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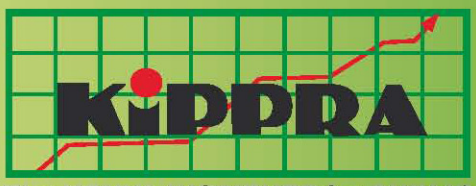

The KENYA INSTITUTE for PUBLIC POLICY RESEARCH and ANALYSIS

Challenges in Implementing and Enforcing Collective Bargaining Agreements

Beverly Muthoki Musili

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THE KENYA INSTITUTE FOR PUBLIC POLICY RESEARCH AND ANALYSIS (KIPPRA)

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Kenya Institute for Public Policy Research and Analysis

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KIPPRA in Brief

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Abstract

Collective bargaining and collective bargaining agreements (CBAs) have featured prominently in the last few years in Kenya, largely due to their perceived failure in averting industrial strikes. Collective bargaining in Kenya is primarily a legal process emanating at the first instance from the Constitution of Kenya and thereafter from Statutes. Collective bargaining as a whole is considered in the realm of employment and labour law and it is significant in relation to workers' fundamental rights. However, as this study will reveal, there are a number of factors which, if considered in totality, significantly affect collective bargaining and collective bargaining agreements. This study serves as a guide in informing the general public on the nature, function and theoretical framework governing collective bargaining agreement. It provides policy recommendations as to how to reconcile the challenges faced and the factors undermining the collective bargaining process and resultant collective bargaining agreement for improved collective bargaining negotiations and improved enforceability of collective bargaining agreements. The findings expose several inconsistencies in the text of the law regulating collective bargaining and in registering and enforcing an ensuing collective bargaining agreement. The findings also indicate a significant problem with collective bargaining in the public sector as opposed to the private sector. Another factor is the legislative and regulatory landscape in the public sector which has changed drastically since the introduction of the Salaries and Remuneration Commission whose role in collective bargaining cannot be ignored in particular regarding negotiation of wages, allowances and benefits of employees in the public sector. Other key issues include lack of fiscal sustainability of wage awards which are granted under collective bargaining agreements.

Abbreviations and Acronyms

CBA	Collective Bargaining Agreement
COTU	Central Organization of Trade Unions
ILO	International Labour Organization
SRC	Salaries and Remuneration Commission
TSC	Teachers Service Commission

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1. Introduction

Labour is one of the factors of production and forms the building blocks of the economy; it is therefore critical to economic growth and development of any nation. Labour law regulates the relationship between an employer and an employee by outlining the legal framework governing that relationship. In the early 1940s, legal studies on labour focused on the common law conceptualization of the "master and servant" relationship, rights and duties of individual employer and employee, safety and welfare of employees, workman's compensation for work-related injuries and on vicarious liability of employers for negligent acts committed by their employees. This understanding has changed in contemporary discussions of labour and labour law. Currently, the scope of labour law is understood as law which is used to "regulate, support and to restrain the power of management and the power of organized labour"[1]. It is important to note that the employer and employee relationship is distinct from other similar relationships, including agency, bail and partnership relationships based on contract of employment or contract of service which used to be known as 'Master and Servant Contract' on the one hand and contract for services on the other.[2]

The terms labour law, employment law, labour relations and industrial relations are frequently used interchangeably. However, according to the International Labour Organization (ILO), industrial relations deal with either the relationships between the state and employers, and workers' organizations or the relations between the occupational organizations themselves. The ILO uses this to signify freedom of association and the protection of the right to organize and the right of collective bargaining; collective agreements, conciliation and arbitration; and machinery for co-operation between the authorities and the occupational organizations at various levels of the economy.[3] Similarly, the terms collective agreement and collective bargaining agreement are used interchangeably.

There is need to maintain amicable industrial relations to prevent dissonance and conflict between employers and their employees, prevent break-down of employer-employee relationships, prevent labour unrest which can lead to disruption or withdrawal of labour from the various sectors of the economy and to maintain socio-economic stability. Well-balanced industrial relations promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement that is conducive to social justice and economic development.

1 Khan – Freund, Labour and the Law, 3rd Edition.

2 Uvieghara, E.E., Labour Law in Nigeria (Lagos: Malthouse Press Ltd., 2001) pp. 3-11. See also Hanami, A.A., Labour Law and Industrial Relations in Japan (Netherlands: Kluwer-Deventer, 1979) p.31.

3 Concept of Industrial Relations shodhganga.inflibnet.ac.in/bitstream/10603/59577/11/11_chapter%205.pdf Retrieved on 13th August 2018 at 8:30am

In recent years, Kenya has experienced frequent and protracted labour unrest, industrial action and disruption of delivery of services in various sectors due to (*inter alia*) delays in registration of Collective Bargaining Agreements (CBAs), breach of collective bargaining agreements, delayed or partial implementation or complete non-implementation of agreed terms and conditions of CBAs in particular in relation to remuneration, salaries and allowances-owed to employees, stalled negotiation processes and impasses between negotiating parties (Table 1). Collective bargaining is one of the means to avert and quell industrial action through negotiation and agreement between parties. These strikes have had significant impact on delivery of vital services in the economy, especially in the health and education sectors. For example, in 2017, doctors in public hospitals went on strike for more than 150 days to negotiate increase of their salaries and improvement of the terms and conditions of their employment. This followed another strike in 2016 that lasted 100 days. The withdrawal of labour and lack of medical care in public hospitals paralysed public health services and led to a health crisis with several deaths as many Kenyans could not access or afford private health facilities. Further, over the years, teachers and lecturers in public service have frequently taken industrial action due to unsuccessful and failed collective bargaining agreements and/or collective bargaining processes regarding various terms and conditions of the employment relationship but, in particular, regarding their salaries, remuneration, allowances and benefits. This has also disrupted the structure of the school term, disrupted learning and ultimately had a detrimental impact on the quality of education delivered to students.

The process and outcome of collective bargaining has a direct impact on labour relations and industrial action, although it is admitted that industrial action can and often arise as a result of other causes not connected to a collective bargaining process or agreement. However, this paper focuses on strikes that have occurred in relation to or in connection with a collective bargaining process or agreement or arisen out of a dispute concerning a collective bargaining process or agreement.

Table 1: Strikes in education and health sectors

Sector	Date/ Duration	Reasons and Outcomes
Education (through the Kenya National Union of Teachers or the Kenya Union of Post-Primary Education Teachers)	1962: (i) 19th to 20th March 1962 (ii) 26th to 27th March 1962 (iii) 18th September 1962	The strikes during this period were prompted by the Teachers Union which then wanted a single employer for all the teachers in the country. This demand was informed by the argument that having one properly and legally constituted employer would enable all demands to be addressed and negotiated with the employer. This demand remained unresolved for several years prompting another strike in 1965.
	11th October 1965	The Teachers Union demand to have one employer for all teachers remained unresolved from the first strike in 1962, prompting teachers to go on strike again. The government declared the strike illegal as result of which union officials were arrested. As this issue remained unresolved, another national strike was organized a year later.
	1st to 3rd November 1966	This strike led to acquiescence by the government and acceptance of the teachers' demands to have a single employer for all teachers in the country. The strike culminated in the formation of the Teachers Service Commission as the one employer that served teachers. The government responded positively to the strike by accepting to establish the Teachers Service Commission (TSC). The TSC was established through a Bill tabled in Parliament by the then Minister for Education, Jeremiah Nyagah.
	4th to 11th November 1969	KNUT felt that there was need for an escrow party to transact between the TSC and the Kenya National Union of Teachers and the Teachers Service Commission Remuneration Commission (TSCRC) was established to cater to both parties. The TSCRC drafted recommendations most of which were subsequently rejected by the Ministry of Education. This led to the teachers strike as a result of which the Ministry accepted the recommendations.
	October 1997	Teachers went on strike demanding a 300% pay rise. The teachers led by the late trade unionist Ambrose Odongo threatened to paralyse end year examinations. Being an election year, retired President Moi accused his political foes from the opposition of instigating the strike. Nonetheless, he gave in to the teachers' demands which culminated in the signing of the agreement – the Legal Notice 534 of 1997 under which teachers' salaries were to be raised at a percentage ranging between 105 to 200 per cent. They were offered five allowances: house, medical, responsibility, special, hardship and commuter as concessions to end the strike.
	October 1998	Teachers went on strike protesting the government's refusal to implement the pay salary increments that had been agreed upon in 1997.
	October 2002	Teachers went on strike disputing the outstanding 300% salary increment which they were granted in 1997. Then Education Minister Henry Kosgey threatened to dismiss the teachers. However, the teachers did not relent.

	January 2009	Teachers went on strike demanding a lumpsum payment amounting to Ksh 19 billion based on the 300% pay increment agreed upon in 1997 but the government insisted that it could only pay Ksh 17.3 billion in phases, citing economic limitations. As a result of this strike, 19,000 primary schools countrywide and more than eight million children were affected.
	2011	Teachers went on strike alleging that they were understaffed as a result of introduction of free primary education.
	3rd September 2012	Teachers officially went on strike demanding a full payment of the 300% pay increment agreed upon in their 1997 agreement
	2013	The issue in dispute was the 300% pay rise which teachers were entitled to based on the agreement reached in 1997. The government signed yet another deal with the union where Ksh 13.5 billion was paid to increase salaries and offer hardship and commuter allowances backdated to 1 July 2012.
	2015	Teachers called off and suspended a planned strike following discussions held with their employer, the Teachers Service Commission to allow for negotiations.
	2016	Teachers called off a planned strike and undertook not to strike for the next 4 years.
University Lecturers (through the Universities Academic Staff Union)	March 2018	University lectures went on strike for a period of 78 days demanding increased salaries and citing non-implementation of a CBA signed in 2013 for the period covering 2013-2017. However, they ended their strike after protracted discussions and agreeing to a Return to Work Formula pending negotiations over the CBA. Nonetheless, lecturers maintained that the CBA was yet to be fully honoured by their employers.
Doctors (through the Kenya Medical Practitioners, Pharmacists and Dentists Union)	December 2016	Doctors went on strike for 100 days demanding implementation of salary increments and improvement of working conditions and working hours pursuant to a CBA which was concluded and signed in 2013 (following another strike in that year) pursuant to which the government undertook to increase pay and improve working conditions. However, the government claimed it did not recognize the said CBA and declared the strike illegal. The strike occurred in the midst of an election and campaigning period whereby General Elections were to take place in August 2017. The government and the doctors' union eventually signed a Return to Work Formula and a CBA thereby ending the strike.
Nurses (through the Kenya National Union of Nurses)	June 2017 – November 2017	Nurses went on strike for a period of 151 days demanding salary increments and increase in allowances. Negotiations and demands over the terms of the CBA were not agreed upon, prompting the nurses to go on strike during the negotiation process. Thereafter, the government threatened to dismiss striking nurses claiming their industrial action was unlawful and illegal. The strike occurred during an election and campaigning period whereby General Elections were to take place in August 2017. The government eventually signed a CBA with the nurses thereby ending the strike.

Clinical Officers (through the Kenya Union of Clinical Officers)	2017	Clinical officers threatened to go on strike in 2017 due to stalled negotiations over the terms of conditions of their proposed CBA. However, they subsequently called off their strike after signing a return-to-work formula with the Council of Governors and the Ministry of Health and undertakings by the government to sign and conclude a CBA. The officers were opposed to the job evaluation and grading by the Salaries and Remuneration Commission (SRC). Similarly, this was during an election and campaign period whereby General Elections were to take place in August 2017.

The total number of Collective Bargaining Agreements (CBA) registered increased to 232 in 2017 from 128 in 2016, with a notable increase in the number of agreements registered in human health and social work activities, financial and insurance activities, and wholesale and retail trade activities which rose by 56, 19 and 34 agreements in number, respectively. The agreements registered in 2017 covered 340,290 unionisable employees of whom 24,628 were in the education sector. This indicates that there are indeed situations in which CBAs have been concluded without significant effect on the particular sector and without any documented strike, such as in the public administration and defence sectors.

Recently, concerns have been raised over the increased number, frequency, period of duration and persistence of strikes. The strikes disrupt delivery of key services including in some cases complete withdrawal of labour in the public health and education sectors. Often, strike notices are issued and workers proceed on strike upon failed implementation of a collective agreement or non-enforcement of agreed terms, delayed registration and stalled negotiations. Complications have also arisen in the public sector regulatory landscape whereby the Salaries and Remuneration Commission (SRC) has been brought to the negotiating table as a fourth party to determine the salaries of public officers in a typically tripartite collective bargaining system based on negotiation and voluntarism.

The foregoing points to challenges in the collective bargaining process. This paper looks at the legislative framework regulating collective bargaining in understanding the meaning and process of collective bargaining, the nature and functionality of collective bargaining agreements, challenges in enforceability and implementation of the collective bargaining agreements, and opportunities available for smoothening the process with a view to averting and quelling the disruptive effects of industrial action brought about by stalled collective bargaining process or a dispute arising in connection with a collective bargaining agreement.

While the author acknowledges the existence of several challenges which confront the collective bargaining process and collective bargaining agreements, including political undertones, the role of trade unions, rivalry among trade unions, multiplicity of unions, inter-union and intra-union rivalry, decline in trade union

membership levels in most countries, resistance and hostility towards trade unions, low bargaining power of trade unions, the powerful position of employers, weak leadership in trade unions and the cost of production, this paper focuses on legal challenges affecting the legal functionality of the collective bargaining agreement as one of the contributing factors to a strenuous collective bargaining process in Kenya.

The paper reviews the legal framework governing collective bargaining primarily considering that the framework for collective bargaining in Kenya is anchored in law and legal provisions which have ultimately guided the collective bargaining process and agreements which have been subsequently concluded and registered. A legal analysis of collective bargaining (in its form as a legally constructed instrument) in Kenya is adopted, including a review of the relevant laws, their gaps, inconsistencies, areas of improvement and highlights of case law which has enumerated the challenges in collective bargaining.

2. Understanding Collective Bargaining

The classical model of collective bargaining has been attributed to Beatrice Webb, an English economic theorist who first coined the term in 1891. Beatrice Webb and her partner Sidney Webb informed the thinking around collective bargaining and described it as a process through which employees collectively come together and authorize their representatives to negotiate over their terms and conditions of employment with their employer(s). It was seen as a collective alternative to individual bargaining - or one of the methods used by trade unions to further their basic purpose "of maintaining or improving the conditions of their [members'] working lives" (Webb and Webb, 1920: 1, cited in Flanders 1968:1-2). It was essentially an economic model. Webb did not define collective bargaining but proffered many examples as indicated in the passage below:

"In unorganized trades the individual workman, applying for a job, accepts or refuses the terms offered by the employer without communication with his fellow-workmen, and without any consideration other than the exigencies of his own position for the sale of his labour he makes, with the employer, a strictly individual bargain. But if a group of workmen concert together, and send representatives to conduct the bargaining on behalf of the whole body, the position is at once changed. Instead of employer making a series of separate contracts with isolated individuals, he meets with collective will, and settles, in a single agreement, the principles upon which, for the time being, all workmen of a particular group, or class, or grade, will be engaged".[4]

The above example along with others in their book indicate that the Webbs conceptualized the method of collective bargaining as comprising of the following elements: (a) a collective equivalent and alternative to individual bargaining, in which (b) the role of employers and their association was overlooked, and (c) the rule-making character of the process was not clearly stated.[5] However, it has been argued that individual bargaining can and does coexist with collective bargaining. Employees who bargain individually may, in certain cases, have the scope and ability, depending upon the nature of the specific labour market, to obtain wages and terms and conditions over and above the minimum level provided in the collective agreement.[6] The Webbs' model has been criticised for its failure to recognize and incorporate the inherent power relationship which exists in a collective bargaining situation in its framework and its failure to place rule-

4 Sidney and Beatrice Webb, Industrial Democracy, London, Longmans, 1902.

5 A Theory of Collective Bargaining, Syed M. A. Hameed Relations Industrielles / Industrial Relations, Vol. 25, No. 3 (August 1970), pp. 531-551

6 Doellgast, V., and Benassi, C. (2014). Collective bargaining [Electronic version]. Retrieved on 13th August 2018 at 8:30am, from Cornell University, ILR School site: https://digitalcommons.ilr.cornell.edu/articles/1243

making and power relationship in the proper perspective.[7]

The Webbs' definition emphasizes the importance and benefits of collective and concerted action on the part of employees in negotiating and concluding formal agreements.[8] Other scholars have defined collective bargaining more broadly as a process of negotiation, joint decision-making, or joint regulation between groups who represent both employer and employee interests; and which implies the "negotiation and continuous application of an agreed set of rules to govern the substantive and procedural terms of the employment relationship" (Windmuller et al. 1987, cited in Traxler 1994: 168).[9] It is distinct from consultation or joint problem-solving in that it results in formal, bargained agreements or contracts to which both parties are obliged to adhere during an agreed upon period.[10]

In Kenya, the definition of Collective Bargaining Agreements, known specifically as "Collective Agreements" under Kenyan law, is one which is provided for by the law and is enshrined in legal provisions. The definition of collective agreements is laid down separately in two pieces of legislation - the Labour Relations Act 2007 and the Employment Act, 2007.

Section 2 of the Labour Relations Act 2007 defines "collective agreement" as follows: *"collective agreement" means a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers*. On the other hand, Section 2 of the Employment Act 2007 defines it as follows: *"collective agreement" means a registered agreement concerning any terms and conditions of employment made in writing between a trade union and an employer, group of employers or employers' organization*. From this definition, it is clear that the issues which may be included in a collective agreement in Kenya are broad and extend beyond the regulation of wages/wage determination. Collective agreements regulate the various aspects of the employment relationship such as working days, working hours, retirement age, payment of gratuity, redundancy, promotions, pensions, etc. From a cursory reading of the two statutory provisions, there is an apparent difference in the wording of the two definitions under the two statutes.

Collective bargaining is generally used by all parties to set, determine and regulate the general terms and conditions of employment. Parties may also be interested in using the avenue created by collective bargaining to attempt to create uniformity and predictability of particulars across contracts of service through the creation

7 A Theory of Collective Bargaining, Syed M. A. Hameed Relations Industrielles / Industrial Relations, Vol. 25, No. 3 (August 1970), pp. 531-551.

8 Doellgast, V. and Benassi, C. (2014). Collective bargaining [Electronic version]. Retrieved on 13th August 2018 from Cornell University, ILR School site: https://digitalcommons.ilr.cornell.edu/articles/1243

9 Ibid.

10 Ibid.

of common terms and conditions which will apply throughout a particular sector or organization. Employees are primarily driven to improve terms and conditions of employment to ensure that they are accorded basic rights in their working environment, which forms part of basic human rights. Collective bargaining has the potential to create avenues through which parties can negotiate to improve the quality of a particular sector for the benefit of consumers of the sector. Collective bargaining allows employees to participate in decision making which is normally reserved for managerial levels and this consequently promotes democracy in the workplace. It also provides an avenue for the resolution of disputes in a controlled and institutionalized manner. At times, the collective bargaining process may culminate as a court ordered dispute settlement mechanism whereby parties are mandated to renegotiate terms of a previously concluded collective bargaining agreement.

What makes the bargaining "collective" is the presence of a trade union(s) that represents the interests of employees as a collective entity.[11] The other party to collective bargaining is usually an employer. However, it could be a number of employers or an employer's organization. At times, the government or a Government/State agency/institution could be the employer party as is the case in public service. One of the major functions of trade unions is that of procuring better working conditions and wages and salaries for its members.[12] This is achieved through the process of collective bargaining. The most important instrument of serving the interests of the members of trade unions is by collective bargaining.[13]

The goal of collective bargaining is reaching of a collective agreement that regulates terms and conditions of employment.[14] Under Kenyan law, the definition of collective agreement is laid down separately in the Labour Relations Act 2007 and the Employment Act 2007[15]. From the definitions provided under these Acts, issues which may be included in a collective agreement in Kenya are broad and extend beyond the regulation of wages. Collective agreements regulate the various aspects of the employment relationship such as working days, working hours,

11 https://repository.up.ac.za/bitstream/handle/2263/29308/04chapter4.pdf?sequence=5 Reviewed on 21/12/2017.

12 D.S Harrison, "Collective Bargaining Within The Labour Relationship: In A South African Context" Dissertation submitted for the degree Magister Commercii in Industrial Socioloav, at the School of Behavioural Sciences at the Vaal Trianale - Campus of the North-West University (2004).

13 Ibid.

14 Bamber and Sheldon "Collective Bargaining" in Blanpain et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies (2002) at pg 1.

15 Section 2 of the Labour Relations Act 2007 defines "collective agreement" as follows:-*"collective agreement" means a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers.* Section 2 of the Employment Act 2007 defines it as follows: *"collective agreement" means a registered agreement concerning any terms and conditions of employment made in writing between a trade union and an employer, group of employers or employers' organization.*

retirement age, payment of gratuity, redundancy, benefits, etc.

Collective bargaining encourages social dialogue between parties involved through negotiation and creates opportunities to negotiate on improvement of working conditions, which have the potential to improve quality of the particular sector. It has also contributed towards the improvement of employment conditions and rights of employees in Kenya.

3. Evolution of Labour Law in Kenya

Labour law in Kenya began to develop in the 19th century when the colonial government in Kenya was required to enact legislation to ensure adequate supply of cheap labour to service the emerging enterprises in agriculture, industry and in the services sector.[16] Initially, English common law and the law of contract was applied in Kenya to regulate and govern employment relationships. The employment relationship is essentially a contractual relationship. In this regard, the Indian Contract Act of 1872 applied in Kenya to contracts made or entered into before 1st of January 1961. Since then, the Kenyan law of contract has been based on the English common law of contract, pursuant to Section 2 (1) of the Kenyan Law of Contract Act (Cap. 23).

The first workers' unions in Kenya can be traced back to the early 1940s and soon after the Second World War. The Ordinance No. 35 of 1939 provided the first piece of regulation in respect of trade unions whereby all crafts organizations were required to apply for and obtain registration which was granted provided they had legitimate dealings consistent with government policy.[17] This 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.[18]

In 1948, in order to maintain firm control of the operations of the trade unions, the government appointed a Trade Union Labour Officer who was assigned to the Labour Department and whose duty consisted of fostering "responsible" unionism.[19] In 1952, the government enacted a more detailed piece of legislation to regulate Trade Unions under the Trade Unions Act Cap 233 (which was repealed by the Labour Relations Act 2007). However, its silence on a number of issues suggested it was largely designed in a manner to ensure that effective operation of trade unions was not legally possible. For instance, it did not legalize peaceful picketing or provide immunity against damages as a result of strikes.[20] On the other hand, the government encouraged creation of staff associations and workers committees since they nonetheless coincided with the government's interest to restrict workers' associations to economic imperative alone and they also lacked powers to call for strikes.[21]

16 http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm Reviewed on 5th September 2018.

17 Ibid.

18 L.P.A Aluchio, Trade unions in Kenya: Development and the System of Industrial Relations, Jomo Kenyatta Foundation, (1998) at pg 3.

19 https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm.

20 Ibid.

21 Ibid.

The colonial government maintained firm control of trade unions until independence. Nonetheless, the labour movement was able to grow both in numerical strength and power. At independence, there were about members of 155,000 trade unions in 52 trade unions, with four centres formed and registered, namely, East African Trade Union Congress (EATUC), Kenya Federation of Registered Trade Unions (KFRTU), Kenya Federation of Labour (KFL) and Kenya Africa Workers Congress (KAWC).[22] Resistance by the labour movement was not only focused on traditional trade union activities, but the movement's activities had political overlays through its role in the struggle for freedom from colonial rule.

At independence, it became necessary to develop a system of voluntary and harmonious industrial relations and tripartism following decades of conflict between the colonial authorities and the growing labour movement whose protests and fight for freedom and labour rights were suppressed by the colonial authorities[23]. Trade unions were equally relentless in pursuing their agenda and embarked on strikes and protests across the country. The growing unrest within the labour movement, acrimonious labour relations and the political role of the labour movement in the struggle for political independence presented an untenable situation in the wake of impending liberation from colonial domination. This led to a transition from antagonistic labour relations to institutionalized governance of the labour market .The employment relationship was formed on a voluntary basis by which the government provides the overarching legal framework within which the parties freely undertake to relate among themselves in a manner that promotes sound labour relations, peace and nation-building.

The determination to resolve labour unrests and averse labour relations resulted in joint commitment by the government, employers and the labour movement to achieve industrial harmony and peaceful relations for national development.[24] The mutual commitment led to signing and adoption of an Industrial Relations Charter in October 1962 which established organizational rights for workers, and committed the parties to tripartite consultation, cooperation, peaceful relations in the workplace, collective bargaining and peaceful settlement of trade disputes.[25] The Industrial Relations Charter further spelt out the agreed responsibilities of management and unions and their respective obligations in the field of industrial relations. It defined a model recognition agreement as a guide to parties involved,

22 https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm.

23 An Overview of Industrial Relations in Kenya Ruth Tubey; Kipkemboi Jacob Rotich; Margaret Bundotich, Research on Humanities and Social Sciences www.iiste.org ISSN (Paper)2224-5766 ISSN (Online)2225-0484 (Online) Vol.5, No.6, 2015 Retrieved Online from: https://www.iiste.org/Journals/index.php/RHSS/article/download/21154/21460.

24 Ibid

25 Ibid

and it set up a joint Dispute Commission. In furtherance of its commitment, the government subsequently established the Industrial Court in 1964 under the Trade Disputes Act (Cap 234) which has since been repealed by the Labour Relations Act 2007 as a consequence of which the Industrial Court was brought under the purview of the Labour Relations Act. The Labour Relations Act forms the main legal basis for collective bargaining and labour relations. Upon enactment, it combined the repealed Trade Disputes Act and Trade Unions Act. The Industrial Court was established as a platform to facilitate amicable settlement of trade disputes and peaceful dispute and conflict resolution. Overall, the historical policy, legal and regulatory landscape for industrial relations in Kenya signified commitment to voluntarism and tripartite cooperation.

Thus, a system of industrial relations in Kenya provides for collective bargaining between employers/employers' organizations and trade unions. 43 trade unions are affiliate members of the Central Organization of Trade Union (COTU) Kenya which is the National Trade Union Centre in Kenya and the trade unions represent more than 1.5 million workers both in the public and private sectors of the economy. While labour unions in the country are mainly affiliated to COTU, some employers are represented by the Federation of Kenya Employers (FKE). Whether through negotiations for better wages and terms of employment, ensuing collective bargaining agreements, legal action or labour strikes, trade unions have shaped the relations between employers and employees in Kenya.

In May 2001, a taskforce to review the labour laws was appointed by the Attorney General vide Gazette Notice No. 3204 as part of an International Labour Organization project. The taskforce was required to examine and review all labour laws in operation including the Employment Act (Cap 226); the Regulation of Wages and Conditions of Employment Act (Cap 229); the Trade Unions Act (Cap 233), the Trade Disputes Act (Cap 234), the Workmen's Compensation Act (Cap 236), the Factories Act (Cap 514) with a view to recommending appropriate legislation or interventions to repeal, amend or revise any of the labour law statutes; to make recommendations on proposals for reform or amendment of existing labour laws to ensure that they are consistent with international standards, and the Conventions and Recommendations of the International Labour Organization to which Kenya is a signatory; and to make recommendations on such other matters related to or incidental to the foregoing.[26] The tripartite taskforce, comprising of members from the government, the trade unions represented by COTU and the employers' organization represented by FKE officially handed over five new texts in respect of labour legislation to the Attorney General in April 2004.

26 https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm

In 2007, the existing Acts were repealed and replaced with the Employment Act 2007, the Work Injury Benefits Act 2007, the Occupational Health and Safety Act 2007, the Labour Relations Act 2007 and the Labour Institutions Act 2007. Further, the Constitution 2010 introduced new changes to the employment regulatory landscape prompting the enactment of the Industrial Court Act 2011 and the Employment and Labour Relations Court Act 2011. The Employment Act specifies the minimum irreducible terms and conditions of employment, which informs the benchmark for collective bargaining. The Labour Institutions Act establishes institutions for labour administration which then included the Industrial Court and also provides for the involvement of trade unions in labour administration. The Labour Relations Act provides the general framework regulating relations between employers, employees, employers' organizations and trade unions and provides a framework regulating industrial action, trade disputes, freedom of association, collective bargaining, registration and enforcement of collective agreements, and dispute resolution.

The Industrial Court has undergone restructuring throughout time. The Industrial Court hears and determines disputes relating to employment and labour relations (including collective bargaining). It was initially established under the repealed Trade Disputes Act. However, upon the repeal of the Trade Disputes Act by the Labour Institutions Act, it was thereafter governed by the Labour Institutions Act. Further, the Industrial Court was previously a subordinate Court under the Trade Disputes Act and the Labour Institutions Act. It became a superior court with the status of a High Court pursuant to Article 162 (2) (a) of the Constitution and the subsequent enactment of the Industrial Court Act 2011. Pursuant to the Statute Law (Miscellaneous Amendments) Act 2014, the Industrial Court was renamed the Employment and Labour Relations Court governed by the Employment and Labour Relations Court Act 2011 which has replaced the Industrial Court Act. Attendant to these legislative instruments were the Industrial Court Rules 2010 which were subsidiary legislation to the Labour Institutions Act. The Industrial Court Rules 2010 have since been replaced with the Employment and Labour Relations Court (Procedure) Rules 2016. The terms "Employment and Labour Court" and "Industrial Court" are used interchangeably herein as per the language used in the relevant statute or case as the terminology is yet to be standardized across all relevant statutes. These legislative developments have formed the legislative framework for the employment relationship and labour and industrial relations. These laws have shaped the definition, nature and process of collective bargaining in Kenya as will be demonstrated below.

4. Legislative Framework for Collective Agreements in Kenya

4.1 Conditions of Employment

Article 41 (1) of the Constitution grants "*every person the right to fair labour practices*". Article 41 (2) (a) to (d) grants every worker the right to fair remuneration; reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and lastly the right to go on strike. Part III of the Employment Act 2007 provides for regulation of the employment relationship, regulation of contracts of service and specifies the particulars of employment which should be included in every written contract of service, the rights of employees at work and includes the right of employees to be granted reasonable access to relevant documents including collective agreements. Part X of the Labour Relations Act regulates strikes and lock outs and makes provisions for "protected" and "unprotected" strikes. The Act grants measures to protect employees participating in protected strikes. An employer cannot dismiss or take disciplinary action against a worker nor can civil proceedings be instituted against any person for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike. Sections 78 (1) (f) and 81 (3) of the Act also prohibit strikes where the employer and employees are engaged in essential services, which include hospital services and fire services, among others. However, these sections were held to be contrary to Article 41 (2) (d) and Article 24 (2) (c) of the Constitution 2010[27].

The prohibition on strike in essential services under Section 78 (1) (f) of the Labour Relations Act was a critical and well-informed provision that is primarily intended to prevent disruption of vital services of the economy during strikes or industrial action. However, the Constitutional right for every worker to go on strike under Article 41 (2) (c) has effectively overridden and nullified this prohibition. Similarly, the repealed Trade Disputes Act Cap 234 Laws of Kenya also envisioned protection of essential services as a critical element in maintaining sound labour relations and prohibited employees who were engaged in essential services from breaking or breaching their contracts of service whereby the likely consequences will result in deprivation of the public or of that essential service or to substantially diminish the enjoyment of that essential service by the public. The Constitutional provision granting every worker the right to go on strike has had negative consequences, primarily during strikes which involve employees who are engaged in provision of essential services as they have an absolute right to strike. The absolute Constitutional right to strike has operated without limitation

27 This was the ruling of the Employment and Labour Relations Court in the case of Okiya Omtatah Okoiti vs Attorney General & 5 others [2015] eKLR

or imposition of conditions precedent, which is not desirable in industrial action that involves employees engaged in essential services. This right has permitted employees to go on strike and completely withdraw labour when they would not have ordinarily been permitted to do so, including for example during a dispute concerning collective bargaining or otherwise. It is important to strike a balance to ensure that a minimum level of service is maintained for essential services. The Court ought to have ordered the relevant Ministry of Labour to develop a framework to regulate strikes in essential services whereby a minimum level of service is maintained and notice periods are extended for such sectors.

4.2 Engaging in collective bargaining

Article 40 (1) of the Constitution guarantees every person the right to fair labour practices. Article 40 (2) further guarantees every worker the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Further, as per Article 40 (4) every trade union and every employers' organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a federation.

Article 41 (5) of the Constitution of Kenya grants trade unions, employers' organizations and employers the right to engage in collective bargaining. Similarly, Part VII of the Labour Relations Act No. 14 of 2007 provides for the recognition of trade unions for purposes of collective bargaining and makes collective bargaining agreements binding to all parties for the period of the agreement, in compliance with the ILO Conventions on Collective Bargaining. The law further provides for the registration of collective bargaining agreements with the Industrial Court (now renamed as the "Employment and Labour Relations Court") for purposes of enforcement.

In addition, Article 36 enumerates the right of every person to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. Article 37 provides for the right to peacefully and unarmed assemble, demonstrate, picket, and to present petitions to public authorities.

4.3 Dispute Resolution

Parties may choose to refer any dispute arising from a registered collective bargaining to conciliation or arbitration under the process specified under Section

58 of the Labour Relations Act. In this case, the registered collective agreement will specify the dispute resolution mechanism. Where there is no concluded collective agreement or the agreement does not provide for an internal dispute resolution mechanism, a trade dispute should be referred to the Minister for conciliation[28] in accordance with the process outlined in Part VIII and Part IX of the Labour Relations Act. If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court.

There is need to improve the conciliation process to pre-empt resorting to litigation or court-ordered dispute resolution. Parties have largely resorted to antagonistic and hostile litigation as a dispute resolution mechanism, which has led to further breakdown of relations. In addition, it is not desirable to involve the courts in the process as they cannot collectively bargain on behalf of parties or imply or impute terms into collective agreements. Neither can a court of law draft or re-write contracts on behalf of parties. Courts often order parties to renegotiate the collective bargaining agreements or revert to conciliation. In the case of *Teachers Service Commission vs Kenya Union of Post Primary Education Teachers (KUPPET) and another [2013] eKLR* the Industrial Court declared the strike by the teachers illegal and ordered them to resume their work. Further, the Court ordered that parties revert to conciliation with negotiations to be convened by the Cabinet Secretary for Labour. In this regard, it would be desirable to avoid litigation as the primary dispute resolution mechanism. Negotiations would best be conducted through effective conciliation or arbitration as alternative dispute resolution mechanisms. The Cabinet Secretary for the time being in charge of labour should take an affirmative position in steering the conciliation process and considerations to involve more suitable parties such as religious elders who can be involved in the conciliation process.

4.4 Collective Agreement Enforcement

Collective Agreements in Kenya are enforced through their registration in accordance with the process stipulated under the law. Rule 36 of the Employment and Labour Relations Court (Procedure) Rules provides that an employer, organization of employers or trade union that has entered into a collective agreement must submit a copy of the agreement with the Cabinet Secretary within fourteen days of its execution. The Cabinet Secretary then provides the Court with a copy of each collective agreement that has been lodged with him/her (with any comments the Cabinet Secretary may have included). Where the Cabinet Secretary objects to the registration of a collective agreement, s/he shall provide the Court

28 Conciliation under Section 2 of the Labour Relations Act means the act or process of conciliating. Conciliation by the Minister is a statutory process.

with a copy of the agreement accompanied by a statement giving reasons for objection. Rule 36 (5) specifies that a collective agreement shall not take effect until it has been registered by the Court. The legal effect of a collective agreement is to bind for the duration of the collective agreement: the parties to the agreement; all unionisable employees employed by the employer, group of employers or members of the employer's organization party; and the employers who are or become members of an employers' organization party to the agreement, to the extent that the agreement relates to their employees to the agreement[29], and once registered the terms of a collective agreement are incorporated into the contract of employment of every employee covered by the collective agreement.[30] Kenyan law recognizes the binding nature of collective agreements and their precedence over individual contracts of employment, while recognizing the stipulations of individual contracts of employment which are more favourable.[31] This is normally determined by the respective legislation or by the collective agreement itself depending on the jurisdiction.

As per the Labour Relations Act, a collective agreement becomes enforceable and is implemented upon registration by the Industrial Court and becomes effective from the date agreed upon by the parties[32]. A collective agreement must be presented to the Industrial Court for registration within 14 days of its conclusion.[33] As per the Labour Relations Act, the employer/employer's organization in the collective agreement submits the collective agreement to the Industrial Court for registration. If the employer/ employers' organisation fails to submit the collective agreement to the Industrial Court, the trade union may submit it. The Industrial Court has discretion to register a collective agreement within fourteen days of receiving it, and also has discretion to refuse to register a collective agreement.

From a reading of the Labour Relations Act and the Employment and Labour Relations Court (Procedure) Rules 2016, a collective agreement will attain legal enforceability upon registration by the Employment and Labour Relations Court. The Courts have held that prior to that, it is merely a statement of intention of parties and can be referred to but can only attain the status of legally binding and enforceable upon registration by the Employment and Labour Relations Court[34].

The Employment Act 2007 defines a collective agreement as one which is registered. On the other hand, the Labour Relations Act defines a collective agreement as one

29 Section 59 (1) of the Labour Relations Act

30 Section 59 (3) of the Labour Relations Act

31 Gernigon, Odero and Guido (2000). ILO Principles Concerning Collective Bargaining

32 Section 59 (5) of the Labour Relations Act

33 Section 60 of the Labour Relations Act

34 This was affirmed in the case of *Kenafric Industries Limited vs Bakery Confectionary Food Manufacturing and Allied Workers Union [2014] eKLR*. This is however contrary to a ruling in *Said Ndege vs Steel Makers Ltd [2014] eKLR* where the judge in that case held that a collective agreement becomes effective from the date agreed upon by the parties, and not necessarily upon its registration.

which is "written" and does not define it as one which is registered. There is an apparent distinction in the two definitions. This contradiction in the text of the law has significant legal consequences such as what constitutes a valid collective agreement and whether registration is an element of validity and enforceability. This inconsistency creates confusion as to the correct procedure to be followed and undermines enforceability of collective agreements.

This confusion is further exacerbated by inconsistent provisions on the process of registration of collective agreements. Rule 36 (5) of the Employment and Labour Relations Court (Procedure) Rules provides that a collective agreement shall not take effect until it has been registered by the Court. However, the language used in Section 59 (5) of the Labour Relations Act is confusing as it states that a collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court, but effective from the date agreed by the parties yet it defines a collective agreement as one which is merely written. This has caused confusion in interpreting at what point a collective agreement comes into force to bind the parties. The conflict in the statutes on the process of registration of collective agreements creates uncertainty and ultimately room for varied interpretation of the law. This uncertainty is likely to hinder enforcement of collective agreements where parties may fail to register a collective agreement while following an incorrect interpretation or procedure. Further, arguments may be raised to create loopholes and quash a collective agreement due to these procedural technicalities.

Further, there is confusion on the process to be followed to register a collective agreement with two different processes being specified under the Labour Relations Act and the Employment and Labour Relations Court (Procedure) Rules. Section 60 of the Labour Relations Act places upon the employer or employer's organization the obligation to submit the collective agreement within fourteen days of conclusion to the Industrial Court for registration. If the employer fails to submit the collective agreement for registration, the trade union is given the leeway to submit it to the Court for registration. However, pursuant to Rule 36 of the Employment and Labour Relations Court (Procedure) Rules 2016 an employer, organization of employers or trade union that has entered into a collective agreement is required to submit a copy of the agreement with the Cabinet Secretary within fourteen days of its execution after which the Cabinet Secretary is required to submit to the Court a copy of each collective agreement that has been lodged with the Cabinet Secretary. This has added a further inconsistency in the registration process of Collective Agreements. These contradictions in the law may contribute to inability to enforce Collective Agreements as these inconsistencies have ultimately resulted

in conflicting judicial interpretation of the law[35]. Parties are therefore also at risk of adopting conflicting interpretations and following an incorrect procedure in reliance of a particular interpretation which may compromise the validity of the particular collective agreement.

Section 61 of Labour Relations Act regulates how the terms and conditions of service in the public sector should be settled where there is no collective bargaining. The Minister (now referred to as the Cabinet Secretary) may, after consultations with the National Labour Board make regulations establishing machinery for determining terms and conditions of employment for any category of employees in the public sector. Basically, the terms and conditions of service in public sector, if not contained in the collective agreement, are fixed through the machinery established by the Minister in charge of Labour and not by the Courts. There is lack of understanding of the scope, definition and limit of the powers of the various stakeholders in the collective bargaining process. The powers of the Minister (now referred to as the Cabinet Secretary) of Labour, the Trade Unions and the Employment and Labour Relations Court need to be clearly defined, streamlined, delineated and limited.

35 This was seen in the two cases of *Said Ndege vs Steel Makers Ltd [2014] eKLR* and *Kenafric Industries Limited vs Bakery Confectionary Food Manufacturing and Allied Workers Union [2014] eKLR* where two judges held contradictory judgments on when a collective agreement comes into force.

5. Challenges Facing Enforceability of Collective Agreements in Kenya

Several challenges confront collective agreements in both the private and public sector including the following:

Differences in definition of Collective Agreement in the text of law. From a cursory reading of the two statutory provisions defining a "collective agreement" under the Employment Act and the Labour Relations Act, there are apparent differences in the wording of the two definitions. These differences have already been subject of several court cases as this goes to the heart of the definition of what constitutes a valid collective agreement. Parties are likely to neglect or fail to register a collective agreement on the premise that registration is inconsequential once an agreement has been signed ultimately undermining the validity of such an agreement.[36] A party can seek to invalidate or renegotiate an already signed and concluded collective agreement on grounds that it is not registered which may be a deliberate attempt to evade being bound by its terms and conditions or to delay effecting and implementing the agreement. The ambiguity in definition creates loopholes and conflicting interpretations. It also leads to narrow and easily-contested definitions of a valid collective agreement.

Confusion in interpreting the point at which a collective agreement comes into force to bind the parties. The Employment Act 2007 specifies that a collective agreement is one which is registered. Rule 36 (5) of the Employment and Labour Relations Court (Procedure) Rules provides that a collective agreement shall not take effect until it has been registered by the Employment and Labour Relations Court. However, Section 59 (5) of the Labour Relations Act states that "a collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed by the parties". There is a risk that the effective date as agreed by the parties may be different from the date of registration. The conflicts in the statutes create uncertainty and could hinder enforcement of collective agreements where parties follow an incorrect interpretation or procedure. Likewise, parties may deliberately delay registration of a concluded collective agreement to undermine its validity and enforceability or delay implementation of its terms. Furthermore, arguments may be raised to create loopholes and quash a collective agreement due to these procedural technicalities.

Unclear process to follow in registering a collective agreement. As per Section 60 (2) of the Labour Relations Act, the employer is required to submit the collective agreement to the Industrial Court for its registration within fourteen days of its conclusion. If the employer fails to submit the collective agreement

36 Ibid

to the Industrial Court for registration, the trade union is permitted to submit it to the Industrial Court for registration. However, under the Employment and Labour Relations Court (Procedure) Rules the employer is required to submit a copy of the collective agreement within 14 days of its execution to the Cabinet Secretary after which the Cabinet Secretary has the responsibility of presenting the collective agreement to the Employment and Labour Relations Court which has added further confusion in the registration process of collective agreements. Such contradictions may result in conflicting judicial interpretation of the law. Parties are at risk of adopting conflicting interpretations and following an incorrect procedure which may compromise the validity of a collective agreement. This was seen in the two cases of Said Ndege vs Steel Makers Ltd [2014] eKLR and Kenafric Industries Limited vs Bakery Confectionary Food Manufacturing and Allied Workers Union [2014] eKLR where two judges held contradictory judgments on when a collective agreement comes into force when the parties followed different procedures.

Lack of adequate knowledge and training on the process and strategies of collective bargaining best practices. A key challenge faced in the success of collective bargaining in Kenya may be due to inadequate knowledge and training on the process and strategies of collective bargaining best practices. This may have precipitated the stalemates and standoffs between trade unions and the government, creation of collective agreements which are unenforceable due to fiscal unsustainability and ultimately continuous, persistent strikes. There is also lack of clarity on the current legal and regulatory landscape which results in conflicting opinions towards the same issue which should quintessentially be certain and unequivocal.

The adversarial nature of the negotiation process which is characteristic of collective bargaining where employers (especially employers who are in the public sector or are government agencies) are naturally in a place of power (and possess the capacity for technical, human and financial resources) and have bargaining strength and power. Employers can easily delay implementation of collective agreements by failing, refusing or neglecting to register the collective agreement (as was seen in the case of Said Ndege vs Steel Makers Ltd [2014] eKLR where the employer failed to take any steps or measures to ensure that the collective agreement is registered. Employers may also derail the process of negotiating, registration and implementation of collective agreements through insolence or inertia. This can be drawn from the recent strikes of teachers who through their

unions Kenya Union of Teachers ("KNUT") and Kenya Union of Post Primary Education Teachers ("KUPPET") have respectively been negotiating terms to lay the framework for collective agreements from 2012 and 2013 and there was no existing collective agreement specifying the salary and allowances to be allocated to teachers (T*eachers Service Commission vs Kenya National Union of Teachers (KNUT) & 3 others [2015] eKLR (Civil Appeal No. 196 of 2015)*).

Applicability of collective agreements to all workers of a particular category. Collective agreements apply to all workers of a particular category whether or not they are members of a trade union which is a party to the agreement and therefore many workers may not even know the existence of the particular agreement or its terms. A collective agreement binds and applies to employees who are not members of a registered trade union or trade unions in the agreement, if the employees are identified in the agreement. The agreement expressly binds them if the majority of employees in the workplace are members of the trade union. When applicable, a collective agreement changes a contract of employment between an employee and employer who are both bound by the collective agreement as the terms of a collective agreement are incorporated into the contract of employment of every employee covered by the collective agreement.[37] Terms of collective agreements take precedence over those in individual contracts of employment and rights acquired through collective agreements cannot be contracted out of or waived. Collective agreements differ from individual contracts of employment in that the latter are entered into between individual employees and their employers, and establish personal rights and duties *inter s*e, while the former are entered into between an employer or a group of employers, on the one hand, and the representative of a number of employees, on the other, and establish uniform conditions of service for all employees falling within particular categories.[38] Collective agreements also contain procedural terms which may not be amenable to individual enforcement or which may not have been intended to create or assign individual rights. In this regard, the ability of the collective agreement to be enforced individually is hindered.

Disharmony between the constitutional and statutory mandates and roles of the independent commissions established under Article 248 of the Constitution, other public institutions and the Salaries and Remuneration Commission in determination of wages for public officers. Primarily the disharmony manifests itself in the following ways: whether the mandate to determine, set, review, revise and advise on the remuneration of

37 Section 59 (3) of the Labour Relations Act states that *"The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement".*

38 D.S Harrison, "Collective Bargaining Within The Labour Relationship: In A South African Context" Dissertation submitted for the degree Magister Commercii in Industrial Socioloav -. at the School of Behavioural Sciences at the Vaal Trianale - Campus of the North-West University (2004).

public officers belongs exclusively to the Salaries and Remuneration Commission as per Article 230 (4) of the Constitution; whether independent commissions established under Article 248 of the Constitution, such as the Teachers Service Commission, are bound by the advice of the Salaries and Remuneration Commission; and the exact role played by the Salaries and Remuneration Commission in the negotiations and conclusion of collective agreements which deal with remuneration, wages, allowances and benefits of employees in the public service. This disharmony was for example, the subject of contention in *Kenya National Union of Nurses vs Moi Teaching and Referral Hospital Board & 2 others [2015] eKLR* and also in *Teachers Service Commission vs Kenya National Union of Teachers (KNUT) & 3 others [2015] eKLR (Civil Appeal No. 196 of 2015)*. It is worth pointing out that the Court of Appeal in *Teachers Service Commission vs Kenya National Union of Teachers (KNUT) & 3 others* clarified the blurred roles of various constitutional bodies as follows:

> *"TSC as employer for the decision and preparation of the budget; SRC for advice on fiscal sustainability of the claim; National Treasury for preparation of National Budget, National Parliament for approval of the budget and Appropriation and Controller of Budget for implementation of the budget by authorizing withdrawals from public funds. The decisions of those constitutional bodies are subject to, inter alia, principles of public finance articulated in Article 201 and principles of financial control of public funds in Article 225 and Article 10 National values and principles of governance…. Disputes relating to revenue allocation and public wage setting are complex, intricate and of technical nature and are best handled by the institutions with institutional competence. The Constitution conferred that jurisdiction to the five institutions to which I have referred."*

The initial confusion over the role of SRC led to parties failing to consult the SRC or ignoring the advice of the SRC during negotiations and conclusion of CBAs which was held to be irregular and which culminated in unenforceable CBAs. Similarly, public sector employers were seen to refuse to engage trade unions in collective bargaining without the involvement of the Salaries and Remuneration Commission or refusing to meet their obligations under already concluded CBAs on the basis that the Salaries and Remuneration Commission has not been involved.

Conflict between relevant statutory Acts establishing independent commissions (such as the Salaries and Remuneration Commission Act and Teachers Service Commission Act) and the Constitution. For example, Section 37 (3) of the TSC Act provides that "the registered teachers recruited by the Commission under Article 237 (2) (b) of the Constitution shall

serve under such terms and conditions as the Committee established under Section 13 (5) of this Act in consultation with the Salaries and Remuneration Commission may determine." The phrase "in consultation" does not correspond to the terminology used in Article 230 (4) (a) of the Constitution which provides that one of the powers and functions of the Salaries and Remuneration Commission is to "set and regularly review the remuneration and benefits of all State officers". Further, Article 230 (4) (b) of the Constitution provides that the function of the Salaries and Remuneration Commission is to "advise the national and county governments on the remuneration and benefits of all other public officers" creating a distinction between the mandate of the Salaries and Remuneration Commission with regard to State Officers and other public officers. Section 11 of the SRC Act which is the enabling Act of the Salaries and Remuneration Commission confers additional functions which are not contemplated or granted by the Constitution. Article 230 limits the Commission's functions of review and setting of remuneration and benefits to State Officers. The role of the Commission on the remuneration of all other Public Officers is purely advisory. However, the SRC Act extends the review function to all Public Officers. The terminology used in Section 37 (3) of the Teachers Service Commission Act is also at variance with Article 259 (11) of the Constitution which by application makes the advice of the Salaries and Remuneration Commission exclusive, binding and mandatory. Section 11 of the Salaries and Remuneration Commission Act also provides that Salaries and Remuneration Commission shall "make recommendations on matters relating to the salary and remuneration of a particular State or public officer". Initially it was not clear from the varied terminology in the Acts and the Constitution whether county employees are "public officers" or whether the recommendations of the SRC are binding which led to bypassing the Salaries and Remuneration Commission and following an irregular procedure compromising the validity and enforceability of concluded CBAs. This was apparent in the case of *Kenya National Union of Nurses vs Moi Teaching and Referral Hospital Board & 2 others [2015] eKLR*. However, the Courts have clarified that all collective agreements regarding unionisable public officers in relation to settling, determination and reviewing of their salaries are subject to the advice and recommendations of SRC which are binding. Further, the Courts have held that seeking and obtaining the advice of SRC is a mandatory pre-condition to the commencement of any collective bargaining process regarding remuneration of public officers.

Confusion between the mandate of the Salaries and Remuneration Commission over State Officers and all other public officers. There is confusion over the role of the Salaries and Remuneration Commission in setting salaries of State officers who are engaged in the administration of the State and other public officers who may comprise of workers employed by the county

government, parastatals or independent public institutions and ancillary staff. This has led to disregarding of advice of the Salaries and Remuneration Commission by some unions or dispute challenging its role in the collective bargaining process. Collective bargaining agreements which were concluded without the advice of the Salaries and Remuneration Commission on the mistaken premise that the unionisable employees were not public officers or state officers were held to be unenforceable and were challenged[39]. This was the issue in contention in the case of *Kenya Union of Domestic Hotels, Education and Allied Workers Union (KUDHEHIA workers) vs Salaries and Remuneration Commission & Attorney General High Court Petition No. 294 of 2013* where the union argued that its unionisable employees at Moi Teaching and Referral Hospital, Kenyatta National Hospital, public universities, domestic workers, allied workers, employees in public educational institutions, hotels, workers in Kenya Power and Lighting Company Ltd among others did not fall within the category of state officers or public officers as defined under Article 260 of the Constitution and therefore their salaries were not to be set and/or reviewed by SRC. The issue in dispute was on the definition and categorization of "public officers" and "State officers" which was unclear. It was held that employees of parastatals are public officers and that their collective bargaining agreements are subject to the mandate of the Salaries and Remuneration Commission in relation to settling and reviewing of their salaries.

Unsustainable wage setting mechanisms prior to the establishment of the Salaries and Remuneration Commission. The potency of the collective agreement in the public sector may have been undermined by the inherited weaknesses in the wage-setting mechanisms where, prior to the creation of the Salaries and Remuneration Commission, wage awards were made arbitrarily without factoring in or appreciating principles of accountable public finance and fiscal sustainability, the process of informed budgetary allocations/appropriations and the multifaceted approach needed to determine the salary structure for public officers who have different job grading structures across various public institutions and sectors in Kenya. Consequently, many collective agreements which trade unions have recently been seeking to enforce were pegged on unsustainable fiscal awards which at the time of their negotiation and conclusion had not been reviewed by the Salaries and Remuneration Commission or any agency for fiscal assessment or were found to be unaffordable, impractical and consequently unenforceable. After the Constitution 2010, the Salaries and Remuneration Commission was tasked to tame the ballooning public wage bill and this has affected collective bargaining with public sector employees as wage setting must be sustainable. Article 230 (5) of the Constitution provides that the Salaries and Remuneration Commission must ensure that the total public compensation bill is

39 See the case of National Union of Water & Sewerage Employees v Mathira Water And Sanitation Company Limited & 2 Others [2013] eKLR

fiscally sustainable. Similarly, Section 15 of the Public Finance Management Act establishes the National Treasury which is mandated to manage public finances in accordance with fiscal responsibility principles. The fiscal responsibility principles include that, over the medium term, a minimum of 30 per cent of the national and county governments budget shall be allocated to development expenditure; the national government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the national government revenue as prescribed by regulations; that the national government's borrowings shall be used only for the purpose of financing development expenditure and not for recurrent expenditure; and that public debt and obligations shall be maintained at a sustainable level. In the case of, *Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR* it was argued that the impact of the increase of salaries and allowances claimed by the teachers then on the national wage bill, and its implementation would risk pushing the national wage bill to Ksh 808.1 billion, which would affect the macroeconomic stability of the economy. It was argued that to finance the additional wage bill, the national government had the options of borrowing, rationalization of the budget and tax measures which were not feasible. Therefore, the teachers' demands for salary increments could not be met. The Salaries and Remuneration Commission has now been tasked with streamlining the wage bill and salary structure in the public sector. However, this may be discordant with previous wage setting mechanisms which are yet to be updated.

Collective bargaining has been turned into a court-ordered process disputing rights and not negotiating interests. Collective bargaining as seen from recent cases is normally not conducted on the basis of fresh negotiations brought in good faith or mutual cooperation but primarily as a court-ordered dispute resolution mechanism whereby employers have failed to honour the terms of previous collective bargaining agreements or where the process of collective bargaining is court-mandated as a result of failure to honour previous collective agreements. At this point, there is already a break down of relations among parties. Often, parties litigate to resolve *dispute of rights* (such as enforcing and registering the collective agreement) and not to resolve *dispute of interests* (which is the substantive terms of the agreement outlining the terms and conditions of employment) after which courts order that parties should enter into fresh negotiations.

Lack of adequate mechanisms to deal with disputes in essential services, particularly in the health sector, without disrupting the delivery of vital services. This warrants an exceptional examination of collective agreements in the health sector and an assessment of why they are increasingly problematic. Public hospitals are worn down by extreme shortages in personnel

which fall below the recommended threshold by international standards. For this reason, health workers feel that their services warrant a wage increase as they are understaffed and consequently overworked. From frequent trends, it appears that pay, allowances and benefits (and not other terms or working conditions) are viewed as critical factors to recruit and retain staff in the Kenyan health sector. The devolution of health services has, however, compounded these issues and created uncertainty as to who is authorized to determine and set the salaries of public health workers. There is lack of a comprehensive framework to regulate strikes by personnel who are engaged in essential services (such as the health sector and other key sectors) which would prevent complete disruption of service delivery or complete withdrawal of labour in the event of stalled negotiations or a dispute concerning a collective bargaining agreement.

Devolution of health services and unclear employment relationships. The 2010 Constitution of Kenya brought about devolution through which some sectors of the economy were devolved, including health services. The problems associated with devolution of the health sector and health services have been exacerbated by a protracted lack of a legislative framework regulating the devolution of health services. According to Article 235 of the Constitution, counties are enabled to establish and abolish offices and to "appoint persons to hold or act in those offices" and to remove or exercise disciplinary measures over them, with the exception of persons employed by the Teachers Service Commission. Such offices created, and persons appointed relate to the services listed in Part 2 of the Fourth Schedule (entitled "Distribution of Services between the National Government and the County Government"). As a result, personnel working in the county health departments are technically employees of the county governments. However, several health officers working in the counties have employment contracts with the Ministry of Health, which is created under the auspices of the national government and their salaries are disbursed and remitted from the national government. This is creating uncertainty and ambiguity as to who the proper employer is in the health sector and to whom health workers report. That is, whether their employer is the Ministry of Health, or the respective County Government in which they are posted. This has significant legal consequences; in particular who will practically perform the contractual obligations and effect and enforce the terms and conditions of the collective agreement. In practical terms, questions arise as to who should pay the doctors or nurses under such a collective agreement. The lack of clarity results in a game of hot potato between the national government and county governments with all parties attempting to evade responsibility to fulfil the financial obligations of the agreement. In addition to this, the creation of the Salaries and Remuneration Commission in addition to the Ministry of Health and the devolved county governments created uncertainty

as to who is authorized to determine and set the salaries of health workers across the various counties as medical employees initially argued they were not public officers subject to the Salaries and Remuneration Commission[40].

Lack of harmony, rationalization and streamlining of the wage bill in the entire public service. The health sector was brought in as part of the public service and any wage increase on their part would cause a ripple/snowball effect on other medical personnel such as nurses or even extend to the entire public service who would also be subject to a review. This can incite other staff or other sectors to demand for higher pay or go on strike. Further, if doctors receive wage increases, other medical employees including nurses and clinical officers are likely to also demand wage increases.

The presence of several stakeholders in public service who contribute to employment relations in the public service who have conflicting and divergent interests in the outcomes of collective bargaining agreements. There are several stakeholders who are interested in, involved in and who influence the outcome of the collective bargaining process (especially in the public service and devolved system where many institutions exist to oversee various aspects of the public sector as a whole). This results in conflicting interests that undermine the overall efficiency of collective bargaining especially in the public sector in addition to the parties to the collective bargaining process and agreement. This may include the Public Service Commission, Salaries and Remuneration Commission, the National Treasury, Council of Governors, the Intergovernmental Relations Technical Committee, County Governors, COTU (Central Organization of Trade Unions), Federation of Kenya Employers (FKE), the Judiciary, and the respective Cabinet Secretary in charge of the Ministry governing the particular sector. All these key players are often very interested in the outcomes of collective bargaining agreements in the public sector and often have conflicts of interest which may delay negotiations and conclusion of collective bargaining agreements.

Introduction of Salaries and Remuneration Commission in the employment relationship of public servants and their public employers. The Salaries and Remuneration Commission has wide, overarching constitutional and legislative powers to unilaterally determine the wages of public sector employees through individual contracts and through any collective agreements that may be concluded, which is averse to the principles of collective bargaining including negotiating based on good faith. In Sweden, both trade unions and employers have been opposed to the State having a role in determination of wages of public sector employees, although it should be noted that the public wage

40 See the cases of Kenya Union of Domestic Hotels, Education and Allied Workers Union (KUDHEHIA workers) v Salaries and Remuneration Commission & Attorney General High Court Petition No. 294 of 2013.

expenditure may vary across both countries and the need for State intervention may be warranted in Kenya where expenditure on public wages is inflated.[41]

Introduction of the Salaries and Remuneration Commission in collective bargaining process for public sector employees which is atypical of collective bargaining. Typically, collective bargaining has traditionally been a bipartite or tripartite system of negotiation involving two or three parties. This is seen in the definition of collective bargaining in the Employment Act and the Labour Relations Act, and the ILO instruments which envisage two or three parties comprising of the employees' representative (trade unions), the employer or its representative who negotiate amongst themselves and the government to provide the regulatory framework. Employees through their workers' representatives independently negotiate terms and conditions of employment with their employers. This has been the typical cannon of construction of collective bargaining processes nationally and internationally. The introduction of the Salaries and Remuneration Commission as the sole determinant of wages of employees in the public service has disturbed this balance, although it is admitted that the function of the Salaries and Remuneration Commission is critical in taming the ballooning wage bill in the public sector.

The role of the Salaries and Remuneration Commission is antagonistic with the nature of collective bargaining and is misplaced in the nature and dynamics of the employment relationship. Collective bargaining is traditionally conducted between trade unions (on behalf of a particular group of employees) and employers with the aim of regulating terms and conditions of the employment relationship. The employment relationship is normally governed by a contract of service. Collective bargaining has traditionally revolved around wage determination and negotiations on wages. According to Article 230 (4) of the Constitution, the mandate to set, determine, review and advise on remuneration of public officers is exclusively for the reserve of the Salaries and Remuneration Commission. The effect of Article 230 (4) on collective bargaining means that where there is any collective bargaining process regarding public employees, the parties therein effectively cannot negotiate or agree on any terms or figures on wages or remuneration or benefits of such public employees without first consulting the Salaries and Remuneration Commission. This undermines the collective bargaining process in the public sector which appears redundant as the Salaries and Remuneration Commission has the exclusive mandate of determining the salaries of all employees in public service, which is binding. This is discordant

41 European Foundation for the Improvement of Living and Working Conditions, *"Employment and Labour Relations in the health care sector in the European Union: How can social dialogue contribute to tackling challenges facing the sector?"* at pg 13 Accessed from: ec.europa.eu/social/BlobServlet?docId=9423&langId=en on 11th January 2018 at 12:33pm.

with the nature of collective bargaining which is primarily carried out on the basis of negotiation. The Salaries and Remuneration Commission as currently constituted and composed has effectively undermined collective bargaining and negotiating between public sector trade union (trade unions representing public sector employees) and public employers on wages and remuneration of public employees as this is determined unilaterally by the Salaries and Remuneration Commission. The role of trade unions in negotiating for wages of their unionisable public sector employees has thus been undermined. Traditionally, besides private (individual) contracts, collective agreements were the only instruments to regulate pay and wages which is no longer the case.

Unavailability and inaccessibility of information and data relied upon by the Salaries and Remuneration Commission to trade unions. Traditionally, the Industrial Relations Charter and the nature of collective bargaining throughout various jurisdictions has recognized a tripartite concertation system whereby the employers, the employees (unions) and the government interacted and negotiated in good faith through social dialogue. The process of social dialogue and collective bargaining therefore involved the 3 traditional parties, but in the post-2010 public-service legislative landscape the Salaries and Remuneration Commission was introduced to determine the remuneration of public officers. The Salaries and Remuneration Commission has published regulations entitled "Salaries and Remuneration (Review of Salaries and Remuneration, Submission of Proposals and Pay Determination and Advice) Regulations, 2012" and the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013. Regulation 18 (1) thereof provides: "*the Commission shall not negotiate with a trade union*". This expressly prohibits the Salaries and Remuneration Commission from directly engaging with trade unions. The trade unions therefore do not have access to the information, factors and considerations the Commission uses in rendering advice to the public body employers and do not have the information relating to fiscal sustainability and other economic indicators or factors the Salaries and Remuneration Commission rely on. These regulations are antithetical to the right to collectively bargain and freedom of association and they undermine the role of public sector trade unions in the collective bargaining process. The lack of dialogue undermines the collective bargaining process, heightens conflict and propagates an unwillingness by trade unions to negotiate or reach an agreement.

Differences between authority of negotiating parties in private and public sector. The most significant difference in the structure of bargaining is who sits at the table and who sits behind the bargainers with the authority to

make the agreement binding. On the union side, there is no significant difference between public sector and private sector bargaining. In both cases, negotiation is done by officers of the union or a negotiating committee. They may have the authority to make a binding agreement and can give a final answer at the bargaining table, though in many unions the agreement must be ratified by the members. On the management, side there is a crucial difference. In the private sector those at the table frequently have the authority to make a binding agreement; they can give a final answer at the bargaining table. In public employment, this is normally not the case, for those at the bargaining table often have no authority to commit the funds required by the contract. Expenditures can normally be authorized only by the legislative body or the National Treasury, which makes up the budget. However, the gap between those who negotiate and those who provide the funds invites the intrusion of political differences that may go beyond the amount of funds requested and lead to an impasse.

Failure to honour contractual obligations. There is also lack of compliance with mandatory timelines in registration of collective agreements, political undertones that deliberately extend the period of the strike and undermine the collective bargaining process, and lack of robust or effective penal consequences for contempt of court orders. Government or public employers are generally notorious for failing to honour the terms and conditions of collective agreements which have been concluded. However, private employers also fail to honour their contractual obligations. Employers sign collective agreements to avert strikes only to renege based on a legal technicality. There may be political undertones deliberately influencing the extension of the period of the strike and undermining the collective bargaining process. In a country such as Kenya, people belong to various political groups and ideologies and have different views on political issues which often affect day-to-day lives and the manner in which individuals relate with each other. When bargaining, this can affect issues that are raised in the bargaining process and can have an effect on the attitude of bargaining parties towards each other. Ultimately, collective bargaining in public sector is influenced by political forces and political processes. There is an evident lack of robust or effective penal consequences for contempt of court orders when employers in particular fail to comply with court orders issued in respect of collective bargaining. In the wake of devolution and creation of multiple public/governmental agencies and institutions, service of legal documents and court orders is more illusory as it is difficult to pinpoint and ascertain the proper persons and officers who are meant to be served with court documents and legal documents who are in many cases unknown, unidentifiable or elusive. For this reason, it is generally harder to

effect service of, and enforce court orders against the government or government agencies.

6. Successes of the Collective Agreement in Kenya

Although the collective agreement has its fair share of challenges and pitfalls, it nonetheless does have elements which are commendable and have contributed towards the improvement of employment conditions and rights of employees in Kenya. The collective agreement is not an entirely failed mechanism to resolve labour disputes between trade unions and employers/employers' organizations, although it has received immense scrutiny and attention for its inability to be enforced and upheld. That said, collective bargaining has made commendable contributions, and several actions should be taken to improve the process in Kenya.

The law on employment in Kenya is, for the most part, comprehensive with robust and modern provisions upholding the rights of employees and regulating employment relations. Employees have by and large benefited from the employment laws and the industrial/employment and labour relations court has been seen to firmly protect, uphold and enforce the rights of employees under the various laws. Collective agreements concluded between trade unions and private sector employers or their organisations may be easier to enforce as the employer is easier to identify and to serve with any legal documents and court orders compared to public sector employers. In the wake of devolution and creation of multiple agencies and institutions, service of legal documents and court orders is more illusory as the proper persons and officers who are meant to be served with court documents and legal documents are in many cases unknown or elusive.

It has also encouraged social dialogue between parties involved. For example, the recent (2017) doctor's strike saw significant support and involvement of other organizations such as the Law Society of Kenya, the Council of Governors, the Kenya National Commission on Human Rights and even religious leaders in mediating the negotiations and drafting the recognition agreement and return-to-work formula. This introduced fresh perspectives and approaches to the dispute at hand.

Collective bargaining has contributed towards the improvement of employment conditions and rights of employees in Kenya. The nature of collective bargaining goes beyond determination of wages and extends to other terms and conditions of employment. Trade unions have the potential to introduce better working conditions for the employees they represent and to introduce dialogue on topics that could reform the particular sector. Collective bargaining creates opportunities to negotiate on improvement of working conditions which have the potential to improve quality of the particular sector. For example, through negotiations between the Kenya National Union of Teachers and a subsequent strike held in November 1966, the government accepted to establish the Teachers Service

Commission[42]. The TSC was established through a Bill tabled in Parliament by the then Minister for Education the Hon. Jeremiah Nyagah.[43] The TSC Act Chapter 212 of the Laws of Kenya thus established the TSC as the sole employer for all teachers in public schools in Kenya.[44] The TSC became operational from 1st July 1967 the Bill having been passed in 1966.[45] Therefore, collective bargaining has culminated in key sectoral and policy developments.

42 http://www.knut.or.ke/index.php/2015-06-08-17-07-02/history

43 Ibid

44 Ibid

45 Ibid

7. Conclusions and Recommendations

In this study, we have examined the various factors which may be undermining the collective bargaining process as a whole and also the factors that may be compromising the success of enforcement of collective agreements, and their sustainability. The various factors may be cross-cutting across both private and public sector whereas some factors may be exclusive to the public sector given its distinct structure in light of the promulgation of the Constitution 2010.

The study revealed a number of conflicts in the laws regulating collective agreements which affects both private and public sector in collective bargaining. There are also conflicts and inconsistencies in the constitutional and statutory roles and mandates of public institutions as outlined in the Constitution and the institutions' enabling statutes which affect enforcement of the terms of a collective agreement.

Another prominent issue is the role of the Salaries and Remuneration Commission in the regulation and determination of wages of public employees which ultimately affects collective bargaining processes and agreements on the same. The study revealed that initial confusion over the role of the Salaries and Remuneration Commission in public sector collective bargaining was brought about by inconsistencies in the law which led to following an incorrect procedure, conflict and resistance between bodies over which the Salaries and Remuneration Commission was seeking to exercise its mandate. There were also incidents of public service employers refusing to engage trade unions in collective bargaining or refusing to effect concluded collective agreements on grounds that the Salaries and Remuneration Commission has the exclusive mandate to set the wages of public sector employees, which led to strikes and court action being instituted. Nonetheless, it is admitted that the arbitrary wage-setting mechanisms prior to the Salaries and Remuneration Commission and prior to development of law, jurisprudence and understanding in the role of SRC may have led to conclusion of collective agreements which have now been held to be unenforceable.

There is also lack of compliance with mandatory timelines in registration of collective agreements, failure to honour contractual obligations which form the terms and conditions of the CBAs, political undertones that deliberately extend the period of the strike and undermine the collective bargaining process, and lack of robust or effective penal consequences for contempt of court orders which affect industrial relations in both the private and public sector. Employers ought to agree on terms which they can uphold; they ought to respect the obligations and timelines imposed on them in the collective bargaining agreement. In particular, the obligations on salaries and allowances and on the right to join and participate in strikes should be adhered to.

The health sector has been faced with unique problems which impact collective bargaining. This includes devolution of health services and lack of clarity on the proper determinant of wages of publicly employed medical staff who may be deployed to counties. Questions arise as to who therefore enforces and implements the terms of a concluded collective agreement.

As a priority, provisions of the Labour Relations Act and the Employment Act on collective agreements should be harmonized to prevent ambiguity, which propagates disputes on validity of collective agreements and undermines their enforceability. The definition of "collective agreement" and the process of registration of collective agreements under the statutes should be clarified for consistency. It is also important to provide a legal mechanism, process and framework under the Labour Relations Act to regulate negotiation and renegotiation of collective agreements which are already concluded although not registered; there is a lacuna between the time of conclusion of a collective agreement and the 14 days within which concluded collective agreements should be registered. This gap in time may foster mischief to continuously negotiate and renegotiate the terms of an already concluded collective agreement. This was the subject of contention in the case of *Kenafric Industries Limited vs Bakery Confectionary Food Manufacturing and Allied Workers Union [2014] eKLR*.

Streamlining laws and legislations that establish public bodies/institutions and regulating their functions and powers is important for coherency, uniformity and certainty. This will serve to bolster the ability of affected parties to enforce collective agreements in the public sector. Further there is urgent need to clearly delineate and clarify the functions and responsibilities of the national government vis-à-vis those of the county governments which are blurred now.

To improve enforcement of collective agreements in the health sector in Kenya, it is also important to amend the Labour Relations Act to adequately accommodate the needs of essential service sectors. While Sections 78 (1) (f) and 81 (3) of the Labour Relations Act No. 14 of 2007 prohibits strikes for those engaged in essential services, including hospital and fire services, the same is termed unconstitutional and contrary to Article 41 (2) (d) of the Constitution which grants every worker the right to go on strike, which was the ruling of the Court in the case of *Okiya Omtatah Okiti vs Attorney General & 5 others [2015] eKLR*. As such, prohibition of strikes by workers in the health sector (and other sectors listed as providing "essential services") cannot stand in Kenya. The Labour Relations Act and the Constitution provide two extremes; on the one hand, there is a complete prohibition on strikes for those engaged in essential services and on the other hand there is an absolute right for every worker to go on strike regardless of the nature of their work. There are differences in practices across countries. In 2004,

Cyprus abolished the limitation prohibiting strikes in essential services (including strikes in hospital services). However, several countries do have a limited right to industrial action in the health care sector and in many countries health services are classified as an "essential service". In South Africa, for example, the South African Labour Relations Act outrightly prohibits strikes in essential services such as the police and health services. It is important to note that the prohibition of strikes by workers in the hospital service is arguably well-founded as it is intended to prevent anarchy and disruption of vital services which is crucial in preventing disruption of key sectors of the economy. Indeed "essential services" is defined as a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population[46]. Therefore, there may be need to provide a limitation to the right to strike and to limit the ability to fully withdraw labour. Nonetheless, it admitted that if the prohibition was to be upheld and enforced strictly it may lead to abuse by employers.

Separate mechanisms and processes can be explored for health workers and other personnel in "essential services" going on strike. This may include providing a peace obligation to prohibit industrial action during the subsistence of the collective agreement while it remains in force, striving for peaceful settlement of disputes before embarking on industrial action, providing minimum services during a strike in certain sectors, or holding of ballots among workers to decide whether they should go on strike before a strike is taken and application of conciliation procedures. In certain European countries, for example, regulations often specify the notice period for any potential strike in the health care sector, which are often longer than the notice period for other sectors. The notice period ranges from five days in France to ten days in Slovenia, and two weeks in Belgium and Lithuania. For example, in Lithuania, the notice period for a strike is twice as long in the health care sector than in most other sectors (14 as opposed to seven days). In European countries such as France, Germany, Belgium, Greece and Italy, strikes in the health care sector are subject to restrictive legislative measures that require hospitals to maintain a minimum emergency or "vital" operative level of service even during a strike. Because the health care sector is classified as "essential services" sector in a number of countries, often only restricted/partial strikes can proceed (for example, in Belgium, the Czech Republic, Estonia, Greece, Hungary, Ireland, Italy, Malta, Romania and Slovenia).[47] Alternative mechanisms (such as enactment of a separate piece of legislation to deal with essential services) can be put in place to provide a framework to govern strikes by personnel in essential services as opposed to an outright abolition of strikes by personnel in essential

46 Section 81 (1) of the Labour Relations Act of Kenya No. 14 of 2007.

47 European Foundation for the Improvement of Living and Working Conditions, "Employment and Labour Relations in the health care sector in the European Union: How can social dialogue contribute to tackling challenges facing the sector?" (2011) at pg 16 Accessed from: ec.europa.eu/social/BlobServlet?docId=9423&langId=en on 11th January 2018.

services. Belgium has a separate piece of legislation which outlines a separate elaborate procedure for strikes in essential services. The Act could stipulate the number and occupational profile of the personnel required to run health care services during strikes as seen in Malta. On the other hand, the 2013 Constitution of Zimbabwe under Section 65 (3) thereof provides that "except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services" which strikes a balance between the right to go on strike and the need to maintain essential services and provides a broad legislative measure for dealing with essential services. This would ameliorate and mitigate the disruptive effects of failed collective bargaining which prompts strikes by employees engaged in essential services such as hospital services.

For Kenya, it is also important that the Health Act 2017 is implemented as soon as possible considering the devolution system and providing a mechanism to deal with previous legal, regulatory and institutional regimes, to ensure a comprehensive and coherent legal framework in the health sector. A parting shot would be to encourage the unions for doctors and nurses to use their influence and mandates to negotiate for improvement of other working terms and conditions which may ultimately work to transform the health sector to improve the quality of health care in Kenya. This would include negotiating to improve working hours for doctors. There is need to ensure that the skills, training and competences of medical personnel are updated on a regular basis to ensure they are continuously informed on and conversant with current developments and trends in medical technology, procedures and patient care, which may be achieved by negotiating through the forums created in the collective bargaining process. In the Netherlands, parties have previously negotiated for medical personnel to have access to life-long vocational and learning avenues and relevant professional training. The Salaries and Remuneration Commission ought to avail the data it relies on to the trade unions (with appropriate caveats and safeguards placed) to ensure equality in access to information during the negotiations and to ensure trade unions are better-informed. This would encourage parties to work towards resolution as opposed to adopting a protracted contest of wills. The Labour Relations Act mandates disclosure of information by employers to trade unions.[48] However, this should also extend to the Salaries and Remuneration Commission. It has been noted that in Japan, employees are entitled to full information since decisions concerning the enterprise must be made jointly by management and

48 Section 57 (2) of the Labour Relations Act No. 14 of 2007.

unions.[49] Employees and employers are considered "partners" in the enterprise. In exchange for job security in the form of permanent employment and security of tenure, employees and trade unions cooperate with employers to maintain the viability of the organization as a going concern[50]. Employees and employers assume joint responsibility to ensure the survival and prosperity of the company.[51] Through these policies, employees and trade unions become essential parties to the decision-making process. To ensure ownership of the decision-making process, full disclosure of information by the employer is necessary. These principles should be entrenched in organizations in Kenya. Although the requirement for disclosure of information already applies to employers *vis-à-vis* their employees, this requirement should extend to the Salaries and Remuneration Commission as well. The principle of maintaining cooperative relationships is necessary to mitigate the adversarial nature of collective bargaining and temper resistance towards the Salaries and Remuneration Commission especially where the wages set by the Commission are final and where the Commission may be perceived to be partial to the interests of the government institutions they advise. However, it is recognized that in Kenya this risks "opening a can of worms" where the data and methodology relied on by the Salaries and Remuneration Commission may be exposed to challenge.

Nonetheless, cognizance must be made of the fact that to influence trends and reform of key sectors of the economy, there must be a level of involvement of trade unions in the collective bargaining of wages of public officers to enable concertation, mutual exchange of information, open discussion and knowledge sharing. In a study on Employment and Labour Relations in the health care sector in the European Union, it was noted that the emphasis of trade union intervention and the focus of expressed views have been on the shape of reforms, ensuring the attractiveness of the health sector, and the need to ensure that quality jobs can be created to meet additional demands in an increasingly difficult budgetary environment.[52]

Further, affected trade unions should consider entering into a preliminary/ interlocutory/interim agreement pending conclusion of a collective agreement to provide an effective framework for the terms and conditions of the collective bargaining process, such as expedient dispute resolution where the employer

49 Vettori, Maria-Stella "Alternative Means to Regulate the Employment Relationship in the Changing World of Work" (May 2005) pg 34 Submitted in fulfilment of the requirements for the degree Doctor of Laws (LLD) In the Department of Mercantile Law, Faculty of Law, University of Pretoria.

50 Ibid at pg 35.

51 Ibid at pg 34.

52 European Foundation for the Improvement of Living and Working Conditions, "Employment and Labour Relations in the health care sector in the European Union: How can social dialogue contribute to tackling challenges facing the sector?" at pg 13 Accessed from: ec.europa.eu/social/BlobServlet?docId=9423&langId=en on 11th January 2018.

delays conclusion of a collective agreement and timelines for conclusion of the agreement. For instance, the return-to-work agreement which was signed by the Kenya Medical Practitioners and Dentists Union provided that the parties shall conclude and register the collective agreement within 60 days.

More importantly, for both private and public sector employers, an assessment of the financial and fiscal implications is necessary prior to commencement of the collective bargaining process and prior to negotiation and execution to ensure that any agreement concluded is fiscally sustainable and enforceable. It is important that any collective bargaining process undergoes an objective and technical assessment of the financial and fiscal implications of the proposed terms to ensure that concluded agreements are fiscally sustainable and therefore enforceable. In the public sector, this has been provided for in Regulation 18 (2) and (3) of the Salaries and Remuneration (Review of Salaries and Remuneration, Submission of Proposals and Pay Determination and Advice) Regulations 2012 and the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations 2013, which provide that the management of a public service organization with unionisable employees must seek the advice of the Salaries and Remuneration Commission before the commencement of any collective bargaining process on the sustainability of the proposal of the union. Where the collective bargaining process is successful, the management is also required to confirm the fiscal sustainability of the negotiated package with the Salaries and Remuneration Commission before signing of the agreement. Although the regulations appear to dictate the progression of the collective bargaining process, public sector employers and trade unions should observe these regulations and follow the process that has been prescribed for collective bargaining to avoid disputes and litigation. Further, the National Treasury should be consulted to ensure that it has the necessary funds to meet the demands of the collective agreement.

There is also need to train collective bargaining parties such as trade unions, employers and employees on the law affecting them, the collective bargaining process and any resultant agreement for harmonization of practices. This is an emerging area of law which may be esoteric to the general public and to the persons involved in the collective bargaining process.

8. Directions for Future Research

Although this study was a legal analysis of the existing legal frameworks governing and surrounding collective bargaining, there are other challenges impeding the collective bargaining process which ought to be considered separately including the role and impact of trade unions in collective bargaining. Other areas could include the effect of the cost of production in collective bargaining.

Future studies could also consider an assessment of the correlation between collective bargaining and performance of employees in the workplace.

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