

## An Overview of Industrial Relations in Kenya

Ruth Tubey<sup>1</sup>; Kipkemboi Jacob Rotich<sup>2</sup>; Margaret Bundotich<sup>3</sup>

1 Moi University, School of Human Resource Development, Department of Entrepreneurship Studies, P.o Box 3900-30100, Eldoret, Kenya.

2 Moi University, School of Human Resource Development, Department of Entrepreneurship Studies , P.o Box 3900-30100, Eldoret, Kenya.

3 Moi University, School of Human Resource Development, Department of Development Studies, P.o Box 3900-30100, Eldoret, Kenya.

Email: [ruthtubey@gmail.com](mailto:ruthtubey@gmail.com)/ \*[richardorotich@gmail.com](mailto:richardorotich@gmail.com)/[mcbundotich@gmail.com](mailto:mcbundotich@gmail.com)

### Abstract

*The development of labour law in Kenya evolved in the voluntary tradition to what is today arguably one of the best institutionalized labour market governance systems in Africa. However, the persistence of labour unrest in various sectors of the Kenyan economy points to the need for a reexamination of the existing labour code in a bid to address areas of weakness for sound economic development. This paper traces the development of labour relations in Kenya from the pre independence period. Key milestones are discussed and examined in the light of best practices elsewhere in the world. It is the expectations of the authors that this paper will provide useful insight to labour officials both in government and business organizations in Kenya and elsewhere.*

**Key words:** labour laws, industrial labour relations, collective bargaining, tripartism

### Introduction

In this paper, we trace the development of industrial relations in Kenya within the legal and constitutional frameworks. In addition, we discuss the regulatory mechanisms available in the labour sector in Kenya. Here, we confine ourselves to the principles of collective bargaining and social dialogue as well as the institutions at play as far as the field of industrial relations is concerned.

#### Industrial relations in Kenya

The evolution of tripartism and voluntary industrial relations in Kenya just before independence followed decades of adversity between the colonial authorities and the restive labour movement, whose protests and struggle for freedom and labour rights were brutally suppressed by the authorities (Aluchio, 1998). Trade unions' response was equally uncompromising, as they embarked on strikes and other forms of protests across the country. These protests were met with the stiff hand of the authorities, determined to quash worker militancy at all costs. Strikes were banned while labour leaders were imprisoned, but these actions generally failed to intimidate the labour leaders or arrest the growing discontent with the colonial authorities. The vexed industrial atmosphere was disturbing enough that it created anxieties in colonial circles about the political role of the labour movement and how it might affect pending political independence (Hagglund, 2008).

The transition from the chaotic relations of the period was a dramatic reversal of acrimonious labour relations in favour of what is today arguably one of the best institutionalized labour market governance systems in Africa. In other words, the employment relationship in Kenya evolved in the voluntary tradition, by which the government provides the legal framework within which the parties freely undertake to relate among themselves in a manner that promotes labour, peace and nation-building. It was this resolve to address the labour challenge in a constructive manner that inspired the government, employers and labour to agree on a joint commitment towards industrial harmony and peaceful relations for national development (Aluchio, 1998).

This consensus led the parties to adopt an Industrial Relations Charter, in October 1962. The charter established organizational rights for workers, and committed the parties to tripartite consultation, collective bargaining and peaceful settlement of trade disputes. The historic agreement was without precedent in Africa, and could be seen as an evidence of the commitment of the parties to use industrial relations as a strategic tool for national development. Following the charter, the government established in 1964 an Industrial Court to facilitate the peaceful settlement of trade disputes. The charter itself was a voluntary agreement. Nevertheless, it represented a genuine commitment of the tripartite parties towards cooperation and peaceful relations in the workplace. The record on trade disputes for the following years attests to this commitment. The number of strikes progressively declined, from 285 in 1962, to 250 the following year, and down to 200 in 1965. By 1968, the number of strikes

had declined to 93 (Aluchio, 1998). Overall, public policy and the institutional arrangements for industrial and employment relations reflect this thrust of voluntarism and tripartite cooperation.

### **Development of labour law**

Right from independence, the legal and institutional framework for employment relations recognized freedom of association and the right to collective bargaining. In fact these rights are entrenched in Kenya's constitution and form part of the foundation of employment relations in the country. However, changing economic and political conditions had from time to time created conditions that tended to undermine these rights. For example, public policies of the 1990s led to the denial of labour rights in the industrial zones, while the right to collective bargaining remains unrealized in much of the public sector.

After decades of indecisive actualization of labour rights for several categories of workers, the government and the social partners undertook a comprehensive reformulation of the labour code that led to the enactment of five major laws in 2007 (Fashoyin, 2007). In many respects, the new legal framework can be described as a favourable response to emerging labour market realities, particularly the changing composition of the labour force and the structure of employment. In particular, these realities dictated the critical need for greater social safety nets for the growing proportion of workers with inadequate or lack of social protection. Finding a suitable balance between a socially responsive legal framework and the inevitable flexibility in the highly competitive global environment is a major challenge for the tripartite partners. Also, the thrust of some of the provisions of the legal framework remains a source of anxiety among the labour market actors (Fashoyin, 2007).

The five laws enacted in 2007 included (a) the labour relations act, (b) the employment act, (c) the labour institutions act, (c) the work injury benefits act and (d) the occupation, safety and health act.

The following is an overview of the labour laws promulgated in 2007 as a major breakthrough in the field of industrial relations in Kenya.

The Labour Relations Act represents the main legal foundation for collective bargaining and labour relations. The new law combines two earlier laws, namely the Trade Disputes Act and the Trade Unions Act. In many respects, the Labour Relations Act contains substantial improvements, particularly in creating more efficient and responsive operational procedures to promote employment relations and labour peace in the country. Specifically, it promotes the collective bargaining process, by encouraging the parties to engage in good faith bargaining. For example, it is mandatory for the parties to disclose information that may be required by the other party, particularly if such information clarifies a particular party's bargaining position. It also reaffirms, even if controversial, the role of the Industrial Court in the registration and approval of collective bargaining agreements (Fashoyin, 2007).

The provisions on dispute management are intended to assure prompt and speedy resolution of disputes. Thus, a dispute lodged with the Ministry of Labour must be settled within 30 days. If the investigation or conciliation role of the ministry fails, the parties must take their dispute to the Industrial Court, which also must make a decision within a reasonable time period. In other words, the law frowns at delays in a dispute situation, while protecting the rights of the parties.

Where a party gives notice to embark on a strike or lock-out, the party receiving the notice can within 7 days go to the Industrial Court and seek a certificate of urgency to prohibit the issuing party from embarking on the strike or lock-out. This is possible especially when (a) the strike or lockout is prohibited under the Act or (b) the party that issued the notice has failed to participate in conciliation in good faith with a view to resolving the dispute. The Industrial Court may issue the certification, in which case the matter is before the court and a strike or lock-out is prohibited. However, where the court refuses to grant the certificate, it becomes a protected strike or lockout. A protected strike is one where, amongst other things, seven days' written notice has been given to the other parties and to the Minister by the authorized representative of the trade union, employer or employers' association. A good example is the ongoing strike by teachers in Kenya.

Generally, the Labour Relations Act streamlines prejudicial trade dispute resolution machinery and stipulates specific time-frames for dispute disposal, and provides for Alternative Dispute Resolution machinery. It also sets out clear procedures and guidelines for protected industrial action.

The Employment Act is a substantial improvement over the old Employment Act (and also the Regulation of Wages and Conditions of Employment Act) which it replaced. The law seeks to discourage the possible recourse to atypical forms of employment. For example, it provides that casual workers cannot be in this type of employment for more than 30 days (in contrast to the 3 months in the old law) of continuous employment. In such cases, the Act converts “casual employment” to “contractual terms” provided the requirements therein are met. Notwithstanding this forthright provision of the law, the question remains whether employers will apply it, or whether the enforcement authority will courageously enforce it.

The Act also extends the maternity leave period to 3 months, and contains a provision which recognizes two weeks’ paternity leave for fathers. As part of eliminating discrimination, the act requires employers to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. The act identifies grounds such as race, colour, sex, language, religion, political or any other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status, or HIV status as not constituting grounds for discrimination in employment.

Another innovation is the harmonization of the provisions on child labour. Thus in regard to the definition of a “child” as contained in the Children’s Act, the law raises the age of a child from 16 to 18 years. The Act also provides for an insurance benefit scheme for employees who suffer redundancy, while also safeguarding workers’ dues in the event of an employer’s insolvency. However, in the case of the unemployment insurance scheme, the Act gives the Minister discretion in making rules that apply to certain employers under an established national insurance scheme or a private scheme underwritten by a private insurer approved by the Minister.

It is important to note that employers have criticized several aspects of this particular law, arguing that the law does not provide adequate flexibility in present-day labour market realities. However, it remains to be seen whether the provisions will in practice incapacitate employers’ ability to achieve any desirable flexibility in manpower deployment.

The Labour Institutions Act is an innovation in the legal framework, as it creates a number of vitally important bodies for the effective functioning of the labour market. One such institution, the National Labour Board, seeks to strengthen tripartism with an extensive mandate on employment related issues, such as a review on general labour relations, on strikes and lockouts; the number of complaints lodged by employees against employers under the law relating to labour relations and vice-versa; and progress in the settlement of such complaints or disputes. Furthermore, the Board is empowered to advise the Minister on any matters relating to labour relations and trade unionism, the labour inspection system and the administration of labour laws in the country.

Several of the provisions in the law are designed to strengthen tripartism. For example, one key provision reaffirms the Wages Councils system which is the foundation for the critically important minimum wage. Thus, the law specifically envisages a general wages council and an agricultural wages council. At the same time, the law endorses sectoral wages councils *only* where this is deemed necessary by the Minister. However, most of these sectoral councils have become dormant, ostensibly because, in the view of the Minister, and also the parties, the collective bargaining machinery is reasonably efficient in dealing with wage determination in the industrial sectors (Fashoyin, 2007). Also to be demonstrated is the evidence that the periodic review of the minimum wage through tripartite negotiations has contributed to ensuring safety nets for workers, irrespective of whether they are in formal or informal employment.

The law also provides for a reinvigorated Industrial Court, whose judges are elevated to the status of high court judges, in effect enhancing the respect for the court. The court has expanded powers, including the power to order the parties to share information or the arrest and conviction of a disobedient party.

The Work Injury Benefits Act replaced the workmen compensation provisions in the previous Workmen’s Compensation Act of 1949 as amended. The new law disallows common law claims whereas claims could be made under both the old Workmen’s Compensation Act and common law. The Act extends insurance cover and ensures adequate compensation for injury and work-related diseases regardless of the employer’s insolvency. The new law provides for payment of injury benefits depending on the severity and/or length of disability (Bor, 2007)

Related to this is the Occupational Safety and Health Act, which repealed the Factories and Other Places of Work Act. The new law seeks to secure safety and health for workers in all workplaces, whether work is performed temporarily or permanently. Also by including the self-employed in this innovative law, the government seeks to ensure that protection is extended beyond the factory or formal workplaces, to a larger segment of the population. The law prohibits employment of children under the age of 18 years, where their safety is at risk.

Furthermore, it seeks to promote a safety culture in workplaces, through education and training in occupational safety and health. The law encourages entrepreneurs to set achievable safety targets for their enterprises, to establish joint health and safety committees in the workplace, and to carry out annual safety and health audits.

It is important to note that employers have criticized several provisions of the new labour regime, which they pinpoint as barriers to flexibility in the labour market, and with potential adverse effects on the sustainability of enterprises and employment. Despite the criticisms, however, employers welcome the reform as necessary for a safe work environment which promotes good labour relations and enterprise productivity. Indeed, the reform has undoubtedly introduced several progressive even if contestable provisions, as well as questions about the fairness or otherwise of certain provisions, or their effects on the advancement of labour peace, workers' welfare, enterprise productivity and labour-management cooperation.

The laws have come into effect in circumstances that might have detracted from the extensive consultation and tripartite involvement in every stage of the reform process. Specifically, the employers have queried some provisions, on the argument that the final stage in the process was devoid of consultation, because certain provisions were not the outcome of tripartite decision. The controversies highlight the inherent differences on the extent of flexibility that was required from public policy. Notwithstanding the misgivings of the employers, the new labour code is a major innovation of the legal framework of employment relations in the country. As I have demonstrated in this paper, the legislative changes have given considerable boost to the collective bargaining process, by generally strengthening organizational rights, creating or strengthening institutions, procedures and rules of engagement, good faith bargaining and access to information. The potential contribution of the new legal framework in the realization of a more enhanced industrial relations system in Kenya is great.

### **Constitutional framework for industrial relations in Kenya**

The constitution of Kenya, lauded as the most progressive constitution in the world has an enhanced bill of rights which, among other rights, addresses labour relations. Article 41 (1) of the constitution of Kenya states that every person has the right to fair labour practices. This is followed by broad provision in section 2 which deals with (a) fair remuneration, (b) reasonable working conditions, (c) formation, joining and participation in trade union activities and programmes and (d) participation in strikes. Section 3 of the same article outlines the rights of employers with regard to (a) formation and/or joining of employers' organizations and (b) participation in the activities and programmes of an employers' organization.

These provisions have been operationalized by the enabling legislation commonly referred to as labour laws of Kenya, 2007 discussed elsewhere in this paper.

### **Regulatory mechanisms in the labour sector**

There are various principles and institutions that regulate affairs in the labour sector. In Kenya, these principles and institutions largely operate within the framework of the law and the constitution. The most common principles used in the labour sector are collective bargaining and social dialogue/tripartism whereas the various institutions include the employers' organizations, the labour unions, the national labour board, the industrial court and the wage councils. I discuss these in the section below.

### **Collective bargaining**

Collective Bargaining may take place at the national, industry or enterprise level. It could be said that collective bargaining is a means of settling issues relating to terms and conditions of employment and has little to do with labour management relations policy formulation. Nevertheless collective bargaining may reflect - sometimes explicitly and at other times implicitly - labour management relations policy such as wage guidelines and termination of employment procedures. It can also be a means of developing policy formulation at the industry level. For instance, arrangements and agreements resulting from collective bargaining may provide ways in

which wages could be adjusted to meet increases in the cost of living, in which event they will constitute an agreed policy on this issue. They may link a part of wage increases to productivity increases or provide for productivity gain sharing in other ways, in which event they represent policy on aspects of productivity. Methods of dispute settlement would reflect a desire for the peaceful resolution of disputes.

In a more general sense, collective bargaining (which has its supporters as well as its critics) is a critical element in pluralism. As Arthur (1985) explains, "why does pluralism place collective bargaining at the centre? Because, as adherents and critics agree, in the pluralist vision, labour and management, as autonomous interest groups, can and should jointly fix the rules of employment upon terms which represent an acceptable compromise between their competing interests. But is this process of negotiation and compromise a good in itself? Pluralists believe that it is, although their rationales vary: collective bargaining replicates the processes by which conflict is and should always be resolved in a democracy; it projects democratic values into the workplace; it preserves the autonomy of social forces as against the pervasive influence of the state; it is faithful to - but makes more acceptable by its mobilization of countervailing power - the conventional marketplace techniques of economic ordering in a capitalist economy; it ensures the participation, and thereby the moral commitment, of those most directly concerned with outcomes; it represents a significant advance over abusive and oppressive unilateral employer control."

Collective bargaining, as it promotes democracy at the enterprise as well as at the national and the industry levels (depending at which level collective bargaining takes place), is an important aspect of a sound industrial relations system. This fact is emphasized by the ILO Convention No. 98 of 1949 relating to the Right to Organize and to Bargain Collectively describes collective bargaining as: "Voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by collective agreements."

### **Social dialogue/Tripartism**

Tripartism is the process through which the foundation for a sound industrial relations system can be laid at the national level. Ideally, tripartism is the process whereby the government, the most representative workers' and employers' organizations as independent and equal partners, consult with each other on labour market and related issues which are within their spheres of competence, and jointly formulate and implement national policies on such issues. However, this ideal situation is seldom reflected in practice, especially in developing countries or in societies with fairly authoritarian governments which believe that the direction of economic and social development is largely their responsibility. A more realistic model where developing countries are concerned is one in which a government consults the most representative employers' and workers' organizations on labour market and related issues which are within their spheres of competence, and takes account of their views in national policy formulation and its implementation.

There are many examples of tripartite mechanisms at the national level, as well as informal applications of tripartism. In many countries there are minimum wage fixing bodies which reflect the participation of all three parties, often leading to a consensus on minimum wages, and sometimes on other minimum terms of employment. As De Silva (2005) observes, in some countries (as in Australia in recent years), agreements are reached at the national level among the three partners after a process of bargaining on important social policy issues. The principles agreed upon in the 1950s in Japan as a forerunner to its productivity movement did much towards assisting that country's productivity growth. In Japan, the Industry and Labour Conference has been a major form of cooperation at the national level, and consultative mechanisms (both tripartite and bipartite) exist at the industry level. In Singapore the National Productivity Board is a tripartite body, and is credited with much of the success in productivity improvement. Tripartite participation in Singapore's National Wage Council has avoided a potential conflict on wages. The introduction of a flexible wage system in Singapore was made possible by a tripartite approach towards reaching a consensus on the issue in the late 1980s (De Silva, 2005)

At the national level the mechanisms and procedures could be formal and institutionalized, or informal and ad hoc. Where the labour administration system consults, on an ad hoc basis, workers' and employers' organizations on subjects falling within their purview, it represents a method of policy formulation on labour management relations. Sometimes these consultations may take place between the two social partners and other public authorities. For instance, a finance ministry may consult the social partners on an issue relating to wage policy. National level policy formulation can take place through institutions which provide for periodic tripartite

discussion and consultation (De Silva, 2005). There are also examples of institutions with functions limited to a particular subject matter such as training, social security, minimum wages (for instance minimum wage fixing bodies) and safety and health. Such specialized bodies may even cover collective bargaining, as in the case of the Singapore National Wage Council created in 1972 which was empowered to issue annual guidelines to coordinate collective bargaining with overall economic policy so as to ensure that wages remain consistent with economic development.

Clarke and Niland (2005) note that labour management relations policy formulation may take place and be reflected in basic agreements or codes or industrial relations charters in which all three parties in the labour relations system have participated. Some such agreements may be bipartite, and may cover a variety of subjects including principles and procedures of labour relations such as freedom of association, trade union recognition, collective bargaining, labour-management cooperation mechanisms, procedures for the prevention and settlement of disputes among others. The 1983 Australian national consensus (Accord) and the succeeding Accords on economic questions among the government, trade unions and employers contributed towards increased employment and profits, and a reduction in the days lost on account of strikes. Other examples include the agreements negotiated by the Tripartite Labour Conference in India (in particular the Code of Discipline of 1958), the Code of Practice for Industrial Harmony (Malaysia 1975), the Code of Practice for the Promotion of Labour Relations (Thailand 1981), the Pancasila Labour Relations (Indonesia) and the labour policies resulting from tripartite consultations in Pakistan (Clarke and Niland, 2005)

The contribution which tripartism can make to the establishment of a sound industrial relations system can hardly be over-emphasized. The rationale of tripartism is to be found in the principle of democracy, the essence of which is a sharing or diffusion of power flowing from the encouragement or recognition of various pressure groups in a society as an effective safeguard against the centralization of power. It has been aptly remarked that "every source of independent power in a democracy is part of its strength, so long as it can be guided to seek its outlet through the democratic political system" (Clegg, 1960). Tripartism as a process is a part of a pluralistic outlook on society through which stability is maintained, freedom of association being the main principle because without the right of association the interest groups in a society cannot function effectively.

As expressed by Clegg (1960), pluralism's theme is when "men associate together to further their common interests and desires; their associations exert pressure on each other and on the government; the concessions which follow help to bind society together; thereafter stability is maintained by further concessions and adjustments as new associations emerge and power shifts from one group to another". Acceptance of the principle of sharing power entails recognition of the fact that capital and labour represent two important pressure groups in society, if for no other reason than that both of them taken together are the principal providers of goods and services and wealth-creators in a market economy.

### **Labour actors in Kenya**

There has been an enduring unity and stability within each of the principal actors in the employment relationship in Kenya. As Fashoyin (2007) observes, this stability is largely attributable to a social contract that was established soon after independence and is the outcome of a labour policy that encouraged at that early stage fewer but strong trade unions, most of which have the capacity to relate with employers on equal terms. On the employers' side, there has also been an internal resolve, for most of the period, to support one body as the sole employers' voice on labour and socioeconomic issues. The premier employers and workers organizations in Kenya have broad appeal in their respective constituencies and have remained the national voice for their members.

The following are the actors commonly engaged in the process of collective bargaining and social dialogue in Kenya.

### **The Federation of Kenya Employers**

The Federation of Kenya Employers, FKE, is made up of 13 sectoral employers' associations and some 2,000 individual/direct enterprise members, totaling about 5,000 in membership in 2009. These figures represent a reversal of the decline which started during the mid-1990s up to 2005, when several enterprises withdrew their membership, in part as a result of unfavourable economic conditions and in part due to a brief spell of representational competition among business interests in the country (Heyler & Strevska, 2010)

Evidently, the FKE has survived the rough times, and appears to have restored itself as the main voice of employers on issues of the labour market, and generally in the economic and social development spheres. Today the FKE boasts of a pool of highly informed seasoned professionals, providing quality technical advice and services to members, as well as effective participation in various institutions of social dialogue in the country. Over the years, not only has the FKE become the sole voice of business on labour and social affairs, it is also the main body that negotiates collective agreements for all the sectoral associations and some 200 individual employers with the workers' organization.

The role of the FKE in collective bargaining negotiations is however not by design; rather, it arose mainly due to the technical expertise that the federation officials had acquired over the years on the legal and institutional framework for employment relations. Related is the favourable image of the federation and the confidence of the members by which they voluntarily designate the federation as lead negotiator in collective bargaining, at both enterprise and sectoral levels. Interestingly, this arrangement has for the most part enjoyed the confidence of labour, which also acknowledges the FKE as fair and impartial in upholding the legal and institutional framework for collective bargaining. In this regard, the FKE is not afraid of letting any of its members know when their conduct or practice might be at variance with the legal framework or with what is considered to be good industrial relations practice.

Apart from an active engagement in the collective bargaining process, the FKE is equally active in tripartite consultation and engagement with government and labour, both on issues that are directly related to the labour market and those that deal with broader economic and social policy. In several of such cases, the representation or participation of the federation is at the top level. One such high level involvement is on the board of the re-invigorated National Social Security Fund (NSSF) where the executive director of the federation is the employers' representative. Not only do gestures such as this provide an eminent opportunity to contribute to shaping public policy, they also enhance the prospect for public policy that responds to employers' broader interests.

### **The Central Organization of Trade Unions, COTU**

In contrast to most labour movements in Africa, the trade unions in Kenya are united in one strong labour centre, the Central Organization of Trade Unions, COTU. What is particularly peculiar about this structure in the country is that, despite the fact that 3 of the 6 unions which are not affiliated to COTU are among the largest in the country (for example The Kenya National Union of Teachers, KNUT) none of them has shown interest in forming a competing labour centre. Attempts were recently made by Trade Union Congress of Kenya (TUC – KE) formerly PUSSETU (Public Servants Trade Union) but the efforts have not borne any serious labour centre equivalent to COTU. By custom or for largely unknown reasons, these unions choose to operate as independent unions.

In 2009 COTU claimed a membership of about 1 million through its 34 affiliated unions, a claim that is most probably exaggerated. Unfortunately, the records of the Registrar of Trade Unions are not helpful. The records are neither regularly updated nor has there been an effort on the part of this government institution to cross check the accuracy of the submissions made to it by the unions. The big unions in the public sector are not its affiliates. Even in the private sector where it draws most of its membership, there has been, in recent years, considerable membership decline in some affiliated unions. For example, the postal and communications union, which a few years ago had a membership of 27,000, was left with about 3,000 members in 2009, ostensibly due to retrenchments and corresponding increase in atypical employment.

But while there has been some increase in union membership in some sectors, notably in universities and agriculture, these increases are not large enough to compensate for employment loss or the growth of atypical employment, such as the fast growing mobile phone service, where unionization is improbable. Also, the planned unionization of the huge *Jua Kali* operators in the informal economy is yet to be realized. In view of the foregoing, it is difficult to know the precise membership size of COTU. However, a realistic estimate of the membership strength of the labour centre is probably about 500,000, which represents a huge increase of 66.7 per cent in the 5 year period ending 2010. When the membership in the non-affiliated unions is added to COTU's, there is a union density of about 30 percent, i.e. the proportion of unionized wage and salary earners in the country (Heyler & Strevska, 2010)

As comparative research suggests, union density is higher in Kenya than in several African countries. As Hayter and Stoevska (2010) show, union density in Kenya is significantly higher than those observed in Egypt: 26.1 per cent; in Ethiopia: 12.9 per cent; Malawi: 20.6 per cent; and in Tanzania: 18.7 per cent. However, in the case of Ghana and South Africa, union density was considerably higher than in Kenya, at 70 per cent and 40 per cent respectively. In any event, despite the difficulty in membership recruitment, Kenyan unions have begun to recruit new members, particularly in the growing atypical employment workforce. For example, unions in sugar, electrical and bakery industries are recruiting casual workers into their membership.

In the collective bargaining arena, COTU does not directly take part in the sectoral or enterprise level negotiations, this function being performed by individual affiliates, although on rare occasions, COTU officials may join the negotiating team of an affiliated union. This arrangement contrasts with the FKE, which actively negotiates on behalf of its members, at either the sectoral or enterprise level. In any event, COTU provides guidance and advice, and statistics to affiliates, which may seek its assistance during negotiations. In this role and through a core of experts - an economist and experts in gender, child labour and HIV/AIDS, COTU has acquired core expertise and technical knowledge which are regularly made available to its affiliated members.

The main challenges that the labour centre faces include reversing a declining union membership or appeal, which has arisen from multiple causes, such as employers' push for flexibility that exacerbates the growth of forms of atypical employment. These have been accompanied by the hostility of some employers towards unions. In its strategic plan, COTU seeks to address these and several organizational issues, perhaps in the anticipation that the decent work country programme would help create productive and sustainable employment opportunities as has been outlined in the government's long term development strategy. In the plan, COTU promises to intensify membership recruitment, especially of workers in atypical employment, improve service delivery to members, undertake capacity building, and enhance its advocacy role and lobbying to influence public policy on economic and social development (Strategic Plan, COTU 2007 – 2012).

Indeed, both the FKE and COTU are investing considerable resources in building the capacity of their members, equipping them with knowledge of specific employment relations themes, and more generally on economic and social issues that affect their respective mandates. Both organizations run pedagogic training programmes that are designed to equip their members with tools and knowledge they need to deal with societal issues, such as globalization and its impact on enterprises and the labour market.

### **The National Labour Board**

The National Labour Board (NLB) is the successor to the Labour Advisory Board, and operates as a tripartite advisory body to the Minister of labour on general issues pertaining to various elements of the labour market, including employment, productivity and wages, training, employment relations, labour legislation and matters relating to trade unions. It deals also with issues relating to the institutions and processes pertaining to the settlement of labour disputes. At another level, the NLB advises the minister on Kenya's participation in international organizations, notably the ILO and other regional and continental institutions dedicated to labour, such as the African Union's Labour and Social Affairs Commission.

The membership of the NLB is tripartite, comprising 3 representatives each from the employers and workers, while the government is represented by 6 members. The board also includes 2 independent members and a chairperson who are experienced in labour relations matters. In many respects, this membership structure takes its cue from institutions such as the ILO. Generally the board functions include the monitoring of developments in the broad area of labour, by which it identifies and discusses issues that can in one way or another affect the smooth functioning of the employment relationship and suggest measures which the government could take, either to change, develop or promote specific issues. Measures in this broad category include providing the minister with advice on how to promote and sustain peaceful relations in the workplace, or how the government might address a potentially damaging development in particular sectors or workplaces. It also involves a tripartite discussion of international issues on which the government might wish to take a position, such as deliberations at the annual International Labour Conference.

Although the functions of the Board are largely confined to the general area of labour, it is also mandated to investigate or carry out research on "labour, economic and social policy". While there is no evidence available



that points to dedicated research commissioned by the board, this is nevertheless a critical opening for innovation and creativity in contributing to national issues that may impact on the labour market. In other words, this window places the NLB in a strategic position within the broader dialogue on socioeconomic issues that are important to the labour market, and could facilitate a potentially fruitful interface with institutions such as the National Economic and Social Council. This is dependent on the Board being able to develop a proactive agenda and clearly defined strategic plan on how the labour market could effectively respond to the changing nature of the employment relationship in Kenya. It also depends on the availability of adequate manpower and material resources, as well as the readiness of the government to make optimum use of the knowledge and expertise of the board to advance the effectiveness of the labour market.

### **The Industrial Court of Kenya**

The Industrial Court of Kenya is an Institution of Social Dialogue. Social Dialogue has been described by the ILO to include all types of negotiation, consultation, exchange of information and collective bargaining. The Industrial Court plays an important role in facilitating social dialogue. The traditional players in social dialogue are the governments, employers and employees. These form the social partnership. They dialogue about issues of common interest, particularly issues that involve socio-economic policies.

The Industrial Court is established in accordance with Article 162 (2) of the Constitution and has the same status as the High Court. The court consists of the Principal Judge and other judges appointed by the President on recommendation by the Judicial Service Commission. The Industrial Court has original and appellate jurisdiction to hear and determine all disputes relating to employment and labor relations. The court has powers to adjudicate in disputes relating to, or arising out of employment between an employer and employee, an employer and a trade union, trade unions, employer organizations among others. The Industrial Court has power to make the following orders within its jurisdiction: interim preservation orders including injunctions in cases of emergency; prohibition; specific performance; declaration of rights; compensation; damages; reinstatement or any other appropriate relief as the court may deem fit. The court orders are enforceable in accordance with the rules made under the Act.

As a way of ensuring expeditious delivery of justice, the court may recommend on its own motion or at the request of the parties the use of any other appropriate means of dispute resolution including: internal methods; conciliation; mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution. The court may refuse to determine any dispute except for appeal or review if it is satisfied that there was no attempt to resolve the matter through alternative dispute resolution. The court also has the power to review its judgments, awards, orders or decrees as per the rules.

Appeals from the Industrial Court lie with the Court of Appeal in accordance with Article 164(3) of the Constitution only on matters of law. The appellate jurisdiction of the court is restricted to hearing and determining appeals from decisions of the Registrar of Trade Unions and any other court, local tribunal or Commission as prescribed under any written law.

### **Wage councils**

Wage councils are established under section 43 of the labour institutions act 2007. The act empowers the minister responsible for labour to establish wage councils whose functions include (a) investigating the remuneration and conditions of employment in any sector; (b) inviting and considering written and oral representations, in the prescribed manner, from interested parties and (c) making recommendations to the Minister on minimum wage remuneration and conditions of employment.

The minimum wage was introduced through the wage council system before independence, and at a time when collective bargaining was at its infancy (Fashoyin, 2007). Wage councils have the goal of putting in place a general (minimum) wage, in addition to a separate council in agriculture and in several industrial sectors, particularly where collective bargaining is weak or nonexistent. In either of these cases, a wage minimum is invariably set. Thus, in the private sector, whether collective bargaining takes place at the sectoral or enterprise level, there is the implicit understanding that collective bargaining negotiations that take place are intended to build on or improve on the minimum that has been set through the wage council system.

Unlike the sector-specific industrial and agricultural wage councils, the general wage council applies to all unspecified sectors and by far has the broadest coverage. Wage councils are setup by the Minister after consultation with the social partners. There were about 17 wage councils before the recent reform of the labour code, although most of them had been dormant before then (Fashoyin, 2007). The relative non-use of the industrial wage councils arose from the disinterest among employers who, instead prefer to apply the prevailing CBA, or the industry minimum wage in their workplaces. Generally, wage councils build on the classic notion of the minimum wage, by which a minimum is set below which wages for a defined population of workers should not fall (Eyraud and Saget, 2005). The logic of the wage councils is that several wage earners are either unorganized, or for one reason or another, are unable to use the collective bargaining process to improve their employment interests.

This might be so either because of the employer's unwillingness to develop a bargaining relationship with the workers, or because the latter were not organized. In cases such as these, public policy response has been the promotion of negotiations at the tripartite wage councils. Once a particular wage and conditions are agreed and approved, every employer in the formal sector is obliged to apply the agreed minimum wage, including hours of work, overtime, annual leave and applicable public holidays as published in the Wages Order. The wage council agreement is based normally on the report of an independent study of economic trends in the particular industry or sector or, in the case of the general wage council, of the national economy. In the event of a rare case of failure to agree in a wage council, the decision devolves on the minister, who then holds informal consultations with other experts and industry leaders, on the basis of which he decides the applicable wage rates and issues the wage order (Eyraud and Saget, 2005)

In addition, the wage councils provide the statutory minimum wages which are the outcomes of tripartite negotiations between government, employers and workers, and represent a political consensus that balances, on the one hand, national commitment to protect low wage earners and, on the other, the ability of business to pay, particularly in small and medium size enterprises. Generally, negotiation at industry or enterprise level takes its cue from the minimum wage, as determined in these councils. In this context, the wage councils in Kenya are aligned with a key objective of the Declaration on Social Justice for a Fair Globalization, which emphasizes the importance of the minimum wage in measuring progress towards social justice in the era of globalization. The Declaration obliges ILO member States to implement "policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection (ILO, 2008). This policy on the role of the minimum wage is underscored by the global jobs pact, which was made in response to the global economic crisis. The pact emphasizes that the minimum wage "can reduce poverty and inequality" while it can "increase demand and contribute to economic stability" (ILO, 2009)

In summary, the minimum wage in Kenya is a highly institutionalized system. In this role the wage councils provide a critical safety net for workers who for one reason or another do not have the protection of trade unions. By providing protection for the low income earners, the wage councils serve as counter to a deflationary policy, and contribute enormously to stimulating internal demand necessary for accelerating economic recovery and employment sustenance. The challenge for the public authority, and indeed the social partners, is the issue of monitoring and enforcement of the minimum wage in unorganized sectors. This is a huge task for the enforcement authority, which is traditionally short of manpower mechanisms to ensure that the legal minimum wages are paid by all concerned employers.

### **Conclusion**

Industrial relations in Kenya enjoy both legal and constitutional backing. There is an elaborate set of laws that regulate affairs in the labour sector as well as constitutional provisions in the bill of rights outlining the conditions for harmonious industrial relations. In addition, various institutions have been created in an innovative endeavour at stabilizing the labour sector for faster economic development. These institutions include the National Labour Board, the Industrial Court and the Wage Councils. However the persistence of strikes in various sectors point to the necessity of a more in depth review of existing provisions especially with regard to collective bargaining. Perhaps what is needed as a resolution mechanism is openness and sincerity on the part of labour actors in order to create sustainable and binding Collective Bargaining Agreements (CBA's) within the framework of the prevailing economic conditions in the country.

## References

- Aluchio, L.P. *Trade unions in Kenya: Development and the system of industrial relations*. Nairobi, Jomo Kenyatta Foundation, 1998, pp. 60-70.
- Arthur, H. (1985) *Understanding Labour Law: The Debate over Industrial Pluralism*, Current Legal Problems.
- Bor, M.K. "The New Labour Laws: An Overview". Paper delivered at a seminar on Responding to the Challenges of Fair and Ethical Trade. Nairobi, on the 23<sup>rd</sup> November 2007
- Brewster, eds. (2008) *Industrial Relations in Africa*. London, Palgrave Macmillan, 2008, pp 28-38.
- Clegg, H.A (1960) *A New Approach to Industrial Democracy*, Blackwell, Oxford.
- Constitution of Kenya, 2010.
- COTU Strategic Plan 2007 – 2010.
- De Silva, S.R (2005) *Elements of a Sound Industrial Relations System*, ILO ACT/EMP Publications.
- Eyraud, F. and Saget, C. (2005) *The fundamentals of minimum wage fixing*. Geneva, ILO.
- Fashoyin, T (2007) "Industrial relations in Kenya" in Geoff Wood and C. Brewster, eds., *Industrial Relations in Africa*. London, Palgrave Macmillan, 2007, pp.39-58.
- Hagglund, G. "The development of industrial relations in Kenya" In Wood, G. and Brewster, C. eds., *Industrial Relations in Africa*. London, Palgrave Macmillan,
- Hayter, S. and Stoevska, V "Trade union density and collective bargaining coverage. *International Statistical Inquiry 2008-9*". Technical Brief. Industrial and Employment Relations Department (DIALOGUE), ILO, 2010.
- ILO Declaration on Social Justice for a Fair Globalization. Adopted by the International Labour Conference at its 97<sup>th</sup> Session. Geneva, 10 June 2008, Article IA (ii).
- Oliver Clarke and John Niland (2005) "The Dynamics and Dimensions of Change" in Agenda For Change: An International Analysis Of industrial Relations in Transition.

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