Treating labour as a non-commodity: The right to strike in the wake of the current employment laws and the new constitutional dispensation

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Declaration

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

Signed: .....
Date: .....

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

Signed:.....
Mr. Allan Mukuki

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To anyone else I may have forgotten, thank you for all your inputs.

List of Abbreviations

ACHPR- African Charter on Human and Peoples' Rights

EAA- East African Association

EATUC- East African Trade Union Congress

ECHR- European Convention on Human Rights

ECtHR- European Court of Human Rights

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

ILO- International Labour Organisation

KFL- Kenya Federation of Labour

KFRTU- Kenya Federation of Registered Trade Unions

KNUT- Kenya National Union of Teachers

KSSHA- Kenya Secondary Schools Heads Association

KUPPET- Kenya Union of Post Primary Education Teachers

LTUEA- Labour Trade Union of East Africa

LTUK- Labour Trade Union of Kenya

PWD- Public Works Department

TSC- Teachers' Service Commission

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1. INTRODUCTORY CHAPTER

1.1 Introduction

For a very long time, a price tag has been attached to the labour that a human person expends. An example of this commodification is slave trading from as early as the 17th century.[1] Before beginning any discussion on the right to strike, it is essential for one to understand the meaning of a strike and commodification. The Employment Act defines a strike as "the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work, for the purpose of compelling their employer or an employers' organization of which their employer is a member, to accede to any demand in respect of a trade dispute".[2] The right to engage in a lawful strike is provided for and guaranteed under Kenya's Constitution.[3] Article 41 of the 2010 Kenyan Constitution goes further to reaffirm a strike action as a fundamental right.

Commodification on the other hand can be defined as the treating of something that cannot be owned or that everyone has a right to, like a product that can be bought or sold. [4] It has been argued that the commodification of labour has led to the diminishment of human dignity which is inherent, universal and ought to be respected and protected.[5] Some authors such as Edmund Burke have argued that labour is a commodity like any other, merely being a function of the market where it is affected by the forces of supply and demand, therefore having economic value attached to it.[6] Other authors at the other end of the spectrum such as Kell Ingram posit that labour is not to be commodified as the provision of a person's labour is the provision of oneself; the provision of one's very essence.[7] Commodification would undermine the inherent dignity accorded to a human person.

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[1] British Library, 'The Slave Trade - A Historical Background' www.bl.uk/learning/histcitizen/campaignforabolition/abolitionbackground/abolitionintro.html on 18 November 2015.

[2] Section 2, *Employment Act* (CAP 226). The Employment Act (CAP 226) is the primary statute on employment law in Kenya as it succinctly defines the employer-employee relationship as well as the rights and duties of each of the parties.

[3] Article 41(2)(d), *Constitution of Kenya* (2010).

[4] Merriam-Webster Dictionary http://www.merriam-webster.com/dictionary/commodification on 21 March 2016.

[5] Article 28, *Constitution of Kenya* (2010). Every human being has dignity and worth. Men and women have equal rights. See United Nations Human Rights Office of the High Commissioner, 'Vienna declaration and programme of action', para 6 http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx on 7 December 2016.

[6] Preece R, 'The Political Economy of Edmund Burke' *Modern Age*, 1980, 266 http://www.mmisi.org/ma/24_03/preece.pdf on 17 November 2015.

[7] Ingram J, 'Work and the Workman', first published in 1880, Ely R, Eason & Son Ltd, 1928.

The objectives of strike actions may be categorized as being 'occupational', 'trade union' or 'political'.[8] The 'occupational' objective seeks to improve or guarantee workers' working or living conditions. The 'trade union' objective seeks to develop or guarantee the rights of trade union organizations and their leaders. The 'political' objective seeks to obtain solutions to social and economic policy questions.[9] Some of the forms of industrial action include but are not limited to: complete cessation, sit-ins, go slows, wild cat strikes, sympathy strikes as well as picketing.[10]

Complete cessation involves employees completely refusing to continue to work, for the purpose of compelling their employer or an employers' organisation, to give in to any demand in respect of a trade dispute.[11] In sit-ins, employees cease to work and sit down at their stations. This makes it difficult for their employers to replace them physically.[12] Go slows are where employees work at a slower pace than normal in order to decrease productivity and eventually profits.[13] Wild cat strikes are characterised by workers who are members of trade unions going on strike without the authorisation of the trade unions.[14] Sympathy strikes involve workers coming out in support of another strike provided that the initial strike they are supporting is lawful.[15] Picketing involves workers and union representatives standing outside a workplace to tell other people the reasons for their striking. These workers (pickets) may also ask people not to go into work or do some of their usual work.[16]

One may, therefore, ask how the right to strike is related with commodification of labour. The right to strike is but an essential tool in the plight of treating labour as a non-commodity. With it, workers can address employment issues such as salaries and wages that would otherwise lead to the commodification of their labour if not addressed and taken into account.

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[8] Gernigon B, Odero A and Guido H, 'ILO principles concerning the right to strike' *International Labour Office*, Geneva (2000), 13-14.
[9] Gernigon B, Odero A and Guido H, 'ILO principles concerning the right to strike', 13-14.
[10] Gernigon B, Odero A and Guido H, 'ILO principles concerning the right to strike', 14.
[11] Section 2, *Employment Act* (CAP 226).
[12] History, '1936 Sit-down Strike Begins in Flint' http://www.history.com/this-day-in-history/sit-down-strike-begins-in-flint on 16 February 2016.
[13] Macmillan Dictionary http://www.macmillandictionary.com/thesaurus-category/british/strikes-and-other-union-activity on 16 February 2016.
[14] Farlex, The Free Dictionary http://legal-dictionary.thefreedictionary.com/Wildcat+Strike on 16 February 2016.
[15] Committee of Experts on the Application of Conventions and Applications (Articles 19, 22 and 35 of the Constitution), 'Freedom of association and collective bargaining: General survey', *International Labour Conference 69th session*, 1983, para. 217.
[16] Government of the United Kingdom, 'Taking Part in Industrial Action and Strikes', https://www.gov.uk/industrial-action-strikes/going-on-strike-and-picketing on 16 February 2016.

In light of the above introductory discourse, this chapter is an introduction of the problem and purpose of the study. Chapter two of this dissertation then discusses in length the right to strike, its history, effectiveness, challenges and loopholes in its enforcement. Chapter three thereafter discusses in length the two notions of commodification, that is, the commodification and non-commodification of labour. Chapter four finally concludes this dissertation by asserting that the right to strike is ineffectively being exercised by employees, as well as some recommendations on how the right to strike can best be enforced.

1.2 Background Information

Strike action was declared a right by the Committee on Freedom of Association from its earliest days; during its second meeting in 1952. The right was recognised as one of the fundamental means by which workers and their associations could legally and legitimately defend and promote their social and economic interests. [17]

Using Kenya as a point of focus, it is noted that apart from alienating indigenous land in colonial Kenya, the colonialists also introduced taxation to force Africans to enter into wage employment. Consequently, a legal and administrative framework was enacted to oversee Africans who were now a severely exploited labour force. An example is the 1940 Defence (Native Personnel) Regulations which vested power in the governor to order provincial commissioners to produce workers for essential and military services. Corporal punishment was used by settlers of Dutch descent to force Africans to provide labour. Communal labour was also mandatory in the native reserves. The conditions of forced labour were depraved and brutal. We can see this brutality in the 1959 Hola Camp massacre in Kenya where eleven detainees were killed after being beaten by wardens, for refusing to work.[18]

Various strikes have been observed to have taken place from 1900, for example the 1900 strike where European, Asian and African workers staged a strike after some workers' privileges had been withdrawn.[19] There was also a 1950 boycott organised by the East African Trade Union Congress (EATUC) which broke out after the acting president of EATUC was arrested and

[17] Gernigon B, Odero A and Guido H, 'ILO principles concerning the right to strike', 11.
[18] Ochieng' W R and Maxon R M (eds), *An economic history of Kenya*, East African Educational Publishers, 1992, 173-185.
[19] Singh M, *History of Kenya's Trade Union Movement to 1952*, Nairobi, 1968, 7.

certain additions to the Schedule of the Essential Services (Arbitration) Ordinance were published in the Official Gazette. In the Schedule, strikes were illegal.[20]

Currently, major restrictions hinder the right to strike. All disputes must be submitted to the Ministry of Labour 21 days prior to calling a strike action or twenty-eight days where essential services are involved such as health, education, water utilities or air traffic control services.[21] The Ministry of Labour may then turn to alternative dispute resolution for example act as an arbitrator or submit the dispute to the Industrial Court. The Ministry of Labour has the discretionary right to decide whether a strike is legal or not.[22]

In practice, the right to strike is frequently violated. The Minister of Labour generally intervenes during the strike notice period and proposes a mediator for the dispute. This is also another challenge to the right to strike. In case the negotiations break down, the dispute is often referred to the industrial court, pre-empting any decision to lawfully strike. In such cases, strikes have usually been declared illegal.[23] The Ministry of Labour may take advantage of the strike notice period to prevent any lawful strikes from taking place.

1.3 Statement of the Problem

The main problem that this dissertation seeks to analyse is the gaps in the enforcement of the right to strike. The right to strike has been exercised ineffectively by employees who are frequently barred from striking by social, political and economic factors. Under the International Labour Organisation (ILO) conventions, the right to strike is controversial and not explicitly provided for.

With the right to strike being exercised ineffectively by employees, their labour is therefore being fully commodified.

1.4 Justification of the study

This study is important in ascertaining to what lengths the right to strike has been enforced and reinforced. As it is provided for in the Constitution and the Employment Act, it would be

[20] Ochieng' and Maxon (eds), *An economic history of Kenya*, 191-192.
[21] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', Geneva, 25 and 27 October 2006, 3.
[22] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.
[23] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.

beneficial to analyse to what extent the various concerned parties have gone in making the enforcement of the right to strike, a reality. The study will also shed light on the gaps in the ratified ILO conventions as pertains to providing for and enforcing the right to strike. What role does the International Labour Organisation play, in making the right to strike a reality? At the end of the day, our main goal is to get labour to be treated as a non-commodity. This study will critically show these decommodification efforts, through the right to strike.

1.5 Statement of Objectives

1.5.1 Main Objective

This dissertation project will mainly seek to establish and analyse the effectiveness of, challenges and loopholes in the enforcement of the right to strike.

1.5.2 Specific Objectives

a. To critically analyse the origins of the legality of the right to strike in Kenya, and how far it has gone in attempting to decommodify labour as provided for in the 2010 Constitution, international legal instruments and key Kenyan employment laws. The mechanisms put in place to facilitate the realisation of the right to strike as well as the remedies afforded to parties whose right to strike has been infringed upon will also be analysed and evaluated.
b. To critically analyse and discuss the notions of commodification and non-commodification of labour.

1.6 Research Questions

This dissertation project seeks to answer the following questions:

i. What are the origins of the legality of the right to strike in Kenya, and how far has it gone in attempting to decommodify labour as provided for in the Constitution, international legal instruments and key Kenyan employment laws? Moreover, what are the mechanisms put in place to facilitate the realisation of the right to strike as well as the remedies afforded to parties whose right to strike has been infringed upon? Are there any challenges and loopholes to the enforcement of the right to strike?
ii. What are the various discussions that have arisen concerning the commodification and non-commodification of labour?

1.7 Literature Review

Various works have been authored on treating labour as a non-commodity and the right to strike separately. However, few works link the two concepts. This dissertation will therefore go ahead to link these two concepts as well as give a critique of both topics as a nexus.

1.7.1 The Right to Strike

The right to strike can be considered an essential human right. The 'dignity of labour', 'labour is not forced', 'labour is not a commodity', and that workers are 'free not slaves', are legitimate positions that are strongly held. The right to strike is not to be abused and workers are not to be punished for going on strike. As White puts it, 'at the end of the day, the individual employee's dignity should be respected and safeguarded.'[24] This dissertation fully agrees with White's assertion to the extent that the right to strike is gravely fundamental as a human right.

For the right to strike to be effective, trade union organisers and the trade union organisation should not be subject to penalties. The individual on strike has a 'firewall protection', a sort of immunity.[25] Apart from losing salaries or wages, no other penalties should be imposed. Dismissal or discrimination against, should not transpire for going on strike.[26] As will be analysed, this approach seems to be rosy, theoretical and does not always transpire during strikes.

Ewing further observes that the right to strike as a human right does not negate the fact that there should be reasonable limitations and respect for others' rights, with the doctrine of proportionality in mind.[27]

The International Confederation of Free Trade Unions reported that the exercise of the right to strike has greatly been restricted. It uses the 2005 Teachers' Service Commission (TSC) regulations as an illustration. The regulations prevent senior teaching staff from participating in strikes. Disciplinary action will be meted out to teachers who fail to comply with the regulations.[28]

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[24] White C, 'The right to politically strike?', Flinders University, School of Law, 263.
[25] Firewall protection means that employees or employers' organisations participating in a lawful strike are to be immune from penalties. This protection ensures that they lawfully strike without fear of illegal consequences.
[26] White C, 'The right to politically strike?', Flinders University, School of Law, 263.
[27] White C, 'The right to politically strike?', Flinders University, School of Law, 264. Also see Ewing KD, 'Laws against strikes revisited' in Barnard C, Deakin S, and Morris G (eds) *The future of labour law*, Hart Publishing, 2004.
[28] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.

Further injustices are evident in a number of strikes. In June 2005, a total of 199 medical workers at two major hospitals in Kenya were suspended for having taken part in a strike. In the same month, around 5,000 nurses also went on strike due to huge pay increases among some hospital administrators. The Government announced that these striking nurses were to be replaced by the hiring of 384 nurses. Furthermore, 9,000 civil servants were dismissed for taking part in "illegal" strikes. In July, the government dismissed 1,600 people who had taken part in the strike. These employees were reinstated in November.[29]

In January 2005, tea workers went on strike as their management had ignored a court order stipulating that the workers were to receive wage increases of between 24 and 32 percent. In May, several of the striking workers were dismissed. They were reinstated after negotiations.[30]

In December 2005, university lecturers went on strike over wage demands. They were threatened with dismissal. Their demands for wage increases were later upheld by a reconciliation committee.[31]

The empirical evidence above goes to show how ineffectively workers have exercised their right to lawfully strike.

1.7.2 Commodification and Non-Commodification of labour

As per Otto Khan Freund, 'the main object of labour law has always been…to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[32] This dissertation concurs with Freund in so far as Employment law must step in to bridge the gap created by inequality of bargaining power.

Joe Burns further argues that labour activists should rely on the maxim of 'labour is not a commodity'.[33] He states that treating labour as a commodity reduces its role and purpose to mere wage-bargaining. He further asserts that commodification of labour functions as a form

[29] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.
[30] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3-4.
[31] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 4.
[32] Davies P and Freedland M, *Khan Freund's Labour and the Law*, 3ed, Stevens and Sons, 1983, 18.
[33] Burns J, *Reviving the strike: How working people can regain power and transform America*, IG Publishing, Brooklyn, New York, 2011, https://libcom.org/files/Reviving%20the%20Strike%20-%20Joe%20Burns.pdf on 21 March 2016.

of social control. Unlike other commodities, labour consists of human actions which have moral importance and lived experiences. Matt Bruenig concurs with Burns' assertions.[34] This dissertation agrees with both Burns and Bruenig and is strongly inclined towards the 'labour is not a commodity' school of thought. This is crucial to the study as it forms the foundational basis of positing that the right to strike goes some distance in trying to treat labour as a non-commodity.

Further, Clause Offe argues that in almost every market economy, people who are working refuse to accept the consequences of commodifying labour. These people do so by constructing welfare states, creating trade unions as well as enacting income redistribution policies.[35]This concept ties in with this study as it will be looking at the role played by trade unions in enforcing the right to strike. This dissertation agrees with Offe in his assertion that people who are working sometimes refuse to accept the consequences of commodifying labour, as the right to strike has been ineffectively exercised in some instances.

As per Roble, Lubeto et al, the employment relationship since time immemorial, has been influenced by three models. These are the free collective bargaining model, the free labour market model and the social justice model respectively.[36] In the free collective bargaining model, they posit that the main actors are employers and trade unions. Whatever these two parties agree upon bind employees as they do not have a say in employment matters. Employees have minimal protection. Further, trade unions can lawfully exist, call for organised industrial action as well as engage in collective bargaining.[37]

The free market model is characterised by free market principles. The model informs policy approaches such as the promotion of cost effective economic objectives, the deregulation of the labour market, flexibility and competitiveness in the use of labour, and many others. It is possible that any gains which employees may have under the free collective bargaining model are eroded by the free market labour model.[38]

In the social justice/employee protection model, the need to elevate the positions of employees in the employment relationship arises. The protection and safeguard of employees is thus its

[34] Bruenig M, 'Reviving the strike and the ethics of labour commodification', 4th March 2012 http://mattbruenig.com/2012/03/04/reviving-the-strike-and-the-ethics-of-labor-commodification/ on 27 February 2016.
[35] Offe C, *Contradictions of the welfare state*, Keane B (ed), Hutchinson, London, 1984.
[36] Roble Z, Lubeto O, Njoroge P, Nasirumbi S, Kinyua C, 'Paternalism and the employment contract: A panacea or anathema?', 1 *UON SALAR Students' Law Journal* (2015), 32.
[37] Roble Z, Lubeto O et al, 'Paternalism and the employment contract: A panacea or anathema?', 32.
[38] Roble Z, Lubeto O et al, 'Paternalism and the employment contract: A panacea or anathema?', 32.

principal concern. The state is seen to interfere in the employment relationship through legislation.[39]

None of the three models operate independently in practice. There are bound to be cases of overlap. What is fundamental and crucial is to strike a balance between the free labour market model and the social justice/employee protection model.[40] This dissertation therefore agrees with this assertion as a balance needs to be struck between; on the one hand, deregulating the labour market and enacting cost effective economic objectives and on the other hand elevating and protecting employees. This is important for the dissertation as striking a balance between the two models critically determines the extent to which the right to strike can be fostered.

In light of the above literature review, this study will show that labour is still treated as a commodity and that the right to strike is exercised ineffectively by workers.

1.8 Theoretical Framework

Two vast theories or schools of thought inform the study: 'Labour is a commodity' and 'Labour is not a commodity'.

1.8.1 Labour is not a commodity

In support of the 'labour is not a commodity' school of thought, thinkers inclined towards a natural law theory point of view, attach some moral value to work and posit that work is good for man as it leads him to self-fulfilment and ultimately the proper end. This moral value includes but is not limited to man's ability to have dominion over the earth.[41]

In 1997, Paul O'Higgins provided that the origins of the maxim 'Labour is not a commodity' can be traced back to Dr. John Kells Ingram,[42] who was an Irish sociologist and economist.[43] O'Higgins went ahead to refer to the address given by Ingram to the Trades Union Congress meeting in Dublin in September 1880. Ingram, being at one extreme of the spectrum, posited that labour is not to be commodified because when a person provides their labour, they provide

[39] Roble Z, Lubeto O et al, 'Paternalism and the employment contract: A panacea or anathema?', 33.
[40] Roble Z, Lubeto O et al, 'Paternalism and the employment contract: A panacea or anathema?', 33.
[41] Pope John Paul II, 'Laborem Exercens', Item 9: Work and Personal Dignity http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html on 16 February 2016. Natural law theory posits that the law establishes reasons for actions as well as creates moral obligations that bind people as they act. See Stanford Encyclopaedia of Philosophy, 'Natural Law Theories', 4th November 2015 http://plato.stanford.edu/entries/natural-law-theories/ on 24 February 2016.
[42] 1832-1907.
[43] O'Higgins P, 'Labour is not a commodity - an Irish contribution to International Labour Law' 26 *Industrial Law Journal* (1997), 225.

their very own essence alongside it. Treating labour as a commodity would therefore go to great lengths to undermine the human dignity accorded to each human person by virtue of them being human persons.[44]

In 1877, Brentano reiterated that in his work on '*The employment relationship pursuant to current German law',* argued that labour is not a commodity. He stressed on labour power being the human person himself/herself and, therefore, labour was essentially different from all other commodities. He further averred that due to this unique feature, it should be treated differently from the rest of the commodities.[45]

This dissertation will lean towards this theory and will propagate that labour is not a commodity as commodifying labour would lead to the diminishment of human dignity which is inherent, universal and ought to be respected and protected.[46]

1.8.2 Labour is a commodity

At the other extreme, the concept of labour as a commodity was fathered by the economist Adam Smith[47] and echoed by Edmund Burke[48]. Smith fully endorsed Burke's views on economics.[49] Burke averred that labour is a commodity and an article of trade like any other, merely being a function of the market where it is affected by the forces of supply and demand, therefore having economic value attached to it. [50]

Karl Marx and Friedrich Engels also subscribed to the theory that labour is a commodity.[51] Engels averred that because labour is a commodity, its price is determined by the exact same laws that apply to other commodities. In an economic regime, the price of a commodity is

[44] Ingram J, *Work and the Workman*. This was an Address to the Trades Union Congress in Dublin, September 1880 (first published 1880). Reprinted with Introduction by Ely R, Eason & Son Ltd, 1928.
[45] Brentano L, *Das Arbeitsverhältnis gemäß dem heutigen Recht: Geschichtliche und ökonomische Studien Reprint, Hrsg. Und eingeleitet von Thilo Ramm*, English edition: *The employment relationship pursuant to current German law*, first published 1877, Keip Verlag 1994, 182–216.
[46] Article 28, *Constitution of Kenya 2010.*
[47] Smith A, *The wealth of nations Books I – III*, first published 1776, Penguin 1999. See also *Wages of Labour*, Chapter VII, 134, 167–169.
[48] Burke E, *Thoughts and details on scarcity*, T. Gillet, 1800, 6 and 13.
[49] Smith A, *The man and his works*, Arlington House, 1969, 201. Smith commented that Burke was "the only man I ever knew who thinks on economic subjects exactly as I do, without any previous communications having passed between us''.
[50] Preece R, 'The Political Economy of Edmund Burke', 1980 http://www.mmisi.org/ma/24_03/preece.pdf on 17 November 2015. See also Burke E, *Thoughts and details on scarcity*, 1800.
[51] Evju S, 'Labour is not a commodity: A reappraisal' Arbeidsnotater Working papers in labour law, 6 *Institutt for privatrett Det juridiske fakultet* (2012), 3.

averagely always equal to its cost of production. Therefore, the price of labour is also equal to the cost of production of labour.[52]

In addition to Engels' views, Marx argued that by equating different kinds of labour to the amount of goods for which they could be exchanged, this labour's social character thus becomes materialistic, it becomes a material relationship between things.[53] Karl Renner also echoed Marx's views.[54]

Andrew Garran; an Australian politician and journalist; remarked in 1891 that labour was "a remarkable commodity" because "it is a live commodity, capable of social and political action,…a commodity that can think,…talk,…read,…attend meetings,…be fired with class-enthusiasm,…can link itself hand-in-hand with other like commodities,…can form trades unions, that can strike,…raise barricades,…can vote, get into Parliament."[55]

1.9 Hypothesis

The right to strike cannot operate in a vacuum and needs a reinforced legal framework as well as comprehensive and practical policies.

1.10 Research Design and Methodology

This study will mainly be qualitative, that is, desk-based. The study will employ the following methods:

1.10.1 Use of a case study

This study will use Kenya as a case study, exploring the origins of the right to strike in Kenya, mechanisms put in place to facilitate this right, remedies afforded to parties whose right to strike has been infringed upon, the right's ineffective exercise as well as challenges and loopholes in its enforcement in Kenya.

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[52] Engels F, 'The Principles of Communism', first published 1914, item 5 www.marxists.org/archive/marx/works/1847/11/prin-com.htm on 16 February 2016.

[53] Marx K in McLellan D (ed), *Selected writings*, 2ed, OUP, 2000, 437–438.

[54] Renner K, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion*, first published 1904, English edition: *The institutions of private law and their social functions*, Ed. and with an Introduction by Otto Kahn-Freund, Routledge, 1949.

[55] Garran A, 'Trade unions: A Criticism', The Australian Economist, II, 24th August 1891, No. 17,145.

1.10.2 Archiving and secondary research

This includes library research, reviewing books and dissertations, newspaper and journal research among other methods.[56]

1.10.3 Desktop research

Internet searches will be employed at this stage. Precedents and ILO Conventions will also be used as employers and employees are central to the discussion on the right to strike. The precedents and ILO Conventions will put into context employers, employees, employers' organisations and trade unions as the target population of the study. The study seeks to portray how the above parties interact with each other in the context of the right to strike, each performing certain duties and enforcing certain rights.

1.11 Scope of study and Limitations

This study is limited to assessing the treatment of labour as a non-commodity through the lens of the right to strike in particular. Other rights may be assessed but the right to strike will be primary.

This study's limitations are as outlined below. These include but are not limited to:

i. Few African authors have written on the right to strike as a means of attempting to partially "decommodify" labour in Africa.
ii. This study will mainly employ qualitative research methods i.e. desk-based methods. Quantitative methods will unfortunately not be used seeing that the critique of the current employment laws will better be elaborated through desk-based methods i.e. library research, book and dissertation reviews etc.

1.12 Chapter Breakdown

Chapter one will introduce the study and incorporate the research proposal. Its contents will be the introduction, background information, statement of the problem, justification of the study, statement of objectives, research questions, literature review, theoretical framework,

[56] Qualitative methods of research include content or documentary analysis and archival research. Explorable, 'Quantitative and Qualitative Research' https://explorable.com/quantitative-and-qualitative-research on 11 February 2016.

hypothesis, research design and methodology, scope of study and limitations, chapter breakdown and finally the timeline/duration of the study.

Chapter two will discuss in length the right to strike, its domestic and international legal framework, its history in Kenya, mechanisms put in place to facilitate this right, remedies afforded to parties whose right to strike has been infringed upon, the right's ineffective exercise, challenges and loopholes in its enforcement, gaps in international instruments as well as a conclusion.

Chapter three will discuss in length the two notions of commodification, that is, the commodification and non-commodification of labour as well as link these two notions to the right to strike. In conclusion, the study will assert which notion it stands by.

Chapter four will finally conclude the dissertation as well as give recommendations on how the right to strike can best be enforced.

1.13 Timeline/Duration

i. Chapter One-9th December 2016.
ii. Chapter Two-6th January 2017.
iii. Chapter Three-22nd January 2017
iv. Chapter Four- 31st January 2017.

The whole dissertation project should therefore be completed by 7th February 2017.

2 THE RIGHT TO STRIKE

2.1 Introduction

This chapter will go on to introduce the right to strike, discuss in length its history, effectiveness as well as the challenges and loopholes in its enforcement. This chapter will go on to conclude that the right to strike has been exercised ineffectively by employees, citing various examples and instances of this.

2.2 The right to strike

2.2.1 Kenya's Domestic Legislative Framework

In Kenya, the right to engage in a lawful strike is provided for and guaranteed under Kenya's Constitution.[57] Article 41 of the 2010 Kenyan Constitution goes further to reaffirm a strike action as a fundamental right.

The right to lawfully strike is also provided for in the Employment Act and the Labour Relations Act. A strike is defined as "the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work, for the purpose of compelling their employer or an employers' organization of which their employer is a member, to accede to any demand in respect of a trade dispute".[58] Section 76 of the Labour Relations Act provides for instances when a person may participate in a strike or lock-out. Some strikes or lock-outs are also prohibited by law.[59]

The right to strike is not absolute as no strike or lock-out in an essential service is to take place. An essential service is "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."[60] Essential services include but are not limited to: hospital services, water supply services, ferry services, air traffic control services and civil aviation telecommunications services, fire services of the government or public institutions as well as posts authority and local government authorities.[61]

[57] Article 41(2)(d), *Constitution of Kenya* (2010).
[58] Section 2, *Employment Act* (CAP 226). The Employment Act (CAP 226) is the primary statute on employment law in Kenya as it succinctly defines the employer-employee relationship as well as the rights and duties of each of the parties. Also see Section 2, *Labour Relations Act* (Act No 14 of 2007).
[59] Section 78, *Labour Relations Act* (Act No 14 of 2007).
[60] Section 81, *Labour Relations Act* (Act No 14 of 2007).
[61] Fourth Schedule, *Labour Relations Act* (Act No 14 of 2007).

In conclusion, the right to strike has been provided for in various pieces of domestic legislation. However, this does not mean that its exercise is directly proportional to this. There is still a long way to go in making the exercise of the right to strike as effective as possible.

2.2.2 International Instruments

In Kenya, the general rules of international law shall form part of the law of Kenya as well as any treaty or convention ratified by Kenya.[62]

Internationally, the ILO Conventions that Kenya has ratified do not explicitly provide for the right to strike. Kenya has ratified the Right to Organise and Collective Bargaining Convention[63] and the Freedom of Association and Protection of the Right to Organise Convention.[64] Both these conventions do not explicitly provide for the right to strike but they provide for the right of workers and trade union organisations to "draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes",[65] as well as the right to establish the machinery necessary for the purpose of ensuring respect for the right to organise.[66]

When the rights of workers and trade union organisations to "draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes",[67] as well as the right to establish the machinery necessary for the purpose of ensuring respect for the right to organise are denied, [68] workers and trade union organisations can resort to strike action to express their distaste. Therefore, this study posits that the right to strike kicks in when these rights have been denied or violated.

Kenya has also ratified the Abolition of Forced Labour Convention. Article 1 of the Convention prohibits the use of forced or compulsory labour as a means of punishment for having participated in strikes.[69]

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[62] Articles 2(5) and (6), *Constitution of Kenya* (2010).
[63] ILO Convention 98 of 1949.
[64] ILO Convention 87 of 1948.
[65] Article 3 (1), *The Freedom of Association and Protection of the Right to Organise Convention* (ILO Convention 87 of 1948).
[66] Article 3, *The Right to Organise and Collective Bargaining Convention* (ILO Convention 98 of 1949).
[67] Article 3 (1), *The Freedom of Association and Protection of the Right to Organise Convention* (ILO Convention 87 of 1948).
[68] Article 3, *The Right to Organise and Collective Bargaining Convention* (ILO Convention 98 of 1949).
[69] Article 1, *The Abolition of Forced Labour Convention* (ILO Convention 105 of 1957).

Moreover, the Voluntary Conciliation and Arbitration Recommendation provides that "no provision of the Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike."[70] The above international instruments go ahead to show that the right to strike is considered to be important.

At the heart of the right to strike, is the right to work and the right to work in just and favourable conditions. Just conditions include but are not limited to equal pay for equal work and the right to form and to join trade unions for the protection of one's interests.[71] The International Covenant on Economic, Social and Cultural Rights further affirms that the States that are party to the Covenant undertake to ensure, "... the right to strike, provided that it is exercised in conformity with the laws of the particular country."[72] The Inter-American Charter of Social Guarantees (not ratified by Kenya) expressly provides that "Workers have the right to strike. The law shall regulate the conditions and exercise of that right."[73] The European Social Charter (not ratified by Kenya) expressly envisions the right to strike in the event of a conflict of interests. This right to strike is however subject to the duties resulting from collective agreements in force.[74] The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (not ratified by Kenya) also recognises the right to strike.[75]

The right to strike and measures to guarantee its exercise are also referred to in several resolutions of the International Labour Conference, regional conferences and industrial committees.[76] Furthermore, the right to strike is mentioned several times in a report by the International Labour Conference during its 30th session. [77] The right to strike is mentioned in the part of the report outlining the survey of legislation and practice, the part on observations and conclusions where it was mentioned in connection with the special case of voluntary

[70] Para 7, *Voluntary Conciliation and Arbitration Recommendation* (No 92 of 1951).
[71] Article 23, *Universal Declaration of Human Rights* (1948).
[72] Article 8(1)(d), *International Covenant on Economic, Social and Cultural Rights* (1966).
[73] Article 27, *The Inter-American Charter of Social Guarantees* (1948).
[74] Article 6(4), *The European Social Charter* (1961).
[75] Article 8(1)(b), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (1978).
[76] International Labour Conference, *Freedom of association and collective bargaining*, 1994, 63. Examples of these international instruments include Para 15, *Resolution concerning Trade Union Rights and their Relation to Civil Liberties* (1970); Para 1(3), *Resolution concerning Protection of the Right to Organize and to Bargain Collectively*; 3rd Labour Conference of the American States which are Members of the International Labour Organization, Mexico, 1946; Paras 13(2) and 17, *The Resolution concerning Industrial Relations in Inland Transport* (1947).
[77] International Labour Conference, *Freedom of Association and Industrial Relations*, 1947, 30, 31, 34, 46, 52, 73-74, 121. Also see International Labour Conference, *Freedom of association and collective bargaining*, 62.

conciliation and public servants and the part describing the history of the problem of freedom of association.[78]

2.3 Origins of the Right to Strike in Kenya

2.3.1 Colonial Kenya (Pre 1963)

From the mid-1930s through the 1950s, colonial Africa experienced a wave of strikes and nationalist protests. Severe economic and political crises in the world capitalist system in general, and the colonial system in particular, brought about by the Great Depression and the Second World War are considered key stimulants of this wave of strikes.[79]

In Kenya, labour struggles can be traced back to the very first few years of colonial rule. They mostly took the form of communal revolts and desertions. These labour struggles were both a product of and a challenge to, the coercive labour control system borne from colonial rule.[80] A series of strikes took place from 1900. In that year, a railway strike was carried out. It started in Mombasa and spread to other centres along the line. The strike was initiated by European subordinate staff who were later joined by some African and Indian workers. It had been triggered by the withdrawal of certain privileges previously enjoyed by the staff. [81]

In 1902, African policemen in Mombasa also went on strike. In 1908, there were strikes of government farm workers at Mazeras near Mombasa, as well as Indian dockworkers and African railway workers in Mombasa. In 1912, African boat workers struck in Mombasa as well. In 1914, some African workers and most of the Indian railway and Public Works Department (PWD) workers went on strike in a bid to oppose the introduction of poll tax and for the removal of other grievances regarding low wages, medical facilities, rations and housing.[82]

Government departments, railways and ports were particularly vulnerable to strike action due to their strategic importance in the colonial economy. These areas were also relatively large-

[78] International Labour Conference, *Freedom of Association and Industrial Relations,* 1947, 30, 31, 34, 46, 52, 73-74, 121. Also see International Labour Conference, *Freedom of association and collective bargaining*, 62.
[79] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes' 22 *Transafrican Journal of History*, 1993, 2.
[80] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 4-5. Also see Berman BJ and Lonsdale J, 'Coping with contradictions; The development of the colonial state in Kenya' 20 *Journal of African History*, 1979, 4.
[81] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 5. Also see Singh M, *History of Kenya's Trade Union Movement to 1952*, 7.
[82] Singh M, *History of Kenya's Trade Union Movement to 1952*, 7.

scale enterprises which facilitated collective action among workers. Mombasa in particular, was the lifeline of the colonial economy.[83]

In 1922, the first general strike in Kenya occurred in Nairobi, the colonial capital, in the midst of a recession. The strike was triggered by the arrest of Harry Thuku; the leader of the East African Association (EAA); on March 14 1922. African workers in Nairobi immediately gathered to demonstrate against Thuku's arrest. The demonstration soon turned into a general strike. The African workers demanded: the reduction of taxes, return of African lands, the abolition of forced labour and the *kipande* system, the improvement of working conditions and wages, that Africans be elected to the Legislative Council, that Kenya should not have a colony status, the provision of higher education as well as more social facilities for Africans. With this strike, the working class entered a new era. [84]

The era of mass strikes begun in the 1930s. The economic depression led to poor wages, increased insecurity and depravation. During this era, squatters went on strikes, refused to accept many of the settlers' attempts to restrict their agricultural activities and illegally occupied European-owned land. In July 1934, dockworkers went on strike over wage cuts imposed by the stevedoring companies. The strike involved about 6,000 workers who were employed in various industries including the oil companies, the municipality, Mombasa Port and Harbour, the PWD, Mombasa Aluminium Works, dairy farms etc. The workers wanted improved working conditions, higher wages, recognition of trade unions and pension schemes, as well as housing. The Willan Commission; appointed by the Government; tried to meet some of these demands, but the results did not satisfy the workers.[85]

The first durable trade union in Kenya was the Labour Trade Union of Kenya (LTUK). It was originally formed in 1934 as the Kenya Indian Union of East Africa, and later renamed the Labour Trade Union of East Africa (LTUEA). The LTUEA participated in the Mombasa general strike of 1939, by making representations to the government and organizing sympathy rallies in Nairobi.[86]

The strike movement gained momentum during the war as the war led to a rapid expansion of the working class through industrialisation, military conscription and increased commercial

[83] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 5.
[84] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 6.
[85] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 6-7.
[86] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 7.

agricultural production.[87] In August 1941, all taxi drivers in Mombasa went on strike in protest against lack of police protection and increasing hooliganism on the part of some of the military personnel who gave them trouble. The following month, a similar strike broke out in Nairobi.[88] In July 1942, conscript workers working on a sisal factory in Gazi left work protesting against too much work and marched en massé to Mombasa.[89] The following September, all conscript workers on an aerodrome in Kisumu went on strike over non-payment of wages during periods of sickness, posho rations and lack of proper drinking water in the area.[90]

In October 1942, African railway workers in Mombasa went on strike. They demanded for higher wages. The strike ended after the railway administration agreed to the appointment of a Trades Disputes Tribunal which recommended a general wage increase. By late October, the strike wave had reached Nairobi and other parts of Kenya. Many employers in Nairobi opposed the application of the Mombasa award which they considered extravagant. The strike was eventually stopped through a combination of repression and concessions.[91]

Between 1947 and 1952, the number of strikes averaged about 80 a year. In 1947, the Mombasa general strike took place. This was the biggest strike that Kenya had ever experienced. The strike started with dock workers, railway workers and seasoned harbingers of labour militancy in Mombasa. The strike quickly spread to virtually all workers in Mombasa, including sugar workers at Ramisi, domestic, hotel, government and municipal workers. It was to last 11 days and involved more than 15,000 workers out of an estimated work-force of 20,000 workers. The strike also produced the African Workers Federation.[92]

The fact that the war had ended brought little relief to workers. Many of them turned to strike action as a channel through which they would put forward their need for better wages and working conditions. The provision of social services, adequate and non-deplorable housing was still a huge problem that plagued workers. Until the 1950s, there was no legislation regulating equipment installation procedures and standards of safety in factories. Moreover, the length of the work day was uniformly long. Few employers provided workmen's compensation and medical care.[93]

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[87] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 7.
[88] Singh M, *History of Kenya's Trade Union Movement to 1952*, 168. Also see the East African Standard, 9 September 1941, Nairobi.
[89]Singh M, *History of Kenya's Trade Union Movement to 1952*, 112.
[90] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 8.
[91] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 9.
[92] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 10-11.
[93] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 9-10.

The Nairobi general strike took place on 16th May 1950. This was hours after the arrest of the acting president of the East African Trades Union Congress (EATUC) and a day after Fred Kubai and Makhan Singh had been arrested. The strike also broke out after the publication of additions to the Schedule of the Essential Services (Arbitration) Ordinance, for which strikes were illegal. This publication was in an extraordinary issue of the Official Gazette. The strike involved about 100,000 workers and lasted eight days. It spread to workers in both "essential" and "non-essential" services and industries. Unlike the Mombasa general strike, the Nairobi general strike was not strictly limited to Nairobi alone. It spread to Limuru, Nyeri, Nakuru, Kisii, Kakamega, Mombasa, Thika, Kisumu and Nanyuki.[94]

The Nairobi general strike led to tougher labour regulatory measures adopted by the state and contributed to the formation of the Kenya Federation of Registered Trade Unions (KFRTU) in 1952, the precursor of the Kenya Federation of Labour (KFL) which was formed in 1955. The KFRTU was quickly recognized by the government as it was seen as a conduit for institutionalized collective bargaining.[95]

In 1952, a state of emergency was declared. This slowed down the pace of strike activity. The number of strikes decreased from 57 in 1951 to 33 in 1954. The number of workers involved fell from 6,610 to 1,518, and the number of man-days lost from 10,708 to 2,026 during the same period. In 1955, a strike erupted in Mombasa and involved oil refinery workers and other workers concentrated in the port area. It involved over 14,000 workers. The strike accounted for 95 percent of the 81,870 man-days lost due to strikes in Kenya in 1955. Tom Mboya settled this strike through skilful mediation.[96]

Between 1960 and 1963, Kenya experienced a wave of strikes similar to those of the 1940s. The numbers of strikes, workers involved and days lost in 1961,1962 and 1963 were 167, 26,677 and 120,454; 285, 132,433 and 745,799; 230, 54,428 and 235,349 respectively.[97] In 1962 alone, there were more strikes and more man-days were lost than during all the years since the 1950 Nairobi general strike combined.[98]

[94] Singh M, *History of Kenya's Trade Union Movement to 1952*, Chapter 18. Also see the East African Standard 16-25 May 1950, Nairobi.
[95] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 11-12.
[96] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 12-13. Also see Cooper, *On the African waterfront*, New Haven and London, Yale University Press, 1987, 202.
[97] Colony and Protectorate of Kenya, *Labour Department Annual Report*, Government Printer, Nairobi, 1963.
[98] Zeleza T, 'The strike movement in colonial Kenya: The era of the general strikes', 20.

2.3.2 Independent Kenya (Post 1963-Present)

Using teachers' strikes as a case study, there have been 10 national teachers' strikes in Kenya since the first one in 1962. This first strike was staged to test the Kenya National Union of Teachers' (KNUT) ability to stage and organise a strike. On March 19th to 20th 1962, two token strikes were staged covering Nairobi, Mombasa, Baringo, Nyeri, Kilifi, North Nyanza and South Nyanza branches.[99]

The second national strike was staged on March 26th to 27th 1962. It covered Kiambu, Taita, Murang'a, Machakos, Kisii, Nakuru and Central Nyanza branches. The second strike took place from October 11, 1965. The strike did not last long owing to the fact that it was promptly declared illegal by the government. Consequently, union officials were arrested. The Minister for Labour referred the officials' grievances to the industrial court. Due to the Minister's action, the government went ahead to withdraw the cases against the KNUT officials.[100]

From November 1st to 3rd 1966, the third national strike took place. This strike was brief but quite historic as it led to the government accepting to establish the Teachers Service Commission. Jeremiah Nyagah; the Minister for Education then; tabled a Bill in Parliament for the establishment of the TSC.[101]

From November 4th to 11th 1969, the fourth strike took place. The Teachers Service Remuneration Committee was established and made certain recommendations to the Minister as per the Teachers Service Commission Act. These recommendations touched on issues that teachers had been raising over the years. However, the Minister was not willing to implement these recommendations. This led to the 1969 strike. Eventually, the strike forced the Minister to implement the recommendations made.[102]

In October 1997, the late trade unionist Ambrose Odongo, led teachers to yet another strike. The teachers demanded a 300 per cent pay rise. The teachers threatened to paralyse end-year examinations. A presidential committee awarded pay raises to the teachers. These pay raises were not implemented and in October 1998, the teachers went on strike again.[103]

In October 2002, the teachers went on strike again. The strike lasted for more than two weeks. They demanded an outstanding salary increment which they had been awarded in 1997. The

[99] Koross K, 'History of teachers' strikes since independence' The Star, 3 September 2012 http://www.the-star.co.ke/news/2012/09/03/history-of-teachers-strikes-since-independence_c672487 on 11 December 2016.
[100] Koross K, 'History of teachers' strikes since independence'.
[101] Koross K, 'History of teachers' strikes since independence'.
[102] Koross K, 'History of teachers' strikes since independence'.
[103] Koross K, 'History of teachers' strikes since independence'.

teachers were threatened with a sack by Henry Kosgey, the then Education minister. They did not barge.[104]

In January 2009, teachers took to the streets leaving 19,000 primary schools countrywide and more than eight million children affected. KNUT declared this strike as the "mother of all strikes". The teachers demanded a lump sum payment amounting to Ksh.19 billion but the government insisted that it could only pay Ksh.17.3 billion in phases. The government cited economic constraints as the main reason for this.[105]

In March 2010, more than 1,500 P1 A-level teachers met in Nairobi to begin a strike. They wanted the government to pay salary arrears dating back 14 years and promote them. In September 2011, teachers went on strike complaining of inadequate staffing. They argued that this affected the quality of teaching especially with the increase of students since the conception of free primary education back in 2003.[106]

In September 2012, teachers through the Kenya Union of Post Primary Education Teachers (KUPPET) and KNUT, gave the government a seven-day notice to address their concerns of a 300 per cent pay hike and a 30 to 50 per cent hike for responsibility allowance for senior, deputy and head teachers.[107]

In July 2013, teachers went on strike demanding their three-hundred percent pay rise and responsibility allowance. The strike lasted for 24 days. The Industrial Court had previously ruled that the strike was illegal but KNUT went on with the strike. KNUT was fined six million Kenya shillings for contempt of court. The teachers returned to work after striking a deal that was spear-headed by Hon. William Samoei Ruto, the Deputy President. Hon. Uhuru Kenyatta promised that the teachers would be paid their July salary despite not having worked for most part of July. This was done amidst more strike threats by the teachers.[108]

In September 2014, teachers went on yet another strike citing their salaries and allowances as the main talking points. KNUT demanded that teachers' salaries and allowances be increased as this had not been done since their strike in July 2013. KNUT insisted that they had never

[104] Koross K, 'History of teachers' strikes since independence'.
[105] Koross K, 'History of teachers' strikes since independence'.
[106] Koross K, 'History of teachers' strikes since independence'.
[107] Koross K, 'History of teachers' strikes since independence'.
[108] Buzz Kenya, 'Incidences of teachers' strikes in Kenya' http://buzzkenya.com/teachers-strike-incidences-in-kenya/ on 20 December 2016.

signed a binding Collective Bargaining Agreement since the strike in 2013, adding that an agreement should have been finalized by 1st July 2014.[109]

In September 2015, a teachers' strike lasted for five weeks. The Industrial Court ordered that the strike end. Twelve million pupils and students in public schools plus 1.4 million candidates, had been at home since the third term of school started due to the strike. KNUT and KUPPET made a new demand on calling off the strike: That the national examinations be suspended to allow the candidates prepare for them adequately. The national examinations were not suspended.[110]

In 2016, KNUT announced that there will be no strikes at least for the next four years. This is owing to the fact that a new Collective Bargaining Agreement was signed with the Teachers Service Commission. This was announced on 22nd June 2016 by KNUT Secretary General Wilson Sossion while addressing over 7,000 head teachers during the opening of the 41st Kenya Secondary Schools Heads Association (KSSHA) conference.[111] The practicality of the new Collective Bargaining Agreement is yet to be seen.

2.4 Mechanisms put in place to facilitate the right to strike

The Labour Relations Act 2007 outlines instances where a person may participate in a strike or lock-out. These strikes or lock-outs are essentially considered protected and lawful. These instances are as follows:[112]

a. The trade dispute that forms the subject of the strike or lock-out concerns the recognition of a trade union or terms and conditions of employment;
b. The trade dispute is unresolved after conciliation either as provided for under the Labour Relations Act or as specified in a registered collective agreement that provides for the private conciliation of disputes;

[109] Goin J, 'Teachers' strike call is off for now – KNUT' Capital News, 11 September 2014 http://www.capitalfm.co.ke/news/2014/09/teachers-strike-call-is-off-for-now-knut/ on 20 December 2016.
[110] Wanzala O and Ondieki E, 'Back to class as unions call off teachers' strike following court order' Daily Nation, 3 October 2015 http://www.nation.co.ke/news/Knut-calls-off-teachers-strike/1056-2896670-hpcb9/index.html on 20 December 2016.
[111] Nyassy DT, 'No teachers' strike for 4 years says KNUT' Daily Nation, 23 June 2016 http://www.nation.co.ke/news/no-teachers-strike-for-four-years--says-Knut/1056-3262512-jr12ey/index.html on 20 December 2016.
[112] Section 76, *Labour Relations Act* (Act No 14 of 2007).

c. Seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of the trade union (in the case of a strike) and the employer, group of employers or employers' organisation (in the case of a lock-out).

The Industrial Court is established under the Labour Institutions Act.[113] The court has its own statute, the Industrial Court Act 2011. The Industrial Court has powers to prohibit a strike or lock-out if the strike or lockout is prohibited under the Labour Relations Act or any other piece of legislation; or the party that issued the strike notice has failed to participate in conciliation in good faith with a view to resolving the dispute.[114] A party that has failed to attend any conciliation meeting shall not be entitled to petition the court under section 77(1).[115]

2.5 Remedies afforded to persons whose right to strike has been infringed upon

A breach of contract or tort does not take place where a person is engaged in a protected strike or a protected lock-out; or any lawful conduct in furtherance or contemplation of a protected strike or a protected lock-out.[116] Employees may not be dismissed, civil proceedings instituted against them or disciplinary action taken against them by their employers for participating in a protected strike or for any conduct in furtherance or contemplation of a protected strike.[117] Employees who are unfairly dismissed due to taking part in a protected strike or lock-out may be reinstated, re-engaged in the work the employee was carrying out previously or other suitable work on any terms; or be paid compensation to the maximum of twelve months wages.[118]

Consequently, a person who refuses to take part or to continue to take part in any strike or lock-out that is not in compliance with the Labour Relations Act may not be expelled from any trade union, employers' organisation or other body, or deprived of any right or benefit as a result of that refusal. He /she may also not be disadvantaged or placed under any disability, compared

[113] Section 11, *Labour Institutions Act* (2007).
[114] Section 77(1), *Labour Relations Act* (Act No 14 of 2007). Prohibited strikes or lockouts are outlined in section 78 of the Labour Relations Act 2007. This dissertation will not delve into these prohibited strikes.
[115] Section 77(2), *Labour Relations Act* (Act No 14 of 2007).
[116] Section 79(2), *Labour Relations Act* (Act No 14 of 2007).
[117] Section 79(3) and (4), *Labour Relations Act* (Act No 14 of 2007).
[118] Section 15, *Labour Institutions Act* (2007).

to the trade union or other members, employers' organisation or other body as a result of that refusal.[119]

The Industrial Court also has the powers to grant injunctive relief, declaratory order, prohibition, award of damages, specific performance or reinstatement of an employee. Any other order deemed necessary by the Industrial Court for the promotion of the objects and purposes of the Labour Institutions Act may also be given.[120]

In *Universities Academic Staff Union v Maseno University*,[121] Maseno University went on strike and some lecturers were unfairly dismissed for having participated in the strike. The court awarded each of the five grievants twelve months salary as compensation, a certificate of service and terminal benefits.[122]

2.6 Is the Right to Strike exercised effectively in Kenya?

The industrial court noted that "…employees principally resort to strike action to unlock an impasse in the collective bargaining and negotiation process…The nature of the right to strike is fundamental to the whole institution of collective bargaining."[123] Although the right to strike is quite fundamental to labour relations, it has been exercised ineffectively in Kenya.

Quite a number of injustices are evident in a number of strikes. In June 2005, a total of 199 medical workers at two major hospitals in Kenya were suspended for having taken part in a strike. In the same month, around 5,000 nurses also went on strike due to huge pay increases among some hospital administrators. The Government announced that these striking nurses were to be replaced by the hiring of 384 nurses. Furthermore, 9,000 civil servants were dismissed for taking part in "illegal" strikes. In July, the government dismissed 1,600 people who had taken part in the strike. These employees were reinstated in November.[124]

[119] Section 80(2), *Labour Relations Act* (Act No 14 of 2007).
[120] Section 12(4) and (5), *Labour Institutions Act* (2007).
[121] (2013) eKLR.
[122] *Universities Academic Staff Union v Maseno University* (2013) eKLR.
[123] *Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch)* (2015) eKLR, para 49.
[124] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.

In January 2005, tea workers went on strike as their management had ignored a court order stipulating that the workers were to receive wage increases of between 24 and 32 percent. In May, several of the striking workers were dismissed. They were reinstated after negotiations.[125]

In December 2005, university lecturers went on strike over wage demands. They were threatened with dismissal. Their demands for wage increases were later upheld by a reconciliation committee.[126]

In *Universities Academic Staff Union v Maseno University*,[127] the national union called for a strike after it had failed to negotiate for a new pay deal with the government. The whole of Maseno University went on strike from 20th to 23rd November 2006. Prof. Adhiambo Odhuno (first grievant), Prof. K. Inyani Simala (fourth grievant) and Elevstone C. Zenge Mwangombe (fifth grievant) were all dismissed after participating in the strike. Lady Justice Hellen Wasilwa held that all the aforementioned grievants were wrongfully dismissed owing to the fact that they had participated in the strike. The University claimed that the grievants were incompetent and guilty of gross misconduct but the court observed that these reasons were just cover ups for the university to hide their true intent.

The *Maseno University case* and the aforementioned injustices in strikes go on to illustrate that employees who go on to strike face wrongful dismissal and intimidation. They therefore exercise their fundamental right to strike ineffectively.

2.7 Challenges in exercising the right to strike in Kenya

First, all disputes in Kenya must be submitted to the Ministry of Labour 21 days prior to calling a strike action or twenty-eight days where essential services are involved such as health, education, water utilities or air traffic control services.[128] The Ministry of Labour may then turn to alternative dispute resolution for example act as an arbitrator or submit the dispute to the Industrial Court. The Ministry of Labour has the discretionary right to decide whether a strike is legal or not.[129] This is a crucial challenge to the right to strike.

[125] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3-4.
[126] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 4.
[127] (2013) eKLR.
[128] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.
[129] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.

In *Universities Academic Staff Union v Maseno University*,[130] the Minister of Labour had declared the strike undertaken by Maseno University as illegal. The Industrial Court determined that the Minister declaring the strike illegal did not have the force of law and also infringed on the expert position on freedom of association.[131] The expert position as at international law states that "it is contrary to freedom of association that the right to declare a strike in the public service illegal should lie with the heads of public institutions which are thus judges and parties to a dispute."[132] Furthermore, paragraph 628 of the digest provides that the "Responsibility for declaring a strike illegal should not lie with government, but with an independent body which has the confidence of the parties involved."[133]

Second, in practice, the Minister of Labour generally intervenes during the strike notice period and proposes a mediator for the dispute. This is also another challenge. In case the negotiations break down, the dispute is often referred to the Industrial Court, pre-empting any decision to lawfully strike. In such cases, strikes have usually been declared illegal.[134] The Ministry of Labour may take advantage of the strike notice period to prevent any lawful strikes from taking place.

Third, contractual obligations may bar employers or employees from resorting to strike action. Contractual obligations are a double-edged sword. On the one hand, they can prevent parties from arbitrarily resorting to strike action especially if the provision of essential services is involved. On the other hand, they can bar legitimate and qualified strike action from taking place.

In *Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch)*[135]the respondent was barred from resorting to strike action as there was a prohibition in the contractual agreement (recognition agreement) between the parties. Clause 11(e) of the recognition agreement provided that: "In the event of failure to reach settlement at the Joint Industrial Council, there shall be no cessation of work and the dispute shall be dealt with strictly under the procedure laid down in the relevant sections of the Labour Relations Act." The court further opined that

[130] (2013) eKLR.
[131] *Universities Academic Staff Union v Maseno University* (2013) eKLR.
[132] ILO Freedom of Association Committee, *Digest of decisions and principles*, 5th ed, para 630.
[133] ILO Freedom of Association Committee, *Digest of decisions and principles*, 5th ed, para 628.
[134] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.
[135] (2014) eKLR.

the respondent was to invoke the provisions of Part IX and X of the Labour Relations Act and refer its dispute to Court and not call a strike.[136]

The court went on to give the rationale for contractual obligations amongst labour parties. It reiterated that "The strike is a weapon of last resort just like termination which should be deployed as the ultimate sanction and before resorting to a strike, the statute and the agreement between the parties oblige them to refer the dispute to Court."[137]

In *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & Another,*[138]it was observed that two strike notices that had been issued by KNUT to the TSC were illegal as the parties had not gone for conciliation either as provided for in their own internal machinery under their recognition agreements or section 62 of the Labour Relations Act.[139] Before strike notices are issued, the parties to the dispute have to refer the dispute for conciliation under the Labour Relations Act or as specified in a registered collective agreement that provides for the private conciliation of disputes.[140] This case goes to further stress the implied importance of contractual obligations and conciliation.

This study has expounded on the challenges of exercising the right to strike in Kenya above. The study will proceed to analyse the various gaps that exist in the international realm below.

2.8 Gaps in international instruments

There exist some gaps in international instruments as pertains to the right to strike. On 4th June 2012, the Employers' Group distributed a short statement at the International Labour Conference.[141] One of the Employers' Group main arguments was that ILO Convention 87 of 1948 is silent on the right to strike. According to them, this therefore means that Convention 87 should be interpreted without a right to strike as per internationally accepted rules of interpretation.[142]

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[136] *Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch)* (2014) eKLR, paras 37 and 39.
[137] *Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch)* (2014) eKLR, para 40.
[138] (2012) eKLR.
[139] *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & Another* (2012) eKLR.
[140] Section 76(b), *Labour Relations Act* (Act No 14 of 2007).
[141] Employers' statement in the Committee on the Application of Standards of the International Labour Conference, 4 June 2012 http://www.uscib.org/docs/2012_06_04_ioe_clarifications_statement.pdf. on 13 December 2016. Also see International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', March 2014, 6.
[142] Employers' statement in the Committee on the Application of Standards of the International Labour Conference, pp 19, 34 and 36. Also see International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 7.

This argument has been considered as flawed by the Committee of Experts. The Committee avers that the terms of Convention 87 of 1948 are broadly stated and thus encompass the right to strike. The Convention's terms also encompass other means of protecting and promoting the social and economic interests of workers. From the concept of freedom of association comes the right to strike. Moreover, the Committee also recognises that the right to bargain collectively is dependent on the right to strike.[143]

There still remains a gap as to the existence of the right to strike in ILO Convention 87 of 1948. Some scholars may choose to side with the Committee of Experts and others the Employers' Group. This dissertation asserts that the right to strike can be inferred from the terms of Convention 87, specifically article 3 which provides for the right of workers and trade union organisations to "draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes."[144]

Although article 8 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) provides for the right to strike, the Covenant does not cover employers, as do ILO standards.[145] Second, article 8(1) (d) of the ICESCR gives a caveat on the right to strike. It should be "exercised in conformity with the laws of a particular country." The respect for the national legal order of a particular country (Article 8(1) (d) of the ICESCR) is not accompanied by the countervailing provision found in Article 8(2) of ILO Convention 87 which provides that "The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention."[146] A gap thus arises in this situation.

The International Covenant on Civil and Political Rights (ICCPR) in article 22 covers the freedom of association and the right to form and join trade unions which is similar to article 8 of the ICESCR, but is less extensive. The ICCPR does not spell out the right to strike.[147] Originally, the Human Rights Committee considered that the ICCPR did not protect the right

[143] International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 20. Also see Committee of Experts, *Report of the Committee of Experts on the application of conventions and recommendations*, General survey on freedom of association and collective bargaining, Report III (Part 4B), International Labour Conference, 81st session, 1994, p 66, para 148.
[144] Article 3 (1), *The Freedom of Association and Protection of the Right to Organise Convention* (ILO Convention 87 of 1948).
[145] International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 41.
[146] International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 41.
[147] International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 44.

to strike.[148] However, since 1999, the HRC has changed tune and now monitors states' protection of the right to strike.[149]

The European Convention on Human Rights (ECHR) does not expressly protect the right to strike.[150] However, article 11 of the ECHR provides for the right to form and join trade unions and the freedom of peaceful assembly and association. In *Demir and Baycara v Turkey,*[151]the European Court of Human Rights (ECtHR) opined that the right to collective bargaining is protected by article 11 of the ECHR and by extension, the right to strike. Since *Demir and Baycara v Turkey*, the ECtHR has more fully developed and recognised the right to strike.[152]

The African Charter on Human and Peoples' Rights (ACHPR) protects the freedom of association in article 11. Article 15 of the Charter protects work conditions by providing that "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." However, the Charter does not expressly provide for the right to strike.

An initial General Guidelines document was published by the African Commission. These guidelines had put trade union rights under the purview of article 15 as well as set out what states should publish in their periodic reports.[153] The right to strike was mentioned in the Guidelines and states were required to report "legal or other provisions governing or affecting the exercise of the right to strike," and, "if no formal provisions exist, description of the position in practice in regard to this right."[154]

2.9 Conclusion

This study clearly brings out the inefficiency and ineffectiveness of exercising the right to strike in Kenya as well as some sort of ambiguity when it comes to defining and providing for the right to strike in the international realm. In the Kenyan context, reinforcement of labour

[148] An example is *JB v Canada* (1986).
[149] International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 45.
[150] International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 45. Also see Ewing KD and Hendy J QC, 'The dramatic implications of Demir and Baycara', 39 *ILJ* 2, 2010.
[151] (2008) ECHR 1345.
[152] International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 47.
[153] Doc ACHPR/RPT (II), Annex IV, reprinted in Murray R and Evans M (eds), *Documents of the African Commission on Human and Peoples' Rights*, 2001, 49. Also see International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 66.
[154] Doc ACHPR/RPT (II), Annex IV, reprinted in Murray R and Evans M (eds), *Documents of the African Commission on Human and Peoples' Rights*, 56. Also see International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 66.

legislation is required to solidify the right to strike as well as punitive measures for those who would deny or violate this right.

3 COMMODIFICATION OF LABOUR

3.1 Introduction

This chapter will go on to discuss the two broad schools of thought of commodification of labour; that is; labour is a commodity and labour is not a commodity. Thereafter, the chapter will link non-commodification of labour to the right to strike and conclude by asserting which school of thought this study stands by.

3.2 'Labour is not a commodity' school of thought

When the Treaty of Versailles was being drafted, negotiations leading to its drafting were conducted. A sub-committee of the Labour Commission came up with a list of principles. Principle no. 13 read:

> *"The principle that in right and in fact the labour of a human being cannot be treated as merchandise or an article of commerce."*[155]

This can be seen as the earliest instance in which the notion of labour not being treated as merely a commodity arose. With this in mind, the Treaty of Versailles came into effect. Part of its Preamble read:

> *"The guiding principle above enunciated that labour should not be regarded merely as a commodity or article of commerce."*[156]

Up to date, the International Labour Organisation asserts 'labour is not a commodity' as its motto.[157] Moreover, the notion that 'labour is not a commodity' is enshrined in the 1944 Philadelphia Declaration which is an integral and critical part of the International Labour Organisation's Constitution.[158]

As seen in chapter one, in support of the 'labour is not a commodity' school of thought, thinkers inclined towards a natural law theory point of view, attach some moral value to work and posit

[155] Shotwell JT (ed), *The origins of the International Labour Organization*, Columbia University Press, 1934, 187. Also see Evju S, 'Labour is not a commodity: A reappraisal', 8.
[156] Shotwell JT (ed), *The origins of the International Labour Organization*, 217. Also see Evju S, 'Labour is not a commodity: A reappraisal', 9.
[157] Collins H, *Employment law*, 2nd ed, Oxford University Press, 2012, 3, para 1.
[158] Evju S, 'Labour is not a commodity: A reappraisal', 3.

that work is good for man as it leads him to self-fulfilment and ultimately to his proper end. This moral value includes but is not limited to man's ability to have dominion over the earth.[159]

The industrial revolution revealed how the capitalist market system appeared to lead to the degradation of human beings, a concept of commodification:

> *"The manufacture of matches dates from 1833, from the discovery of the method of applying phosphorous to the match itself…The manufacture of matches, on account of its unhealthiness and unpleasantness, has such a bad reputation that only the most miserable part of the working class, half-starved widows and so forth, deliver up their children to it; their ragged, half-starved, untaught children. Of the witnesses examined by Commissioner White (1863), 270 were under 18, fifty under 10, ten only 8, and five only 6 years old. With a working day ranging from 12 to 14 or 15 hours, night-labour, irregular meal-times, and meals mostly taken in the workrooms themselves, pestilent with phosphorous, Dante would have found the worst horrors in his inferno surpassed in this industry".*[160]

In 1997, Paul O'Higgins provided that the origins of the maxim 'Labour is not a commodity' can be traced back to Dr. John Kells Ingram (1823-1907), who was an Irish sociologist and economist.[161] O'Higgins went ahead to refer to the address given by Ingram to the Trades Union Congress meeting in Dublin in September 1880. Ingram, being at one extreme of the spectrum, posited that labour is not to be commodified because when a person provides their labour, they provide their very own essence alongside it. Treating labour as a commodity would therefore go to great lengths to undermine the human dignity accorded to each human person by virtue of them being human persons.[162]

In 1877, Brentano reiterated this in his work '*The employment relationship pursuant to current German law'.* He argued that labour is not a commodity. He stressed on labour power being the human person himself/herself and, therefore, labour was essentially different from all other

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[159] Pope John Paul II, 'Laborem Exercens', Item 9: Work and Personal Dignity http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html on 16 February 2016. Natural law theory posits that the law establishes reasons for actions as well as creates moral obligations that bind people as they act. See Stanford Encyclopaedia of Philosophy, 'Natural Law Theories', 4 November 2015 http://plato.stanford.edu/entries/natural-law-theories/ on 24 February 2016.
[160] Marx K, *Capital*, Harmondsworth Penguin, 1976, 356. Also see Children's Employment Commission, *First Report*, 1863; Collins H, *Employment law*, 4.
[161] O'Higgins P, 'Labour is not a commodity - an Irish contribution to International Labour Law', 225.
[162] Ingram J, *Work and the Workman*.

commodities. He further averred that due to this unique feature, it should be treated differently from the rest of the commodities.[163]

Guy Robinson goes ahead to further state that Marx himself had too great a respect for Aristotle not to be alive to the fact that 'labour', being the activity of 'labouring', cannot be separated from the actor except intellectually. One's labour cannot be separated from one in the way the product of one's labour can, the way a piece of real or personal property can, for the simple reason that one's labouring has no separate existence from an individual. It is for this reason that labouring can neither be alienated nor sold.[164]

Roble, Lubeto et al, posit that the employment relationship since time immemorial, has been influenced by three models. These are the free collective bargaining model, the free labour market model and the social justice model respectively.[165] The social justice model is critical to the notion of 'labour is not a commodity'. Central to the model is the need to elevate the positions of employees in the employment relationship. The protection and safeguard of employees is thus its principal concern. The state is seen to interfere in the employment relationship through legislation.[166]

Locke, in discussing the notion of property says that one may make something theirs by mixing their labour with it. He also avers that one has property in their own labour. This is incorrect as it was noted above that labour can neither be alienated nor sold.[167] Robinson gives the answer to this dilemma by stating that one's labour brings something new into existence. It is that new, created value that one relinquishes, that one makes over to another person in advance when they sell another their labour power.[168]

Karl Marx insists on distinguishing labour and labour power. He suggests that it is labour power that one can sell, put into the hands of another, relinquish control over and wish for a specified period. One puts their abilities, strength, skills or maybe just their presence; for example night watchmen and film extras; under the disposal and control of someone else. One usually

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[163] Brentano L, *Das Arbeitsverhältnis gemäß dem heutigen Recht: Geschichtliche und ökonomische Studien Reprint, Hrsg. Und eingeleitet von Thilo Ramm*, English edition: *The employment relationship pursuant to current German law*, 182–216.

[164] Robinson G, 'Labour as commodity'71 *Philosophy* 275, 130 https://www.jstor.org/stable/pdf/3751531.pdf on 1 November 2016.

[165] Roble Z, Lubeto O, Njoroge P, Nasirumbi S, Kinyua C, 'Paternalism and the employment contract: A panacea or anathema?',32.

[166] Roble Z, Lubeto O et al, 'Paternalism and the employment contract: A panacea or anathema?', 33.

[167] Locke J, *Second Treatise of Government*, Chapter 2. Also see Robinson G, 'Labour as commodity', 132.

[168] Robinson G, 'Labour as commodity', 132.

alienates those abilities by contracting to give another person control over those skills for a definite period, and get a salary or wage in return.[169]

Robinson comes out and boldly states that when the persons themselves and not their labour power are put at the disposal of a hirer, we then have prostitutes or 'rent-boys', not labourers. For a prostitute, it is their person that is being used and humiliated, not their skills and abilities being used.[170] Furthermore, he does away with the notion that labour power is 'rented' rather than used as a commodity because once labour power has been expended, it cannot be returned to the owner.[171]

Hugh Collins asserts that the employment relationship; between employer and employee; is quite distinct and unique from other types of contracts. This is because workers are people, not things and they deserve to be treated with dignity and respect. By employees agreeing to work for another, they do not consent to being treated like slaves or chattels.[172] Collins further provides that work provides people with a critical and principal source of meaning in their lives. People seek personal fulfilment from work and they obtain entry into a social community through participation in a workplace.[173]

Collins acknowledges that workers are compelled by economic necessity to comply with an economic system that treats them like commodities, however, these workers seek and often find recognition for their humanity and dignity.[174]

Joe Burns avers that labour activists should rely on the maxim of 'labour is not a commodity'.[175] He states that treating labour as a commodity reduces its role and purpose to mere wage-bargaining. He further asserts that commodification of labour functions as a form of social control. Unlike other commodities, labour consists of human actions which have moral importance and lived experiences. Matt Bruenig concurs with Burns' assertions.[176]

Furthermore, Clause Offe argues that in almost every market economy, people who are working refuse to accept the consequences of commodifying labour. These people do so by

[169] Robinson G, 'Labour as commodity', 130.
[170] Robinson G, 'Labour as commodity', 130-131.
[171] Robinson G, 'Labour as commodity', 131.
[172] Collins H, *Employment law*, 3, para 3.
[173] Collins H, *Employment law*, 4.
[174] Collins H, *Employment law*, 4.
[175] Burns J, *Reviving the strike: How working people can regain power and transform America*.
[176] Bruenig M, 'Reviving the strike and the ethics of labour commodification'.

constructing welfare states, creating trade unions as well as enacting income redistribution policies.[177]

Employment law itself aims to reinforce the slogan ‘labour is not a commodity’ by ensuring that employment relations function successfully as market transactions and, at the same time, ensuring that workers are protected against the economic and capitalistic logic of commodification of labour. Moreover, employment law seeks to strike a balance between economic production and protecting the humanitarian interests of workers.[178]

Taking the history of England as an example, the misconception of labour as a commodity is evidenced in a series of draconian laws that were enacted at the time of Henry VIII that specified punishments for 'vagabonds' of whipping 'till the blood streams', imprisonment, and for a third offence, execution. Under Edward, those who did not sell their labour power faced chains, whipping, slavery and being branded on the forehead with a 'S' for 'slave'. Under Elizabeth they were branded only on the ear, but under James I, persistent ‘vagabonds’ got branded on the shoulder with a 'R' for 'rogue'. In every case they faced forced service, imprisonment, whipping and execution.[179]

3.3 ‘Labour is a commodity’ school of thought

At the other extreme, the concept of labour as a commodity was fathered by the economist Adam Smith[180] and echoed by Edmund Burke[181]. Adam Smith admired the intensive division of labour as having led to production efficiency in the manufacture of pins,[182] as well as better standards of living for most people, wealth, communities full of civic pride and new towns.[183]

Smith went ahead to observe that in an employment relationship, there exists inequality of bargaining power for two reasons: workers typically require a job immediately to provide an income, whereas employers can refrain from hiring workers until the price is right. Employers only run the risk of a reduction of profits.[184]

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[177] Offe C, *Contradictions of the welfare state*.
[178] Collins H, *Employment law*, 4.
[179] Robinson G, ‘Labour as commodity’, 137.
[180] Smith A, *The wealth of nations Books I – III*. See also *Wages of Labour*, 134, 167–169.
[181] Burke E, *Thoughts and details on scarcity*, 6 and 13.
[182] Smith A, *An inquiry into the nature and causes of the wealth of nations*, Harmondsworth Penguin, 1970 Edition, Chapter 1.
[183] Collins H, *Employment law*, 4.
[184] Smith A, *An inquiry into the nature and causes of the wealth of nations*, 169. Also see Collins H, *Employment law*, 7.

Smith fully endorsed Burke's views on economics.[185] Burke averred that labour is a commodity and an article of trade like any other, merely being a function of the market where it is affected by the forces of supply and demand, therefore having economic value attached to it. [186]

Karl Marx and Friedrich Engels also subscribed to the theory that labour is a commodity.[187] Engels averred that because labour is a commodity, its price is determined by the exact same laws that apply to other commodities. In an economic regime, the price of a commodity is averagely always equal to its cost of production. Therefore, the price of labour is also equal to the cost of production of labour.[188]

In addition to Engels' views, Marx argued that by equating different kinds of labour to the amount of goods for which they could be exchanged, this labour's social character thus becomes materialistic, it becomes a material relationship between things.[189] Karl Renner also echoed Marx's views.[190]

As mentioned earlier, Roble, Lubeto et al posited that the employment relationship since time immemorial, has been influenced by three models.[191] Of interest to the 'labour is a commodity' notion is the free collective bargaining model and free market model. The free collective bargaining model was characterised by employees having minimal protection.[192] The free market model was characterised by the deregulation of the labour market, the promotion of cost effective economic objectives, flexibility and competitiveness in the use of labour etc. It is possible that any gains which employees may have enjoyed under the free collective bargaining model are eroded by the free market labour model.[193] These two models place great emphasis on cost-efficient economic production unlike the social justice model.

Andrew Garran; an Australian politician and journalist; remarked in 1891 that labour was "a remarkable commodity" because "it is a live commodity, capable of social and political action,…a commodity that can think,…talk,…read,…attend meetings,…be fired with class-

[185] Smith A, *The man and his works*, 201.
[186] Preece R, 'The Political Economy of Edmund Burke'. See also Burke E, *Thoughts and details on scarcity*.
[187] Evju S, 'Labour is not a commodity: A reappraisal', 3.
[188]Engels F, 'The Principles of Communism'.
[189] Marx K in McLellan D (ed), *Selected writings*, 437–438.
[190] Renner K, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion*, first published 1904, English edition: *The institutions of private law and their social functions.*
[191] Roble Z, Lubeto O et al, 'Paternalism and the employment contract: A panacea or anathema?',32.
[192] Roble Z, Lubeto O et al, 'Paternalism and the employment contract: A panacea or anathema?', 32.
[193] Roble Z, Lubeto O et al, 'Paternalism and the employment contract: A panacea or anathema?', 32.

enthusiasm,…can link itself hand-in-hand with other like commodities,…can form trades unions, that can strike,…raise barricades,…can vote, get into Parliament."[194]

Robinson adds a new twist to the notion of labour being a commodity. In his conclusion, he signs off by saying that it is not the activity of labouring that is being sold, but the ability to work that is being sold. The ability to work is not sold forever and absolutely, but for a certain period of time.[195]

Hugh Collins gives an illustration of why labour is not completely a non-commodity. He states that employers buy labour like other commodities. The owner of a factory would go ahead to purchase the raw materials, premises, labour and machinery and combines all these factors of production to produce goods. He further states that workers sell their labour power; their time effort and skill; in return for a wage. [196]

3.4 Linking the two notions of commodification of labour

These two notions of commodification of labour are quite different and distinct in their applications in Employment law. They both have different ramifications when applying them to the employer-employee relationship. Various authors as has been seen above, have chosen to stand by the notion that they favour. The application of either of the notions will depend on the author. This study stands by the notion that labour should not merely be treated as a commodity. This notion ties in well with the right to strike as will be seen below.

3.5 Linking non-commodification of labour to the right to strike

As seen in chapter two, at the heart of the right to strike, is the right to work in just and favourable conditions. Just conditions include but are not limited to equal pay for equal work and the right to form and to join trade unions for the protection of one's interests.[197] Just and favourable working conditions go ahead to break down the barriers caused by treating labour as just a commodity.

Chapter two also discussed certain instances where a person may participate in a strike or lock-out under the Labour Relations Act 2007. These strikes or lock-outs are essentially considered

[194] Garran A, 'Trade unions: A Criticism', 145.
[195] Robinson G, 'Labour as commodity', 138.
[196] Collins H, *Employment law*, 3, para 2.
[197] Article 23, *Universal Declaration of Human Rights* (1948). Article 41(2) of the Constitution of Kenya (2010) also makes reference to fair remuneration and reasonable working conditions.

protected and lawful and go further to reinforce labour as not a commodity. These instances are as follows:[198]

a. The trade dispute that forms the subject of the strike or lock-out concerns the recognition of a trade union or terms and conditions of employment;
b. The trade dispute is unresolved after conciliation either as provided for under the Labour Relations Act or as specified in a registered collective agreement that provides for the private conciliation of disputes;
c. Seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of the trade union (in the case of a strike) and the employer, group of employers or employers' organisation (in the case of a lock-out).

Kenya has ratified the Right to Organise and Collective Bargaining Convention[199] and the Freedom of Association and Protection of the Right to Organise Convention.[200] Both these conventions provide for the right of workers and trade union organisations to "draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes",[201] as well as the right to establish the machinery necessary for the purpose of ensuring respect for the right to organise.[202] These rights go on to safeguard the protection of workers' rights, seeing that workers are people and not slaves or chattels. Workers have the avenue of resorting to strike action if their objective interests are not met.

Kenya has also ratified the Abolition of Forced Labour Convention. Article 1 of the Convention prohibits the use of forced or compulsory labour as a means of punishment for having participated in strikes.[203] Forced or compulsory labour was used to diminish persons who were treated as slaves during the historic slave trade. The abolition of forced or compulsory labour goes further to reinforce that 'labour is not a commodity' and implies that the right to strike kicks in where this abolition is not complied with.

A conclusion on the study's final position will be given below.

[198] Section 76, *Labour Relations Act* (Act No 14 of 2007).
[199] ILO Convention 98 of 1949.
[200] ILO Convention 87 of 1948.
[201] Article 3 (1), *The Freedom of Association and Protection of the Right to Organise Convention* (ILO Convention 87 of 1948).
[202] Article 3, *The Right to Organise and Collective Bargaining Convention* (ILO Convention 98 of 1949).
[203] Article 1, *The Abolition of Forced Labour Convention* (ILO Convention 105 of 1957).

3.6 Conclusion

This study stands by the assertion that labour is not a commodity. However, the study is aware that labour cannot fully be treated as a non-commodity. At the end of the day, the payment of salaries or wages for labour expelled qualifies labour to be treated as a partial commodity. Commodifying labour entirely would lead to the diminishment of human dignity which is inherent, universal and ought to be respected and protected.[204]

[204] Article 28, *Constitution of Kenya* (2010).

4 CONCLUSION AND RECOMMENDATIONS

This chapter will finally conclude the dissertation as well as give recommendations on how the right to strike can best be enforced.

4.1.1 Summary

Chapter one of this dissertation introduced the study and incorporated the research proposal. It highlighted the background information, statement of the problem, justification of the study, statement of objectives, research questions, literature review, theoretical framework, hypothesis, research design and methodology, scope of study and limitations, chapter breakdown and finally the timeline/duration of the study. The chapter concluded by stating that chapter two would unpack the right to strike and its exercise in Kenya, chapter three would discuss the two notions of commodification of labour as well as assert the notion that this dissertation stands by and chapter four will give the final conclusion as well as the dissertation's recommendations.

Chapter two of this dissertation discussed in length the right to strike, its domestic and international legal framework, its history in Kenya, mechanisms put in place to facilitate the right to strike i.e. through some provisions of the Labour Relations Act 2007, remedies afforded to parties whose right to strike has been infringed upon such as an award for damages, reinstatement, injunctive reliefs; the right's ineffective exercise, challenges and loopholes in its enforcement as well as gaps in international instruments. The chapter concluded by asserting that the right to strike has been ineffectively and inefficiently exercised by employees as evidenced by the history of teachers' strikes in pre-independent and post-independent Kenya as well as employment case law. Quite a number of injustices are also present in a number of strikes.

Chapter three discussed in length the two notions of commodification, that is, the commodification and non-commodification of labour. The chapter went ahead to link these two notions together. Thereafter, the notion of not treating labour merely as a commodity was linked to the right to strike. The chapter concluded by asserting that the study stands by the notion that labour is not to be treated merely as a commodity. It was also noted that one cannot completely remove the 'commodification' aspect from labour as salaries and wages are still paid for labour asserted.

4.1.2 Conclusion

Before this dissertation was authored, there was a sense that the right to strike in Kenya was being exercised ineffectively by employees. Moreover, the employment laws; both domestic and international; seemed to have gaps in them specifically in providing for the right to strike and its application. This dissertation therefore sought to critique the current employment laws in relation to the right to strike and link the right to strike to the notion of not treating labour merely as a commodity.

This dissertation has gone ahead to analyse these fears and has asserted that there is need for reinforcement of domestic and international labour legislation in order to solidify the right to strike as well as clarify on punitive measures for those who would deny or violate this right. This dissertation is unique in its own nature owing to the fact that few authors have attempted to link the right to strike and the notions of commodification of labour.

This dissertation therefore concludes by asserting that the right to strike in Kenya is exercised inefficiently and ineffectively by employees. Employees have been noted to suffer a great number of injustices in several strikes.[205] Furthermore, the study stands by the notion that labour should not be treated merely as a commodity. Treating labour as a mere commodity diminishes the human dignity that is inherent in all human beings.

4.2 Recommendations

This dissertation notes that few authors have written on the subject of commodification and non-commodification of labour. This dissertation recommends that more authors should take up this subject as it is critical to employment law and the employment relationship.

Few African authors have also written on the right to strike as a means of attempting to partially "decommodify" labour in Africa. This dissertation recommends that more attempts should be made to link the right to strike with non-commodification of labour, as this dissertation has attempted to do.

Chapter two noted that all disputes in Kenya must be submitted to the Ministry of Labour 21 days prior to calling a strike action or twenty-eight days where essential services are involved

[205] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.

such as health, education, water utilities or air traffic control services.[206] Moreover, the Ministry of Labour has the discretionary right to decide whether a strike is legal or not.[207] This is a crucial challenge to the right to strike. Paragraph 628 of the ILO's Freedom of Association Committee's Digest of decisions and principles, provides that the "Responsibility for declaring a strike illegal should not lie with government, but with an independent body which has the confidence of the parties involved."[208] This dissertation recommends that this power should be devolved to other independent institutions.

Chapter two also noted that in practice, the Minister of Labour generally intervenes during the strike notice period and proposes a mediator for the dispute. In case the negotiations break down, the dispute is often referred to the Industrial Court, pre-empting any decision to lawfully strike. In such cases, strikes have usually been declared illegal.[209] The Ministry of Labour may take advantage of the strike notice period to prevent any lawful strikes from taking place. This dissertation recommends that the decision to declare strikes unlawful should be scrutinised heavily.

Ultimately, looking at the Kenyan context, reinforcement of labour legislation is required to solidify the right to strike as well as punitive measures for those who would deny or violate this right.

Moving on to international instruments, although article 8 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) provides for the right to strike, the Covenant does not cover employers, as do ILO standards.[210] This dissertation recommends that employers should be given the same protection as employees under the ICESCR.

The African Charter on Human and Peoples' Rights (ACHPR) protects the freedom of association in article 11. Article 15 of the Charter protects work conditions by providing that "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." However, the Charter does not expressly provide for

[206] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.
[207] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.
[208] ILO Freedom of Association Committee, *Digest of decisions and principles*, para 628.
[209] International Confederation of Free Trade Unions (ICFTU) 'Report for the WTO general council review of the trade policies in Kenya', 3.
[210] International Trade Union Conference (ITUC), 'The right to strike and the ILO: The legal foundations', 41.

the right to strike. This dissertation recommends that the right to strike should be expressly provided for and protected under the ACHPR.

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