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A SYNOPSIS OF TRADE UNIONS' LEGAL ENVIRONMENT IN KENYA

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Abstract: Trade unions are critical in championing for better work conditions and workers welfare at the workplace. They fight for good pay and dignified working conditions, reduce discrimination in the workplace, advance employment levels and giving advic e and counselling to members under various circumstances that they undergo. To achieve this, they have to operate within an established legal framework which has transformed over time from the period the country was a British colony all the way to attainment of independence and to date. Efforts have been made to improve the laws governing workers unions in Kenya, but still a lot needs to be done in terms of ensuring adherence and compliance to the rule of law, observance of constitutionalism and enforcement of the same. This article stresses the role of the legal system and government support in overcoming challenges emanating from weak laws, non-adherence, and disregard of the existing laws. We recommend that the legal framework requires some redefining and amendment s to address some lacuna in the labour laws and that the existing laws be aligned with Kenya Constitution 2010 to streamline effe ctive running of trade unions. We recommend also for the inclusion of technology based initiatives in overcoming unforeseen la bour situations that created serious challenges that were experienced during the covid -19 pandemic. We conclude that despite efforts to improve laws governing the labour movement in the country there is need to reassess and revamp the legal framework whic h is still weak to create a level playing ground for players in the labour movement.

Keywords: *Trade Unions, Legal Environment, Working Conditions, Tripartism, Labour Laws*.

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Introduction

The realization and development of the labour unions in Kenya is engrossed in a wide historical setting spread in varying timeframes with substantial effect in their overall development. The legal framework in the pre-independence period in which the trade unions operated was colonial based and not well established, immediate post-independence period which was defined by the evolution of tri-parties engagement and voluntary industrial relations, the independence constitution and, the present post-2010 constitution otherwise known as the contemporary period with lots of reforms and enactment of news laws where workers' rights and trade unionism was entrenched in the Kenyan constitution.

Earlier on, the independence constitution which was meant to grant the citizens an opportunity to exercise their civil rights freely, did not capture well the aspirations of the ruled majority as anticipated, and was highly lacking in terms of checks and balances, inadvertently enabling the executive arm of the government to amend it severally within a short span of time to suit the political expediencies of the day with the ultimate goal of centralizing power within its ranks. Just like other institutions the workers unions' autonomy was curtailed and were unable to operate without restrictions. There was heavy government hand in virtually all its operations. The leaders of the workers movement were allowed to only articulate or practice that which had been sanctioned by the government. They were made more or less an appendage of the executive arm of government.

In the subsequent years, the laws governing the management of trade unions have undergone significant transformation in the life of the country and this has consequently affected the way the unions have operated over the years. Despite efforts to improve laws governing the labour movement, the prevalent unrests, turbulence and discontentment by labour unions' leadership across board paints a wanting situation that calls for a reassessment of the legal framework under which these workers organizations are operating in. This paper explores strategies and legislative actions directed at stimulating a decent legal environment for trade unions to prosper and be able to execute their critical role of championing for the welfare of the workers and improvement of the working conditions at their places of work. It stresses on the need to adhere to the rule of law when handling trade unions.

We also examine the different regimes in the country's labour history and how they contributed in defining the way trade unions conducted their affairs with a specific examination on how the changing legal system affected in particular the working and operations of trade unions. We take note of obstacles and challenges that have hindered successful implementation of these laws that only seem to be effective on paper, and recommend suggestions on how they can be improved to the betterment of all the players in the labour movement to achieve a level playing field. The key implication in this study is that full implementation of the existing laws is paramount to the smooth running of the unions since the laws are to a larger extent, adequate though not sufficient enough.

Historical Development of Trade Unions

East Africa became a British colony and protectorate in 1895 and thus the history of labour can be traced from this period when need arose for the colonial government to pass legislation to ensure adequate supply of cheap labour to service the emerging enterprises in agriculture, industry and in the service sector (Ochieng, 2019). In return, workers in Kenya set up organizations to articulate their grievances at the workplace and used strikes as a weapon to attain their goals. This was a response to harsh conditions that workers faced. The colonial regime used all sorts of tactics to prevent the formation of these organizations but the workers were determined to make their voices heard. Most of the organizations took the form of associations and not trade unions per se. Salum (2021) observes that the East African Indian National Congress formed in 1914 and the Workers Federation of British East Africa that catered for the interests of the European employees in 1919 were the pioneer trade unions in the country. This clearly indicates that these entities were birthed to address the concerns of the different races.

The surge in African trade labour organisation and trade union growth began to heighten and took an astronomical rise after the end of the Second World War (Friedland 1974). Chege and Morrocchi (2006) have additionally postulated that trade union movement in Kenya is a child of economic, social and political struggles dating back to the imperialist days. The same way that the labour movement remains an important feature of our country's operational dynamics today, so it was from the beginning. It evolved through difficult situations created by the imperial colonialists whose main agenda was to defend the employer to clamp down on emergence of a strong trade union of workers. Changes that followed in terms of outlook by the British Labour Policy in her colonies culminated in the enactment of 1937 Trade Unions' Ordinance act which stipulated the conditions under which Africans could organize themselves into trade unions (Gitari, 2010).

Ordinance 35 of 1939 required all crafts organizations to apply for registration which they could be granted or denied depending on whether they had legitimate dealings consistent with government policy. The Ordinance also permitted any group of seven people to form a trade union and operate as one upon registration. Cancellation of registration under the Ordinance was not subject to appeal or open to question in a court of law (Aluchio 1998). Despite the passing of the ordinance, organizing and recruitment was difficult because of colonial government, employers and white settler's hostilities against trade unionism. Trade union leaders were harassed victimized and threatened with deportation by colonial authorities.

As the workers agitation persisted, more trade unions were formed representing the various interest groups such as the railway workers, the local government workers, the teachers, the people in the transport sector, domestic workers, gardeners, watchmen, building and construction workers and tailors. The penultimate result was the formation of an umbrella union body which was never registered, but was instead affiliated to the International Confederation of Labour Union called the Kenya Federation of Registered Trade Unions in 1952 (Gitari, 2010). In the same year, a detailed piece of legislation was enacted for Trade Unions but again with significant omissions. It lacked necessary provisions for effective operation of trade unions. It did not legalize peaceful picketing or provide immunity against damages as a result of strikes. On the other hand, the government encouraged creation of staff associations and works committees since they fitted in its interests to confining workers' organization to economic imperative alone and also lacked strike powers.

There are many reasons which led to the formation of the trade unions in Kenya. The main causes were: Imposition of colonialism; Land alienation; Introduction of Indian labour; Introduction of cash rupees in the economy; Passing of repressive ordinances 1895 – 1938: In 1895.

Evolution of Trade Union Law

The evolution of labour laws in Kenya mirrors a journey from colonial-era manipulation to a more rights-based approach, with ongoing efforts to address the complexities of the modern labour market and ensure fair treatment for all workers. The evolution can be broadly categorized into three main periods: the colonial era, the post-independence period, and the contemporary era marked by reforms and new legislation. In the early years, the British colonial administration introduced laws like the Master and Servant legislation, which primarily served to regulate African labour for colonial needs. Imbalance of power, and limited application of the law was the norm. Post-independence, Kenya saw the establishment of trade unions, the adoption of the Industrial Relations Charter, and the enactment of various labor laws to address the changing needs of the workforce. More recently, Kenya has focused on reforming its labor laws to enhance workers' rights, address imbalances favoring employers, regulation the informal sector and the rising need to protect workers' rights in a globalized world.

Colonialization Period

The genesis of labour law and practice can be traced to the 19th century when need arose for the colonial government to pass legislation to ensure adequate supply of cheap labour to service the emerging enterprises in agriculture, industry and in the service sector. Terms and conditions of employment were regulated by statutes and the common law. The first legislation on labour in east Africa was the Master and servant legislation. It was introduced in 1906 in Kenya and was of influence until 1950s.The most important aspect of this law was that breach of it by the employer resulted into a civil suit, but breach by the employee resulted into a criminal suit. It was introduced to regulate Africa labour that the British needed for their plantations (Ochieng, 2019).

Consequently, the history of labour law in Kenya can be traced back to the colonial period. The period 1895-1930 has been termed as the setting ground of the modern economy of modern Kenya. The rise of industrialization in the kingdom prompted the need for raw materials and food, in which Africa and Asia colonies were the best sources. These colonies also provided for the market of the finished products though in a much lesser percentage. In order to maintain a steady flow of raw materials and food, the colonial administration had to put in place regulations for the labour industry. The end of world war one formed a vital shift on the nature of labour laws in the world. Colonial powers such as Britain and France had suffered greatly from the war, and hence they had to find a way of recovering. The only available prospect was to ensure an all-out exploitation of their colonies to cover the loss experienced (Ochieng, 2019).

Anderson (2000), observed that the recruitment of African labour at poor rates of pay and under primitive conditions of work

was characteristic of the operation of colonial capitalism in Africa during the nineteenth and twentieth centuries. The implications of these conditions have been generalized very widely in the historiography of colonial Kenya.' Where capital was centred upon extractive industries or upon settler agriculture (as in Kenya), historians have found much evidence to indicate that colonial states (and the metropolitan government) readily colluded with capital in providing the legal framework within which labour could be recruited and maintained in adequate numbers and at low cost to the employer

As Clayton and Savage (1974) recognized, in what was the first of several studies of labour in colonial Kenya, the legislation governing labour evolved out of the conflicts between the various factions. Kenya's settler colonialism was always a house divided, its voices as discordant as they were clamorous. Larger employers of African labour, often wealthier and better-capitalized, blamed the mistreatment of labour upon 'the small settler' who lacked the resources and experience to manage his farm appropriately. At the level of the state, a gulf existed between the Nairobi administration and the Colonial Office in London, while on the ground in Kenya there were officials who willingly assisted settler employers in finding labour while others exposed the many abuses of African workers. It is around these disputes within European colonialism that the problems of labour come most sharply into focus (Anderson, 2000).

Exploration of these disputes through an examination of the operation of master and servants (M & S) legislation, which was first added to the statute book of the East Africa protectorate in I906 and was to remain the most important element of Kenya's labour laws until the I950s. M & S laws originated in a large corpus of medieval and early modern English legislation, reinforced in the eighteenth and nineteenth centuries by new enactments, the last in I867. These laws regulated contracts of employment between employers and workers (Anderson, 2000). By the time that Britain extended a protectorate over East Africa in I895, however, the old master and servants legislation of English law was already a thing of the past in the seat of empire. It was removed courtesy of its punitive sanctions. In I875, the Employer's and Workmen Act (37 & 38) had been introduced in England, following a prolonged campaign by organized labour and it recognized the rights of workers to collective representation. With the rise of industrial processing and the emergence of larger-scale capitalist enterprises in industry, the English labour market altered dramatically over the nineteenth century. The application of M & S laws in East Africa after 1900 therefore arose from a deliberate decision to impose a particular type of legislation that was by then already considered outmoded in the metro pole. The explanation for this is to be found in a combination of Kenya's political economy, and the attitudes toward race that prevailed amongst the colony's European settlers and administrators (Anderson, 2000).

Muir & Brown argue that in an attempt to discourage the development of trade unions during early 1950s the Government in Kenya used different measures such as (a) sponsoring the establishment of associations and works' committees to try to eliminate the need for unions at the shop level, (b) established statutory wage determination machinery by forming wages council for various industries and thereby try to eliminate the need for unions, (c) providing close control over the internal activities of the unions through the Registrar of Trade Unions powers to de-register the unions, and (d) extending compulsory arbitration and other restrictions to almost all major industries through liberal application of the Essential Services Ordinance. Thus, although the Government was overtly following a policy of union recognition, it was also actively discouraging the development of the unions (Muir & Brown, 1974). In addition to that, the trade union movement was significantly weakened during the 1952-1958 period and its activities were generally restricted to non-political affairs due to the state of emergency declared by the government following the *Mau Mau* movement in 1952 (Muir & Brown, 1974).

The law of contract in Kenya was originally based on the Contract Act, 1872, of India, which applied on contracts made or entered into before 1st of January 1961. The Indian Contract Act applied to the three countries Kenya, Tanzania and Uganda. Since then the Kenyan law of contract has been based on the English common law of contract, under the Kenyan Law of Contract Act (Cap. 23), section 2 (1). With industrialization, towards the middle of the 20th century, an organized trade union movement was well established.

It was shown, for example, how the legal framework in relation to trade unions was developed from an analysis of the class dynamics of capitalist society, and the choice of certain legal techniques which, while primarily motivated by historical experiences, were nonetheless implicitly attuned to some of the limitations inherent in the legal form, and the limitations of the formal equality and freedom which it expressed. This included: an attempt to minimise contact between trade unions and legal institutions, to secure them a sphere of operational autonomy in which alternative conceptions of justice, and legitimacy, could be forged; a system of statutory immunities drafted so widely so as to limit the scope for legal intervention in industrial disputes; and the use of law to incentivise voluntary, sector-level, organisation, and thus, facilitate collective self-regulation, so as to increase the power that trade unions had vis-à-vis the future development of the law (Adams, 2023).

Legal texts were the main tool used by colonial governments to control workers' movements in the country. There is no doubt that legal environment was not conducive for workers to favourably run their movements. All literature around this topic agree that colonial governments used to introduce new laws and regulation whenever they thought that pressure from workers were increasing. They did so not just to deny them an opportunity to address their work related challenges but also to block chances of forming collective groups which could jeopardise their political power. In Kenya, despite the 1930 directive from the British Office to allow workers to form trade unions, it was not until 1943 that a statute was passed recognizing trade unions in Kenya. All legislation prior to this period was of repressive nature and designed to provide the government with powers to control unionism (Muir & Brown, 1974).

Comment [hp41]:

Legal Environment after Independence

Post-independence, Kenya saw the establishment of trade unions, the adoption of the Industrial Relations Charter, and the enactment of various labor laws to address the changing needs of the workforce. Legal environment for trade unions after independence seems to have not changed too much from the colonial period, in terms of restrictions to unions (Muir & Brown, 1974). Notably, the two independence political parties with different ideologies merged together in November, 1964 and this gave the then KANU government the opportunity to install a

centralist system of government in place with little or no opposition at all. Trade unions were roped in. They were expected to identify themselves with the ruling party. Indeed this marked the beginning of interference and muzzling of the trade union movement in Kenya (Nyongesa & Boit, 2025).

In 1965, the government passed the Trade Disputes Act to regulate collective bargaining relationships in both private and public sectors. Muir &Brown (1974) argue that this Act did little to change the restrictive legislative framework which existed prior to Independence. Thus it is not surprising to find that the Trade Disputes Act served to place a number of restrictions upon the trade unions' collective bargaining activities. This Act was later amended in 1971 to give both the Minister of Labour and the Industrial Court wider powers over the collective bargaining process (Muir & Brown, 1974).

Additionally, the Trade Unions Act which came into being around the same time as the trade disputes act gave the Registrar of Societies sweeping powers on the issue of the registration of trade unions. The general practice by the Registrar had been either to sit on the applications without response or to refuse registration against the provisions of the law. This trend of behavior was directly linked to situations where the president had directly and openly taken a stand as he did in the cases of University Staff Union (USU) and later Universities Academic Staff Union (UASU), Civil Servants Union (CSU), Kenya Medical Practitioners and Dentists Union (KMPDU) and the political party SAFINA (Swahili word for Noah's Ark). However, SAFINA was thereafter registered in late 1997 (Adar, 1999). The trade unions act was repealed and in its place came the Labour Relations Act.

However, after decades of unwilling actualization of labor rights for numerous types of workers, the government and social partners started a comprehensive reformulation of the labor code, where the then Attorney General formed a committee to relook into the labour laws of the country in 2001. This resulted in the taking effect of five important labour laws in 2007 (Fashoyin, 2007). This is an era that was marked by reforms and new laws. The new legal framework can be seen in many ways as a positive reaction to the realities of the labor market as they emerge, especially the way that the labour force and employment structure are evolving. In particular, these realities dictated the critical need for greater social safety nets for the growing proportion of workers with inadequate or lack of social protection. Finding an equitable equilibrium between a socially responsive legal framework and the requisite flexibility required in the increasingly competitive global environment is a significant problem for the tripartite partners. Furthermore, several of the elements of the legislative framework continue to cause concern among labor market operators (Fashoyin, 2007).

History has informed Kenya current labour laws. Contemporary issues have reshaped our thinking of the laws. The world having turned into a global village, labour forms a key component that needs to be protected by the laws. Ensuring social-economic rights are realized shall promote sustainable human development, equity and dignity (Ochieng, 2019). Domestically, before 2007, Kenya had punitive labour laws. Through social dialogue, Central Organization of Trade Unions COTU (K) in consultation with the government and the Federation of Kenya Employers (FKE) spearheaded the formulation of five sets of labour laws that are currently operational.

Contemporary Legal Era

This is a period that is marked with reforms and vibrant legislation of the labour laws. The independence constitution of Kenya which was highly deficient in matters concerning workers welfare was reviewed. The Associations act under which workers matters were placed, was reviewed and the new constitution 2010 of Kenya was birthed that effectively captured workers issues under the bill of rights. The bill of rights among other rights, addresses labour relations. Article 41 (1), in chapter four of the constitution of Kenya, states that every person has the right to fair labour practices. This is followed by broad provision in section 2 which deals with (a) fair remuneration, (b) reasonable working conditions, (c) formation, joining and participation in trade union activities and programmes and (d) participation in strikes. Section 3 of the same article outlines the rights of employers with regard to (a) formation and/or joining of employers' organizations and (b) participation in the activities and programmes of an employers' organization. Sections 4 and 5 have additional rights. (Constitution of Kenya, 2010). These provisions have been operationalized by the enabling legislation commonly referred to as labour laws of Kenya, 2007 (Tubey, 2015).

The 2010 constitution further set the guiding principle in labour law relations under article 37. Enshrined under the chapter four which contains the Bill of Rights, labour laws have been given a human rights approach. Also social-economic rights advocated since 1945 by the International Labour Organization and the Declaration of Philadelphia has been anchored in the constitution. Thus all labour laws should conform to this guiding principle (Ochieng, 2019). This enactment of the new constitution in the year 2010, where unionism was given full recognition under this chapter was a great boost to the labour movement in the country and the scope of its activities became well defined.

Importantly, the year 2007 saw a new dawn in terms of legislation where there was a repeal of the Trade Unions Act and in its stead, the Labour Relations Act was birthed. The repeal of the trade unions act was necessitated by the need to address the insufficiencies therein and also to advance workers wellbeing at the workplace and the labour union relations with the employers and the government. Other four accompanying labour related acts were geared to reflect the changing times in the workers environment and encompass the myriad issues affecting workers, and which shall be discussed in brief, were the Employment Act, the Labour Institutions Act, the Work Injury and Benefits Act (WIBA) and the Occupation, Safety and Health Act (OSHA) (Tubey, 2015). These laws consist of what can be referred to as the 2007 "quintet" of laws that were enacted specifically for the revamping of the labour sector. Other relevant laws include: (a) the Employment and Labour Relations Court Act (No 20 of 2011), (b) the National Social Security Fund Act 2013, (c) the National Hospital Insurance Fund Act, (d) the Social Assistance Act, (e) the Health Act 2017 (Njuguna, 2022). The Social Insurance Health Act (2023) replaced the National Health Insurance Act that has been in existence since 1966.

The rebirth of these laws was the culmination of the efforts of the Attorney General who in 2001, appointed a task team to review the Kenyan labour legislation and develop national labour laws within. Additionally, the review was to ensure that the labour legislation was responsive to the present-day changing economic and social times. Further, the team was assigned with the establishment of an Alternative Dispute Resolution (ADR)

mechanisms that distinguished starkly with the previous ones by shepherding in a conceivably more refined process of both labour dispute resolution and prevention (Gathongo, 2018). Each of the Acts integrated the doctrines of the 1998 ILO Declaration on Fundamental Principles and Rights at Work; thus guaranteeing the universal and basic human values that are critical to our development in both the social and economic fronts. The Right to Work and to fair work practices is provided for in Kenyan laws.

In this regard, the Employment Act (2007) defines the fundamental rights, principles, terms and conditions of work guiding the relationship between employers and workers in the informal economy. It provides for the hours of work, leave days, termination as well as appointment requirements that the informal economy players ought to adopt. The Work Injury and Benefits Act (2007) provides for compensation measures in case of injuries sustained in the cause of duty. Social dialogue occurs in line with the established social dialogue institutions under the Labour Institutions Act. Under such social dialogue institutions, negotiations occur as defined by the Labour Relations Act that establishes tripartite and bipartite parties to social dialogue in general and in the informal sector as defined in this study. The Occupational Safety and Health Act sets up the safety and health requirements and policies that employers must adhere to for the safety and good health of workers during the working period. These policy requirements are geared towards protecting workers against work-related injuries. The Occupational Safety and Health Act No.15 of 2007 repealed the Factories Act Cap 514. The Factories Act was meant to "make provisions for health, safety and welfare of persons employed in factories and other places of work, and for matters incidental thereto and connected therewith." (Owithi, 2018).

The 2010 constitution is a powerful tool that guide the country to extraordinary success, but unfortunately it is the most abused document, with a good number of articles rendered obsolete and others useless. Following the experience where a lot of powers were concentrated around the presidency, they also sought to protect some government functions. This led to about 14 independent commissions and offices including the judicial service commission, Teachers Service Commission, Public Service Commission, Salaries Review and Remuneration Commission, etc. The unfortunate bit is these institutions tend to take the character of those appointed to head them and operate by the mercies of the appointing authority. Not once have some of these institutions made decisions clearly non–independent (Nyagwoka, 2024). Courtesy of a complacent parliament.

Deficiencies in the Legal Framework

Taking into cognisance the above discussion, it is apparent that the prevailing legal framework governing labour relations has to a great extent rationalized the way trade unions operate in Kenya. That notwithstanding, the same requires effective implementation, which can only be attained through the commitment of all the concerned parties. There are noticeable weaknesses in the labour laws that need to be addressed in order to achieve seamless operations. It is therefore imperative to relook into these laws to deter exploitation of the loopholes within the legal framework that may impede day-to-day running of trade unions to the detriment of workers. The stakeholders in the labour movement, the judiciary and other players in the legal fraternity need to come up with measures to fast-track the realignment and dispensation of matters related to the general running of trade unions and workers concerns.

It is reckoned that the 2007 labour laws were enacted four years before the passing new 2010 Constitution of Kenya and I opine that there is need to align them with the constitution which is the supreme law of the land in order to address for instance some hitherto unforeseeable legal lacunas emanating from those laws. Also in as much as laws normally operationalize the constitution, there is need to reexamine the same laws to remove any grey areas that may not be in tandem with the constitution. All legislative and policy interventions therefore have to be adherent to the provisions of the Constitution. Key among the deficiencies is the failure to clearly state the procedure needed to amend the "quintet" laws which is not stipulated.

Further, despite efforts to improve laws governing the labour movement and the entrenchment of labour unions in the constitution, the prevalent workers unrests in the country, the turbulence and discontentment by labour unions' leadership across board paints a wanting situation that calls for a reassessment of the legal framework under which these workers organizations are operating in.

Granted, the existing labour laws have facilitated greatly the smooth running and general management of the trade union movement. However, Owithi (2014) has observed that among others, the main challenges facing trade unions in Kenya include the interference of the negotiation processes by the salaries and remuneration commission (SRC); Delays and backlog of cases in the ELRC; resistance from employers who are anti-trade unionism, low levels of enforcement of labour laws by the government. These notwithstanding, some unions have reported harassment of organizing teams by police especially on matters strikes. The outright remedy for this would be to enforce observance to the laws by all the players in the country.

Clear gaps concerning the statutory framework regulating the determination of a labour dispute and the application of laws remain and continue to pose huge challenges. To some degree, this has slowed down the ultimate realisation of the primary purpose of an expeditious labour dispute resolution envisaged by the Labour Relations and the Employment Acts of 2007 (Gathongo, 2018). Considering the chronology of events dating back to the year 2001, leading to the passage of these laws and ineffectiveness of the dispute resolution system therein, it is a high time to reflect and consider the extent to which these laws have or have not effectively improved the labour dispute resolution system in the country. Gathongo (2018) additionally observes that besides, the problems mentioned above, other problems in practice that undeservedly hinder the effectiveness and efficiency of labour dispute resolution relate to the current structural and referral framework for steering labour disputes. For instance, it happens that the Cabinet Secretary or Labour Officer simultaneously happens to be an interested party/parties in a dispute that has been referred. This happens, for example, to an employee who finds himself/herself in a labour dispute against the government as the employer. The question that immediately springs to mind is to whom/where do such employees refer such labour disputes? This question consequently raises a number of problems that need to be answered.

Njuguna (2022) has postulated that labour laws in Kenya need to respond appropriately to the technology-driven market and

economy which has changed in the last ten years. The corvid-19 pandemic for instance created a renewed push to reexamine the relevance of the labour laws in Kenya. It created a situation where workers jobs were seriously put at stake and most employers didn't know how to handle the situation. Workers were required to work from home as a safety net to avoid contact and minimize the spread of the highly contagious disease previously not captured in the legal system should such a situation arise. Many workers lost their jobs as a result since it was difficult for employers to assess their productivity. The laws need to be fine-tuned to address possible occurrence of such situations in future.

Njuguna (2022) has further observed that just like the Employment Act, the Labour Relations Act only covers those who are employed in the formal labour sector. Those in the informal sector are not covered, and yet these workers are the lowest paid and the most vulnerable working under precarious conditions. Interventions are thus needed to strengthen organizations and to capacitate them to bargain and negotiate with decision and policymakers.

There is need also to checkmate the activities of trade unions by way of enacting laws that administer their proper functioning and also as a way of advancing the rule of law. The same has been echoed by the International Labour Organization. Its Supervisory authorities concurs that there is need for limitations to regulate the labour sector so that its activities do not go overboard to the detriment of other citizens. The common adage that "ones rights should end where the other's right begin," should be observed at all times. This rule is at times ignored by players in the labour field. Legal framework regulating the establishment and registration of trade unions in Kenya advocate for unreserved exercise of freedom of association. This in itself has created a problem. Consider the case of the health workers who are critical workers in the country's realm, and by all standards are frontline workers in terms of attending to and saving the lives of the populace. Category wise, they are by extension an equivalent of the armed personnel whose terms of service are treated differently from the rest of the workers and tailor-made to suit their needs by the regulatory laws and policies that created those divisions.

This study finds that it was a big error of omission by the crafters of the constitution to allow health workers to participate in strikes. Whenever they strike, they leave the sick exposed with no alternative recourse for treatment and this ultimately leads to loss of innocent lives. Limitations should be put in place stating clearly to what extent health workers should participate in strikes, and such limitations should, nonetheless, be reasonable without jeopardising trade unions from effectively promoting the interests of their constituents, while at the same time safeguarding the interests of the citizens. Such a balance can critically help manage the sector. The Employment Act (2007) under sections 4 and 5 should exclude this category of workers and place them under special categories of workers.

Reneging on agreed pacts emanating out of recognised legal processes has been the norm to several other unions. The issues on the table notwithstanding, the last thing that should be allowed is the government taking away the benefits and allowances already settled. This is counterproductive to the process and against the principle and spirit of collective bargaining agreements. A climate of mutual understanding and partnerships among the stakeholders needs to be cultured during negotiation processes in order to create harmony. There is need to form an implementation body to ensure that agreements reached are fully brought to fruition to avert situations where non-compliance leads to cycles of subsequent and endless strikes thus eliciting unnecessary industrial disharmony. On the government's end, there is need to ensure its receptiveness in honouring collective agreements to avoid buildup of unresolved grievances.

Gathongo (2018) has highlighted other several limitations in the labour laws: The inadequacies of the previous legislations may have been duplicated and perhaps new ones additionally integrated especially regarding the framework and processes for labour dispute resolution; It is similarly generally acknowledged that while the intention of the 2007 labour laws was noble, they are less likely to enhance the existing relationship between the workers and employers. Looking at the laws keenly, it is apparent that they favour the employees while disadvantaging employers. The umbrella body, federation of Kenya Employees (FKE) has repetitively raised this irritating concern. FKE has been discouraged subsequently especially as they always face head-on the negative effects of effecting the regulations. It points the cause to the duplication and incorporation of the framework and processes of dispute resolutions. Debatably also among the reasons associated with the situation in our country, seems to be the deficiency in terms of proper and effective statutory and institutional mechanisms for labour dispute resolution that involves parties in worthwhile bipartite dialogue.

Close scrutiny of the Kenya's dispute resolution system within the labour movement realm reveals that it is structured on the dual system, which still exists to date. The labour dispute resolution framework under the 2007 LRA on the outset, is mainly dedicated to resolving collective labour disputes. The task of resolving collective labour disputes remain the responsibility of conciliators or a conciliation committee appointed by the Cabinet Secretary (LRA, 2007). Instructively, individual disputes are resolved in terms of the framework confined in the 2007 Employment Act. However on the other hand, the Employment Act provides parties engaged in individual disputes an option of either referring their dispute to the Labour Officer or directly to the Employment and Labour Relations Court for determination (EA, 2007).

Perhaps with some exceptions and without undervaluing the important role played by the Cabinet Secretary and the Labour Officers, serious criticism may be directed against the current dual system of labour dispute resolution. Besides compromising independence, such system undermines fairness, objectivity and impartiality that are at the centre of any dispute resolution and therefore prejudicial to a party or parties in dispute. This happens since both the Cabinet Secretary and the Labour Officers are members of the executive arm of government and are at the same time deeply involved in the critical role of decision making in disputes. Besides, allowing them the liberty and control to facilitate adjudication on the same disputes they are party to is tragic and against the rules of natural justice. This arrangement constitutes not only as a direct violation of article 50 of the Constitution of Kenya that entrenches the right to a fair hearing, but also an obstruction of basic principles of separation of powers. It also waters down impartiality, neutrality and legitimacy, which are the fundamental pillars in a conciliation process.

Resolving disputes and ensuring that they are resolved in a speedy manner is a critical outcome in terms of placing bounds on referral timeframes to matters at hand. A slower structure takes a

prolonged time to yield a resolution resulting to ineffectiveness. Real differences exist between referral timeframes for labour disputes under the 2007 Employment Act as well as the 2007 LRA. The two demand that labour disputes concerning alleged termination or dismissal of an employee must be referred to the Cabinet Secretary within three months of the discharge from work or any longer period that the Cabinet Secretary, on good cause, permits. Also through the same case, the 2007 LRA necessitates disputes relating to the redundancy of one or more employees be referred to the Cabinet Secretary at "any stage" after the employer has given notice of its intention to terminate the employment of any employee on account of redundancy.

The lengthy processes that takes three months resulting out of the intended referrals do not augur well for a system that is out to speedily address concerns arising out of disputes. Granting the Cabinet Secretary an express mandate to have redundancy related matters forwarded to his or her office at "any stage" is grossly ambiguous and is prone to abuse. The same is against the dictates of the Constitution of Kenya and specifically Article 159 on judicial authority which details how such disputes should be handled. It is important to note also that LRA 2007 envisages a situation where disputes are settled speedily without undue delays. I recommend that the prolonged referral timeframes ought to be amended consequently to signify shorter referral timeframes.

Looking at Article 27 of the Kenyan Constitution and also section 5 of the 2007 Employment Act which prohibit any manner of discrimination based on various listed grounds.70 unfortunately the 2007 Employment Act seems to only regulate referral timeframes for alleged unfair dismissals giving a wide berth to other equally important grounds such as timeframes for discrimination disputes. The 2007 Employment Act is somehow silent on matters referral times. This omission creates ambiguity and leaves parties in dispute pondering what the silence indicates. This obvious *lacuna* directly affects the effective resolution of disputes. To address this unfortunate situation, it is imperative that amendments to the relevant provisions of the 2007 Employment Act be done in order to out rightly provide referral timeframes for all disputes it seeks to regulate under its dispute resolution framework. Otherwise, one can only envision inevitable confusions in practice coupled with major uncertainty (Gathongo, 2018).

Both 2007 Employment and 2007 Labour Relations Acts do necessitate that either a conciliator, Labour Officer or commissioner be selected to try and assist the parties through conciliation process to arrive at an amicable settlement.In section 65(1) of the 2007 LRA, there are no regulations that guide the Cabinet Secretary in the process of appointing a perceived conciliator. This leaves the Cabinet Secretary at a vantage position whereby he may refuse to appoint a conciliator based purely on subjective opinion rather than on regulated principles. Observedly, Gathongo (2018) highlights that under such unprecedented circumstances, the Cabinet Secretary acts *ultra vires* due to the fact that he or she arrogates to himself/herself the power to interpret the provisions of the 2007 LRA as per their wish, an undertaking that is beyond their powers. It is doubtful that section 65(3) of the 2007 LRA permits this lawmaking function. It currently does not afford the Cabinet Secretary such powers and therefore this could lead to abuse of power, politically motivated decisions and misjudgments. Also allowing the Cabinet Secretary the discretion to appoint or not to appoint a conciliator may not only unduly defeat access to justice for aggrieved, but also create excessive barriers to an effective settlement of disputes. In Kenya, history has time and again shown that limitless power in the hands of one individual in most cases means that others are suppressed or their powers curtailed (Gathongo, 2018) and he strongly submits that the discretionary powers given to the Cabinet Secretary to solely decide on whether to appoint a conciliator or not, to resolve a labour dispute referred to him/her is a unwarranted arrangement. To avoid the aforementioned obstacles, a recommendation to the effect that a Conciliation and Mediation Commission (CMC) should urgently be established as a prerequisite of the 2007 LRA to take over from the Cabinet Secretary's control of the labour dispute resolutions.

In Kenya, expertise in labour law and labour relations is not a precondition for appointment as a conciliator. This has the effect of calling upon, the Chief Justice, through a notice in the Government Gazette, to appoint Magistrates to manage over cases involving employment and labour relation maters. This then implies that such Magistrates are then granted the jurisdiction and authority to oversee disputes relating to employment and labour relations as well as what they usually do on a day to day basis. This negates the attainment of the primary drive behind the enactment of the Employment and Labour Relations Act, which is to make a determination on labour disputes within reasonable timeframes. This is because, most Magistrates are not trained purely to deal with labour disputes and so do the Magistrate Court's jurisdiction. Additionally, they are usually overloaded with a chain of cases and this may occasion further delays considering the enormous buildup of pending cases already experienced in their own tedious civil matters. Experts in labour law should be the ones left with the task of resolving labour disputes and not magistrates. This again echoes the urgent need of establishing CMC while at the same time hiring or engaging labour specialists or experts to deal solely with labour related disputes.

In terms of getting the information which they may require from the employer, the employment act under Section 73 has specified the steps needed to acquire such information. From a bird's eye, it looks like an easy or straight forward process kind of. Unfortunately is made difficult by Kenyan Constitution under article 35 which lays down the lawful ways of obtaining information. It envisages that the requirements within the Access to Information Act should be besought to warrant unlimited access to specific information as a way of validating the same. Such a task is not easy at all. This article is of the opinion that the varying sets of laws need to be merged or amalgamated, to facilitate employees obtain whichever information they may need to address their concerns.

The Kenyan industrial relations structure presumes that in a situation where some conciliation has been done with a fruitful outcome, the selected conciliator or Labour Officer at the end of the process issue a written settlement agreement, which is agreed and signed by the two parties involved in the particular dispute. However, under the 2007 LRA as well as the 2007 Employment Act of Kenya, in a situation where no agreement is arrived at, the parties are supposed to proceed to the Labour and Employment Relations Court or in the alternative, embark on a protected strike. Unfortunately, this is not captured in both the 2007 LRA and the 2007 Employment Act labour dispute resolution system. That omission is glaring considering that in normal dispute resolution practice, arbitration process immediately takes effect once conciliation effort has not been successful. An Arbiter's decision in a matter should be final and binding to the parties involved in the dispute (Gathongo, 2018). Very serious questions regarding the

effectiveness of the current statutory framework in terms of resolving disputes without delay abound with this kind of blatant exclusion in the two key enabling legislations (Gathongo, 2018).

Failure to establish CMC as envisaged under section 66(1) (c) of the 2007 LRA has effectively meant that a huge number of disputes automatically spiral to the Employment and Labour Relations Court once conciliation or mediation effort by either the conciliator or the Labour Officer fails to materialise. The overall effect to this court is that it continues to witness a case backlog, including very trivial matters, which could be avoided had the CMC been in place.

CMC can be of greater advantage to the dispute resolution system key among them is that of relieving case backlog, creating a single impartial institution for effective dispute resolution, eliminating delays experienced by the Employment and Labour Relations Court as well as an increase of access to justice for most poor and disadvantaged employees. Equally, the number of trivial disputes escalating to the Employment and Labour Relations Court for litigation can be minimised. For the most part, the Commission will seek to discharge its function in a less adversarial manner and as a new institutional fulcrum for voluntarism, provide effective and high-quality conciliation, mediation and additional arbitration service to employers, employees and unions when negotiations at the workplace cannot be resolved (Gathongo, 2018).

Finally, in as much as Kenya is a signatory to International Labour Organization, there are still major problems facing the labour industry in the country. These issues range from globalization, poverty, unemployment and under employment and technology advancement (Ochieng, 2019). There is need to beef up and spruce the labour laws to cater for such situations while taking into cognisance factors related to social-economic rights, human rights and the accepted international labour standards and more so, operating within the provisions of the constitution.

Conclusion

Trade unions have gained a wider recognition in the labour movement jurisdiction since the enactment of the new constitution 2010, and their activities were well entrenched under the bill of rights. The new constitution came into being after an elaborate set of the labour laws had been enacted three years earlier in 2007 to manage the administration of labour matters amongst the key players. However despite the actuality of these laws, the constitution and other regulations, there still exists the need to reexamine the legal framework governing the labour sector with a view to strengthening the operations for better industrial relations. Deficiencies exist in the legal framework. The existing laws have not been fully implemented. The five labour laws were enacted three years before unveiling of the new constitution and in as much as they operationalize the constitution, there is need to realign the same to be in tandem with the constitution. This will help in addressing the lacunas that have emerged in the laws.

Any interference in the observance of the laws and procedures in collective bargaining negotiations needs immediate address to ensure collective bargaining agreement pacts passed are fully honoured and not reneged upon. This can be best achieved by creation of an implementation body to avert post CBA strikes and fallouts. There is need also to extend limitations in stikes by regulating critical sectors such as the health division without infringing on their freedom to raise issues affecting them so that its industrial activities do not hamper the very citizens, who they should otherwise be looking after in hospitals and other health facilities.

The other noticeable weaknesses of both the 2007 LRA and the 2007 Employment Act include long-drawn-out referral timeframes for dismissal disputes, lack of a regulated timeframe for appointing a conciliator to conciliate the dispute, lack of legal/statutory framework for an arbitration process and unnecessary dual system of labour dispute resolution, which, besides wasting resources, causes confusion and inconsistencies in decision making. The corvid-19 pandemic created a renewed push to reexamine the relevance of the labour laws in Kenya. It created a situation where workers jobs were seriously put at stake and most employers didn't know how to handle the situation. Critically, the Kenyan system lacks an independent statutory institution in the lines of the CMC which has been proposed in this article with a principal function of resolving trivial to bigger labour disputes. The government needs to detach itself completely also from the burden of resolving statutory labour disputes through the Ministry of Labour and instead establish an independent body to handle such matters. The current arrangement has created a major problem towards effective resolution of the many labour disputes, particularly due to lack of impartiality and fairness in the process and outcome of the decisions made which not only need be fair, but must be seen to be so to the satisfaction of the parties concerned. Unless this is done, there is bound to be an upsurge in strikes, picketing, sit-ins/sit-outs and other related forms of persistent labour disputes.

This article that has centered the study on legal, academic and everyday viewpoints within the dispute resolution system, makes the above recommendations which can be helpful in addressing the root cause of enduring conflicts in the workplace. In light of all these, it is concluded that despite the existence of the enacted labour laws and the new Kenyan Constitution, there is some weakness in the overall legal framework that needs to be addressed for effective dispensation of labour disputes. More studies on the same, can be carried out to identify other unforeseen improvements that can be done in the overall legal framework within the labour dispute resolution system.

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