



Strathmore
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***TITLE: THE PROTECTION OF DEPENDENT SELF-EMPLOYED WORKERS AGAINST
SEXUAL HARASSMENT WITHIN THE WORK PLACE UNDER LABOUR LAWS IN
KENYA***

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

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Declaration

I, **KEILLA OKARI**, do hereby declare that this research is my original work and that to the best of my advertence 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.

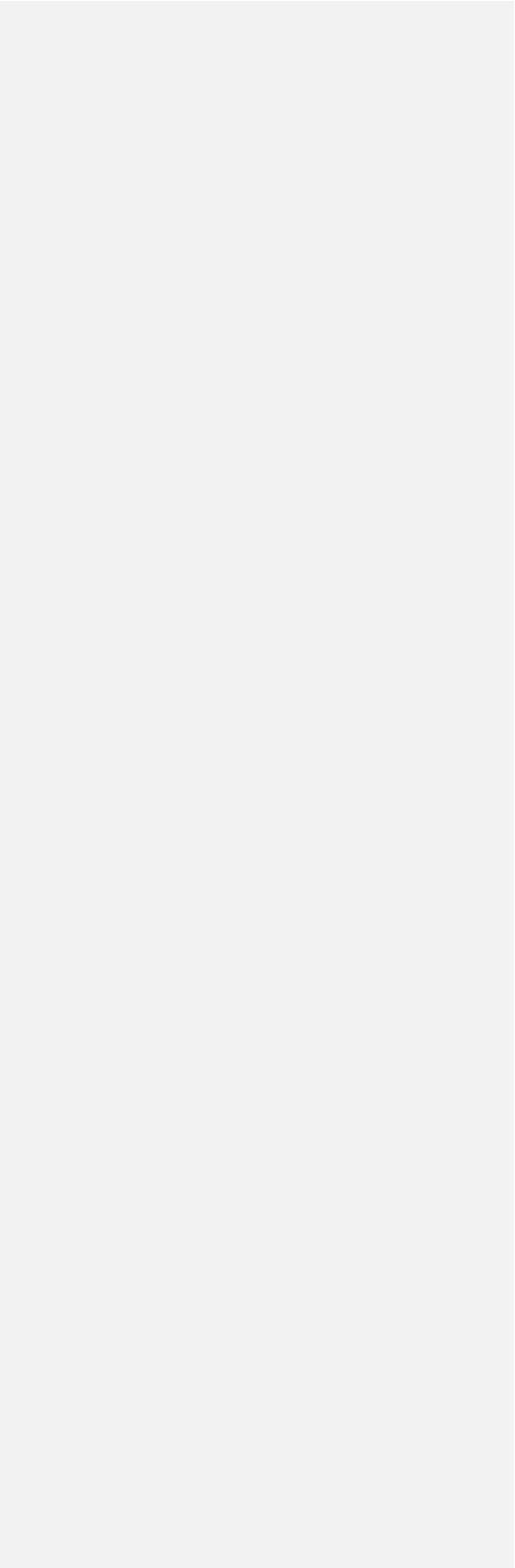
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Abstract

The world of work as we know it today is constantly evolving majorly due to the ever-expanding service sector. The moribund traditional employment structures that had once informed the backdrop of labour legislation can no longer be sufficient for the Non-Standard forms of Employment recognized by the International labour Organisation. The protections of dependent self-employed workers against sexual harassment in Kenya is centered as the subject of this thesis. The study investigates whether they are adequately protected under employment laws in Kenya in comparison with other jurisdictions and proceeds to give recommendations on measures and mechanisms to ascertain the protection against sexual harassment within the work place.

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Everett Aviation Ltd v The Kenya Revenue Authority

John Charo v Christopher Njao

List of abbreviations

ILO	International Labour Organization
NSE	Non-Standard Employment
SER	Standard Employment Relations
DSEW	Dependent Self-Employed Workers
ILRF	The International Labour Rights Fund
EWCS	European Working Conditions Survey
ECtHR	The European Court of Human right
ECHR	Equality and Human Rights Commission

CHAPTER ONE: INTRODUCTION

1.1. Background

Capitalism has played a major role in the economic transformations that the world has experienced in the last few decades.¹ One such role has been the insecurity within the job market in favour of maximizing profits to achieve economic prosperity. The crisis of capitalism has resulted in a shift from the objectification of labour to the uberization of the economy, specifically the gig economy.² According to the International Labour Organization (ILO) this, amongst other factors, has resulted in the rise of Non-Standard Employment (NSE).³ The shift from Standard Employment Relationships (SER) to NSE relations has been credited to a list of factors encompassing globalization as a result of technological advancements, growth of the service sector, the increased role of women in the workforce and the need for greater flexibility in the organization of work and personal life.⁴ NSE as described in a report by the ILO is work which falls outside the scope of SER which is understood as work that is fulltime, indefinite, occurring at a set place outside the home and part of a subordinate and bilateral employment relationship.⁵

This study will be centered on a sub-category of NSE workers known as ‘dependent self-employed workers’(DSEW) who perform services under civil or commercial contracts which is contrasted from an employment contract yet, are dependent on one or a few clients for their income and receive direct instructions on how the work is carried out.⁶ The rise of NSE has been attributed to more people leaning towards flexibility and moving away from the moribund traditional models of employment.⁷ Although this progression is celebrated, legal systems have failed to adapt by

¹ Hosseini H, ‘Globalization and capitalism’, Research gate, 27 March 2010,

https://www.researchgate.net/publication/276346257_Globalization_and_Capitalism on 18 March 2021.

² Hughes C, Southern A, ‘The world of work and the crisis of capitalism: Marx and the Fourth Industrial Revolution’19 *Journal of Classical Sociology* 1,2019, 59.

³ *International Labour Organization, Non-standard employment around the world: Understanding challenges and shaping prospects*, ISBN 978-92-2-130385-5, 24.

⁴ *International Labour Organization, Non-standard employment around the world: Understanding challenges and shaping prospects*, ISBN 978-92-2-130385-5, 24.

⁵ *International Labour Organization, Non-standard employment around the world: Understanding challenges and shaping prospects*, ISBN 978-92-2-130385-5, 29.

⁶ *International Labour Organization, Non-standard employment around the world: Understanding challenges and shaping prospects*, ISBN 978-92-2-130385-5, 31.

⁷ Omondi. O, ‘Employed or not? Comparing employees and independent contractors’, Oraro & Company Advocates, <https://www.oraro.co.ke/2018/06/27/employed-or-not-comparing-employees-and-independent-contractors/>, on 24 February, 2020.

regulating and amending existing provisions in this economy to mirror the evolving needs of DSEW.⁸

The Universal Declaration of Human rights (UDHR) soundly declares that all human beings are born free and equal in human dignity and rights.⁹ The Constitution of Kenya 2010 asserts every worker's right to the protection and respect of their human dignity.¹⁰ This includes their right to be free of sexual harassment. A 2015 survey by the European Working Conditions Survey (EWCS) calibrated that only 47% of DSEW received help and support from employers and colleagues in light of sexual harassment compared to 71% of employees.¹¹ This is largely due to the absence of formal infrastructure such as human resource management departments in NSE arrangements.¹² Research released by Honeybook in 2018, a platform dedicated to empowering women in the creative economy stipulated that 54% of dependent self-employed women specified in their report that they had been subjected to sexual harassment at least once while working with over 83% of them not reporting these cases.¹³ This was due to the fact that their financial stake was at risk due to the dependency on the client's fees to earn a living.¹⁴ According to the survey, 58% of the 1,000 respondents did not have a sexual harassment clause in their contracts.¹⁵

In Kenya, the ILO, in congruence with World Bank Development Indicators estimated a 51.31% growth in the self-employment sector as of 2020.¹⁶ The International Labour Rights Fund (ILRF) conducted research showing 90% of dependent self-employed workers had experienced or observed sexual harassment within their work place with a reported 70% of men who were interviewed bearing the view that sexual harassment of women workers is natural behaviour.¹⁷

⁸ Snider L, 'Enabling exploitation: The law on gig economy', *Critical Criminology*, 2018, 563.

⁹ Article 1, *Universal Declaration of Human rights*, 10 December 1948, 217 A(III).

¹⁰ Article 28, *Constitution of Kenya* (2010).

¹¹ Lapeyre F, Williams C.C., 'Dependent self-employment: Trends, challenges and policy responses in the EU', International Labour Office, Employment policy department Paper number 228, 2017, 6 - https://www.ilo.org/wcmsp5/groups/public/--ed_emp/documents/publication/wcms_614176.pdf on 18 March 2021.

¹² Madell R, 'Freelancers and self-employed are not immune to sexual harassment,' *Flex Jobs*, 2 April 2018, - <https://www.flexjobs.com/blog/post/freelancers-self-employed-not-immune-harassment/> on 25 March 2021.

¹³ Honey book, 'Sexual harassment is pervasive amongst self-employed creatives,' Honeybook, 25 January 2018, <https://www.honeybook.com/risingtide/sexual-harassment-report> on 25 March 2021.

¹⁴ Madell R, 'Freelancers and self-employed are not immune to sexual harassment,' *Flex Jobs*, 2 April 2018, - <https://www.flexjobs.com/blog/post/freelancers-self-employed-not-immune-harassment/> on 25 March 2021.

¹⁵ Honey book, 'Sexual harassment is pervasive amongst self-employed creatives,' Honeybook, 25 January 2018, <https://www.honeybook.com/risingtide/sexual-harassment-report> on 25 March 2021.

¹⁶ <https://tradingeconomics.com/kenya/self-employed-total-percent-of-total-employed-wb-data.html> on 3 April 2021.

¹⁷ Karega R, 'Violence against women in the work place: Assessment of workplace sexual harassment in the commercial agriculture and textile manufacturing sector,' May 2002, 1.

Despite these staggering figures which represent a desperate reality for many dependent self-employed workers there exists a deficiency in their legal protection. The Kenyan Employment Act explicitly defines sexual harassment as an occurrence whereby an employer or a representative of the employer or a co-worker;

“directly or indirectly requests an employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express promise of preferential treatment in employment, threat of detrimental treatment in employment; or threat about the present or future employment status of the employee”¹⁸

This definition is legally binding for the protection of employees against sexual harassment who are defined under Section 2 of the Act. However, this provision remains unclear as to the protection of DSEW. This paper investigates the legal framework governing labour laws in a bid to determine whether it adequately protects dependent self-employed workers against sexual harassment.

1.2. Statement of problem

Ideally, in a world where all workers are perceived to have inherent dignity in work, we see the law providing protection to employees from the power imbalance created by capitalism. Currently, there is gap in the Kenyan Labour laws on the question of safeguarding the rights of DSEW against sexual harassment. Legal histories on labour laws across many countries dictate employment as the basis of labour regulation with self-employment often falling outside the parameters of this regulation.¹⁹ Technological advancements, changes in business organization and new business practices have contributed to the blurry distinction of workers living within the binary divide of the ‘employed’ and the ‘self-employed’.²⁰ This grey area includes dependent self-employed workers. The current Kenyan legislation governing employment relations continues to be unclear on the issue, which exposes dependent self-employed workers to lack of protection against sexual harassment. This research analyzes the legal framework governing labour laws in a bid to

¹⁸ Section 6, *Employment Act* (2007).

¹⁹ *International Labour Organization, Non-standard employment around the world: Understanding challenges and shaping prospects*, ISBN 978-92-2-130385-5, 58.

²⁰ Lapeyre F, Williams C.C., ‘Dependent self-employment: Trends, challenges and policy responses in the EU’, International Labour Office, Employment policy department Paper number 228, 2017, 6 - https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_614176.pdf on 18 March 2021.

determine whether it adequately protects dependent self-employed workers against sexual harassment

1.3. Research objectives

The general objective of this study investigates the legal framework governing labour laws in a bid to determine whether it adequately protects dependent self-employed workers against sexual harassment. The specific objectives are;

1. To assess Kenya's legal framework and statutory provisions governing the rights of dependent self-employed workers against sexual harassment.
2. To undertake a comparative study of the laws governing DSEW in other jurisdictions, particularly the UK and Spain in the European Union (EU).
3. To recommend legislative amendments to employment laws in Kenya governing the relationship between employers and dependent self-employed workers.

1.4. Hypothesis

This research is premised on the hypotheses that;

1. There exists a lacuna in Kenya's legislative framework governing the relationship between the employer and DSEW in relation to protection against sexual harassment.
2. This gap has left DSEW vulnerable to sexual harassment within the work place.
3. There is a compelling need to reconcile this gap if the rights of DSEW are to be safeguarded.

1.5. Research questions

1. Are dependent protected against sexual harassment under Labour laws in Kenya?
2. To what extent can Kenya's legal framework adopt from the European Union, particularly the UK and Spain regarding the protection of DSEW within the work place?
3. What legislative amendments can be recommended to be applied in employment law in order to achieve the protection of DSEW?

1.6. Justification of Study

In recent times, we have witnessed a growing interest from policy makers, scholars, government institutions, and so on, in the regulation of work done by DSEW.²¹ The attraction to this kind of employment is two-fold. On the side of firms, it is the ability to increase the size and composition of the workforce while disintegrating output through outsourcing and subcontracting whereas for the workers, the autonomy and the chance for higher returns have made it worth the gamble.²² Governments also have a stake on the beneficial basis of creation of new employment models for the country's workforce hence there is a high incentive to remove barriers to self-employment. The lack of regulation of dependent self-employed workers under labour law is covered by different of law particularly commercial and contract law which have deviating principles to Labour law.²³

For the purpose of this research, the paper will focus specifically on the protection of DSEW against sexual harassment. The #Metoo movement prompted the world to re-focus their lenses on sexual harassment within the work place.²⁴ This raised questions on the available legal protections set in place in different states for workers at risk of exposure to sexual harassment. The current state of the labour market has widened the scope of the conversation from the context of an employer-employee relationship to accommodate other forms of employment including dependent self-employment. This research investigates legal protections of DSEW within the work place in Kenya's context.

1.7. Literature review

While there is a wealth of material on the protection of sexual harassment against dependent self-employed workers in other jurisdictions, Kenya continues to skirt around the topic. Therefore, this

²¹ Engblom S, 'Self-employment and the personal scope of labour law: comparative lessons from France, Italy, Sweden, United Kingdom and the United states', Published PHD Thesis, European University Institute, Florence, 2003, 6.

²² Engblom S, 'Self-employment and the personal scope of labour law: comparative lessons from France, Italy, Sweden, United Kingdom and the United states', Published PHD Thesis, European University Institute, Florence, 2003, 7.

²³ Freedland M, Davies P, 'Employees, workers, and the autonomy of labour law', European Corporate Governance Institute, 1999, 3.

²⁴ M Khadija, 'Sexual harassment in the work place', National Conference on State Legislatures, 17 February 2020-<https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx> on 20 April 2021.

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research will borrow heavily from preceding texts particularly from the European Union and the United States.

Sean Sayers, a professor and writer on Marxist philosophy agrees with Benton's critique of Karl Marx's view of labour as a form giving activity which directly relates to work as exclusively creating a material product through craftsmanship or industry.²⁵ Michael Hardt and Antonio Negri are of the opinion that this stringent definition fails to encompass the post-industrial society we live in today where new immaterial forms of labor such as service work or for the purpose of this research, 'gig economy' have developed and changed the outlook on employment relations.²⁶ Samuel Engblom affirms this position by noting the problematic nature of Labour laws in their effort to regulate self-employment, a new category of work resulting from the gig economy.

Dosen Igor and Michael Graham define the gig economy as an economic model characterized by temporary and flexible jobs within a Labour market under short term contracts whereby workers are paid in return for their service or the 'gigs' they perform.²⁷ Robinson Kelsey and Mahajan Deepa note that the gig economy captures the method through which a large percentage of the work force today earns a living.²⁸ The ILO explains that workers in the gig economy are largely presumed to be independent contractors, an assumption that fails to take into consideration the fact that their work maybe supervised closely and the payment done via a specific application or online medium.²⁹ This disguised employment as the ILO coins it, risks ambiguity resulting in the rights and obligations of parties failing to exhibit any clarity.³⁰ As highlighted earlier in this study, dependent self-employment falls outside the scope of a traditional employment relationship and thus, this opens them up to the risk of lacking benefits of protection offered under Labour laws.

²⁵ Sayers S, 'The concept of labour: Marx and his critics', 71 *Science & society Journal* 4, 2007, 431.

²⁶ Sayers S, 'The concept of labour: Marx and his critics', 431.

²⁷ Igor D, Michael G, 'Labour rights in the gig economy, an explainer', Parliament of Victoria, - <https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13869-labour-rights-in-the-gig-economy-an-explainer-> on 17 April 2021.

²⁸ Mahajan D, Kesley R, 'Independent work: Choice, Necessity and the Gig economy,' Mckinsey Global Institute, 10 October 2016- <https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy> on 17 April 2021.

²⁹ https://www.ilo.org/global/topics/non-standard-employment/WCMS_534833/lang--en/index.htm on 17 April 2021.

³⁰ https://www.ilo.org/global/topics/non-standard-employment/WCMS_534833/lang--en/index.htm on 17 April 2021.

Mohammed Anwar and Mark Graham elaborate that the African continent has endured years of economic stagnation, dependency and exploitation leading to the dire state of many countries suffering adversely from high unemployment rates, industrial decline and inequality in spite of spiking population growth.³¹ The authors describe the emergence of the gig economy in Africa as a promising solution to create employment in the parts of the continent characterized by low income earning.³² This novel strategy for economic development promoted by the private sector and governments is a double edged sword as observed by Olda Morawczynski who states that it increases the risk for low quality work by restricting workers' rights.³³

Miriam Cherry and Antonio Aloisi seek to evaluate the effectiveness of the intermediate category of workers (dependent self-employed) between employees and independent contractors in remedying the issue of misclassification in the United States.³⁴ Their position is inconclusive due to the controversy in its regulation as it has been successful in various states and a tragic failure in others. Esther Sanchez notes that the major challenge with law is its dereliction in adjusting protection levels to suit reality in order for it to effectively establish general and abstract regulations which may become permanent.³⁵ The ILO reports that its main aim is to make all work decent despite existing outside the scope of standard employment contracts through policy frameworks. The ILO idealizes decent work as the sum up of employment opportunities that recognize the rights of human persons as well as workers' rights and respect for their physical and mental integrity.³⁶ Thus, protection of dependent self-employed workers from sexual harassment is encapsulated within the ILO's mandates.

³¹ Graham M, Anwar M, 'Between a rock and a hard place: Freedom, flexibility, precarity and vulnerability in the gig economy in Africa, 25 *Competition & change Journal* 2, 2021, 238.

³² Graham M, Anwar M, 'Between a rock and a hard place: Freedom, flexibility, precarity and vulnerability in the gig economy in Africa, 238.

³³ Morawczynski O, Porteous D, 'How the gig economy could help empower Africa's growth', World Economic Forum, 17 June 2019, <https://www.weforum.org/agenda/2019/06/africa-s-gig-opportunity> on 17 April 2021.

³⁴ Cheery M, Aloisi A, 'Dependent contractors in the gig economy, A comparative approach', 66 *American Law Review* 3, 2016, 637.

³⁵ Torres, S.E., 'The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labour Law', Hein Online, 2009, 231.

³⁶ <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> on 25 March 2021.

1.8. Research design and methodology

In an aim to represent the most accurate data of the challenges facing regulation of laws within the gig economy, particularly the protection of dependent self-employed workers from sexual harassment, this paper's research design looks at different statistics on the prevalence of sexual harassment in the workplace, it engages different opposing views of scholars and employs doctrinal methodology to inform the research by reviewing both primary and secondary sources including published books, papers, journal articles, reports and other relevant studies carried out within the personal scope of labour law in relation to the protection of DSEW. The use of these sources is motivated by the extensive material in jurisdictions that have widely explored the terrain of governing self -employment.

This paper will also contain a comparative study with other jurisdictions within the European Union to fully assess the extent of regulation in this sector of employment and arrive at recommendations that would be applicable to the Kenyan context. This comparative study is informed by the fact that Kenya and the EU are both governed by common law.

1.9. Limitations of the study

The scope of this study is confined to Kenya's legislative framework. This paper will focus on two main contenders in this sector of labour laws: dependent self-employed workers and their employers excluding other players in the NSE world such as part-time workers, temporary workers and multi-party employed workers. This research is cognizant of the fact that there exists a plethora of challenges facing DSEW which vary from one state to another, however, for the purpose of this research, the paper limits its discourse to Kenya's context.

1.10. Chapter breakdown

Chapter One

This chapter provides: the introduction to this dissertation; the problem this dissertation seeks to solve; the justification and the intended scope of this dissertation; the research objectives; the research questions; the literature review; the hypothesis; the assumptions; the design and methodology; and the limitations of this dissertation.

Chapter Two

This chapter explores the theoretical underpinning of this research by expounding on the human rights theory and the Marxism theory which are instrumental in mapping out the history of the gig economy and validating the need of protection for dependent self-employed workers.

Chapter Three

This chapter investigates the Kenyan legal framework on labour protections of dependent employed workers against sexual harassment.

Chapter Four

This chapter focuses on the EU's perspective on the protection of DSEW and the policies adopted by its members.

Chapter Five

This chapter concludes the study and proposes recommendations towards the amendment of the legislative framework governing labour laws such as the recognition of this novel category of work, attaching rights and protections to dependent self-employed workers or reclassifying them. It will also conclude this study.

CHAPTER 2: THE THEORETICAL UNDERPINNING OF THE STUDY

This Chapter explores the theoretical and philosophical underpinnings that lend credence to the rights of DSEW against sexual harassment. The theories applied herein posit their rights as a fact while the succeeding chapters explore their rights as an aim yet to be realized.

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2.1. Marxist theory

Adam Smith, an 18th century economist viewed the exploitation of labour as optional moral injustice.³⁷ Karl Marx shared the same opinion when he stated that the use of absolute power to systemically extract more value from workers would result in a structurally imbalanced relationship between employers and workers which, if left unchecked, would lead to more dominance.³⁸ Marx's written work in *Das Capital*, described capitalism as a capital driven economy fostered in the age of technology to create a world market whereby capitalists advance innovation by pressing excess output from workers under systemic constraints to maximize surplus value and drive growth while concurrently undermining the original source of production of their wealth which is the workers.³⁹ Marxist scholars, in their aim to abolish capital for this very reason, describe it as a social economic relation between people as opposed to a relation between people and things.⁴⁰ They believe that revolutionary socialism is the right channel to replace capitalism which is based on private ownership as a means of production for enriching capitalists at the expense of exploiting workers.⁴¹ Karl foresaw this when he warned that private ownership as a means of production and distribution would create dependency of the bourgeoisie class to the ruling class which would eventually be a source of restriction to their freedom and dignity.⁴²

³⁷ Amdur E, 'Adam Smith, Karl max and the gig economy,' Amdur Coaching and Group advisory LLC, 11 June 2020, - <https://eliamdur.com/index.php/2020/06/11/adam-smith-karl-marx-and-the-gig-economy/> on 21 April 2021.

³⁸ Amdur E, 'Adam Smith, Karl max and the gig economy,' Amdur Coaching and Group advisory LLC, 11 June 2020, - <https://eliamdur.com/index.php/2020/06/11/adam-smith-karl-marx-and-the-gig-economy/> on 21 April 2021.

³⁹ Marx K, '*Capital: A critique of political economy*', 1 ed, Progress Publishers, Germany, 1867, 127.

⁴⁰ 'The Marxist critique of capitalism,' Libre texts, 15 December 2020, - [https://socialsci.libretexts.org/Bookshelves/Sociology/Book%3A_Sociology_\(Boundless\)/16%3A_Economy/16.01%3A_Economic_Systems/16.1C%3A_The_Marxist_Critique_of_Capitalism](https://socialsci.libretexts.org/Bookshelves/Sociology/Book%3A_Sociology_(Boundless)/16%3A_Economy/16.01%3A_Economic_Systems/16.1C%3A_The_Marxist_Critique_of_Capitalism) on 21 April 2020.

⁴¹ 'The Marxist critique of capitalism,' Libre texts, 15 December 2020, - [https://socialsci.libretexts.org/Bookshelves/Sociology/Book%3A_Sociology_\(Boundless\)/16%3A_Economy/16.01%3A_Economic_Systems/16.1C%3A_The_Marxist_Critique_of_Capitalism](https://socialsci.libretexts.org/Bookshelves/Sociology/Book%3A_Sociology_(Boundless)/16%3A_Economy/16.01%3A_Economic_Systems/16.1C%3A_The_Marxist_Critique_of_Capitalism) on 21 April 2020.

⁴² 'The Marxist critique of capitalism,' Libre texts, 15 December 2020, - [https://socialsci.libretexts.org/Bookshelves/Sociology/Book%3A_Sociology_\(Boundless\)/16%3A_Economy/16.01%3A_Economic_Systems/16.1C%3A_The_Marxist_Critique_of_Capitalism](https://socialsci.libretexts.org/Bookshelves/Sociology/Book%3A_Sociology_(Boundless)/16%3A_Economy/16.01%3A_Economic_Systems/16.1C%3A_The_Marxist_Critique_of_Capitalism) on 21 April 2020.

The Fourth Industrial Revolution driven by technology has revolutionized the world of work as we know it today.⁴³ Marx predicted this outcome when he distinguished the tendency of capitalism to create disposable income on one side while converting it into surplus labour on the other side.⁴⁴ Investment in technology has been used to drive innovation by making the means of production cheaper and replacing stable employment with outsourcing, casual labour and temporary contracts in order to produce surplus value resulting in today's 'gig economy'.⁴⁵ Marxists observe that the gig economy has promoted the myth of self-employment and independence under the guise of 'flexibility' masking a threatening reality that is unfavourable to gig workers.⁴⁶ Marx's theory of alienation reflects this reality as it posits that alienation and dignity are inextricably linked.⁴⁷ In the *Economic and Philosophic manuscripts*, Marx expounded that a worker's alienation from their humanity transpires when they can only express their labour as 'a thing' and not a person belonging to a private system of industrial revolution which results in the denial of their dignity.⁴⁸

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Sociologists note that this alienation has manifested in the gig economy revolutionizing the relationship landscape of employers and workers, particularly self-employed workers through psychosocial ramifications as a result of a toxic work environment in the form of sexual harassment.⁴⁹ Moreover, Marx and Engels in their analysis of power and conflict found that social conditions and behaviour contribute greatly to the character and development of people hence the need for regulation of sexuality for the sake of social order.⁵⁰ Marxist theory posits that the power imbalance in work settings fosters an environment that facilitates sexual harassment. |

Commented [u5]: Include a final paragraph in which you summarize how this theory underpins your study

⁴³ Grouchy De K.K, Khan A.H, 'Work place autonomy in the gig economy: A lonely ride?', Unpublished LLM Thesis, London School of Economics, London, 2018, 3.

⁴⁴ Southern A, Hughes C, 'The world of work and the crisis of capitalism: Marx and the Fourth Industrial Revolution', 19 *Journal of classical sociology* 1, 2019, 708.

⁴⁵ Klein M, 'Precarious work: A Marxist explanation', MR Online, 4 May 2019, <https://mronline.org/2019/05/04/precariou-work-a-marxist-explanation/> on 22 April 2021.

⁴⁶ Klein M, 'Precarious work: A Marxist explanation', MR Online, 4 May 2019, <https://mronline.org/2019/05/04/precariou-work-a-marxist-explanation/> on 22 April 2021.

⁴⁷ Wilkowska I, Healy M, 'Marx, alienation and the denial of dignity of work', in Kostera M and Pirson M (eds) *Dignity and the organization*, Palgrave Macmillan publishers, United Kingdom, 2016, 213.

⁴⁸ Marx K, *The Economic and Philosophical manuscripts of 1844*, Progress Publishers, Moscow, 1932, 210.

⁴⁹ Baker A.P, 'Work alienation and Disengagement: Sexual harassment and Uber', Springer International Publishing, USA, 2020, 3.

⁵⁰ Maina L, 'Impact of sexual harassment at the workplace: A case study of the United Nation in Kenya', LLM Published Thesis, University of Nairobi, Nairobi, 2018, 20.

This theory informs this study by highlighting the reality that we live in an inherently exploitative capitalist society today whereby dependent self-employed workers exist in an imbalanced power relationship with their employers making them even more vulnerable to sexual harassment.

2.2. Human rights theory

Religious precepts dictate that if dignity is to be preserved, then the basic human rights of workers must be respected in order to accomplish God's will for humanity to continue participating in creation's process through work.⁵¹ Legal systems across the world invoke this entitlement in their human rights practices in a bid to safeguard a decent working environment for all workers.⁵² Human rights theorists posit that fundamental human rights principles and labour rights are inseparable, mutually supportive and interrelated.⁵³ Labour rights are defined as entitlements based upon various foundations such as freedom and dignity that relate specifically to the role of workers.⁵⁴

Professor Virginia Mantouvalou provides an in depth analysis on this assertion by expounding on three different approaches to underpinning labour rights on the basis of Human rights which consist of a positivist perceptive, instrumental viewpoint and a normative outlook.⁵⁵ Positivists adduce that labour rights are human rights as long as they are provided for under legal instruments.⁵⁶ They look at a list of human rights conventions protecting labour rights such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and deduce satisfactorily that the provisions therein catering to these rights are indeed human rights.⁵⁷ The United Nations and various international and regional protocols have acknowledged sexual harassment as a form of sex based discrimination that violates human dignity.⁵⁸ For the very purpose of advancing the discussion on labor rights as human rights, a positivist examines the ILO

⁵¹ Paulus J, 'Laborem Exercens', The Holy See, http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html on 24 April 2021.

⁵² Gilbert P, 'Labor Human rights and Human dignity', 42 *Philosophy and social criticism journal* 2, 2015, 171.

⁵³ <https://socialprotection-humanrights.org/key-issues/relationship-with-other-human-rights/labour-rights/> on 25 April 2021.

⁵⁴ Mantouvalou V, 'Are labour rights human rights?', 3 *European Labour law Journal* 2, 2012, 3.

⁵⁵ Mantouvalou V, 'Are labour rights human rights?', 2.

⁵⁶ Mantouvalou V, 'Are labour rights human rights?', 2.

⁵⁷ Mantouvalou V, 'Are labour rights human rights?' 4.

⁵⁸ UN Women, 'Sources of International law related to sexual harassment', Centre of Virtual knowledge to End Violence Against Women and Girls', 13 January 2011 - <https://www.endvawnow.org/en/articles/492-sources-of-international-law-related-to-sexual-harassment.html> on 25 April 2021.

as the bench mark branch of the UN on all matters concerning labour rights.⁵⁹ The ILO endorses a catalogue of labour rights as human rights through the Declaration of Fundamental Principles and Rights at Work, adopted in 1998, which include freedom of association and the right to collective bargaining, elimination of forced or compulsory labour, abolition of child labour and the elimination of discrimination in employment.⁶⁰ Critics of the positivist approach claim that the ILO's decision to only pick out four primary labour rights as human rights excludes other socio-economic rights of workers and thus renders positivists as incapable of fully addressing this debate.⁶¹ Thus, the recognition of sexual harassment as form of sex discrimination following the positivist argument qualifies it as a human right.

The Instrumental viewpoint dictates that labour rights are human rights if international instruments, courts, trade unions, and NGOs are successful in promoting them as such.⁶² On the subject of courts, The European Court of Human rights (ECtHR) has ruled in favour of workers' claims in the case of *Siliadin v France*, whereby the court determined that conditions of modern slavery impose a duty to enact legislation criminalizing actions of employers.⁶³ The instrumental approach seeks to use powerful legal methods to present worker's claims as human rights claims and secures the advantage over employers seeking the same approach.⁶⁴ This was witnessed in the case of *Risse v Chardin*, the courts established that the complacency of the victim (which was interpreted as a being afraid of seeming problematic by complaining of the sexual harassment), as submitted by the defense could not be relied on while assessing the evidence that the conduct complained about amounted to abuse of authority in terms of sexual harassment.⁶⁵

⁵⁹ Symonides J, 'The international Labour Organization's System of Human rights Protection' in Jamusz Symonides 'Human rights: International monitoring, supervision and enforcement', 1ed, Routledge publishers, London, 2017, 239.

⁶⁰ <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/governance/fprw/lang--en/index.htm#:~:text=Fundamental%20principles%20and%20rights%20at%20work%20provide%20the%20foundation%20on.and%20just%20societies%20are%20built.&text=Freedom%20of%20association%20and%20the.key%20aspects%20of%20their%20relationship> on 28 April 2021.

⁶¹ Mantouvalou V, 'Are labour rights human rights?', 7.

⁶² Mantouvalou V, 'Are labour rights human rights?', 8.

⁶³ *Siliadin v France*, ECtHR Judgement of 26 October 2005.

⁶⁴ Fenwick C & Novitz T, 'Conclusion: Regulating to Protect Workers' Human Rights' in Collins Fenwick and Tonia Novitz' *Human rights at work: Perspective on Law and regulation* (eds), Hart Publishers, London, 2010, 587.

⁶⁵ Hodges A.J, 'Sexual harassment in employment: recent judicial and arbitral trends', 135 *International Labour Review* 5, 1996, 516.

The normative outlook views this discourse on labour rights as human rights as a matter of moral truth.⁶⁶ Scholarship based on this line of thinking affirm the justification of human rights as labour rights by defining human rights as universal and imperative, afforded to every person on the basis of their humanity with significant moral weight which trumps over other deliberations.⁶⁷ Critics of this approach state four discerning arguments as to why labour rights cannot be considered as human rights such as; the lack of similar compelling claims, absence of universality afforded to human rights, inability to incorporate strict standards and lastly, they change and adapt over time while human rights are unchanging necessities.⁶⁸

Human rights prohibit grave moral wrongs. Similarly, labour rights protect workers from ill treatment that is degrading and humiliating from employers such as sexual harassment within the work place.⁶⁹ Abusive working conditions have been classified as ‘modern slavery’ by NGOs, courts and governments in an aim to recognize the interests of workers adversely affected as a result.⁷⁰ On the other hand, critics stipulate that, rights such as paid holidays,⁷¹ although included in the UDHR do not meet the rubric of Human rights.⁷²

Secondly, the argument that labour rights are not universal because they only apply to workers and not all persons has been debunked by the notion that rights connected to the status of a person does not negate their universality.⁷³ The foundation of their universality as human rights is principled on the fact that when the person finds themselves in the capacity of a worker, they will be qualified to be accorded with the reverence that human rights universally demand.⁷⁴ The third argument posits that some labour rights are not stringent enough to extent that all countries must respect them due to different resource capacities of these countries.⁷⁵ Human rights scholars state that in

⁶⁶ Mantouvalou V, ‘Are labour rights human rights?’, 16.

⁶⁷ Collins H, ‘Theories of rights as justification for Labour law’ in Davidov G and Langille B, *The idea of Labour Law*, Oxford publishers, London, 2011, 137.

⁶⁸ Collins H, ‘Theories of rights as justification for Labour law,’ 144.

⁶⁹ Tasioulas J, ‘On the nature of Human rights’ in Heilinger J and Ernst G, *The philosophy of Human rights: Contemporary controversies*, eds, Hubert & Co publishers, Germany, 2011, 17.

⁷⁰ Mantouvalou V, ‘The many faces of Slavery: the example of domestic work,’ *Summer/Autumn 2012 Global Dialogue, special issue on Modern Slavery* - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046039 on 28 April 2021.

⁷¹ Article 24, Universal Declaration of Human Rights, 10 December 1948.

⁷² Cranston M.W, *What are Human Rights?*, eds, Bodley Head publishers, London, 1973, 66.

⁷³ Mantouvalou V, ‘Are labour rights human rights?’, 20.

⁷⁴ Mantouvalou V, ‘Are labour rights human rights?’, 20.

⁷⁵ Mantouvalou V, ‘Are labour rights human rights?’, 21.

viewing human rights as normative standards, the incapability of a country to comply with a right because of resource limitations does not equate to its non-rigidity.⁷⁶ The United Nations Committee on Economic, Social and Cultural Rights explains that duties such as prohibition from sex based discrimination in the form of sexual harassment require immediate, deliberate and targeted action irrespective of resource implications.⁷⁷

The fourth argument advances the fact that labour rights may evolve over time as a result of change in means of production, division of labour and other forms of work whereas human rights remain timeless.⁷⁸ Human rights theorists state that although a claim may be timeless, its expression may change due to external factors.⁷⁹ This study asserts that technological advancements have led to the change in employment patterns which has made it more complex to regulate labour relations but this does not suggest that the right to protection of workers from sexual harassment is not a timeless claim. Professor Mantouvalou maintains that the nature of human rights as hypothetical standards qualifies them as ideal for stipulating the principles that ought to govern employment relations since the labour rights that obtain the standard of human rights are irrevocable to revision when the system of production changes.⁸⁰

The Human Rights theory informs this thesis by advancing the argument that dependent self-employed workers ought to be protected against sexual harassment on the basis of their human dignity.

2.3. Conclusion

The Marxist theory explains the inherently exploitative capitalist system which thrives on the backbone of undervalued workers. The Fourth Industrial Revolution also known as the age of technology as Karl Max predicted in a capitalist society has ushered in the gig economy as we know it today where the flexibility of workers to create disposable income through online work platforms is balanced out by the surplus labour they provide to employers. Marxist theory further

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⁷⁶ Sunstein C, Holmes S, 'The cost of rights: Why liberty depends on taxes', eds, W.W. Norton & company publishers, New York, 2000, 46.

⁷⁷ Craven M, 'The International Covenant on Economic, social and Cultural rights: A perspective on its development' eds, Clarendon Publishers, London, 1998, 238.

⁷⁸ Collins H, 'Theories of rights as justification for Labour law', 142.

⁷⁹ Tasioulas J, 'On the nature of Human rights' 35.

⁸⁰ Mantouvalou V, 'Are labour rights human rights?', 23.

examines the imbalance of power in work settings which fosters a hostile work environment that facilitates sexual harassment.

The human rights theory focuses on three different approaches to labour rights as human rights; the positive, instrumental and the normative. Firstly, the positive approach states that human labour rights are human rights when they are provided for in key legal human rights documents. Secondly, the Instrumental approach outlines that labour rights are human rights if international instruments, courts, NGOs, trade unions are successful in promoting them as such. Thirdly, the normative approach views labour rights as human rights as a matter of simple moral truth.

CHAPTER THREE: THE KENYAN LEGISLATIVE FRAMEWORK ON SEXUAL HARASSMENT OF DEPENDENT SELF-EMPLOYED WORKERS.

This chapter provides a legal context for the labour laws protecting DSEW from sexual harassment with the aim of analyzing the protections, if any, are sufficient. This chapter is divided into three sections. The first defines the legal status of dependent self-employed workers in their protection against sexual harassment within the Kenyan legal framework by looking at statutory provisions and the approach of the courts. The second presents challenges faced in combating sexual harassment within the workplace while the third concludes the chapter and provides a bridge to chapter 4.

3.1. Legal uncertainty on the status of dependent self-employed workers in their protection against sexual harassment

The current legal framework on labour laws in Kenya may not have envisaged the changes in employment we are now witnessing through the gig economy. The impact of Covid-19 has left gig workers even more vulnerable in Kenya due to the absence of social and legal protections in light of vulnerabilities and contingencies such as the pandemic.⁸¹ The growth of gig workers as a result of coronavirus has been exponential mainly because the crisis has upended the 8-5 working model as more employers have sought technology based solutions which has resulted in more online based work.⁸² The emergence of gig workers as essential workers exempted from curfew restrictions by the Kenyan government has raised more concern from gig platforms on their legislative protection against sexual harassment.⁸³

3.1.1. What does the Constitution provide?

Labour laws in Kenya provide minimum standards in regard to employee protection and stipulate reasonable working conditions. Kenya's jurisprudence on the notion of fair labour practice is principled on the provisions embalmed in the Constitution of Kenya, labour legislations, common law practices, treaties and conventions ratified by Kenya, and various terms and conditions of

⁸¹ Mwaura J, 'Who is responsible for supporting gig workers left vulnerable by covid-19', Mercy Corps, 16 July 2020, - <https://www.mercycorps.org/blog/covid-19-gig-workers-social-protection> on 6 May 2021.

⁸² Henderson R, 'How covid has transformed the gig economy', Forbes, <https://www.forbes.com/sites/rebeccahenderson/2020/12/10/how-covid-19-has-transformed-the-gig-economy/?sh=5a2e2e656c99> on 6 May 2021.

⁸³ Kibe J, Kaaria L, Deshpande R, 'Covid 19 exposes risks and opportunities in the gig economy', CGAP, 15 April 2020, - <https://www.cgap.org/blog/covid-19-exposes-risks-and-opportunities-kenyas-gig-economy> on 8 May 2021.

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employment as set in the subject employer's code of conduct.⁸⁴ The Kenyan Constitution asserts every worker's right to fair labour practices.⁸⁵ The statute also guarantees every worker's right to reasonable working conditions.⁸⁶ However, there is significant absence as to the threshold of what constitutes as fair labour practices due to the absence of definition by the Constitution and other labour statutes in Kenya.⁸⁷ The Bill of Rights under the Constitution affirms every person's equality before the law and protects every person from direct or indirect discrimination on the basis of sex.⁸⁸ The inherent dignity of persons is also upheld as the Constitution firmly states that it must be respected and protected.⁸⁹

Kenya has ratified key legal international labour laws, treaties and conventions as part and parcel of state law under the constitution.⁹⁰ The International labour standards adopted by the ILO prioritize the development of people as human beings.⁹¹ Equality and discrimination on the basis of sex for workers is provided for as an International Labour Standard under The Discrimination (Employment and Occupation) Convention of 1998 No.111.⁹² The United Nation Convention on the Elimination of Discrimination Against Women (CEDAW) specifically prohibits sexual harassment in Article 11 of General recommendations 19.⁹³

The labour statutes in Kenya are founded on the principles of the 1998 ILO Declaration on fundamental principles and rights at work.⁹⁴ The Employment Act is established on three specific principles, the prohibition of sexual harassment, discrimination in employment and prohibition

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⁸⁴ MANN, 'Development of Fair Labour Practices Concept', MANN <https://mman.co.ke/content/development-fair-labour-practices-concept-0> on 24 May 2021.

⁸⁵ Article 41(1), *Constitution of Kenya* (2010).

⁸⁶ Article 41(2)(b), *Constitution of Kenya* (2010).

⁸⁷ MANN, 'Development of Fair Labour Practices Concept', MANN <https://mman.co.ke/content/development-fair-labour-practices-concept-0> on 24 May 2021.

⁸⁸ Article 27, *Constitution of Kenya* (2010).

⁸⁹ Article 28, *Constitution of Kenya* (2010).

⁹⁰ Article 2(6), *Constitution of Kenya* (2010).

⁹¹ ILO, 'A Path to Full and Productive Employment and Decent Work for All: The 2030 goals' - <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang-en/index.htm#:~:text=Fair%20labour%20practices%20set%20out.engaged%20in%20the%20informal%20economy>. On 24 May 2021.

⁹² Awad B.A, Varga C, 'Guide to International Standards and Rights at work concerning young people', ISBN 978-92-2-130839-3.

⁹³ Karega R, 'Violence against women in the work place: Assessment of workplace sexual harassment in the commercial agriculture and textile manufacturing industry in Kenya', Published PHD Thesis, Kenyatta University, 2002, 3.

⁹⁴ Kituo cha Sheria, 'The Kenyan worker and the law: An information booklet', 4 April 2016 - <http://kituochasheria.or.ke/wp-content/uploads/2016/04/Kenyan-Worker-and-the-Law-final2.pdf> on 5 May 2021.

against forced labour.⁹⁵ Sexual harassment as a form of sex discrimination was mentioned as part of the 1985 draft of the Nairobi Forward Looking Strategies for the Advancement of Women.

The ILO states that sexual harassment takes two forms: Quid Pro Quo and a hostile working environment.⁹⁶ Quid Pro Quo establishes the conditional nature of sexual harassment where a job benefit such as a pay rise, continuous employment or promotion is dependent on the victim's acceptance of sexual advances whereas a hostile working environment is created whereby sexual conduct fosters circumstances that are intimidating and humiliating to the victim.⁹⁷ The Employment Act prohibits both however, only employers of more than 20 employees are legally required to adopt and implement a sexual harassment policy.⁹⁸

3.1.2 What is the position of the Courts?

Despite these provisions by the Constitution and various labour statutes on the regulation of sexual harassment in Kenya, their applicability and interpretation at the courts thus far have relied on the classification of workers as employees expressly defined by the Employment Act as persons employed for wages or a salary which include an apprentice or indentured learner.⁹⁹ The Act fails to define other classifications of workers existing in the world of work as we know it today such as dependent self-employed workers. Although it does make a distinction between employees and independent contractors through a 'contract of service' versus a 'contract for service' respectively for the purpose of determining the rights and obligations of employees protected under Employment Laws.¹⁰⁰

Several tests have been used by Kenyan Courts to separate the legal definition of employees from independent contractors such as the control test, integration test, the economic reality test and the multifactor test.¹⁰¹ Kenyan Courts have mostly relied on the multi factor test as was in the case of *Everett Aviation Ltd v The Kenya Revenue Authority* where the court determined that in order to

⁹⁵ Part 2, *Employment Act* (2007).

⁹⁶ 'Sexual harassment at work' - https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf on 10 May 2021.

⁹⁷ 'Sexual harassment in the world of work' - https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_738115.pdf on 10 May 2021.

⁹⁸ Section 6(2), *Employment Act* (2007).

⁹⁹ Section 2, *Employment Act* (2007).

¹⁰⁰ Section 2, *Employment Act* (2007).

¹⁰¹ The Lex Fetter, 'Contract of service contrasted with contracted for service- The shift towards the objective Kenyan Test' <https://mulenwa.wordpress.com/2015/11/10/contract-of-service-contrasted-with-contract-for-services-the-shift-towards-the-objective-kenyan-test/> on 25 May 2021.

define the employment status of an individual, no single factor can be considered as conclusive. Instead, the court must examine the contract as a whole in addition to all pertinent issues to that employment relationship.¹⁰²

Moreover, Kenyan courts have employed the literal rule of statutory interpretation in dealing with sexual harassment labour cases, as was seen in *SRM v GSS*, where the court determined that an employee is sexually harassed under section 6 of the Employment Act if the employer, his representative or a co-worker shows physical behaviour of a sexual nature that both directly or indirectly subjects the employee to unwelcome or offensive behaviour.^{103,104}

Labour laws governing the employment relationship have raised questions regarding their applicability to the fresh dynamic that other classifications of workers present. The notion of personal dependence and economic dependence are crucial in answering these questions.¹⁰⁵

Personal dependence applies to employees whereby the employer determines when, where, how the work is carried out whereas economic dependence refers to where a worker has one employer and risks generating their entire income on the business relationship which is the case for DSEW.¹⁰⁶ This distinction has been used by European jurisdictions to determine whether dependent self-employed workers are more similar to employees or independent contractors.¹⁰⁷ Chapter 4 illustrates that countries like the United Kingdom offer protection against sexual harassment to dependent self-employed workers with more employee-like characteristics as opposed to independent contractors or the 'self-employed' who do not enjoy employment benefits.

It is noteworthy to state Kenya law does not entitle the benefits of employees to independent contractors let alone, dependent self-employed workers.¹⁰⁸ More accurately, the Labour Relations

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¹⁰² (2013) eKLR.

¹⁰³ Mbithi S, 'The rules of statutory interpretation and the meaning of Section 43(2) of the Law Society Act No.21 of 2014', The Platform, 12 October 2018, -<https://theplatform.co.ke/the-rules-of-statutory-interpretation-and-the-meaning-of-section-432-of-the-law-society-act-no-21-of-2014/> on 13 May 2021.

¹⁰⁴ *SRM v GSS, (K) Limited & Another* (2017) eKLR, 69.

¹⁰⁵ *Employment Policy on Social protection rights of economically dependent self-employed workers*, April 2013, ISBN 978-92-823-4389, 29.

¹⁰⁶ *Employment Policy on Social protection rights of economically dependent self-employed workers*, 29.

¹⁰⁷ Boheim R, Muhelberger U, 'Dependent Self-Employment: Workers between Employment and Self-Employment in the UK' *Journal for Labour Market Research*, 2009, 182 - <https://labourmarketresearch.springeropen.com/articles/10.1007/s12651-009-0014-x> on 25 May 2021.

¹⁰⁸ The Lex Fottter, 'Contract of service contrasted with contracted for service- The shift towards the objective Kenyan Test' <https://mulenwa.wordpress.com/2015/11/10/contract-of-service-contrasted-with-contract-for-services-the-shift-towards-the-objective-kenyan-test/> on 25 May 2021.

Court previously held no jurisdiction to hear claims arising from independent contractors as established in *John Charo v Christopher Njao*.¹⁰⁹

Therefore, it is accurate to conclude that the protection of independent contractors against sexual harassment remains an uphill battle in Kenyan courts.

3.2. Challenges faced combating sexual harassment of dependent self-employed workers in Kenya within the work place

Firstly, the lack of juridical recognition of DSEW in Kenya as seen in 3.1. proves as a barrier towards protecting these workers under labour laws. The ILO establishes that DSEW fall between the class of dependent employees and self-employed workers.¹¹⁰ The rationale informing the protection of employees under labour laws regards them as the disadvantaged party in labour contracts whereas self-employed workers are seen as equals.¹¹¹ This leaves a grey area of self-employed workers that are reliant on one or a few employers for their income which is unregulated and unprotected from sexual harassment.

Secondly, a disproportionate scale exists between the prevalence of sexual harassment cases and the reporting of the cases by victims in the work place. This is due to various factors including the outdated view that sexual conduct belongs to the private sphere outside the legal reach of courts.¹¹² Professor Catherine Mackinnon boldly states that sexual harassment has little to do with sex and everything to do with power.¹¹³ She asserts that “economic power is to sexual harassment as physical force is to rape.”¹¹⁴ The Employment Act vests the power of receiving, investigating and reprimanding reports on sexual harassment fully on the Employer.¹¹⁵ This posits that there is a link between the structure of reporting mechanisms and the reluctance of victims to report incidences of sexual harassment especially where economic dependence is at play. The Employment Act states that the reporting mechanism for sexual harassment claims are outlined in the sexual

¹⁰⁹ (2005), eKLR.

¹¹⁰ *Employment Policy on Social protection rights of economically dependent self-employed workers*, 30.

¹¹¹ *Employment Policy on Social protection rights of economically dependent self-employed workers*, 30.

¹¹² Madek G, Earle B, ‘An international Perspective on Sexual Harassment Law’, 12 *Minnesota Journal on Law and equality* 1, 1994, 46.

¹¹³ Mackinnon C, ‘*Sexual harassment of working women: A case of sex discrimination*’, Yale University Press, London, 1979, 217.

¹¹⁴ Mackinnon C, ‘*Sexual harassment of working women: A case of sex discrimination*’, 217.

¹¹⁵ Section 6(3), *Employment Act* (2007).

harassment policy adopted by the employer upon consultation with employees and their representatives.¹¹⁶

In *SRM v GSS*, the claimant alleged that they had been receiving sexual advances from the HR manager which she declined. Despite her reports to the perpetrator's senior through internal procedures outlined in the sexual harassment policy, the advances did not cease. Instead, the claimant began receiving ill treatment such as exclusion from trainings and eventually the situation culminated in what the court determined as malicious termination.¹¹⁷ This case illustrates a situation whereby the perpetrator is also the person mandated to receive the complaints in line with the reporting mechanism adopted by the employer which may be a deterrence from victims reporting these instances to begin with.

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Dependent self-employed workers are even more vulnerable as they lack the infrastructure afforded to employees in light of sexual harassment cases. The lack of human resources departments to regulate and oversee legal protections within the work place contributes to the fear of reporting these cases at first instance.¹¹⁸ In *MWS v MFS*, the claimant expressed her fear to report the managing director who was her senior due to the impending threat of retaliation.¹¹⁹ Furthermore, the economic dependence on the employer is a disincentive to report sexual harassment cases due to fear of losing the stream of income.

Thirdly, the lack of monitoring and evaluation framework to follow up on the implementation of sexual harassment policies gravely affects the goal of a sexual harassment free work environment. In some cases, the adopting of sexual harassment policies by employers in Kenya is treated as a formality of legal compliance with little initiative geared towards training of staff to ensure increased awareness on definitions of sexual harassment and reporting mechanisms whereas in others, employers fail to adopt sexual harassment policies at all. In the *CAS v CS Ltd*, the claimant disclosed that she had been harassed by various staff members and cited the absence of a sexual harassment policy which contributed to her frustration at the hands of her employer.¹²⁰

¹¹⁶ Section 6(2), *Employment Act* (2007).

¹¹⁷ *SRM v GSS, (K) Limited & Another* (2017) ekr, 69.

¹¹⁸ Hersch J, 'Compensating Differentials for sexual harassment', 101 *The American Economic Review* 3, 2011, 630.

¹¹⁹ *MWS v MFS*, (2014) ekr.

¹²⁰ *CAS v CS Ltd*, (2016) ekr.

Lastly, the flexible nature of dependent self-employed workers who are subcontracted by employers make it difficult to organize against abuse.¹²¹ The lack of collective bargaining power that is afforded to employees incapacitates dependent self-employed workers by reducing their negotiating advantage with employers to ensure protection from sexual harassment.¹²²

3.3. Conclusion

This chapter illustrates three major gaps in Kenyan labour laws on the protection of DSEW. Firstly, there is no definition or criteria for identification of DSEW under any statutes. Secondly, the definition of sexual harassment in the Employment Act applies strictly to employees and not any other category of workers in Kenya. Thirdly, The Labour Industrial courts lack the jurisdiction to hear cases pertaining to sexual harassment of dependent self-employed workers. The challenges faced in combating sexual harassment stem from their uncertain legal status in Kenya in addition to the obstacles met in reporting mechanisms availed under the Employment Act on the basis of their economic dependence on their clients as was seen in *MWS v MFS*. Chapter 4 will focus on the EU's approach to protecting dependent self-employed workers against sexual harassment through a case study of the UK and Spain.

¹²¹ Karega R, 'Violence against women in the work place: Assessment of workplace sexual harassment in the commercial agriculture and textile manufacturing industry in Kenya', Published PHD Thesis, Kenyatta University, 2002, 3.

¹²² Lovells H, 'Collective bargaining for the self-employed- a tough gig', 25 January 2021 <https://www.jdsupra.com/legalnews/collective-bargaining-for-the-self-7427162/> on 13 May 2021.

CHAPTER FOUR: AN OVERVIEW OF THE EUROPEAN UNION'S POSITION ON SEXUAL HARASSMENT OF DSEW: CASE STUDY OF THE UK AND SPAIN

This chapter examines the European Union's approach to protecting dependent self-employed workers from sexual harassment. This chapter is divided into two sections. The first maps out the reality of sexual harassment for DSEW in the EU. The second illustrates the strides taken by the UK and Spain to tackle sexual violence of dependent self-employed workers by analyzing their approaches towards the juridical recognition of these workers. The last part concludes the chapter.

4.1. The relationship between sexual harassment and dependent self-employment in the EU.

The European Court of Justice (ECJ) succinctly defines self-employment as the lack of subordination in an employer-employee relationship.¹²³ Following this definition, dependent self-employed workers are not legally subordinate as they do not have a labour contract with their employers. Notwithstanding, they are still economically dependent.¹²⁴ The Istanbul Convention, a leading instrument in fighting violence against women in Europe defines sexual harassment as unwanted sexual conduct aimed at violating the dignity of a person through creating an intimidating and humiliating environment.¹²⁵ This paper affirms that similarly to Kenya, dependent self-employment is characterized by job insecurity due to the economic dependence on one or a few clients which risks job loss as compared to employees making it increasingly difficult to report cases of sexual harassment in the EU.¹²⁶

4.2. What steps have been taken by EU member states in the protection of DSEW against sexual harassment

DSEW are heavily misclassified amongst different jurisdictions in the European union due to their heterogeneous nature. In 2010, for the first time in its legal history, the EU recognized the novel category of Financially Dependent Self-Employed Workers (FDSEW) or commonly known as (TRADES) in Spain.¹²⁷ The ILO describes dependent self-employment synonymously with

¹²³ See case 268/99 ECR I-8615.

¹²⁴ Fernandez S et al, 'Economically dependent self-employed workers: Statistical measurement, challenges and opportunities' https://upta.es/wp-content/uploads/2019/10/trade_result_en.pdf on 25 May 2021.

¹²⁵ Article 40, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, 210.

¹²⁶ Dragano N et al, 'Precarious Employment and Self-Reported Experiences of Unwanted Sexual Attention and Sexual Harassment at Work: An analysis of the European Working Conditions Survey', 15 *PLOS one Journal* 5, 2020, 2.

¹²⁷ Carmen G.A, Cayetano G.N, 'The Regulation of Economically Dependent work in Spain: A Critical Analysis and Comparison with Italy' 1 *E-Journal of International and Comparative Labor Studies* 2, 2012, 2.

disguised employment where workers are referred to as para subordinate, quasi-employees or intermediate workers.¹²⁸ Countries in the EU hold different positions with regard to FDSEW as seen with the varying definitions with few actively taking steps to legislate this new category of work such as Spain, United Kingdom, Italy, Germany, Austria and Portugal.¹²⁹ For the purpose of this research, the paper focuses on the cases of Spain and United Kingdom.

4.2.1. The case of the United Kingdom

In the UK, the dependent self-employment sector is majorly concentrated in the construction and finance industry according to empirical evidence by the British Labour Force Survey.¹³⁰ Noticeably, the finance and media services sectors in the UK report the highest cases of sexual harassment according to expert guides on sexual harassment.¹³¹ The UK distinguishes three categories of employment: employee, worker and self-employed.¹³² Similarly to Kenya, there exists uncertain legal clarity on the status of DSEW with marginal attempts to confer to them employment rights that they would otherwise not benefit from through classifying them under the category of a ‘worker’.¹³³ This provision under the Employment Relations Act of 1999 has resulted in more labour protection for employee-like workers although the lack of clarity continues to make it difficult for courts to separate dependent workers from independent self-employed workers.¹³⁴

According to the aforementioned statute, the distinction between a ‘worker’ and a self-employed individual lies in the fact that the worker is required to perform their services themselves therefore, they cannot get a substitute as is in the case of self-employment thus informing the categorization

¹²⁸ Hunter D et al, ‘Statistical Definition and Measurement of Dependent “Self-employed” Workers: Rationale for the proposal of a statistical category of dependent contractors’, ILO, 19 October 2018, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_636042.pdf on 17 May 2021

¹²⁹ Narvaiza Z, ‘Opinion of the European Social and Economic Committee on New trends in Self Employed Work: The specific case of economically dependent self-employed work’ (own initiative opinion), *Official Journal of the European Union*, 2011, 6, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52010IE0639> on 17 May 2021.

¹³⁰ Boheim R, Muehlberger U, ‘Dependent forms of Self-Employment in the UK: Identifying workers on the border between employment and self-employment’, Institute for the Study of Labour, IZN Discussion Paper Number 1963, 2006, 4 - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=882060 on 20 May 2021.

¹³¹ <https://cms.law/en/int/expert-guides/cms-expert-guide-on-sexual-harassment-in-the-workplace/united-kingdom> on 21 May 2021.

¹³² Freedland M, ‘*The Personal Employment Contract*’ eds, Oxford University Press, London, 2003, 16.

¹³³ Section 23, *Employment Relations Act UK* (1999)

¹³⁴ Millan J.M, Millan A, ‘Disclosing Masked Employees in Europe: Job control, job demands and job outcomes of dependent self-employed workers’ *Small Business Economics: An entrepreneurial Journal*, 2020, 462-<https://link.springer.com/article/10.1007/s11187-019-00245-7#citeas> on 20 May 2021.

of dependent self-employed individuals as workers.¹³⁵ The Equality law of 2010 in the UK has been a championing instrument in the fight against sexual violence in Employment. The statute generally defines harassment as unwanted demeanor that violates a person's dignity and creates a hostile or offensive environment."¹³⁶ This provision stipulates protection from unwelcome behaviour connected to the protected category of sex, harassment of a sexual description which is unwelcome behaviour of a sexual character and lastly, mistreatment as a result of on a person's refusal or acceptance of sexual advances.¹³⁷

The most recent development in this area in January 2020 has been the EHRC publishing a practical manual on workplace harassment that stipulates how courts and tribunals should adjudicate sexual harassment disputes.¹³⁸ The guideline asserts that courts should look beyond what the contract says and the supposed intention of the employer and individual in question. Instead, they should observe what transpires in that relationship between the two parties. In case the resulting observation leads to a relationship that is protected by the Act, then the individual will be covered against sexual harassment.¹³⁹ UK case law indicates a criteria for identifying a worker which is premised on various factors such as the worker performing their services personally and their dependency on a client as they are not free to work for others and their employer at the same time. DSEW fit into the protected criteria of a 'worker' as they are economically dependent on their client and they perform their services personally receiving direct instructions on how their work is done therefore making them susceptible to sexual harassment.

4.2.2. The case of Spain

Spain formally recognizes DSEW as a separate statutory category under the 2007 statute of self-employment.¹⁴⁰ Spanish labour law views dependent self-employed workers (TRADEs) as a subgroup of self-employees and not an in between category between employees and self-

¹³⁵ EHRC 'Sexual Harassment at the Work Place: Technical guide'-
https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf on 23 May 2021.

¹³⁶ Section 26, *Equality Law UK* (2010).

¹³⁷ Section 26(1)(2)(3), *Equality Law UK* (2010).

¹³⁸ <https://cms.law/en/int/expert-guides/cms-expert-guide-on-sexual-harassment-in-the-workplace/united-kingdom> on 23 May 2021

¹³⁹ EHRC 'Sexual Harassment at the Work Place: Technical guide'-
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¹⁴⁰ Pereiro C.J, 'Notes, debates and communications: The status of self-employed workers in Spain' 147 *International labour Review* 1, 2008, 1.

employees.¹⁴¹ Chapter 3 of the gazetted law, aimed at extending the traditional limits of labour law to include self-employment provides a criteria for a worker to be considered as an economically DSEW on the condition, amongst others, that they do not subcontract third parties to carry out the work allocated by their client and they receive economic compensation for their work which covers the risk they bear.¹⁴²

The statute also defines them as individuals undertaking economic risk for profit through personal means for their client whom they are economically dependent for majority of their income amounting to 75%.¹⁴³ Chapter 2 safeguards their right to dignity with adequate provisions prohibiting sexual harassment and harassment on the premise of sex.¹⁴⁴ The provision also preserves their equality in the eyes the law that is devoid of discrimination under the category of sex.¹⁴⁵ Additionally, TRADES in Spain possess the right of association to trade unions of their choice in order to practise their collaborative defence of their occupational rights.¹⁴⁶

4.3. Conclusion

This chapter looks at two different approaches towards the protection of dependent self-employed workers against sexual harassment in 4.2 by the UK and Spain. The UK legally recognizes the rights of DSEW under the category of a ‘worker’ in accordance with Section 23 of the Employment Relations Act of 1999 while Spain expressly provides juridical recognition for DSEW as a subcategory of self-employees under the Statute of Autonomous work of 2007. Both jurisdictions provide a criteria for identification of DSEW to enable labour courts to effectively determine if they are to be protected against sexual harassment.

¹⁴¹ Signes-Todoli A, ‘Workers, The Self-Employed and TRADES: conceptualization and collective rights in Spain’ 10 *European Labour Law Journal* 3, 2019, 4.

¹⁴² Article 11(2), *Statute of Autonomous work*, Law 20/2007 of July 2011.

¹⁴³ Article 11(1), *Statute of Autonomous work*, Law 20/2007 of July 2011.

¹⁴⁴ Article 4(3)(c), *Statute of Autonomous work*, Law 20/2007 of July 2011.

¹⁴⁵ Article 4(3)(a), *Statute of Autonomous work*, Law 20/2007 of July 2011.

¹⁴⁶ Article 19(1), *Statute of Autonomous work*, Law 20/2007 of July 2011

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

This chapter recommends policies based on the findings in chapter 3 & 4 on the legislative gaps currently existing in labour laws with respect to the protection of DSEW against sexual harassment. This chapter is divided into 3 sections. The first addresses the misclassification of DSEW in Kenya. The second proposes aligning labour protections against sexual harassment of DSEW with those provided for employees. The third recommends collective bargaining as a regulatory tool towards ensuring a safe working environment free from sexual harassment.

5.1. Addressing misclassification of dependent self-employed workers in Kenya

This thesis establishes that there is an apparent division between employment and self-employment. In many jurisdictions, employment is viewed as the bedrock for labour regulation leaving self-employment outside the purview of labour regulation according to Chapter 1. The misclassification of DSEW makes it increasingly difficult to regulate them as category of workers. This is heavily aided by the lack of statistical measurement data In Kenya which impairs efforts towards legally defining who DSEW are and the necessary criteria for identifying them as a group.¹⁴⁷ The British Labour Force Survey and the European Working Conditions Survey in the European Union have been instrumental in determining the scope of DSEW across the categories of age, sex, marital status, educational backgrounds and many more. This has been essential for defining this sector and more importantly, regulating it in countries such as the UK and Spain as shown in Chapter 4 which both have statutory definitions and criteria for identifying DSEW. Kenya could adopt this method to avoid further gaps in legislating protections against sexual harassment of dependent self-employed workers.

¹⁴⁷ Fernandez S et al, 'Economically dependent self-employed workers: Statistical measurement, challenges and opportunities' - https://upta.es/wp-content/uploads/2019/10/trade_result_en.pdf on 26 May 2021.

5.2. Aligning labour protections against sexual harassment of DSEW with employees.

As illustrated in chapter 1, NSE is characterized by higher margins of decent work deficits as compared to SER.¹⁴⁸ The ILO defines decent work as productive work which guarantees a fair income, safe working environment, social protections, favourable prospects for personal development, social integration, freedom, capacity to organize and participate in decisions that affect workers' lives and offers equal opportunity and treatment of men and women.¹⁴⁹ The aim of decent work is not to formalize the dependent self-employment sector into the employee sector but merely to align, as closely as possible, the protections availed to employees against sexual harassment in order for dependent self-employed workers to mitigate abuse from employers.¹⁵⁰ This will result in equality of treatment, fairer working conditions and inclusive labour practices across both sectors of employment.¹⁵¹ This is achieved through applying principles of non-discrimination between NSE and SER, the support of courts in adjudicating cases on equal treatment, and removing legal and practical barriers towards protecting dependent self-employed workers against sexual harassment.

As stated in Chapter 3, The Kenyan Constitution mandates the quality of all persons and the entitlement of equal protection against discrimination on the premise of sex, health status, amongst other factors.¹⁵² Similarly, the Employment Act prohibits discrimination of employees by employers on the same basis in addition to prohibiting sexual harassment of employees in the work place.¹⁵³ Additionally, The Discrimination (Employment and Occupation) Convention No.111 of 1958 seeks to eradicate discrimination on the same grounds.¹⁵⁴ These instruments, when applied indirectly extend protection to dependent self-employed workers against sexual harassment.

As established in Chapter 1, dependent self-employed workers provide services under a civil or commercial contract dependent on one or a few clients for their income and receive direct instructions on how the work is carried out. Chapter 4 advances the case of the UK where

¹⁴⁸ *International Labour Organization, Non-standard employment around the world: Understanding challenges and shaping prospects*, ISBN 978-92-2-130385-5, 247.

¹⁴⁹ ILO, 'Decent work', <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> on 18 May 2021.

¹⁵⁰ Mitullah W, 'Challenges of protecting labour rights in the informal economy in Kenya,' Research Gate, 2006, 8.

¹⁵¹ *International Labour Organization, Non-standard employment around the world: Understanding challenges and shaping prospects*, ISBN 978-92-2-130385-5, 250.

¹⁵² Article 27(1)(5), *Constitution of Kenya* (2010).

¹⁵³ Section 5(3), 6(2) *Employment Act* (2007).

¹⁵⁴ Article 1(1), *The Discrimination (Employment and Occupation) Convention*, 4 June 1958,

dependent self-employed workers with employee-like characteristics are extended for protections against sexual harassment under the category of workers. Kenya has a long-standing history in borrowing legislation from the UK therefore, the Employment Act can possibly be amended to incorporate the same protection. It is important to note that the utilization of the broader idea of a ‘worker’ in the UK instead of employee increased protection by 5%.¹⁵⁵

5.3. Collective bargaining of DSEW against sexual harassment.

The role of collective bargaining as a means to ensure protections against sexual violence in the work environment in a world where sexual violence policies adopted by employers focus on preventing liability rather than creating a non-discriminatory work environment cannot be understated.¹⁵⁶ Collective agreements are ideal bargaining and regulatory tools structured to consider particular circumstances of a specific sector of the economy in the aim of actualizing decent work in employment thus making them appropriate for dependent self-employed workers.¹⁵⁷ The Constitution of Kenya asserts every worker’s right to engage in the activities of a labour union.¹⁵⁸ It also provides trade unions with the right to collective bargaining on behalf of the workers.¹⁵⁹ Despite these provisions, as highlighted in Chapter 3, the flexibility of dependent self-employed workers proves as an impediment to organizing against abuse due to practical barriers to unionization which are founded on the fear of retaliation which could result in dependent self-employed worker being black listed or losing their contract.¹⁶⁰ This obstacle may be remedied by extending protection against discriminatory dismissal to dependent self-employed workers as well as specifying that the right to collective bargaining goes beyond the limitations of SER.¹⁶¹

The uncertain legal status of DSEW explained in Chapter 3, as an unrecognized employment relationship in Kenya increases the difficulty to engage in collective bargaining and further, to be

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¹⁵⁶ Hodges C.A, ‘Strategies for Combating Sexual Harassment: The Role of Trade Unions’, 15 *Texas Journal of Women and Law* 183, 2006, 184.

¹⁵⁷ *International Labour Organization, Non-standard employment around the world: Understanding challenges and shaping prospects*, ISBN 978-92-2-130385-5, 281.

¹⁵⁸ Article 41(2), *Constitution of Kenya* (2010).

¹⁵⁹ Article 41(5), *Constitution of Kenya* (2010).

¹⁶⁰ Tayo F, ‘Collective bargaining and employment relations in Kenya’, International Labour Organization, Industrial and Employment Relations Department working paper 13, 2010, 7-
https://www.ilo.org/wcmsp5/groups/public/--ed_dialogue/---dialogue/documents/publication/wcms_158357.pdf on 18 May 2021.

¹⁶¹ Hodges C.A, ‘Strategies for Combating Sexual Harassment: The Role of Trade Unions’, 192.

protected under any collective bargaining agreements that are negotiated on behalf of workers.¹⁶² The recognition of this employment relationship as a legitimate legal category in order to avoid misclassification will go a long way in removing any hindrances towards dependent self-employed workers organizing under trade unions.

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