

Right Behind Bars: Examining the Appropriateness of Kenya's Prison Labour Wages and Earnings Scheme

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Abstract

Sentenced inmates in Kenya are obligated to provide labour while imprisoned. This is to reduce idleness, for punishment, to enhance prisons' cost-efficiency, and for rehabilitation. Some scholars posit that prisoners should be paid, others state that they should not, and some others recognise that they should be paid but vary between a high or low rate of payment. In Kenya, prisoners are paid for their labour at rates espoused in Section 5 of the Earnings Scheme, Kenya Prisons Service Standing Orders, 1979. The rates range between 10 and 20 cents a day. From this pay, they are to spend on necessities while in prison, send some money to their families and save some for use after their release. However, the rates are very low and based on the purposes the wages are to serve, the meagre pay is grossly incommensurate. This paper uses the concept of prison industrial complex and the human rights theory to make a case for higher pay for prison labourers. Lastly, it suggests a revision of the earnings scheme after drawing lessons from India.

Keywords: *Prisoners, Prison Labour, Paid Prison Labour, Unpaid Prison Labour, Kenyan Earnings Scheme*

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Table of Contents

I. Introduction.....	51
II. The essence of prison labour.....	54
i. Prison labour as a concept and its history	54
ii. The concept of prison labour vis-à-vis forced labour or slavery	58
III. Contextualisation of the problem of meagre pay	59
i. Human rights theory and a case for the right to dignity.....	59
ii. The right to dignity	60
iii. The concept of prison industrial complex.....	63
IV. Lessons from India	67
i. India's model of payment for prison labour.....	69
V. Recommendations and Conclusion	72
i. Recommendations.....	72
ii. Conclusion.....	74

I. Introduction

The sanction of imprisonment is, *inter alia*, geared towards rehabilitation.¹ For rehabilitation and re-integration of the offenders into society, convicted persons are to be treated in a manner that encourages self-respect and personal responsibility.² One way to ensure this is by teaching the offenders skills and having them work in prisons.³ The prisoners perform different types of work,⁴ becoming eligible to participate in the earnings scheme for payment.⁵ In *Job Nganga Thiongo v Kamiti Medium GK Prison and 3 others* [2013], it was shown that the labour done by a prisoner is listed in their labour card. This labour card is issued to each prisoner at the onset of their sentence. Accordingly, all prisoners are therefore expected to work.⁶

Concerning payment to prisoners, the route followed is the earnings scheme which classifies prisoners into three grades. Grade A prisoners have exemplary conduct and are skilled in their trade, those in grade B have good conduct but are semi-skilled and those in C are not in grade A or B but are eligible to be in the earnings scheme⁷ by virtue of the labour they undertake.⁸ The different grades are a creation of privileges geared towards the prisoners by the power of the Commissioner-General of Prisons and therefore only applicable to those who are eligible.⁹ Upon admission to a prison, a convicted prisoner is initially placed in Grade C.¹⁰ Thereafter, they can be promoted to Grades B and A only upon certification by the officers charged over the matter if such promotion is warranted.¹¹ The criteria used to classify prisoners is based on the quality of their workmanship – this means that the Commissioner (with help from prison officers) gauges the work done and decides what classification grade each prisoner should belong to (premised on the quality of work done).¹²

¹ The Judiciary, *Sentencing policy guidelines*, (2016). Paragraph 4.1.

² The Judiciary, *Sentencing policy guidelines*, (2016). Paragraph 4.1.

³ Schedule, *Prisons Act* (Act No.8 of 1963). This is rule 3(c).

⁴ Section 43, *Prisons Act* (Act No.8 of 1963). See for example *William M. Mutungi v Samuel K. Nyutu and another* (2001) eKLR, 1, para. 3, where the claimant was working as they usually did with other inmates. And the prison warden's explanation showing that excavation is part of the inmates' work. See also *Joseph Mallos v R* [2011] eKLR, 3, para. 3, officers take prisoners to different sites for work.

⁵ Rule 19, *Prison Rules* (Legal Notice No. 60 of 1963).

⁶ *Job Nganga Thiongo v Kamiti Medium GK Prison and 3 others* [2013] eKLR paras. 8, 11, 13 and 16.

⁷ Schedule, *Prisons Act* (Act No.8 of 1963). This is rule 19(1).

⁸ Section 2, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

⁹ Rule 17, *Prison Rules* (Legal Notice No. 60 of 1963).

¹⁰ Section 2, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

¹¹ Sections 3 and 4, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

¹² Section 1, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

The earning rates are broken down as follows – those in Grade A receive Kshs. 20 cents a day, those in B, 15 cents and those in grade C, 10 cents.¹³ These amounts were meagre even in 1979¹⁴ when the Standing Orders were last revised. The Kenyan shilling has since lost its value and today the amounts payable are worth much less.¹⁵ The docket to make amends on this lies with the Minister for Home Affairs who decides the grade classification of the prisoners.¹⁶

Prisoners who are to be released between 6 months and 3 years receive their pay upon release. Those with longer sentences can use up to two-thirds of their payment then receive balance credits upon release.¹⁷ They can save up to a third of their earnings which should help them survive during the initial stages of their release.¹⁸

In *Aloise Onyango & others v Attorney General*, some prisoners moved to court to contend some issues they faced while in prison, among which included the earnings scheme. On this front, they requested a review of the provision of the amount payable in the earnings scheme, claiming that the pay was very little. One Masara, for example, received Kshs. 50 after serving a 32-year sentence. Another problem that was a contributing factor to the current quandary and was discussed within the case was the fact that the prison systems also lack an elaborate manner to track payments and money expenditure within prisons as well as a lack of means to account for the work hours and work pay. This led to Masara's case being dropped due to lack of evidence of his eligibility within the earnings scheme.¹⁹ However, the court found that there are different mechanisms to address prison matters and noted that the then Minister (current Cabinet Secretary for National Security), and not the Attorney General, has the powers to change the rates. In this case, the enjoined respondent was the Attorney General as opposed to the Minister. The case also acknowledged that prisoners are working towards better lives after imprisonment as per *Rule 3(c), Prisons Rules*.²⁰

¹³ Section 5, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

¹⁴ Section 1, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

¹⁵ -<https://take-profit.org/en/statistics/inflation-rate/kenya/> on 22 February 2022. See also – <https://m.investing.com/currencies/usd-kes-historical-data>– on 11 January 2021. This shows the shilling-dollar exchange rate within the last 30 years. The average difference then and now is shillings 75.689 for a dollar with 1991 standing at shillings 24.684 and today at shillings 109.7.

¹⁶ Section 74 1(a) and 1(j), *Prisons Act* (Act No.8 of 1963) and Rule 20 *Prisons Rules* (Legal Notice No. 60 of 1963).

¹⁷ Schedule, *Prisons Act* (Act No.8 of 1963). This is rule 21(1).

¹⁸ Section 1, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

¹⁹ *Aloise Onyango Odhiambo & 2 others v Attorney General & another* [2019] eKLR.

²⁰ *Aloise Onyango Odhiambo & 2 others v Attorney General & another* [2019] eKLR, paras. 8, 35, 37 and 45. The author thinks that the court ought to have passed a direction towards the Minister, in a call towards policy change instead of just throwing the case out.

Work done in prison is meant for the betterment of the offenders. The pay they receive is to incentivise them as well as help them start afresh, upon release.²¹ In Kenya, according to data collected by the Kenya Prisons Service, the stance is the same considering that prisoners should be paid enough to enable them to spend while in prison, send some money to their family (which incentivises them) and save some for use after their release.²²

Some scholars shun the meagre payment of prisoners, stating that it goes against their right to dignity.²³ Others argue however that the state facilitates prisoners' upkeep and prisoners should thus not be paid,²⁴ or they should receive little pay.²⁵ This causes uncertainty on the subject of prisoners' payment. This study will therefore examine the appropriateness of the meagre remuneration to prison labourers regarding what the payment is meant to achieve. Alongside advocating for the increment of payment to prisoners, the author explores an approach of the prison industrial complex (PIC) and singles out private-oriented prisoners in a bid to advocate for higher pay. The concept of PIC is a notion in which the government works with private organisations to employ strictly regulated, cheap, and immensely adaptable forced labour—from prisoners.²⁶ This is based on the revenue collected from the Kenyan prison enterprise where, for example, in 2019, the Kenyan Enterprise Industry raised around four hundred and forty-four million Kenya shillings (Kshs. 444,535,244.94) in revenue from the sale of prison-crafted goods.²⁷ The PIC concept will further be expounded on in the paper.

²¹ Shea E, *Why work? A study of prison labour in England, France and Germany*, Duncker & Humblot, Berlin, 2007, 57.

²² Owila R, 'The relationship between inmates' length of stay in prison and their perception of prison reforms: A case of Eldoret GK prison, Kenya' 36(1) *Journal of Law, Policy and Globalization*, 2015, 2.

²³ Gray K, 'Labour and the state in China's passive revolution' 34(3) *Capital and Class Journal*, 2010, 452. See also Harner H, M, Wyant B. R and Da Silva F, 'Prison ain't free like everyone thinks: Financial stressors faced by incarcerated women' 27(5) *Qualitative Health Research*, 2016, 693. See also Hawkins G, 'Prison labour and prison industries' 5(1) *Crime and Justice: An Annual Review of Research*, 1983, 110- 111.

²⁴ Black J, 'Prison works?' 74(1) *Criminal Justice Matters*, 2008, 6. See also White R, 'On prison labour' 11(2) *Current issues in criminal justice*, 1999, 243.

²⁵ Wu H, 'Slaves to the state' 29(1) *Index on Censorship*, 2020, 56. See also Burnett J and Chebe F, 'Captive labour: Asylum seekers, migrants and employment in UK immigration removal centres' 51(4) *Race and Class Journal*, 2010, 100-101.

²⁶ Worger W, 'Convict labour, industrialists and the state in the US South and South Africa' 30(1) *Journal of South African Studies*, 2004, 63.

²⁷ Office of the Auditor General, *Report of the Auditor General on Prison Industries Revolving Fund for the year ended 30 June, 2019*, 2019, ix - <http://www.parliament.go.ke/sites/default/files/2021-11/Ag%20-Prison%20Industries%20Revolving%20Fund%2030%20th%20june%202019.pdf> on 2 June 2022.

Part II delves into the essence of prison labour, looking into its history and the nexus between prison labour and forced labour. The aspect of forced labour brings forth a case for the prison industrial complex design. Part III then discusses the human rights theory to show the place of dignity, as a right within the matter of meagre pay for prison labour. The study also delves into the concept of prison industrial complex (PIC), which will call for a case for an increment of the amounts payable, considering the nature of this concept. Thereafter, Part IV provides a comparative analysis between Kenya and India and thus helps to chart a way forward concerning the issue. Part V gives recommendations and concludes this paper.

II. The essence of prison labour

i. *Prison labour as a concept and its history*

Prison labour emerged at the dawn of civilisation.²⁸ It came about due to a search for the most effective manner to organise production within correctional institutions.²⁹ Prison labour simply defined is work done by prisoners while in prison. Work may be seen as a means of escaping suffering and a path to happiness through self-realisation.³⁰ Some of the purposes of prison labour were to serve as a further form of punishment to the convicts³¹ and to view the work as providing a ‘correctional experience’ to inmates.³² Further, it was essentially meant to foster a rehabilitative function: where prisoners ‘train for work’ and ‘train by work’. This was to enable the reintegration of convicts back into the society.³³

The concept of prison labour found its way to Africa, though it began in Egypt, and later on, came to Kenya, but had its roots in diverse civilisations of different countries as discussed herein.³⁴ As Egypt’s civilisation developed, Pharaohs enslaved the wrong-doers and forced the notorious ones to labour in mines. Additionally, inmates in China were forced to work in the government’s

²⁸ Jackson H, ‘Prison labor’ 18(2) *Journal of criminal law and criminology*, 1927, 218.

²⁹ Maguire K, Flanagan T and Thornberry T, ‘Prison labor and recidivism’ 4(1) *Journal of Quantitative Criminology*, 1988, 3.

³⁰ Sigmund F, *Civilization and its discontents*, W. W. Norton, New York, 1962, 26- 27.

³¹ See for example Jackson H, ‘Prison labor’, *Journal of Criminal law and Criminology*, 1927, 221.

³² As noted in America, work has been central to the correctional experience. See Maguire K *et al*, ‘Prison labour and recidivism’, 3.

³³ Hawkins G, ‘Prison labor and prison industries’, 88.

³⁴ Jackson H, ‘Prison labor’, 18 *Journal of Criminal law and Criminology*, 1927, 218.

iron and salt mines from an early period.³⁵ The ancient Greeks forced convicts to work on galleys, in silver mines and to build fortifications. Roman criminals were sold as slaves and subjected to work in the mines of Spain for the rest of their lives.³⁶ However, in Europe, correctional institutions mainly housed political offenders. Torture, fines, and death were proffered as punishments; detention was infrequent and convict labour was not practised. From the 1550s to around 1680s, confinement houses were then established in Northern Europe to aid the impoverished and not to punish criminals.³⁷ When criminal issues became rampant, Europeans practised exposure of prostitutes and petty thieves in the pillory.³⁸ One, Peter Rentzel, founded a spin-house in Hamburg in 1669 after noting that the pillory made the prisoners worse. He offered the convicts a chance to redeem themselves by using religious teachings and engaging them in labour.³⁹ Prison labour was from around then primarily used as a means of punishment around the world. Hard labour became a punishment component of a sentence in England and Wales.⁴⁰ The England Hard Labour Act, 1822 and their 1865 Prison Act established a system of hard, meaningless labour. Then, the Du Cane era (1869-1895) solidified the concept of prison labour as a deterrent and retributive form of punishment as opposed to the purposeless strenuous labour by abolishing its 'purposelessness concept'.⁴¹

Imprisonment as a form of punishment was brought forward to African countries during the colonial period by the Europeans (colonisers).⁴² Prisons were built to be places of physical punishment and to maintain control over colonial subjects.⁴³ Prison labour also emerged due to colonialism and/or during

³⁵ Jackson H, 'Prison labor', 218.

³⁶ Jackson H, 'Prison labor', 218.

³⁷ Hawkins G, 'Prison labor and prison industries', 88. See also Jackson H, 'Prison labor' 18 *Journal of Criminal law and Criminology*, 1927, 218-219.

³⁸ Oxford Advanced Learner's Dictionary, 8th ed. The pillory is defined as a wooden structure with head and hand holes where prisoners were subjected to public abuse.

³⁹ Jackson H, 'Prison labor', 18 *Journal of Criminal law and Criminology*, 1927, 219.

⁴⁰ Bailey V, 'English prisons, penal culture, and the abatement of imprisonment: 1895-1922' 36(3)

Journal of British Studies, 1997, 285 and 295.

⁴¹ Mario G, 'Private prison labour: Paradox or possibility: Evaluating modern-day systems and establishing a model framework through the lens of the forced labour convention' 8(2) *UCL Journal of Law and Jurisprudence*, 2019, 35.

⁴² <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-893?print=pdf> on 2 April 2022, 3. See also, for Kenya, Branch D, 'Imprisonment and colonialism in Kenya, c. 1930- 1952: Escaping the Carceral Archipelago, 38 (2) *The International Journal of African Historical Studies*, 243.

⁴³ Bernault F, 'The politics of enclosure in colonial and post-colonial Africa' in McCracken J (ed), *A history of prison and confinement in Africa*, Heinemann Publishing, 2003, 2.

war.⁴⁴ Penal servitude was thus an inherent feature of the system in the colonial period.⁴⁵

As in most Sub-Saharan regions, there is no evidence of the existence of prisons in Kenya during the pre-colonial period.⁴⁶ However prisons were introduced in Kenya after the establishment of British control in 1895. Soon after, there followed the introduction of labour in prisons in Mombasa where, in March 1896, prisoners were employed to build and engage in public works.⁴⁷ After independence, most African countries, including Kenya, continued the practice of imprisonment. However, this has been subject to certain reforms with some of the practices such as prison labour being retained.⁴⁸

Prisons maintain prison labour for various reasons including reduction of idleness, training for jobs, punishment, enhancing cost-efficiency in prisons, rehabilitating prisoners as well as teaching financial responsibility.⁴⁹ Prison labour is therefore a tool of control that can create order through a reward and punishment system. Prisoners are rewarded with paid work which is easily taken away at the onset of unaccepted behaviour and this equates to punishment.⁵⁰

On matters of paying prisoners for labour, the initial stance was that prisoners, by having committed a crime, should be subjected to theft of their wages and earnings as a form of punishment.⁵¹ Thereafter, around 1910, conversations on payment of prisoners were held—establishing some pros and cons around the subject. Some of the objections were premised on the following reasons—deprivation of earning capacity being part of the punishment; the benefits that free labour meted on the economy; to ease society's likelihood of supporting prisoners' families and dependants because the prisoners were already 'suffering', as well as a consideration of the high cost of prison and prisoners' maintenance.⁵² Despite these, humanitarian voices insisted on their remuneration. They stated

⁴⁴ De Vito C and Lichtenstein A, 'Writing a global history of convict labour' 58(1) *International Review of Social History*, 2013, 291.

⁴⁵ De Vito C and Lichtenstein A, 'Writing a global history of convict labour', 298.

⁴⁶ Branch D, 'Imprisonment and colonialism in Kenya, c. 1930- 1952: Escaping the carceral archipelago' 38(2) *The International Journal of African Historical Studies*, 2005, 243.

⁴⁷ Branch D, 'Imprisonment and colonialism in Kenya, c. 1930- 1952', 243-244.

⁴⁸ Bernault F, 'The politics of enclosure in colonial and post-colonial Africa', 2.

⁴⁹ Wu H, 'Slaves to the state', 56.

⁵⁰ <http://www.aviddetention.org.uk/immigration-detention/what-immigration-detention> on 22 February 2022. See also <https://www.gov.uk/government/publications/welfare-in-immigration-removal-centres-irc> on 22 February 2022.

⁵¹ Lyon F E, 'Payment of prisoners' 3(1) *Journal of Criminal Law and Criminology*, 1912, 36.

⁵² Lyon F E, 'Prison labor and social justice' 46(1) *The Annals of the American Academy of Political and Social Science*, 1913, 148-149.

these reasons—to emit the suffering of innocent persons who choose to care for prisoners, either voluntarily or obligatorily;⁵³ to prevent social suicide against the prisoners and thus enhance the integrity of the family—whereby the prisoner can still provide for the family; to prevent society from suffering from pauperism and likely recidivism since the prisoners would not be able to support themselves upon release; to prevent punishing the prisoners' kindred, if the prisoner was their provider and, to teach the prisoners life lessons that connote the functioning of a normal (non-crime) society.⁵⁴ Generally, this conversation was premised on the bane of moral standings and justice to all relevant parties—the prisoners, their family and friends as well as society.⁵⁵ There has since been a call to move toward paying prisoners but the financial burden borne by each state would vary and be on each state's preference.⁵⁶

Prisoners undertake different tasks while incarcerated. For example, in some prisons, they are to garden, clean, prepare food, pick up litter and do other tasks along these lines.⁵⁷ In such situations, however, few skills are learnt⁵⁸ and prisoners do not gain lessons for future survival.⁵⁹ In Kenya, apart from these tasks done to maintain prison facilities, prisoners are involved in other difficult tasks like wall excavation,⁶⁰ soap-making for profit,⁶¹ making number plates using iron sheets and even engaging in carpentry to make furniture.⁶² For such and other prison works, Rita Owila states that prisoners should be paid enough to enable them to spend while in prison, send some money to their families and save some for use after their release.⁶³ This is based on data collected by the Kenya Prisons Service in coming up with prison reforms to ensure restitution of the dignity of prisoners' life to an acceptable level.⁶⁴

⁵³ The voluntary basis is, for example, where family and members of the society choose to support prisoners while the obligatory form is where citizens are taxed to support prisoners.

⁵⁴ Lyon F E, 'Prison labor and social justice', 149-151.

⁵⁵ Lyon F E, 'Prison labor and social justice', 152-153.

⁵⁶ Lyon F E, 'Payment of prisoners', 40.

⁵⁷ <https://www.gov.uk/government/publications/welfare-in-immigration-removal-centres-irc> on 22 February 2022.

⁵⁸ <https://www.gov.uk/government/publications/welfare-in-immigration-removal-centres-irc> on 22 February 2022.

⁵⁹ Dissel A, Prison Conditions in Africa, Centre for the Study of Violence and Reconciliation, September 2001, 3.

⁶⁰ As seen in *William M. Mutungi v Samuel K. Nyutu and another* (2001) eKLR, 1, para. 3.

⁶¹ <https://youtu.be/nDfYzcljIg8> on 20 September 2021. In this video, in Nyeri Women's prison for example, from around minute 4.30 – 4.35, the prison officer talks about the sale of the multi-purpose soap (made by the prisoners) which generates income.

⁶² <https://biznakenya.com/kenyan-prisons/> on 29 September 2021.

⁶³ Owila R, 'The relationship between inmates' length of stay in prison and their perception of prison reforms: A case of Eldoret GK prison, Kenya' 36(1) *Journal of Law, Policy and Globalization*, 2015, 2.

⁶⁴ Kenya Prison Service, *A handbook on human rights in Kenya prisons* IED, 2007.

ii. *The concept of prison labour vis-à-vis forced labour or slavery*

Prison labour is based on involuntary state-mandated acts⁶⁵ and the exploitative nature of the works and/or services.⁶⁶ Slavery was taken up as a form of punishment, upon the criminalisation of wrong-doers through a system of convict leasing where criminals were sold and transferred aimlessly.⁶⁷ The justification which allowed slavery to develop was the fact that these people had wronged and were considered criminals.⁶⁸ Additionally, the slave trade was considered legitimate commerce which led to it being acceptable despite its inherent wrongness.⁶⁹

Burris-Kitchen and Burris aptly phrase it by stating that upon abolishment, ‘the slave went free; stood a brief moment in the sun; then moved back again toward slavery’.⁷⁰ Prison labour has taken the shape of slavery in many forms, specifically the conditions present in both systems. Both systems were and still are plagued with harsh confinement conditions and subjection to involuntary work.⁷¹ They also both contribute to a state’s economy due to the *low rates or no payment for the subjected labour*. Also, both equate to punishing offenders, who were mostly from the lower class and racially profiled persons.⁷²

In the Kenyan Employment Act, forced labour is defined as any *involuntary* work or service extracted from a person under threat of penalty, such as losing privileges and/or rights.⁷³ This definition is according to the Convention Concerning Forced or Compulsory Labour⁷⁴ of the International Labour Organisation (ILO).⁷⁵ An example is found in the *Didovskiy Igor case* where the claimant was, by definition, subjected to forced labour.⁷⁶ However, this definition

⁶⁵ Mario G, ‘Private prison labour’, 32.

⁶⁶ Browne J, ‘Rooted in slavery’, 43.

⁶⁷ Burris-Kitchen D and Burris P, ‘From slavery to prisons: A historical delineation of the criminalization of African Americans’ 4(5) *Journal of Global Intelligence & Policy*, 2011, 1.

⁶⁸ Burris-Kitchen D and Burris P, ‘From slavery to prisons’, 2.

⁶⁹ Balakrishnan S, ‘Of debt and bondage: From slavery to prisons in the gold coast, c. 1807- 1957’ 61(1) *Journal of African History*, 2020, 6.

⁷⁰ Burris-Kitchen D and Burris P, ‘From slavery to prisons’, 1.

⁷¹ Smith B, ‘Sexual abuse of women in United States prisons: A modern corollary of slavery’ 33(2) *Fordham Urban Law Journal*, 2006, 101-136.

⁷² Gilmore K, ‘Slavery and prison: Understanding the connections’ 27(3) *Social Justice Global Options Journal*, 2000, 197-198.

⁷³ Section 2, *Employment Act* (Chapter 227 of 2007).

⁷⁴ Article 2(1), *Forced Labour Convention*, 10 June 1930, Convention No. 29.

⁷⁵ To which Kenya is signatory to. <https://www.ilo.org/global/regions/lang--en/index.htm> on 29 September 2021.

⁷⁶ *Didovskiy Igor & 11 others v International Bulk Carrier SPA & 2 others* (2013) eKLR. In this case, the

does not apply to persons subjected to work or service under a conviction by a court of law.⁷⁷ In addition to this, prison labour must be performed under supervision by a public authority and the convicts are not to be hired out to private natural and/or legal persons.⁷⁸ This means that forced prison labour does not apply to prisoners awaiting trial. Further, 'supervision and control by a public authority' dictates that, within and without private entities, a protective cover is made available to the prison labourers which determines the conditions in which the inmates work.⁷⁹

Further to this, the *Aloise Onyango case* established that work done by prisoners does not constitute slavery or a violation of Article 30 of the Constitution of Kenya.⁸⁰ The work they engage in instead is meant to equip convicts with skills which will assist them upon their release.⁸¹ From the above, though prison labour has some aspects of slavery and/or forced labour, it is not fundamentally equal to slavery.

III. Contextualisation of the problem of meagre pay

i. Human rights theory and a case for the right to dignity

Human rights came from philosophical debates concerning the search for moral standards of the political organisation, which is independent of contemporary society.⁸² They are founded on and inherently flow from the dignity of human life. This connotes the aspect of man living a life worth living.⁸³ They bring about a minimum requirement to be met to equate to a life of dignity.⁸⁴

claimants were found to have been subjected to forced labour where they involuntarily provided work at the risk of losing the benefits accrued to them as maritime users. Despite the bad working conditions and being left in charge of a ship, according to maritime law, they could not vacate the ship as they had an inherent duty to ensure their specific ship was safe and that other maritime users were equally safe and protected.

⁷⁷ Section 4(2)(c), *Employment Act* (Chapter 227 of 2007).

⁷⁸ Article 2(2)(c), *Forced Labour Convention*.

⁷⁹ Committee of Experts on the Application of Conventions and Recommendations (CEACR), *General survey on the reports concerning the Forced Labour Convention*, 2007, 26.

⁸⁰ Article 30, *Constitution of Kenya* (2010). This provides for the right to freedom from 'slavery, servitude and forced labour' for all persons. Article 25, *Constitution of Kenya* (2010) further establishes this right as a fundamental freedom that may not be limited.

⁸¹ *Aloise Onyango Odiambo & 2 others v Attorney General & another* [2019] eKLR, para 22.

⁸² Heard A, 'Human rights: Chimeras in sheep's clothing?' *Academia Education*, 1997, 1 - https://www.academia.edu/11431763/HUMAN_RIGHTS_CHIMERAS_IN_SHEEPS_CLOTHING- on 15 August 2021.

⁸³ Donnelly J, *Universal human rights in theory and practice*, Cornell University Press, Ithaca, 1989, 17.

⁸⁴ Donnelly J, *Universal human rights in theory and practice*, 17.

Human beings have ‘an intrinsic worth’; dignity, which sets them above other creations.⁸⁵ The Universal Declaration of Human Rights presents that every person is ‘born free and equal in dignity and right’.⁸⁶ Subsequently, an obligation is created for persons to act in a moral manner and, in a way, act for humanity. This includes government, through their laws and policies, corporate society as well as individuals. Men should therefore be treated ‘as an end’ and not a mere ‘means to an end’.⁸⁷

Justice entails giving to each man what is due to him⁸⁸ which implicitly leads to the achievement of the right to dignity. It connotes the virtue of balance: do not give one more than what they deserve and, equally, do not give them less than they deserve.⁸⁹ However, the concept of mercy is still applicable—where pardon is granted to wrong-doers.

A criticism of the human rights theory is based on the question of ‘who determines what is right or wrong’.⁹⁰ The critique begs the question whether apart from human beings having intrinsic rights, can rights just be created based on what persons in society think is a right? Therefore, does everything flow from the right to dignity? Is the creation of rights thus unlimited? Some proponents find that rights, which are based on dignity, are subjective and draw from different times and circumstances.⁹¹ Yet others are firm and posit that rights are only rights insofar as they come from man’s intrinsic nature of dignity.⁹²

ii. *The right to dignity*

The right to dignity is a delicate matter that can mean different things⁹³ because it is vague.⁹⁴ Therefore, instead of first defining this idea, the author denotes its basis. The right to dignity lies in a person’s self-worth which comes

⁸⁵ Donnelly J, *Universal human rights in theory and practice*, 17.

⁸⁶ Article 1, UNGA, Universal Declaration of Human Rights, 217 A(III) 10 December 1948.

⁸⁷ Donnelly J, *Universal human rights in theory and practice*, 17.

⁸⁸ Plato, *Republic*, book 4 - <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0168%3Abook%3D4%3Asection%3D433a-> on 18 August 2021.

⁸⁹ Aristotle, *Nicomachean ethics*, translated by W.D. Ross, written 350 BCE, book iv.

⁹⁰ Heard A, ‘Human rights: Chimeras in sheep’s clothing?’, 3.

⁹¹ Donnelly J, *Universal human rights in theory and practice*, 17. See also Heard A, ‘Human rights: Chimeras in sheep’s clothing?’, 14.

⁹² Heard A, ‘Human rights: Chimeras in sheep’s clothing?’, 14-15. See also Gewirth A, ‘Why there are human rights’ 11(1) *Social Theory and Practice*, 1985, 235.

⁹³ Wright G, ‘Dignity and conflicts of constitutional values: The case of free speech and equal protection’, 43(527) *San Diego Law Review*, 2006, 528.

⁹⁴ *Siliadin v France*, ECtHR Judgement of 30 January 2005.

from their ability to self-determine as well as their ability to self-govern (or self-autonomy).⁹⁵ In other words, human dignity exists for each human by virtue of their humanity. From its historical conception, the right to dignity is identified with the Judeo-Christian idea that humans are born in the image of God⁹⁶ and thus intrinsically have a superior rational capacity.⁹⁷ Human beings should therefore be treated (with respect) in a way befitting their rational faculty.⁹⁸

Immanuel Kant posits a secular approach to dignity. He states that dignity is an 'absolute inner worth'; human beings should therefore not be treated as an instrument but as persons because of this 'absolute inner worth'.⁹⁹ He additionally notes that humans are an end in and of themselves and they thus have dignity which cannot be equated to anything else; dignity lacks a substitute.¹⁰⁰ In Kantian thought, dignity's application in the legal realm is premised on human beings intrinsically having protection from the law and within any law in a state.¹⁰¹ This is further backed by Thomas Paine's conception: that human dignity should be the right within which all other rights are based. This, he states, is because the dignity of humans is the reason for the existence of all other rights.¹⁰²

To tie this into prison labourers' right to dignity, sometimes free and cheap labour is pursued at the expense of prisoners who are overworked but do not receive pay commensurate to the work they do. This leads to them being mere 'means to the end,' with the means being the prisoners and the end being free prison upkeep and free or cheap labour. On the flip side, they should be 'an end' where their dignity is considered, and they are thus treated humanely even where prison labour occasions some good—like rehabilitation. For the sake of human dignity, showing mercy and giving just punishment¹⁰³ is the correct standpoint, especially where it concerns other rights and freedoms¹⁰⁴ like the freedom of movement. However, situations where one over-punishes infringe on a person's

⁹⁵ Mahlmann M, 'The basic law at 60 - Human dignity and the culture of Republicanism' 11(9) *German Law Journal*, 2010, 30.

⁹⁶ Catechism of the Catholic Church, 2nd ed.

⁹⁷ Ebert R and Oduor R, 'The concept of human dignity in German and Kenyan constitutional law' 4(1) *Thought and Practice: A Journal of the Philosophical Association of Kenya*, 2012, 44.

⁹⁸ Cicero, *De Officiis*, William McCartney ed., Edinburgh (1481), 1798, 30.

⁹⁹ Immanuel Kant, *Grundlegung Zur Metaphysik der Sitten*, Akademie Ausgabe ed., Bd. IV (1911), 1785.

¹⁰⁰ Immanuel Kant, *Grundlegung Zur Metaphysik der Sitten*, Bd. IV (1911), 1785.

¹⁰¹ Immanuel Kant, *Grundlegung Zur Metaphysik der Sitten*, Bd. IV (1911), 1785.

¹⁰² Thomas Paine, *Rights of Man*, Gregory Claeys ed., Hackett Publishers (1992), 1791.

¹⁰³ Where the non-payment of prisoners for their labour constituted a form of punishment as seen earlier. See Lyon F E, 'Payment of prisoners', 36. In this instance, there seems to be two forms of punishments – first, the imprisonment then the denial of or meagre pay.

¹⁰⁴ Aristotle, *Nicomachean ethics*, book v.

right to dignity. This can be seen when a wrongdoer is already imprisoned and is further subjected to compulsory prison labour, with meagre pay.¹⁰⁵

In Kenya, the right to dignity is guaranteed to each person by virtue of Article 28 of the Constitution.¹⁰⁶ Further, prisoners have a right to be treated humanely.¹⁰⁷ Inasmuch as the right to dignity is seen as a basis on which other laws are premised, Article 10 of Kenya's Constitution lists human dignity as one of Kenya's national values and principles of governance.¹⁰⁸ By virtue of this, this study upholds the right to dignity in Kenya in high regard due to its constitutional standpoint as a national value, essential for national development and actualisation of the sustainable development goals and Kenya's development blueprint, Vision 2030. All state organs, including national security organs, of which prisons form part of the national security, are thereby to abide by the national values and principles.¹⁰⁹

Based on the above, the right to dignity, which is a right guaranteed to each Kenyan, connotes humane treatment. In Article 24 of the Constitution, a right may only be limited by law, in a reasonable, justifiable and open democratic society based on dignity, equality and freedom.¹¹⁰ In the case of *Judicial Service Commission v Mbalu Mutava*, the court noted that for a right espoused in Article 24 to be limited, the limitation must be legal.¹¹¹ In this case, prisoners' right to dignity can be lawfully limited, by virtue of meagre pay, because incarceration is a justifiable reason for infringing on some of the prisoners' rights.¹¹² Further to this, legality entails confirming whether such an occurrence is allowed in law¹¹³ and this meagre pay is indeed entrenched in law, within the earnings scheme.¹¹⁴ However, one must ask how much punishment constitutes too much punishment. In this case, therefore, the limitation on their right to dignity in terms of meagre pay is legal (the right is justiciable, i.e., can be challenged in court) but not justifiable. As such, where one receives an amount as low as Kshs. 50 over a thirty-two-year

¹⁰⁵ This is as required in Section 43, *Prisons Act* (Chapter 90 of 1963) and further seen in the case of *Job Nganga Thiongo v Kamiti Medium GK Prison and 3 others* [2013] eKLR.

¹⁰⁶ Article 28, *Constitution of Kenya* (2010).

¹⁰⁷ Article 51, *Constitution of Kenya* (2010).

¹⁰⁸ Article 10(2)(b), *Constitution of Kenya* (2010).

¹⁰⁹ Kenya Institute for Public Policy Research and Analysis (KIPPRA), 'Report on the Status of National Values and Principles of Governance in Kenya', 2015, 3.

¹¹⁰ Article 24(1), *Constitution of Kenya* (2010).

¹¹¹ *Judicial Service Commission v Mbalu Mutava & Another* (2014) eKLR.

¹¹² Rule 3(c), *Prisons Rules* (Legal Notice No. 60 of 1963).

¹¹³ *Judicial Service Commission v Mbalu Mutava & Another* (2014) eKLR.

¹¹⁴ Section 5, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

sentence,¹¹⁵ the author finds this position to be unreasonable. Further to this, and from an economic standpoint, the purchasing power of the shilling has grossly deteriorated, and such payment cannot serve its purpose which is to help the prisoner and reintegrate them into society as a useful member.¹¹⁶ This breach of his right to dignity is therefore not *justifiable or reasonable* in any way.

Further to legality, the limitation of a right must conform with necessity and/or legitimacy.¹¹⁷ In this case, prisoners' right to dignity, by virtue of imprisonment and perhaps what comes with it, like meagre pay, can be lawfully limited to maintain social security and restitution of inmates. Another aspect that needs to be examined for limitation is proportionality. One needs to balance the rights of an individual and the interests of the public.¹¹⁸ In this case, the right of the individuals (the prisoners) is dignity, through dignified pay, and that of the public is accountability for taxpayers' monies. A balance between ensuring prisoners' right to dignity and utilisation of taxpayers' monies should be struck in that, if possible, ways to remove the burden from taxpayers can be taken up but a slight increment of payment for prison labour would also be plausible. An example of doing this would be reliance on the proceeds from the sale of the goods and services provided by the prisoners themselves—which will further be discussed in the recommendations.

iii. The concept of prison industrial complex

The concept of prison industrial complex (PIC) is a construct where the state together with private institutions employs strictly controlled, cheap and immensely flexible forced labour – from convicts.¹¹⁹ Some prisons are therefore incentivised to keep more prisoners as they provide cheap labour. Patrice Fulcher argues that prisoners should fall under the Fair Labour Standards Act (FLSA) whereby the minimum wage would apply despite their not being employees because working under PIC makes them seem to take the form of employment.¹²⁰

When prisoners are contracted out, private institutions are the main beneficiaries because they scout for cheap and easily exploitable sources of

¹¹⁵ *Aloise Onyango Odiambo & 2 others v Attorney General & another* [2019] eKLR, para. 13.

¹¹⁶ Section 1, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

¹¹⁷ *Judicial Service Commission v Mbalu Mutava & Another* (2014) eKLR.

¹¹⁸ *Judicial Service Commission v Mbalu Mutava & Another* (2014) eKLR.

¹¹⁹ Worgler W, 'Convict labour, industrialists and the state in the US South and South Africa', 63.

¹²⁰ Fulcher P, 'Emancipate the FLSA: Transform the harsh economic reality of working inmates' 27(4) *Journal of Civil Rights and Economic Development*, 2015, 682. The FLSA sets the minimum wage rate for American employees.

labour. The private sector gains workers that cannot unionise or strike, are not covered by the employment regime for fair work practice, can be hired and let off at will, can work late and take up weekend shifts and are either paid the minimum wage or even less.¹²¹ The actors involved (for example, public and private firms) benefit at the expense of the prisoners' inhumane treatment.¹²² Such systems bring massive gains to the companies, but this does not translate to what the workers, prisoners in this case, receive as pay. Therefore, it leads to a prioritisation of profits over human beings.¹²³

In 2018, the Government of Kenya, took up a PIC structure, to explore the labour found within prisons by creating the Kenya Prisons Enterprise Corporation. This Corporation aims to maximise the easily and affordably available labour within prisons, either in the public or private sphere.¹²⁴ This Corporation is mandated to broaden the scope of prison labour programmes in order to unleash the industry's revenue potential and eventually transform the industry into a reformatory and financially self-sustaining organisation.¹²⁵ An example of the workings of the Corporation is when the Kenya Prison Farms Fund and the Kenya Prison Enterprise Fund were to be merged and taken under one umbrella that would oversee a total of over 18,225.9 acres of land for prisoners' farming. The aim of this corporation merger was to yield extensive economic growth under a typical business model¹²⁶ which is state-owned but run by the private sector.¹²⁷ This ethos is based on the belief that the private sector would help in saving money as well as enhance the system's efficiency.¹²⁸ However, this would likely not be the case, especially for low-income and corruption-encroached states who must first analyse and strengthen their criminal justice infrastructure to allow for expansion through alternative-based forms of sentencing (for example).¹²⁹

¹²¹ Burnett J and Chebe F, 'Captive labour', 99.

¹²² Arichibong B and Obikili N, *Prison labour: The price of prisons and the lasting effects of incarceration*, SSRN Electronic Journal, 2020, 2-3.

¹²³ White R, 'On prison labour', 244.

¹²⁴ Section 4, *The State Corporations Act* (Chapter 446 of 2018).

¹²⁵ Dena K, The Presidency's Spokesperson, *President Kenyatta to sign Kenya Prisons Enterprise Corporation Order 2018 at a later date*, 2 October 2018.

¹²⁶ Dena K, *President Kenyatta to sign Kenya Prisons Enterprise Corporation Order 2018 at a later date*.

¹²⁷ Mungai C, *Kenya's prison industrial complex – the fundamental flaws in President Uburu Kenyatta's plan to make jails profitable*, 09 May 2020, 3.

¹²⁸ Mungai C, *Kenya's prison industrial complex*, 3.

¹²⁹ Allen R and English P, 'Public-private partnerships in prison construction and management' The International Bank for Reconstruction and Development, Justice and Development Working Paper Number 35, 2013, 3 - <https://documents1.worldbank.org/curated/en/104841468337289976/pdf/833470NWP0Web000Box304492B00PUBLIC0.pdf> on 29 May 2022.

Kenya's PIC model, the Corporation, is in line with the deduction from prison labour being forced labour as espoused in the Employment Act and the ILO where it provides that prison labour must be performed under supervision by a public authority and the convicts are not to be hired out to private natural and/or legal persons.¹³⁰ An example of private sector involvement is the 'Prison Enterprises' where prisoners make furniture, having learnt the skill from their vocational training, that is distributed from different prisons to willing buyers.¹³¹ Specifically, the Shimo la Tewa Prison Industry, a Kenyan prison company, out-contracts prisoners for carpentry, tailoring, upholstery, leather crafting, metal work, construction and farming.¹³² In 2019, the Kenyan Enterprise Industry raised around four hundred and forty-four million Kenya shillings (Kshs. 444,535,244.94) in revenue from the sale of prison-crafted goods.¹³³ This was a registration of a marginal decrease from the previous financial year which stood at Kshs. 457,603,352.60.¹³⁴

Where the two tenets of lack of supervision and/or hiring prisoners out to private contractors are available, then the labour extracted from inmates constitutes forced labour. However, this can be corrected by attaching an 'employment' tag to the prisoner. Employment is defined as a commitment to provide services or deal with goods (performing work) in exchange for a wage (as compensation).¹³⁵ An employer is any person, public body, corporation, firm, or company that has engaged in a contract of service to employ any individual, including their foreman, agent, manager, or factor of such person, firm, public body, company, or corporation.¹³⁶ Furthermore, an employee is a person engaged for work to gain wages or a salary and includes an apprentice and indentured learner.¹³⁷

¹³⁰ Section 4(2)(c), *Employment Act* (Chapter 227 of 2007). See also Article 2(2)(c), *Forced Labour Convention*.

¹³¹ <https://www.facebook.com/people/Prison-Enterprises/100069041774314/> on 29 May 2022.

¹³² Ojiambo N, 'Internal growth strategies and performance of Kenya Prisons Enterprise' Unpublished, Kenyatta University, 2021, 6.

¹³³ Office of the Auditor General, *Report of the Auditor General on Prison Industries Revolving Fund for the year ended 30 June - 2019*, 2019, ix - <http://www.parliament.go.ke/sites/default/files/2021-11/Ag%20-Prison%20Industries%20Revolving%20Fund%2030%20th%20%20june%2C%202019.pdf> on 2 June 2022.

¹³⁴ Office of the Auditor General, *Report of the Auditor General on Prison Industries Revolving Fund for the year ended 30 June, 2019*, 2019, ix - <http://www.parliament.go.ke/sites/default/files/2021-11/Ag%20-Prison%20Industries%20Revolving%20Fund%2030%20th%20%20june%2C%202019.pdf> on 2 June 2022.

¹³⁵ Black's Law Dictionary, 4th ed.

¹³⁶ Section 2, *Employment Act* (Chapter 227 of 2007).

¹³⁷ Section 2, *Employment Act* (Chapter 227 of 2007).

In Kenya, to determine whether an employment relationship exists, the courts examine the conduct of the parties involved. This is done by use of certain tests – the control test which establishes the idea that an employer has control over not just the outcome of work to be done, but also the means and techniques by which it will be completed.¹³⁸ Based on this test, prison labour may fall under the ambit of employment, but this is not necessarily the case since all tests must be considered collectively. Prison labour within private PIC is more likely to constitute employment. The mutual obligations test connotes providing a service in exchange for remuneration and making mutual promises for performance in the future.¹³⁹ Within prisons, the commitments depend on a prisoners' sentencing term (this may equate to either a short or long-term period of working).¹⁴⁰ In contemporary prison labour, the situation is more of a 'must do', but private PIC is more likely to be defined as employment because one may ride on the aspect of the private sphere involvement and claim that they are being subjected to forced labour. Private PIC prisoners may thus evade the 'must do'.

The integration test determines if the individual was operating on his or her initiative or was subjugated to the organisation's norms and procedures.¹⁴¹ For prison labour, all labourers (including private PIC prisoners) are subjected to the prisons' rules, procedures and authorisation by prison officers and may thus implicitly be seen as employees. The economic reality test considers whether the worker is self-employed as an entrepreneur or works for someone else, the employer, who bears the ultimate risk of loss or profit.¹⁴² Prisoners, even private PIC ones, cannot be deemed as self-employed fellows and their *individual* work does not influence company's profit or loss-making. And the multiple test asserts that the listed tests are not sufficient as stand-alone tests. The court, therefore, utilises the multiple test which incorporates all the tests.¹⁴³ Private PIC prisoners meet all the criteria and can thus be defined as 'employees'; however, this is not the case for all prison labourers.

In summation, the author notes that the PIC concept plays out by checking various boxes which are as follows. Before tackling these, it is important to state that prison labour is not forced labour because it falls under the metric of work or service within a conviction ordered by a court of law.¹⁴⁴ However, certain criteria

¹³⁸ *Yevens v Noakes* (1880), The United Kingdom Queen's Bench Division.

¹³⁹ *Stanley Mungai Muchai v National Oil Corporation of Kenya* (2012) eKLR.

¹⁴⁰ Rule 21, *Prisons Rules* (Legal Notice No. 60 of 1963).

¹⁴¹ *Jinnah Muchiri v Agricultural Society of Kenya* (2019) eKLR.

¹⁴² *The Kenya Hotel & Allied Workers Union v Alfajiri Villas (Mafuga Ltd)* (2013) eKLR.

¹⁴³ *Stanley Mungai Muchai v National Oil Corporation of Kenya* (2012) eKLR.

¹⁴⁴ Section 2, *Employment Act* (Chapter 227 of 2007). See also Article 2(1), *Forced Labour Convention*, 10 June 1930, Convention No. 29.

must be met for such work or service to remain prison and not forced labour. The first box is that the labour must be performed under supervision by a public authority.¹⁴⁵ The second is that the prisoners are not to be out contracted to private actors.¹⁴⁶ Therefore, if a prisoner is subjected to labour sans supervision, it will amount to forced labour. And, if they are subjected to work under a private actor, this is also forced labour. As earlier stated, the concept of PIC can manifest itself in out-contracting the prisoners to either public or private actors.¹⁴⁷ This paper, therefore, focuses on private PIC – where the prisoners work for private actors. A way to go around the forced aspect of this labour (found within private PIC) would be to pay the prisoners at the employment level,¹⁴⁸ as discussed below, because private PIC prisoners somewhat check the employment box as discussed above.

IV. Lessons from India

The author compares Kenya to India firstly because both countries fall within global south states.¹⁴⁹ States that fall within the global south divide are those that are either least developed or developing, as opposed to those within the north divide which are developed like some states in Europe and North America.¹⁵⁰ However India is also significantly different from Kenya. The differences include geographical location,¹⁵¹ size,¹⁵² population, gross domestic product (GDP), and life expectancy, among others.¹⁵³

¹⁴⁵ Section 2, *Employment Act* (Chapter 227 of 2007). See also Article 2(1), *Forced Labour Convention*, 10 June 1930, Convention No. 29.

¹⁴⁶ Section 2, *Employment Act* (Chapter 227 of 2007). See also Article 2(1), *Forced Labour Convention*, 10 June 1930, Convention No. 29.

¹⁴⁷ Section 4, *The State Corporations Act* (Chapter 446 of 2018).

¹⁴⁸ Fulcher P, 'Emancipate the FLSA', 682.

¹⁴⁹ United Nations Educational, Scientific and Cultural Organization, 'Countries in the global south (by region)' - <https://owsd.net/sites/default/files/OWSD%20138%20Countries%20-%20Global%20South.pdf> on 24 December 2021.

¹⁵⁰ World Atlas, 'What is the global south?' - <https://www.worldatlas.com/articles/what-is-the-global-south.html> on 24 December 2021.

¹⁵¹ My life elsewhere, 'Quality of life comparison' - <https://www.mylifeelsewhere.com/compare/kenya/india> on 26 December 2021. Where India is in South Asia while Kenya is in East Africa.

¹⁵² My life elsewhere, 'Country size comparison' - <https://www.mylifeelsewhere.com/country-size-comparison/kenya/india> on 26 December 2021. India is about six times larger than Kenya being approximately 3,287,263 square kilometres while Kenya is 580,367 square kilometres.

¹⁵³ <https://versus.com/en/india-vs-kenya> on 26 December 2021. Kenya has approximately forty-nine million inhabitants while India 1,351 million. India has a higher GDP per capita of 4,617.00 dollars in comparison to Kenya. India's life expectancy stands at around sixty-nine years while that of Kenya is around 65.

Despite the stated differences, both countries are Commonwealth countries,¹⁵⁴ both having been colonised by the British. Based on this backdrop, the style and content of laws and regulations adopted and followed have slight similarities.¹⁵⁵ Specifically, the Kenyan Prisons Act and the Indian Prisons Act take a similar trajectory in the matters discussed.¹⁵⁶ Similarly, India's Prisons Regulations and Kenya's Prisons Rules also show similarities, especially, the content of the said regulations.¹⁵⁷ Just as Kenya classifies her prisoners into different grades,¹⁵⁸ India also takes up different classifications of prisoners for division of labour.¹⁵⁹ Further, while Kenya has a law that espouses the paying and/or earning scheme for the prisoners,¹⁶⁰ in 2008, the Indian Code of Criminal Procedure was amended, requiring every state to draw up schemes for compensation of prisoners based on the Supreme Court-decided amount, which is discussed below.¹⁶¹ The previous legal dispensation required that labouring prisoners be paid twelve to fifteen rupees a day¹⁶² (which is equivalent to Kshs. 18.24 to Kshs. 22.8; the conversion rate being that one Kenyan shilling is equal to 1.52 Indian rupees).¹⁶³

Further to the above, India's model has proven to be efficacious where it yields great results. Since the increment of prison labour pay which serves as prisoners' incentive to work hard, the prisoners' products have gained strong market value which has led to the improvement of the state's economy.¹⁶⁴ It has also enhanced a self-serving system where the prisoners' wages currently mainly stem from the proceeds of their labour.¹⁶⁵ For these reasons, the author finds it logical to draw some lessons from India's model—which is discussed below.

¹⁵⁴ The Commonwealth, 'Member countries' - <https://thecommonwealth.org/member-countries-> on 26 December 2021.

¹⁵⁵ Leichter H, 'The patterns and origins of policy diffusion: The case of the commonwealth' 15(2) *Comparative Politics*, 1983, 225-227.

¹⁵⁶ See generally *Prisons Act* (India) and *Prisons Act* (Chapter 90 of 1963).

¹⁵⁷ See generally *Prisons Regulations* (India) and *Prisons Rules* (Legal Notice No. 60 of 1963).

¹⁵⁸ Rule 19, *Prison Rules* (Legal Notice No. 60 of 1963).

¹⁵⁹ Section 59(14) and (17), *Prisons Act* (India).

¹⁶⁰ Section 5, *Earnings Scheme, Kenya Prisons Service Standing Orders* (Chapter 68 of 1979).

¹⁶¹ Section 357A, *Code of Criminal Procedure* (India).

¹⁶² Jatir Verma Organisation, *National Crime Records Bureau's Prison Statistics India – 2017 Report & Prison Reforms*, 2 November 2019.

¹⁶³ <https://themonycconverter.com/INR/KES> on 28 December 2021.

¹⁶⁴ National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics India*, 2020, 215.

¹⁶⁵ National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics India*, 2020, 216.

i. *India's model of payment for prison labour*

The previous part briefly explained the initial developments in India concerning the payment of prisoners for their labour. The Indian courts however have decided on the matter and specifically on the acceptable rates of amounts payable to prison labourers. This is discussed hereunder.

The Supreme Court of India, the apex court in India,¹⁶⁶ pronounced itself on the matter, the decision for which is binding, by law, to all other courts. In *State of Gujarat and another v Honourable High Court of Gujarat*, the Supreme Court stated that prison labourers were entitled to pay equated to the minimum wage standard but subjected to certain reductions.¹⁶⁷ While the case was in session, the court placed a holding payable amount of around eight rupees per day to allow for time to settle on the appropriate amount¹⁶⁸ as previously stated. The Court mandated the states in India to 'fix' equitable wages (in the form of earnings' schemes) for their respective state prisoners.¹⁶⁹ As of 2020, the states had adopted varying rates, payable to their prisoners. Their net remunerations range from about eighty-five to three hundred rupees a day which is remitted to prisoners in the different classification levels.¹⁷⁰ The author does not recommend such high remuneration to Kenyan prisoners but consideration of more reasonable amounts—in following the skeleton behind India's model.

The court first established that there are two types of imprisoned persons, those that are simply imprisoned and those sentenced with rigorous imprisonment which constitutes labour.¹⁷¹ Within this scenario, the simply imprisoned persons can willingly choose to work or decide not to. However, those sentenced to rigorous imprisonment due to committing greater crimes undertake prison labour compulsorily. This stance resolves the issue of many or all prisoners being eligible for pay which makes the cost of sustaining prisoners expensive. The author believes Kenya should take up this position.

¹⁶⁶ Article 141, *The Constitution of India* (India).

¹⁶⁷ See generally *State of Gujarat and another v Honourable High Court of Gujarat* (1998) Supreme Court of India.

¹⁶⁸ *People's Union for Democratic Rights v Union of India*. See also *State of Gujarat and another v Honourable High Court of Gujarat* (1998) Supreme Court of India, para. 5.

¹⁶⁹ *State of Gujarat and another v Honourable High Court of Gujarat* (1998) Supreme Court of India, para. 66-67. See also Section 357A, *Code of Criminal Procedure* (India) which shows a 2008 amendment to reflect states' obligation to fix respective earnings schemes.

¹⁷⁰ National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics India*, 2020, 216-217.

¹⁷¹ *State of Gujarat and another v Honourable High Court of Gujarat*, (1998) Supreme Court of India, paras. 12 and 13. The same decision was also later upheld in *O.P Gandhi v Pio, Tihar Jail* (2015) Central Information Commission, para. 3.

The court further discussed how failing to remunerate prison labourers constitutes a contravention of the constitutional provision against ‘forced labour’. The Indian Constitution, in Article 23, refers to any form of forced labour as ‘traffic in human beings’ which simply translates to ‘trade in human beings’ or using human beings as a trade commodity.¹⁷² The court thus interpreted that having prisoners work for no or meagre payment constitutes ‘traffic in human beings’. They defined forced labour as having persons do work without receiving remuneration. The court explicitly stated that ‘we are, therefore, of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words ‘forced labour’ under Article 23’.¹⁷³

Judge K.T Thomas went on to explain why India’s constitution concerning forced labour does not read like other states’ provisions on the same – where labour conducted as punishment for a crime does not form part of forced labour. In the preliminary discussion of this constitutional provision, the clause on forced labour had the said exception. However, upon consultation within the advisory committee, the constitution writers chiselled the provision down by striking out the exception which was on the basis of ‘public purpose’ designed to have punitive labour to deter the commission of the crime.¹⁷⁴ The constitutional writers saw it fit to omit payment for prison labour on the legal basis that they had done wrong and deserved punishment. However, they took up a social and ethical standpoint where they found that ‘extracting somebody’s work without giving them anything in return is only reminiscent of the period of slavery and the system of beggar’ which dilutes the person’s dignity.¹⁷⁵ Despite Kenya having a different perspective on prison labour which does not amount to forced labour,¹⁷⁶ India is at the forefront in upholding the right to dignity – where Kenya also lies.

Not only does the court advocate pay, but they also participate in a conversation on what amount would be appropriate to constitute pay. The court chose to take up the existing legislation on matters of pay- by referring to the

¹⁷² Article 23, *The Constitution of India* (India).

¹⁷³ *State of Gujarat and another v Honourable High Court of Gujarat*, (1998) Supreme Court of India, para. 21.

¹⁷⁴ *State of Gujarat and another v Honourable High Court of Gujarat*, (1998) Supreme Court of India, paras. 22-27.

¹⁷⁵ *State of Gujarat and another v Honourable High Court of Gujarat*, (1998) Supreme Court of India, para. 34.

¹⁷⁶ Section 4(2)(c), *Employment Act* (Chapter 227 of 2007). See also Article 2(2)(c), *Forced Labour Convention*.

Minimum Wages Act. They posited that the minimum wage paid should be enough to cover the physical demands of a prisoner's bare workmanship and their family, such as education, medical care, and amenities, to maintain their efficiency.¹⁷⁷ The court relied on a Supreme Court ruling of *Express Newspaper (P) Ltd v Union of India* where the court termed this as payment for a person to live in a *dignified manner* having met his needs and those of his family.¹⁷⁸ The minimum standard is to be fixed by the government and applicable to all persons who work or provide a service based on their right to dignity.¹⁷⁹

However, the court noted some restraint in taking up this stance from lower courts and specifically, in the Gujarat High Court case of *Jail Reforms Committee v State of Gujarat*, they conditionally agreed to prison labourers receiving payment equal to the minimum wage subject to a deduction of the amount set aside for upkeep – for food and clothing.¹⁸⁰ In the Supreme Court, the judges reasoned out this position by posing a three-fold stand, where one, if the pay was not subjected to deductions, prison labourers would in turn likely earn more than law-abiding citizens who have to expend some of their monies on basic amenities like food, shelter and clothing. Secondly, that the government will now use taxpayers' money to pay both for their prison expenses as well as pay them for their labour. The court recognised that it is the government's duty to ensure that prisoners are locked in, for society's security, as punishment and rehabilitation to the wrongdoers, among other reasons. Consequently, the government is obligated to provide food and clothing to inmates. Third, and what they termed as the most important, is that the Minimum Wages Act permits employers to deduct sums from certain kinds of fixed amount¹⁸¹ as justified in the Minimum Wages (Central) Rules.¹⁸² The conditions for this are where the employer provides housing and services and amenities supplied by the employer. For the above reasons, the court saw fit to have the amount payable according to the minimum wage standard but subject to deduction, based on the government's daily spending on each prison labourers' upkeep.¹⁸³ On deductions, the court further directed that legislation be made to have direct diversion of some of the funds to the victims of the

¹⁷⁷ *State of Gujarat and another v Honourable High Court of Gujarat*, (1998) Supreme Court of India, para. 34.

¹⁷⁸ *Express Newspaper (P) Ltd v Union of India*, (1958) Supreme Court of India, para.

¹⁷⁹ Section 4, *Minimum Wages Act* (India).

¹⁸⁰ *Jail Reforms Committee v State of Gujarat*, (1992) Gujarat High Court of India.

¹⁸¹ Section 12, *Minimum Wages Act* (India).

¹⁸² Rule 21, *Minimum Wages (Central) Rule* (India).

¹⁸³ *State of Gujarat and another v Honourable High Court of Gujarat*, (1998) Supreme Court of India, paras. 40-44.

offences committed by the prisoners.¹⁸⁴ These positions would also work in Kenya to expunge the demerit of increased prisoners' pay—on questions of whether prisoners would receive higher remuneration than law-abiding citizens.

V. Recommendations and Conclusion

i. Recommendations

Borrowing from India's model, the author suggests that the policymakers exercise their executive role and revise the rates espoused within Section 5 of the Earnings' Scheme, Kenya Prisons Standing Orders, to create an upgrading system to determine the amounts payable to inmates. The Cabinet Secretary for National Security ought to take up this task and make revisions.¹⁸⁵ Further to this, the legislature ought to also take up an active role and amend the Prisons Act¹⁸⁶ to perhaps learn from India's approach of not having all prisoners participating in prison labour and thus being eligible for pay. The metric for deciding who works and who does not should be based on the type of crime committed—where those who commit larger crimes are subjected to compulsory work (with varying working hours based on different crimes).¹⁸⁷ And, those that committed lesser crimes should be granted the choice to work or not to work.¹⁸⁸ However, one of the key lessons that the Kenyan prison system aims to ingrain in its prisoners is founded on their prison work; for them to learn responsibility.¹⁸⁹ This can still be maintained by having those prisoners who are not subjected to prison work undertake chores that constitute the daily running of the prisons.¹⁹⁰ Pragmatically, the legislature should also work in tandem with the Cabinet and change the budgetary allocation,¹⁹¹ set aside for prisons to enable the scheme's increment.

This model is more suitable for private PIC prisoners, as they entirely meet the threshold that defines them as forced labourers. They can therefore easily

¹⁸⁴ *State of Gujarat and another v Honourable High Court of Gujarat*, (1998) Supreme Court of India, paras. 48-49.

¹⁸⁵ This is as seen in *Aloise Onyango Odhiambo & 2 others v Attorney General & another* [2019] eKLR, where the court found that the Cabinet Secretary, and not the Attorney General, has the power to revise the said rates.

¹⁸⁶ The relevant provision for amendment is Section 43, *Prisons Act* (Chapter 90 of 1963).

¹⁸⁷ *O.P Gandhi v Pio, Tihar Jail* (2015) Central Information Commission, para. 3.

¹⁸⁸ *O.P Gandhi v Pio, Tihar Jail* (2015) Central Information Commission, para. 3.

¹⁸⁹ Rule 3(c), *Prisons Act* (Act No.8 of 1963).

¹⁹⁰ See for example, *William M. Mutungi v Samuel K. Njyutu and another* (2001) eKLR, 1, para. 3.

¹⁹¹ Article 95(4), *Constitution of Kenya* (2010).

take up India's model on the front of forced labour. Further to this, private PIC prisoners, due to the aspect of forced labour, meet the criteria of what constitutes employment in Kenya and are accordingly eligible for employees' rate of pay. On the other hand, prison labourers are also eligible for this revision, based on the right to dignified pay.

The author, therefore, opines that the revised earnings scheme should be based on Kenya's criterion for salaried pay (the minimum wage rates).¹⁹² Minimum wage is the lowest amount a worker can legally be paid for their work.¹⁹³ In many countries, governments have set up a certain rate and range that they rely on for their minimum wages. India, from which the author studied, also has minimum wage rates. The Government of Kenya sets the rate based on age, location, and level of skill.¹⁹⁴ On 1 May 2022, to assist workers in coping with a rise in consumer costs, President Uhuru Kenyatta announced an immediate raise in Kenya's minimum wage by 12 percent.¹⁹⁵ This constituted a change from the previous regime where in May 2015, the minimum wage rate was set at Kshs. 10,107.10 per month for urban workers and Kshs. 2,536 per month, excluding housing allowance, for unskilled agricultural employees.¹⁹⁶ The new rates now range between Kshs. 7,544.70 for unskilled employees¹⁹⁷ and Kshs. 15,120.00 for urban workers.¹⁹⁸ To ensure that citizens do not commit crimes to earn money, slightly less than the lower amount of Kshs. 7,544.70, excluding housing allowance (because the prisons house them) can be adopted. Just as seen in India's model, the Cabinet Secretary should be tasked with the role of fixing the rates for pay while considering the necessary deductions, which include housing, food, and clothing. The Cabinet Secretary, in exercising his powers, may decide to retain the 3 grades for payment. To facilitate this pay, the author suggests that the money can be cut from the sale of the goods and services that prisoners provide.¹⁹⁹ However this can be further backed by the tax cut remitted

¹⁹² Minimum-Wage.org, 'Kenya minimum wage, labor law, and employment data sheet: Kenya minimum wage rate', 2021.

¹⁹³ Minimum-Wage.org, 'Kenya minimum wage, labor law, and employment data sheet'.

¹⁹⁴ Minimum-Wage.org, 'Kenya minimum wage, labor law, and employment data sheet'.

¹⁹⁵ Virtual HR, 'Kenya revised minimum wages – 2022', 17 June 2022.

¹⁹⁶ Minimum-Wage.org, 'Kenya minimum wage, labor law, and employment data sheet'.

¹⁹⁷ Virtual HR, 'Kenya revised minimum wages – 2022'.

¹⁹⁸ Trading Economics, 'Kenya minimum wages', 2022.

¹⁹⁹ <https://youtu.be/nDfYzcljIg8> on 20 September 2021. In this video, from around minute 4.30 – 4.35, the prison officer talks about the sale of the multi-purpose soap (made by the prisoners) which generates income. From this, part of the proceeds can be used to pay prisoners for the labour they undertake. See also Office of the Auditor General, *Report of the Auditor General on Prison Industries Revolving Fund for the year ended 30 June, 2019*, 2019, ix - <http://www.parliament.go.ke/sites/default/files/2021-11/Ag%20-Prison%20Industries%20Revolving%20Fund%2030%20th%20%20june%2C%202019.pdf> on 2 June 2022.

to run prisons.²⁰⁰ Nonetheless this is dependent on the budgetary allocations within parliament, as they hold the strings of the purse.²⁰¹ The author, therefore, suggests that the two organs, the executive and the legislature, work hand in hand to right this wrong of meagre pay to prison labourers.

ii. Conclusion

This study has questioned the appropriateness of meagre pay to prisoners for prison labour. The author has shown, using the human rights theory and the concept of prison industrial complex (PIC), specifically for private PIC, that the meagre rate espoused in Section 5 of the *Earnings Scheme, Kenya Prisons Service Standing Orders* is inappropriate. And, borrowing from India's model, it is hoped that this study will be useful to legislators and policymakers as they come up with laws and policies on appropriate payment for prison labourers.

The author believes that this approach is fair and does not jeopardise the traditional objectives that society seeks to achieve through incarceration.

²⁰⁰ This is seen where part of taxpayers' monies is cut for running prisons. For example, in <https://www.gobankingrates.com/taxes/filing/wont-believe-much-prison-inmates-costing-year/> on 20 September 2021.

²⁰¹ Article 95(4), *Constitution of Kenya* (2010).