the constitutional right to healthcare services, the right to strike, and the harmonisation of the conflicting provisions.

a. Okiya Omtatah Okoiti v Attorney General & 5 others [2015] eKLR

This Petition was filed in 2014 to stop the doctors and nurses from striking, given the adverse health effects that it has had and was going to have on the general public. Among the issues to be determined by the court was whether Section 81(3) of the LRA which prohibits strikes or lockouts in essential services is sufficient for limiting the enjoyment of rights as provided in Article 24 (1-3), and whether a declaration should be issued that there is need for a comprehensive policy and legal framework for the amicable resolution of labour disputes in essential services, including in health.[98]

Having analysed the constitutional provisions on the right to strike and the limitations under Article 24 of the Constitution, the court held that the prohibition of strikes in essential services prohibited under Section 78 (1) (f) and Section 81 (3) of the LRA derogate from the core content of the right to strike provided under Article 41 (2) (d) of the Constitution and that the legislature should revisit the law with a view to remove the apparent conflict between the constitutional provision and the statutory law.[99]

[98] *Okiya Omtatah Okoiti v Attorney General & 5 others* [2015] eKLR, para 34.

[99] *Okiya Omtatah Okoiti v Attorney General & 5 others* [2015] eKLR, paras 58 and 59.

b. County Government of Kakamega & another v Kenya National Union of Nurses & another [2017] eKLR

In this matter, the County Government of Kakamega and the county public service board sought a temporary injunction to prevent health workers from participating in activities or meetings in preparation for a strike. The court emphasised the importance of internal dispute resolution mechanisms under the 2007 Labour Relations Act (LRA) and required parties to engage in conciliation before seeking court intervention. The court ruled that parties negotiating in essential services should take advantage of section 78(1)(a) and (b) of the LRA to manage deadlocks during collective bargaining, protecting public interests and ensuring employee rights.[100] The court applied the utilitarianism theory as postulated by Jeremy Bentham and John Stuart Mill as discussed above, considering the best interests of all community members over personal interests. The court also addressed the controversy between the Constitution and the LRA, stating that the limitation of the right to strike under Section 81 of the Labour Relations Act is justifiable under Article 24 of the Kenyan Constitution.[101]

c. Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another [2021] eKLR

The petition sought to determine the right of doctors to take industrial action alongside the right to life and quality healthcare for the public. The court referenced the *Okiya Omtatah Okoiti v The Attorney General*[102] case and the *Eskom Holdings Ltd v National Union of Mineworkers and Others*[103] case to determine the concept of 'minimum service'. The court emphasised that the right to life is greater than the right to picket and go on strikes and that not all workers in essential service industries should be restrained from striking to maintain acceptable service levels.[104]

The court, while referring to the *National Union of Mineworkers v Essential Services Committee and Others*[105] defined a 'minimum service' as one that is sufficient

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100 *County Government of Kakamega & another v Kenya National Union of Nurses & another* [2017] eKLR.

101 *Kenya Ferry Services Limited V Dock Workers Union (Ferry Branch* [2015] eKLR.

102 *Okiya Omtatah Okoiti v The Attorney General & 5 others* [2015] eKLR.

103 *Eskom Holdings Ltd v National Union of Mineworkers and Others* (840/2010) [2011] ZASCA 229; 2012 (2) SA 197 (SCA); [2012] 1 All SA 278 (SCA); [2012] 3 BLLR 254 (SCA); (2011) 32 ILJ 2904 (SCA), Supreme Court of Appeal of South Africa.

104 *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another* [2021] eKLR, para 61.

105 *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists* (2021), para 63. See also *National Union of Mineworkers v Essential Services Committee and Others* (JR 1147/16) [2019] ZALCJHB 82, The Labour Court of South Africa, Johannesburg.

to ensure no person's life, personal safety, or health is endangered during a strike. While holding that there must be a balance to protect all fundamental rights, it then set out the criteria for determining 'minimum service' to include considering employees' constitutional right to participate in industrial action, examining specific critical or necessary services required within an essential services designation, assessing if a service is superfluous or critical to the overall objective, and assessing if interdependent business components are necessary.[106] The court ruled that prohibiting the right to go on strike for medical professionals would derogate from the core of their right to life, which is not what the Constitution contemplates.[107] The court ordered that industrial action by health workers be prohibited unless there is a known and acceptable formula of 'minimum service' retention at every affected health facility.[108] It is however unfortunate that such guidelines have not been developed or the LRA Act been amended to feature this position, which risks more strikes by medical practitioners.

This is a commendable ruling by the Employment and Labour Relations Court, which seeks to balance the two conflicting constitutional rights. This is due to the ambiguity that has existed in law as far as this issue is concerned, especially the 2007 LRA. On the one hand, the doctors will enjoy their constitutional right to go on strike upon ensuring that there is a good level of 'minimum service' retained at a given health facility. On the other hand, the general good of the society will be achieved, since the members of the community will still be able to access essential services and thus preservation of their right to life and quality healthcare despite the ongoing strike. The ruling invalidates the provisions of the 2007 LRA, which seeks to fully prohibit the members of the medical profession from engaging in a strike.

The Employment and Labour Relations Court has thus adopted the position that guarantees the doctors the right to strike while at the same time ensuring that there is a minimum level of services aimed at preserving lives and assisting patients who are in critical conditions. What the Kenyan courts have done is to ensure that there is harmony in the society, and that the constitutional rights of every individual are safeguarded.[109]

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106 *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another* [2021] eKLR, para 63.

107 *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists* (2021), para 66.

108 *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists* (2021), para 68.

109 This is in accordance with its Constitutional roles and powers under Article 23 as read with Article 165 of *The Constitution* (2010).

V. Comparative Study

This part will look at the right to healthcare and the right to strike in two other jurisdictions – India and South Africa, with an aim of borrowing their best practices. The aim of this part is to show the direction that Kenya should take and the one it should not take in as far as resolving the essential service disputes is concerned.

Generally, India and South Africa, just like Kenya, have had endemic issues of strikes by medical practitioners.[110] India has taken the direction that Kenya should not take in as far as the strike by essential service providers is concerned. Notably, as will be discussed in this section, India has not only completely barred strikes by medical practitioners but also other service providers such as legal practitioners who have been classified as essential service providers. As a lesson to heed by Kenya, completely barring medical practitioners from striking has escalated the number of strikes in India. This is evident through the constant strikes being witnessed in India, which can be translated to be an act of retaliation against the government of India's non-performance in meeting the doctors' demands and in restricting the rights of doctors.[111]

India has been experiencing strikes by medical practitioners for the longest time ever, and this has continued up to date. As late as August 2023, up to three thousand junior doctors in Chhattisgarh, India, went on an indefinite strike demanding an increase in their honorarium and the betterment of working conditions in the rural areas.[112] This followed a planned gradual strike from May 1 2023 in Madhya Pradesh State, which was aimed at pressurising the state to restore an older more favourable pension plan.[113] Whereas strikes by medical practitioners in India have been there for a very long time, the period between

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110 Karthikeyan P Kumar V and Raju V, 'Medical doctors in India are on strike: a moral and national conundrum,' *BMJ Postgraduate Medical Journal*, 2020, 1. See also, Bhekisisa Centre For Health Journalism Team, 'Go inside SA's biggest hospital during a national strike' (2022), Available at <https://bhekisisa.org/health-news-south-africa/2022-11-22-go-inside-sas-biggest-hospital-during-a-national-strike/>. Last Accessed 20 February 2023.

111 'Why Are Doctors in India Always on Strike?' (Quora) <https://www.quora.com/Why-are-Doctors-in-India-always-on-strike> accessed 11 July 2023.

112 'Junior Doctors Strike Work Demanding Hike in Honorarium and Reforms in Bond Policy - Times of India' <https://timesofindia.indiatimes.com/education/news/junior-doctors-strike-work-demanding-hike-in-honorarium-and-reforms-in-bond-policy/articleshow/102322566.cms> accessed 30 August 2023.

113 'India: Medical Professionals to Implement Gradual Strike in Madhya Pradesh from May 1' (*India: Medical professionals to implement gradual strike in Madhya Pradesh from May 1 | Crisis24*) <https://crisis24.garda.com/alerts/2023/04/india-medical-professionals-to-implement-gradual-strike-in-madhya-pradesh-from-may-1> accessed 30 August 2023.

2020-2023 has been marked by numerous strikes. Doctors from Hindu Rao Hospital went on an indefinite hunger strike in October 2020,[114] followed by Karnataka doctors who went on strike in July 2020 as a result of delayed salaries for almost sixteen months and also demand a constant monthly pay date. This shows how in one way or another, the tough restrictions against the medical practitioners' strikes in India has, rather than salvaging the situation, escalated it even more.

The author has chosen South Africa since it is more progressive in terms of the resolution of disputes involving medical practitioners. Additionally, just like Kenya, South Africa has a progressive and transformative Constitution which guarantees the protection of fundamental human rights. The South African Labour Relations Act has provided for a progressive mechanism through which medical practitioners and their employers can enter into a collective bargaining agreement on the minimum number of doctors who should be left in a hospital in the event of a strike.

South Africa has been successful in averting strikes and resolving grievances faced by essential service providers by including conciliation and arbitration in their trade dispute resolution systems.[115] During the 2016-2017 reporting period, for example, the Commission for Conciliation Mediation and Arbitration (CCMA) conciliated up to 5013 disputes arising out of collective bargaining and industrial action whereby 3324 (64%) were resolved.[116] Additionally, within the same reporting period, the CCMA successfully resolved 143 out of 173 public interest disputes, recording a success rate of 83%.[117]

i. The right to strike for essential service providers in South Africa

The right to strike in South Africa is protected under Section 23 (2) (c) of the Constitution of the Republic of South Africa.[118] The same is also guaranteed and protected under the South African *Labour Relations Act (SALRA)* of 1995

[114] '5 Hindu Rao Doctors Begin Hunger Strike for Salaries; MCD, Govt Blame Each Other | Delhi News - The Indian Express' <https://indianexpress.com/article/cities/delhi/5-hindu-rao-doctors-begin-hunger-strike-for-salaries-mcd-govt-blame-each-other-6859302/> accessed 30 August 2023.

[115] 'Strengthening Labour Relations to Avert Strikes in the Health Care Sector in Kenya – KIPPRA' <https://kippra.or.ke/strengthening-labour-relations-to-avert-strikes-in-the-health-care-sector-in-kenya/> accessed 9 May 2023.

[116] Barney Jordaan, *Mediation and Conciliation in Collective Labor Conflicts in South Africa* in Martin C. Euwema et *al,* Eds.), *Mediation in Collective Labor Conflicts* (2019), 300.

[117] Barney Jordaan, *Mediation and Conciliation in Collective Labor Conflicts in South Africa* (2019), 300.

[118] Section 23(2)(c), *Constitution of South Africa* (1996).

which also provides for its limited application to essential services.[119] The courts have supported this, such as in *NUMSA v Bader Bop,*[120] where the South African Constitutional Court has emphasised that *'… it is through industrial action that workers can assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system ….'*[121]

Section 65 of the *SALRA* limits strikes in essential services.[122] The Essential Services Committee (ESC) established under Section 70 is tasked with designating a service, or any part of a service as an essential service, after investigating whether or not such a designation should be made. Specialist panels familiar with a particular sector conduct the work of the ESC. Section 213 of the *SALRA* defines an essential service to include:

(i) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;

(ii) the Parliamentary Service; and

(iii) the South African Police Services.

Under Section 74 (1) of the *SALRA,* the employees working in a designated essential service may not strike. However, the *SALRA* makes provisions for other mechanisms that, should they be complied with, allow the essential service providers to legally conduct a strike. Section 74 of the *SALRA* provides that parties in designated essential services may enter into a collective agreement, which intends to regulate the minimum services to be provided by employees in that essential service in the event of a strike. One of the main requirements is that there must be minimum service retained in hospitals before doctors go on strike. Notably, strikes are only to be resorted to once it has been classified that the dispute cannot be resolved through ADR mechanisms.[123]

Thus, workers in a trade union wishing to engage in a strike must make prior arrangements for the provision of minimum-level service.[124] This prevents the need and the move to seek employment of replacement labour and maintain production and the delivery of services during the pendency of a strike.[125] This

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119 Sections 64-65, South Africa *Labour Relations Act,* 1995.

120 *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT14/02) [2002] ZACC 30.

121 Janice B, 'The ILO and the right to strike,' 29-70.

122 See for example Section, which provides that 'no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if- that person is engaged in- (i) an essential service; or (ii) a maintenance service.'

123 See Sections 72 and 74, South African *LRA.*

124 *National Union of Metal Workers of South Africa and Others v Bader Bop* (Pty) Ltd and Another, para 32.

125 Gathongo J and Ndimurwimo L, 'Strikes in essential services in Kenya,' 7.

saves a nation of such moves as have been seen in Kenya where the national government and even the counties fire medical service providers hiring others, and even importing foreign doctors to provide the essential services during a strike.[126]

The provisions that the disputes in essential services in Kenya are to be resolved by the industrial court sharply contrasts with the South African position, which has an elaborate mechanism for resolving disputes in essential services.[127]

Important to note is the fact that, unlike the case in South Africa, Kenyan law does not provide for the provision of minimum services in hospitals whenever doctors resort to going on strike. This then leaves both the doctors and the government in the dark when it comes to the provision of critical services in hospitals. By the time the dispute is resolved in court, patients will have as a result suffered damage. This, viewing it through the utilitarianism theory earlier discussed occasions a greater harm than benefit to not only doctors and the entire government but also the entire community. This then calls for actions to be taken to mitigate the circumstances, in order to ensure that there is a greater benefit and better results of strikes by medical practitioners to all the stakeholders. The following are some of the legislative and technical recommendations that the author believes can help in bettering the situation as far as the strike by medical practitioners in Kenya is concerned.

VI. Recommendations

Borrowing from South Africa, Kenya needs to take progressive steps in addressing the concerns raised by medical practitioners in an amicable way, with an aim of bringing to an end the perennial strikes by medical practitioners. This paper makes among others the following recommendations:

i. Fully embracing of conciliation and other forms of alternative dispute resolution mechanisms

Better than litigation, conciliation works better in resolving disputes between the medical practitioners and the employer. This helps in restoring the relationship between the employer and the employee. In the realisation of the Constitutional spirit in the promotion of ADR, there has to be working conciliation mechanisms in place that will ensure that issues between the medical

126 See for example *Robert Alai Onyango v Cabinet Secretary in charge of Health* [2017] eKLR.

127 Section 74, Republic of South Africa *Labour Relations Act No 66 of* (1995).

practitioners are adequately and swiftly resolved for the good of the general public who stand to suffer every time there is a dispute(s) between the practitioners and the employer. This includes the establishment of the Conciliation and Mediation Commission (CMC) envisaged under section 66(1)(c) of the *2007 LRA,* which if established as an independent body, should be empowered to facilitate such negotiations.[128]

ii. Adoption of the concept of minimal services

Just like the case in South Africa and under ILO, Kenya ought to embrace and fully adopt the concept of minimal services in essential services. There has to be a mechanism in place to ensure that there are a certain number of medical practitioners who will be left to offer critical services to seriously ill patients and stabilise them. The Kenyan LRA of 2007 ought to be amended to provide for the same. Additionally, the Cabinet Secretary for Health ought to develop such policies. This should however be made flexible enough to be able to accommodate different hospitals with their own unique circumstances.

iii. Amendment to the Kenyan Labour Relations Act of 2007

As aforementioned, the Kenyan LRA of 2007 ought to be amended to provide for the concept of essential services. The determination of the number of medical practitioners to be left in a hospital and the criteria for their selection whenever there is a strike ought to be expressly provided for under the law, and not left for courts' determination. Additionally, the law should be open and allow the employer and the employee to enter into a contract with favourable terms for both parties to the agreement. The establishment of CMC above as an independent body can also come in handy in developing guidelines, frameworks and procedures for negotiating minimum service agreements.[129]

VII. Conclusion

The Constitution guarantees everyone their own rights and fundamental freedoms. This includes the right of doctors and other medical practitioners to

[128] Section 66 (1) (c), *Labour Relations Act* (2007).

[129] Johana K Gathongo and Leah A Ndimurwimo, 'Strikes in Essential Services in Kenya: The Doctors, Nurses and Clinical Officers' Strikes Revisited and Lessons from South Africa' (2020) 23 *Potchefstroom Electronic Law Journal (PELJ),* 12.

go on strike whenever their professional needs are not sufficiently met. However, every Kenyan is also entitled to the right to the highest attainable standard of health, and not to be denied emergency medical treatment. Whenever the medical practitioners are on strike, it is the rights of the patients which are jeopardised. The two classes of rights are conflicting, and need a good balance since they must co-exist in practice the same way they co-exist under the constitution. It therefore calls upon the courts and other relevant stakeholders to strike a good balance so as to ensure that, while other rights are being pursued, other rights are not trampled upon.

This is given the fact that there is not a clearly delineated line, Parliament has not amended the 2007 LRA to conform to the Constitution. This is also premised upon the fact that there is no clarity on the position of the provisions of the 2007 LRA. The Kenyan ELRC has nonetheless done a commendable job on the same in among others *Oruoch v. KMPDU.*[130] While borrowing from ILO and South African jurisprudence, it has applied the principle of 'essential service' to ensure that the doctors are able to enjoy their constitutional right to strike, while at the same time the right to health of the general public is safeguarded.

The ELRC has not hesitated in finding the provisions of the 2007 LRA that prohibit the right to strike unconstitutional for contravening Article 41 of the constitution. Constitutional reform is not a static process but a continuous one, involving all the citizens on both sides of the negotiating table. The right to strike for essential service providers is an evolving process as well, dependent upon finding a good balance between Article 41 of the constitution and the limitations under the 2007 LRA.[131] Once the government of Kenya acknowledges that an "all-hands-on-deck" approach is needed in balancing constitutional rights, it will take relevant steps including amending the 2007 LRA in order to balance with Article 41 of the constitution. Before then, more chaos might still be witnessed especially by the doctors who are the essential service providers, which is a great and a very detrimental social phenomenon.

What is still the challenge however is the enactment of legislation to prescribe the criteria for determining the criteria for engaging in a strike for essential service providers, while at the same time proscribing the number of essential services to be left in hospitals before engaging in a strike.

Additionally, the extent of such a limitation should the law provide for

[130] *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another* [2021] eKLR.

[131] 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, 2014*, 181.

it. While doing this, the general good of the society ought to be the guiding principle. This will avoid situations of conflict between different provisions of the law.

The 2007 LRA should thus be amended to allow for ADR mechanisms to be employed in the resolution of disputes touching on the government and medical practitioners. Further, such an amendment should get rid of the complete ban on strikes by essential service providers as provided for under the 2007 LRA.[132] As the case is in South Africa and in line with the Constitution, this ought to be encouraged since it is one of the most efficient ways of resolving disputes while at the same time medical services are provided to patients. Once that has been done, then powers ought to be given to agencies and persons who help in resolving such disputes such as arbitrators, so that their decisions can be legally recognised. Medical practitioners, as a matter of right, should only be allowed to go on strike as a matter of last resort. This is once it has been determined that all the other conciliation mechanisms have been tried but have failed. Importantly, the amendments to be made under the Kenyan *LRA* or any other relevant law should provide for mechanisms for determining the minimum number of medical practitioners, together with their specializations, who must be left in hospitals to attend especially emergency situations before going to strike.

Once this is settled, the doctors will have legitimate claims which are anchored in law, thus relieving the courts of the burden of writing grappling with these issues. The courts will have a point of reference while interpreting the law and avoid incidences of speculation by the courts which may in a number of instances act to the detriment of the medical practitioners, the patients and even the government. This, beyond serving the best interest of the medical practitioners goes a long way in ensuring that the best interests of the society are served.

[132] See Section 78, *Labour Relations Act*, 2007.