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**Reforming the Approach to Alternative Dispute Resolution in Kenyan Industrial Disputes:
A Comparative Analysis**

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of Master of Laws Specializing in Dispute Resolution in approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

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ABSTRACT

Dispute resolution plays an important role in industrial relations. This is because conflicts are an inherent part in any relationship and industrial relationships are not exempt from this. To this end it is important to have a dispute resolution system that ensures efficient and effective resolution of disputes that arise in the course of industrial relationships. Efficient and effective dispute resolution is particularly important in the industrial relations arena as industrial relations attract various stakeholders, some who may not necessarily be a part of the dispute that arises, but who might inadvertently be affected in the situation of an unresolved dispute.

Traditionally litigation has been the most commonly utilized medium of resolution of industrial disputes, with disputants rather choosing to take the dispute to the courts of law for adjudication and determination. However with the advent of alternative means of dispute resolution such as negotiation, mediation and arbitration, it has become paramount that these alternative dispute resolution methods be promoted for the reasons of expediency and efficiency.

Regardless of the advent of such methods of dispute resolution, courts have still exercised some form of control and oversight of the dispute processes, and such oversight can be easily misused to defeat the main intention of having the alternative dispute resolution processes in the first place. This thesis discusses reforming the approach to alternative dispute resolution in Kenyan industrial disputes, so as to achieve maximum efficiency of the system. In doing this, the thesis does a comparative analysis of the systems of South Africa and Australia respectively.

DEDICATION

I dedicate this work to THE ALMIGHTY GOD

ACKNOWLEDGEMENT

I acknowledge the help I have received from the ALMIGHTY GOD in this work. I thank my parents Dr. Evans Basweti and Prof. Elizabeth Abenga for their support in this work. I thank my brother Ernest Abenga for his prayers and encouragement and my fiancée Dr. Mercy Oira for the support given throughout my studies.

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CHAPTER ONE

AN OVERVIEW OF THE KENYAN INDUSTRIAL DISPUTE RESOLUTION FRAMEWORK

I. INTRODUCTION

An efficient and functional industrial dispute resolution system and framework is without doubt pivotal to the growth of industry. This is because industry generally relies on human resources for operational purposes, and consequently, disputes are more often than not inevitable and unavoidable. This is more so because of the shift from manufacturing to service based industries as noted by Jan Theron.¹ This has led to the emergence of reliance on human capital to drive the service-based industry, and has thus necessitated a reform of labour law and policies.

As the shift to a reliance on human resources in service-based industries continues, the nature and rate of occurrence of industrial disputes has also increased to such an extent that courts have become so overwhelmed, thereby leading to the slow resolution of such industrial disputes. There has thus been an increasing reliance on alternative dispute resolution methods for settling of such disputes. When writing about arbitration in Kenya, Gakeri² notes that, until recently, courts have been guided by the traditional notion that they have exclusive jurisdiction in dispute resolution. He states that because arbitration is a private and consensual procedure, it has been perceived as competing with the courts in the administration of justice and subject to judicial control. He notes, however, that with time the courts have had to cope grudgingly with an ever-increasing workload and are thus slowly embracing arbitration, even though this is not out of any conviction that it is a positive alternative.³ This general reluctance on the part of the courts to apply alternative dispute resolution mechanisms also extends to labour and industrial disputes which, regardless of the provisions for alternative dispute resolution methods such as conciliation and arbitration, frequently make their way to court, thus beating the expediency and efficiency advantage of out-of-court processes.

¹ Jan Theron *The Shift to Services and Triangular Employment* Working Paper Development Policy Research Unit University of Cape Town (2007).

² John Gakeri. 'Placing Kenya on the Global Platform: An evaluation of the legal framework on arbitration and ADR' (2011) 1 *International Journal of Humanities and Social Science* at 220

³ Ibid at 220.

(a) The Role of the Kenyan Constitution in Industrial Dispute Resolution

The Constitution of Kenya, under art 41(1) of the Bill of Rights, provides for the right to fair labour practices.⁴ The interpretation, application and enforcement of this right to fair labour practices are often the cause of many industrial disputes in Kenya. This is because workers seek to claim protection from unjust and unfair labour practices by way of litigation more so in the High Court that has primary jurisdiction in constitutional interpretation.⁵

While declaring that it is the responsibility of the state to ensure access to justice for all persons,⁶ the constitution provides for alternative dispute resolution methods by urging the promotion of an alternative dispute resolution mechanism.⁷ This constitutional recognition of alternative dispute resolution mechanisms is a positive step towards providing the impetus for change of attitude and focus from court-oriented litigation to out of court-settlement of disputes. The next section discusses the various alternative dispute resolution methods practiced in Kenya.

⁴ Article 41 (1) Every person has a right to fair labour practices

(2) Every worker has the right to

(a) fair remuneration

(b) to reasonable working conditions

(c) to form, join or participate in the activities and programs of a trade union; and

(d) to go on strike.

⁵ Article 165 (3)(b) of the Constitution provides the High Court with jurisdiction to determine the question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. It is noteworthy however that labour disputes are determined by the Industrial Court established under the Industrial Courts Act with the status of a High Court.

⁶ Article 48.

⁷ Article 159 (2) In exercising judicial authority, the courts and the tribunals shall be guided by the following principles

(a) justice shall be done to all irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted... .

(i) *Arbitration under the Arbitration Act of 1995*

According to Muigua,⁸ arbitration occurs where a neutral third party is appointed by the parties to a dispute or by an appointing authority to determine the dispute and give a final and binding award. Gakeri⁹ defines arbitration as an adjudicative process in which parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards. Khan,¹⁰ on the other hand/further defines arbitration as a private consensual process where parties agree to present the dispute to a third party for settlement. Arbitration in Kenya is governed by the Arbitration Act of 1995¹¹ (hereinafter referred to as the Act) that defines arbitration in vague terms to mean any arbitration whether or not administered by an arbitral institution.¹²

Arbitration under the Act is based on the existence of an arbitration agreement that must be writing in a document that has been signed by both parties.¹³ Courts in Kenya have been keen to apply the principle of separability, its effect being that when an arbitration agreement is incorporated into a contract it assumes an existence independent of the contract.¹⁴ Where there is such an agreement to arbitrate, either party to the agreement, upon the commencement of any suit in court, may apply to the court for an order of stay of proceedings in the court pending the determination of the dispute by way of arbitration.¹⁵ Notwithstanding the fact that a stay of proceedings has been issued, any party is at liberty to apply to the High Court for an interim measure.¹⁶ This shows that the court still maintains some degree of control over the process of arbitration, thus defeating the purpose of arbitration as an alternative dispute resolution mechanism that promotes out of court settlement of disputes. This contradicts s 10 of the Act that provides for non-interference by the court on matters that are subject to the Act.

⁸ Kariuki Muigua ‘Alternative Dispute Resolution under the Article 159 of the Constitution’ *Chartered Institute of Arbitrators (CiArb) Kenya* (accessed on 14/09/2015 via www.kmco.co.ke/attachments/article/10)

⁹ Gakeri op cit (n2).

¹⁰ Farooq Khan ‘Alternative Dispute Resolution’ A paper presented at the Chartered Institute of Arbitrators Advanced Arbitration Course held 8 to 9 March 2007 at Nairobi (accessed on 14/09/2015 via www.kmco.co.ke/...).

¹¹ Arbitration Act, Chapter 49 Laws of Kenya.

¹² Ibid at s 3(1).

¹³ Section 4 of the Arbitration Act.

¹⁴ See Kimaru J. in *Kenya Airports Parking Ltd and Another vs. Municipal Council of Mombasa* HCCC 434 of 2009 and Gikonyo J. in *Infocard Holdings Limited vs. Attorney General & 2 Others (2014) eKLR* enforcing Section 17 of the Act.

¹⁵ Section 6 of the Arbitration Act.

¹⁶ Section 7.

Court interference with regard to arbitration under the Act is further illustrated by the fact that an arbitral tribunal, or a party with the approval of the tribunal, may request the High Court to assist in the taking evidence, which may execute the request within its competence.¹⁷ One would be behooved to wonder why an arbitral tribunal would require the court's intervention in the taking of evidence, yet arbitration as a process is quasi-judicial in nature. This process has the general effect of unduly lengthening the time for the resolution of the dispute.

At the conclusion of the arbitral process, the arbitral tribunal would make an award that is also subject to the possibility of being set aside by the court. Any party to the arbitral proceedings may move the court to set aside an award that has been issued on the following grounds:

- a. That a party to the arbitration was under some incapacity; or
- b. That the arbitration agreement is not valid under the law to which the parties have subjected t to or the laws of Kenya;
- c. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case;
- d. The arbitral award deals with a dispute not contemplated by or falling within the terms of the reference to arbitration;
- e. The composition of the arbitral tribunal was not in accordance with the agreement by the parties; OR
- f. The making of the award was induced or affected by fraud, bribery, undue influence or corruption.¹⁸

Parties may choose to use any of the above measures to challenge and render an award invalidated by the court. As earlier stated, this would defeat the purpose of having a process that is out of court in the event that the parties eventually revert to court for to set aside the award. On conclusion of the arbitration process, the parties must deposit the original award or a certified copy of the award to the High Court for it to be enforced by the court.¹⁹ The courts' supervision of the arbitration process is indicative of a system that is not supportive of out-of-court settlement of disputes. It is the purpose of this research to investigate how to change this position, especially with regard to the settlement of industrial disputes.

¹⁷ Section 28 of the Arbitration Act.

¹⁸ Section 35.

¹⁹ Section 36.

(ii) *Mediation of Disputes*

Mediation is defined as a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated settlement or solution.²⁰ It is also defined as the intervention in a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement in respect of the issues that are in dispute.²¹ Thus, as unlike in arbitration, a mediator plays a facilitative role of helping disputing parties to reach their own negotiated settlement. According to Muigua,²² the constitutionalisation of mediation in Kenya means that in the policy on the resolution of conflicts, there will be a paradigm shift towards encouraging mediation and the other traditional means of conflict management, as opposed to the formal mechanism.

However, as an informal or non-formal process, Kenya lacks an act of Parliament or legislation that would set appropriate structures for the promotion of mediation as an alternative dispute resolution process. According to Berkovitch,²³ since mediation is in essence a form of assisted negotiation, it does not have a direct legal basis, and the parties do not have to have a written agreement. He states, however, that mediation outcome is binding because the parties have chosen to undertake it voluntarily.²⁴ The lack of a legal basis for mediation and its informality may at times make the parties regard the outcome of the process as non-binding in nature. Thus, to prevent this from happening, the terms of the settlement reached are usually reduced into a written agreement executed by the parties and witnessed to and attested by the mediator.

Mediation has various advantages that can be applied in resolving industrial disputes. Mediation is generally expeditious and time saving in nature, thus fulfilling the objective of giving parties access to justice that is not delayed.²⁵

²⁰Fenn. 'Introduction to Civil and Commercial Mediation' *Workbook on Mediation* Chartered Institute of Arbitrators as cited in Muigua n8.

²¹ Moore C *The Mediation Process: Practical Strategies for Resolving Conflict* (1996) 14 as cited in Muigua n8.

²² Muigua op cit (n8).

²³Berkovitch 'Mediation Success or Failure: A Search for the Elusive criteria' *Cardozo Journal of Conflict Resolution* 289, p.290 as cited in Muigua n8.

²⁴ Ibid.

²⁵ 'Beyond myths: Get the facts about dispute resolution' (2007) *American Bar Association* cited in s n8.

However, as noted by Muigua,²⁶ mediation is only time saving and expeditious when both parties enter the mediation with goodfaith.²⁷ Where the parties lack goodfaith to negotiate by making concessions, then the mediation generally becomes a longer and more tedious process, further compounded by the lack of formality of the process. The expeditious nature of mediation also in essence also means that mediation, as a process, is cost effective in the sense that it is less costly as compared to litigation in courts. The only rider to the cost-effective nature of mediation is when the process fails and the parties have to resort to litigation.²⁸ Mediation is also a flexible process, which can be customised by the parties in dispute to be able to work within busy schedules in the resolution of the dispute.

Notwithstanding the various advantages mentioned above, mediation does not address the issue of power imbalance, which may be present in industrial dispute resolution. As noted by Kahn-Freund,²⁹ there is inherently an imbalance of power in an employment relationship. This is because the employer is the resource owner and appropriator while the employee is heavily reliant on the employer. According to Kahn-Freund, one of the main purposes of labour law is to address the inherent imbalance in employment relationship, which is done through collective bargaining rights. Manning³⁰ suggests that power imbalance may originate from various sources, including those derived from financial resources, knowledge and skill in negotiating, access to decision makers, personal respect and friendships.³¹ A concern raised in mediation is that if there is too great an imbalance of power, it may affect parties' freedom in the process, which may result in a biased outcome of one party over the other. Thus for a mediation process to be successful and legitimate, it should be able to deal fairly with a power imbalance that may be present in the process.³²

Mediation as a process can therefore, can be easily adapted and utilised in the resolution and settlement of industrial disputes in Kenya by the setting up of structures that will address the challenges mentioned above.

²⁶ Muigua op cit (Supra n8).

²⁷ Ibid.

²⁸ Ibid.

²⁹ P Davies & M Freedland *Kahn-Freund's Labour and the Law* (1983) at 18.

³⁰ Manning C 'Power imbalances Imbalances in *Mediation*' mediation' unpublished paper cited in Supra n.8

³¹ Ibid.

³² Ibid.

(b) Industrial Dispute Resolution in Kenya

The main alternative dispute resolution process that is applied in the resolution of industrial disputes under the Labour Relations Act of 2007 is the process of conciliation. Conciliation is a process in which a neutral third party called a conciliator restores damaged relationships between disputing parties by bringing them together, clarifying perceptions and pointing out misperceptions.³³ Conciliation is preferred in industrial dispute resolution as it is focused on the restoration of on-going relationships generally characteristic of industrial relationships. It is also used in situations in which the parties are either unwilling or unable to come to the bargaining table.³⁴ Section 15 of the Industrial Court Act provides for settlement of industrial disputes by way of conciliation.³⁵ Under s15 (2) of this Act, the court may refuse to determine any dispute that has been brought before it if it is not satisfied that appropriate dispute resolution mechanisms have been applied.³⁶ This makes provision for court-annexed alternative dispute resolution, where the ADR mechanisms are applied not by consent of the parties but by operation of law and court order. The effectiveness of such is debatable as parties could bargain out of coercion. It however creates an avenue for prevention and avoidance of litigation.

The process commences by the making of a formal report of the trade dispute to the minister in charge of labour affairs either by the trade union or the employers' union.³⁷ Individual employers and employees are also allowed to make such references to the minister. This is in line with the requirements of access to justice under the Constitution,³⁸ as earlier stated in this chapter.

³³ Ibid.

³⁴ Ibid.

³⁵ 'Section 15 (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties 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. Is this a direct quote? If so it needs to be in quotation marks.

³⁶ Though various alternative dispute resolution methods are mentioned, the Industrial Courts Act has a bias on conciliation, and this bias is evident in s 15(3) that requires the court to be furnished with a certificate from the conciliator certifying that there has been an attempt to settle the dispute through conciliation and that the dispute remains unsettled even after conciliation.

³⁷ Section 62(1) of the Labour Relations Act.

³⁸ Article 48 of the constitution.

Once the dispute has been reported, every party has the right to file a written statement in reply to the reference of the dispute to the minister. Failure to file a written statement does not of itself invalidate the reference of the dispute to the minister.³⁹ Interested parties are also allowed to file their statements of interest.⁴⁰ The minister then appoints a conciliator to conciliate the dispute, unless the conciliation procedure in an applicable collective agreement that is binding to the parties has not been exhausted,⁴¹ or a law or collective agreement binding on both parties prohibits negotiation on the issue in dispute.⁴² This is indicative of a labour relations system that puts heavy emphasis on party autonomy in dispute resolution with heavy reliance on the collective agreements that may have been signed by the parties. The collective agreement could prohibit any kind of negotiation on the issue in question, in which case the minister does not have the requisite legal authority to appoint a conciliator to conciliate the dispute on the prohibited issue.⁴³

The conciliator(s) will then attempt to resolve the dispute within 30 days of their appointment, or any extended period as may have been agreed by the parties to the dispute.⁴⁴ Under s 67 (2) of the Labour Relations Act, the conciliator or the conciliation committee has the power to:

- (a) Mediate between parties;
- (b) Conduct fact finding exercise; and
- (c) Make recommendations or proposals to the parties for settling the dispute.

If the trade dispute is resolved in conciliation, it is reduced to an agreement the terms of which are recorded in writing and signed by the parties and the conciliator. A signed copy of the agreement is then lodged with the minister.⁴⁵ If the dispute is deemed to have been unresolved, the conciliator issues a certificate to that effect and any party to the dispute may refer it to the Industrial Court for adjudication.⁴⁶ The Labour Relations Act does not provide for the formal

³⁹ Section 63.

⁴⁰ Section 64.

⁴¹ Section 65 (a).

⁴² Section 65 (b).

⁴³ As much as s 65 (b) of the Labour Relations Act indicates that parties may by collective agreement restrict or even prohibit negotiation, this is a very rare occurrence in Kenya.

⁴⁴ Section 67(1) L.R.A.

⁴⁵ Section 68 LRA.

⁴⁶ Section 70 (2) and 73 of the L.R.A respectively.

process of resolving disputes through arbitration since after conciliation, the parties may refer the dispute to the Industrial Court. It however, gives parties the autonomy to select and set an appropriate dispute resolution mechanism in their collective bargaining agreement that they lodge in court. The act provides that an employer, or a group of employers and a trade union may conclude a collective agreement providing for the conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and arbitration of any category of trade disputes identifiable in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties.⁴⁷

Thus from the forgoing that the Industrial Court will only refer a matter to arbitration when the parties to the collective bargaining agreement have clearly provided for and stipulated it in their collective bargaining agreement. In the case of *Kenya Chemical and Allied Workers Union vs. East African Portland Cement and Company Limited*⁴⁸ the Industrial Court was confronted with a situation in which a trade dispute had been referred to the minister who then appointed a conciliator in accordance with the procedure discussed above. The conciliator was however unable to reach an amicable solution for both parties, and thus the dispute ended up at the Industrial Court. The court declined to exercise its jurisdiction over the dispute since the collective bargaining agreement provided for arbitration and the parties had not exhausted that option.⁴⁹ The court stated as follows:

‘The CBA contained a valid arbitration agreement. No arbitration has taken place. Conciliation by the Minister is a statutory process, overseen by the State. It is a public process, not a private mechanism. It is not arbitration. Arbitration is a private dispute resolution mechanism. There is no evidence that arbitration has been exhausted. There is no record of any arbitration proceedings. There is no award from any arbitral panel in the records filed by the parties. The Industrial Court will only be involved in an appeal against the arbitration award, in setting aside the arbitration award, or in enforcement of the arbitration award. The court has not been asked to exercise any of these functions, but is being asked to determine the matter directly, in a case where the CBA contains a valid arbitration agreement. The Industrial Court can only come in in the aid of the arbitration process and not to assume the role of the arbitrator.’⁵⁰

⁴⁷ Section 58 L.R.A.

⁴⁸ (2013) eKLR.

⁴⁹ Ibid.

⁵⁰ Ibid.

It seems therefore, that any arbitration agreement that is stipulated in the collective bargaining agreement that has been signed by the parties can still be subject of review and setting aside by the Industrial Court. With regard to an appeal against the arbitration award, the Labour Relations Act provides that an award in arbitration, in terms of a collective bargaining agreement is final and binding, and is subject to appeal on points of law to any court. It may also be set aside by the Industrial Court on any ground recognised by law, or be enforced by the Industrial Court.⁵¹ It is thus clear that arbitration is still subject to a court's interference, which thus defeats the entire purpose of it being an alternative dispute resolution method as was discussed in the earlier section of this chapter.

The jurisdiction of the Industrial Court includes the following disputes:

- (1) Disputes relating to or arising out of employment between an employer and employee;
- (2) Disputes between an employer and a trade union;
- (3) Disputes between an employer's organization and a trade union organization;
- (4) Disputes between trade unions;
- (5) Disputes between employers organizations;
- (6) Disputes between an employer's organization and a member of the organization;
- (7) Disputes between a trade union and a member of the union;
- (8) Disputes regarding the registration of a trade union and its officials; and
- (9) Disputes regarding the registration of an employer's organization and the election of its officials.

Unlike in jurisdictions where there is a distinction between disputes of right and disputes of interest, more so with regard to application, the Kenyan Labour Relations Act makes no such distinction. This Act defines a trade dispute as defined by the Kenyan Labour Relations Act as a dispute or a difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employer's organization and trade union. These differences can be about any employment matter and include disputes regarding the dismissal, suspension or redundancy of employees, allocation of work and

⁵¹ Section 58(3) of the LRA.

recognition of a trade union.⁵² This non-distinction is in the favor of employees, who may register a trade dispute on any matter touching on the issue of employment.

II. CONCLUSION

It is evident that, even though the Kenyan Constitution makes a provision for alternative dispute resolution mechanisms to be applied in the resolution of disputes, there is need for reform and development of the law relating to dispute resolution, especially industrial dispute resolution in order to promote the expedient and efficient resolution of industrial disputes. There is need for the Kenyan system to find and strike a balance between recognising the right of review of arbitration of industrial disputes versus the need for achieving arbitral finality. The next chapter analyses the global framework for industrial dispute resolution, commencing with the discussion on striking the balance between the finality and fairness of arbitral awards.

⁵² Section 2 of the L.R.A.

CHAPTER TWO

GLOBAL FRAMEWORK FOR INDUSTRIAL DISPUTE RESOLUTION

I. INTRODUCTION

The first chapter of this work set out an overview of the industrial dispute resolution framework in Kenya. It was noted that there has been a general shift from manufacturing to service-based industries, which has necessitated the emergence of reliance on human capital to drive the service-based industry. This has resulted in increase in industrial disputes⁵³. It was also noted that in the past, Kenyan courts took a conservative approach to dispute resolution, holding the view that they held the absolute traditional position as the sole avenue for dispute resolution. It has been noted however, that this view has changed as the courts are increasingly being overwhelmed with work. Additionally, the need for timeous and expeditious resolution of cases has led to the acceptance of alternative dispute resolution mechanisms such as arbitration and mediation in the resolution of disputes.

The chapter noted that as a central point, the Kenyan Constitution, in addition to recognising the right to fair labour practices in art 41 (4),⁵⁴ also provides for the responsibility of the state to ensure access to justice for all persons.⁵⁵ The Constitution also provides for the promotion of alternative forms of dispute resolution, to wit, reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.⁵⁶ This constitutional anchorage, as was set out in the past chapter, raises optimism for the continued promotion of alternative dispute resolution mechanisms, especially in the resolution of industrial disputes.

The first chapter concluded with an attempt at demonstrating the nature and scope of judicial control over the alternative dispute resolution process in industrial disputes in Kenya, especially where there is in force a valid arbitration agreement in a collective bargaining agreement.

⁵³ Discussed at length in Supra n.1

⁵⁴ If this refers to the Bill of Rights it needs to be quoted fully.

⁵⁵ Article 48 of the Kenyan Constitution

⁵⁶ Supra n.7

This second chapter analyses the global framework for industrial dispute resolution. It commences with a discussion on balancing the right to finality of an industrial arbitration award without downplaying the fairness requirement.

This chapter also analyses the international law background to industrial dispute resolution by conducting an analysis of the International Labour Organisation (I.L.O.) framework and in particular: the I.L.O. Labour Disputes Systems Guidelines for Improved Performance; the I.L.O. Recommendation number 92 on Voluntary Conciliation and Arbitration, as well as the I.L.O. Examination of Grievance Recommendation. The main purpose of this chapter is to derive inspiration from the global framework on industrial dispute resolution in order to suggest the policy and legal amendments necessary for restructuring the design of the industrial dispute resolution system in Kenya.

(a) Balancing the Finality Expectation with the Right of Review of an Arbitration Award

Arbitration, as an alternative dispute resolution mechanism, is intended to offer a forum for the expeditious resolution of industrial disputes. This is because courts and the litigation process have generally been proven to be lengthy and arduous, involving the use of state organs in the form of the judiciary. Industrial disputes, by their very nature, require expeditious resolution. This is illustrated in the point made in the introduction to this work: that the economic shift to service-based work environment necessitates the speedy resolution of industrial disputes as to ensure that the operations of the work force are not destabilized. This is because a destabilization. Destabilization of the work and labour environment would have a ripple effect leading to the destabilization of the economy.

According to Anyim et al,⁵⁷ there are three social partners who are affected in the occurrence of an industrial dispute. The work identifies them as government, labour and the management.⁵⁸ The total and general costs incurred in industrial dispute resolution usually outweigh the benefits that accrue from the process. Quoting from Imberman,⁵⁹ with regard to strikes in particular, he states that trade disputes have great bearing on the smooth and orderly development of the

⁵⁷ Anyim Chukwudi Francis, Chidi Odogwu Christopher & Ogunyomi Olusiji Paul 'Trade disputes and settlement in Nigeria' (2012) 2 *Interdisciplinary Journal of Research in Business*, available at www.idjrb.com, accessed www.idjrb.com on 24 May 2015 <https://www.idjrb.com/articlepdf/article221.pdf>

⁵⁸ Ibid at 1 Anyim et al op cit.

⁵⁹ Imberman J 'Strikes cost more than you think' (1979) 57 (3) *Harvard Business Review* 13.

economy and the maintenance of law and order in society.⁶⁰ He further quotes Ubeku,⁶¹ stating that industrial disputes such as strikes have a dramatic effect on the public especially with regard to such industrial disputes arising in the essential services industries.

It is because of the effect of industrial disputes have on the society, including the public who are not party to the dispute, that there is an overriding public policy need for the speedy resolution of industrial disputes. To this end, the use of various forms of alternative dispute resolution methods and mechanisms, as discussed in the first chapter, is encouraged, in the anticipation that such methods would be conclusive in the settlement of the disputes. This section discusses arbitration as such a method, as it is the most legally binding alternative dispute resolution process used in the resolution of industrial disputes, compared with the other methods such as mediation and negotiation.

Abedian,⁶² while commenting on arbitration in an international context, states that where the parties have agreed that their dispute be resolved through a private forum, in this case arbitration, judicial review of the award would in principle clash with the contractual expectation of the parties to the extent that they have agreed to submit to the ruling of such a private forum.⁶³ The suggestion made in this work is that the same underlying principle could be stated with regard to the arbitration of local industrial disputes. There is an inherent legitimate expectation that the submission to arbitration of an industrial or industry related dispute, would lead to a conclusive settlement of that dispute without necessitating the intervention of the court. This would generally be classified as the legitimate expectation to the finality of the arbitration award.

As much as there is a general expectation that the arbitration award would be final and binding on the parties — more so in a contractual situation where the arbitration process is enshrined in the agreement made by the parties — there remains a residual expectation of some

⁶⁰ Imberman op cit (n57).

⁶¹ AK Ubeku *Industrial Relations in Developing Countries: The Case of Nigeria* (1983)).

⁶² Abedian Hossein 'Judicial review of arbitral awards in International arbitration: A case for an Efficient System of judicial review' (2011) (6) *Judicial Review* *Journal of International Arbitration* 553—590.

⁶³ Ibid.

level of public scrutiny of the award. This is especially in cases where its fairness is in question. To this point, Abedian⁶⁴ notes as follows:

It is, on the other hand, important to note that the absence of significant erosion of judicial scrutiny would adversely affect the victims of manifestly flawed arbitrations...the possibility of judicial scrutiny of an arbitral award at the seat of arbitration enhances the integrity and efficiency of the arbitral proceedings: it reduces the risk of the rendering of arbitrary decisions by some arbitrators, increasing the trust of the business community in international arbitrations.⁶⁵

Although the point made in the above statement relates to international arbitration, it can be extended to the arbitration of industrial disputes, and generally to all manner of arbitration of disputes. If arbitrators were given the unfettered right to final decisions that could not be subject to review, then such manifest powers would easily be prone to abuse and the victims would have no recourse whatsoever and no remedy. This would be contrary to the principle that equity suffers no wrong without a remedy.⁶⁶

From the foregoing, it is imperative to strike a near perfect balance between the competing legitimate expectations of finality of the arbitral award, with the right to review the award by a party who is adversely affected by it. Any such balance of the two legitimate expectations would need to take into account the functional role that is played by arbitration.⁶⁷ According to Schmitz,⁶⁸ finality has been the functional corner stone of arbitration, in that it has allowed arbitration to develop as a private, flexible and self-contained process regarded as more efficient than litigation both in terms of time and expense.⁶⁹ He also mentions flexibility of the process and privacy as critical advantages that would necessitate the arbitral award being final. In respect of the flexibility of the arbitration process, he states that the independence of the arbitration process from the judicial system is a central advantage to its being a viable form of alternative dispute resolution, in the sense that it not only eases the burden of dispute resolution from the courts but also provides equitable application of the law in the particular dispute.⁷⁰ With

⁶⁴ Abedian op cit note 61.

⁶⁵ Ibid.

⁶⁶ The doctrines of equity are incorporated to Kenyan law vide Section 3 of the Judicature Act, CAP 8 Laws of Kenya.

⁶⁷ Amy Schmitz 'Ending a Mud Bowl: Defining Arbitration' finality through functional analysis' (2002) 37 *Georgia Law Review* 123 at 132.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Heise Michael 'Justice delayed? An empirical analysis of Civil case disposition time' (2000) 50 *Western Reserve Law Review* 813-49 quoted at n.66

regard to the application of arbitration in industrial disputes, Schmitz states that, due to its flexible nature, arbitration is suitable for an employee who has an equitably strong but legally weak case.⁷¹ This is, however, debatable in that arbitral tribunals are bound to follow the law.

Few scholars have suggested effective means of striking the desired balance between the double tenets of legitimate expectation — these being the expectation of finality and the expectation of fairness — and the right of review that is afforded to an aggrieved person in the case of erroneous or unfair arbitration awards. However, as noted by Abedian,⁷² the most popular view on striking this delicate balance is that of allowing for the review of an award based on procedural irregularities or a violation of public policy considerations.⁷³ This he notes is the approach adopted by the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) under its art34. This approach of excluding the issue of the merits of the award from being the subject of review by a court of law is arguably one of the most effective methods of striking the balance. This could, however, still be prone to misuse as aggrieved parties who would otherwise have accepted the results of the arbitral award would then use the excuse of some procedural technicality to invoke the court's judicial intervention.

A second approach identified by Hossein⁷⁴ is that of limiting the review of the arbitration award and restricting it to questions of law. This approach, though broader in nature, would be more applicable to appeals from awards rather than from the review of the awards. This is because facts would have already been established by the arbitrator or arbitral panel and thus the court to which the appeal has been preferred would only have to deal with the substantive issues of law. This approach conforms to the traditional role played by the court and thus may not be desirable.

Another approach suggested by this work, is to have an arbitral award reviewed by another arbitral tribunal independent from the supervision and control of the judiciary. This approach would ensure that an aggrieved party still has the opportunity to address the necessary

⁷¹ Amy Op Cit note 66 at 174.

⁷² Abedian Op cit note 61.

⁷³ Ibid.

⁷⁴ Ibid.

forum and to air any grievances or disagreements as to the nature or outcome of the arbitral award to another arbitral panel. This would ensure that the benefits of arbitration as a process in the speedy resolution of disputes, that is, flexibility and privacy are still maintained while guaranteeing an independent review of the award⁷⁵.

This chapter will now discuss international law articles and recommendations with a view to identifying the global framework used for industrial dispute resolution. Inspired by the processes followed internationally, the chapter proposes recommendations regarding the reform of the Kenyan industrial dispute resolution framework.

(b) The International Labour Organisation (I.L.O)

According to Sengenberger,⁷⁶ the I.L.O. was founded in 1919 as part of the Treaty of Versailles and became the first specialized agency of the United Nations which embodies a vision of universal, humane conditions of labour to attain social justice and peace among the nations.⁷⁷ Article 1 of the I.L.O. Constitution states that the function of the I.L. O is the promotion of the objects which have been detailed in the preamble as follows:

Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures; Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries; The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization⁷⁸

It is noteworthy that the preamble does not in any way allude to any method of dispute resolution in the industrial sector, but it does state in its opening sentence that universal and

⁷⁵ This approach has been previously suggested by Peter Cane *Administrative Tribunals and Adjudication* (2009) Hart Publishing Oxford and given buttress Michael Adler 'Administrative Tribunals and Adjudication by Peter Cane' (2010) 37 *Journal of Law and Society* 526-530

⁷⁶W Sengenberger *The International Labour Organisation: Goals Functions and Political Impact* (2005) FES

⁷⁷ Ibid.

⁷⁸ Preamble to the Constitution of the International Labour Organisation.

lasting peace can be established only if it is based on social justice. As observed by Kamenka,⁷⁹ the concept of justice presupposes conflict, and there is no problem of justice and no perception of it, where there are no conflicts.⁸⁰ On this issue, Chesler⁸¹ notes as follows:

Most protracted conflicts (disputes) have their roots in perceived injustice... Thus, surfacing and escalating conflict often is part of a group's conscious strategy designed to require the other parties to pay attention to the issues, to get them to "come to the table" to begin discussions on bargaining, to pressure and threaten others in the effort to gain different allocation of resources, and to pursue their conceptions of social justice.⁸²

It is indeed correct that the whole concept of justice arose due to the occurrence of conflicts that were initiated because of apparent injustice. The concept and strategy of the use of conflict by a group to get the other group to bargain is often applied in industrial disputes, more so in interest-based disputes. Thus it can be safely assumed that the purpose of the I.L.O., in its determination to ensure realisation of social justice, also entails a commitment to ensure and promote the best mechanism to be used in dispute resolution, one that would ensure social justice is attained by all. According to Bush,⁸³ social justice generally refers to a state of affairs in which inequality of wealth, power, access and privilege — inequalities which affect not only individuals but classes of people — are eliminated or greatly decreased.⁸⁴ It is the very existence of such inequalities that in a great way contribute to the emergence of disputes that need to be resolved using the appropriate means and methods of dispute resolution.

Alternative dispute resolution methods are highly applicable and the most favourable methods of attaining social justice are through the resolution of disputes and conflicts that arise as a normal occurrence. The preference for the use of alternative dispute resolution methods in the resolution of such disputes and conflicts lies in the advantages that such methods have as compared to the settlement of the disputes by recourse to the court-mandated processes. To this end, the I.L.O. does promote the application of alternative dispute resolution methods in the

⁷⁹ E Kamenka 'What is justice' In Kamenka & Tay (eds) *Justice* (1979) 17.

⁸⁰ Ibid.

⁸¹ Mark Chesler M 'Alternative Dispute Resolution/Conflict Intervention and Social Justice' *Program on Conflict Management Alternatives* (Working Paper no.20 of 1989) at 23.

⁸² Ibid.

⁸³ Robert Bush & Joseph Folger 'Mediation and Social Justice: Risks and opportunities' (2012) *Ohio State Labour Dispute Resolution* 1–51 at 27.

⁸⁴ Ibid.

resolution of industrial disputes. This is in harmony and synchrony with the purposes of the I.L.O. mission of promoting social justice.

Muigua⁸⁵ analyses the structural advantages that alternative dispute resolution mechanisms have in conflict resolution — this being part of the process towards the attainment of social justice. He states that ADR Mechanisms, such as negotiation and mediation, seek to address the root cause of the conflict. This is unlike litigation, which concerns itself in reaching a settlement, as settlement. Settlement implies that the parties have to come to an accommodation with which they have to live due to the anarchical nature of society and its role in power relationships.⁸⁶ The nature of alternative dispute resolution methods in addressing the root cause of the conflict is particularly important, especially since parties in social justice contexts usually need to maintain an ongoing relationship.

In concluding this section, this work recommends that in promoting the realisation and achievement of social justice in the context of the resolution of disputes, the I.L.O ought to promote the use of alternative dispute resolution methods in the resolution of industrial disputes. The next section of this work discusses the I.L.O. Labour Disputes System Guidelines for Improved Performance.

(i) Analysis of the International Labour Organisation Labour Dispute System Guidelines for Improved Performance

The I.L.O Dispute Systems Guidelines have been developed to help individual states devise a more effective dispute resolution framework, especially in the case of labour and industrial dispute resolution. The foreword to the document states as :

Dispute prevention and resolution is today attracting more and more attention, as the effective prevention and resolution of labour disputes is critical for sound and productive employment relations worldwide. Dispute resolution processes offer a collective bargaining resource to the interested parties, and strengthen social partnerships. As conflict is inherent to and inevitable in employment relationships, establishing effective dispute prevention and resolution processes is key to minimizing the occurrence and consequences of workplace conflict. It is with this in mind that the guide aims to assist practitioners working to establish, assess, and improve such processes. Many countries have put in place dispute prevention and resolution systems, both inside and outside their ministries of labour, with different organizational structures and roles. The International Labour Organization has been assisting member

⁸⁵ D Muigua ‘ADR: The Road to Justice in Kenya’ (2014) 2 (1) *Chartered Institute of Arbitrators* (Kenya); 28 – 94.

⁸⁶ *Ibid.*

States, as well as workers and employers' organizations, to set up, or strengthen, such systems. This guide is part of the ILO's effort to strengthen the prevention and resolution of labour disputes by providing advice to both ILO's constituents and industrial relations practitioners interested in dispute resolution. It provides advice on the steps to be taken to either revitalize an existing system, or establish an independent institution, ensuring that they operate efficiently and provide effective dispute resolution services.⁸⁷

Such acknowledgment is illustrative of the increasing inherency of conflict in any employment relations and validates the view, that the resolution of disputes is central to the attainment of social justice, as articulated in the previous session. The step taken by the I.L.O. in recognizing the role of dispute resolution in such a process can be seen thus a positive step.

The guidelines commence by recognizing that industrial disputes generally arise from power imbalances and a perceived competition for power and influence by the various parties in industrial relations.⁸⁸ Thus, in the resolution of industrial disputes, any such processes must take into account and effectively handle the apparent or perceived power imbalances that are inherent in the system. To this extent, the guidelines define power as the ability to influence others, as a result of the position a person or an institution holds, the technical competence and ability of a person or institution and the personal characteristics of the persons who are interacting.⁸⁹ Employers have thus traditionally been considered to have more power and influence by virtue of the resources they have at their disposal over their employees. Labour systems in individual states have attempted to address this apparent imbalance in power and influence by providing for collective bargaining arrangements and the right to form trade unions.⁹⁰

While taking note of the inevitability of occurrence of conflict in the workplace, the guidelines suggest that such inevitability is due to the nature of the ever- conflicting interests between the various actors in industrial relations.⁹¹ Thus addressing the conflicting interests with a view of harmonizing them will be pivotal to the resolution of the disputes. To this end, the guidelines note as follows:

Conflict and disputes can be minimized, but the nature of employee-employer interactions in a market economy point to the inevitability of conflict. Industrial relations in a market economy accepts and recognizes that employees and management have a separation of interests and that some conflict is inevitable and needs to be managed. Conflict may manifest itself as a dispute. The separation of interests,

⁸⁷ Leon Robert Heron. *Labour Disputes System Guidelines for Improved Performance* (2013).

⁸⁸ Ibid at 16.

⁸⁹ Ibid.

⁹⁰ This is recognized by Article 41 of the Kenyan Constitution.

⁹¹ Op cit note 86.

however, does not have to mean constant disputes. Employees and employers can work together to resolve their differences and reach a common understanding without disagreements escalating into formal disputes. The conflicting interest creates the need to discuss and negotiate, while the common interest provides the impetus to reach compromise and agreement. Disputes can be prevented and resolved by the action of the parties themselves, without the intervention of third parties. It may also be prevented or resolved by services provided by State-supported or operated bodies, or private sector operators. An effective dispute management system aims for prevention in the first instance, and subsequently for the orderly and peaceful resolution of any disputes that arise in spite of preventive efforts, primarily through the efforts of the disputing parties themselves.⁹²

Key to the above statement is the recommendation in the guidelines that an effective dispute resolution system should be aimed at the prevention of the dispute at first instance. This would seem to be contradicting the earlier finding that disputes are basically inevitable due to the power imbalances and the conflicting interests between the parties. However, the aim of that recommendation can be construed to be a minimization of the occurrence of disputes rather than a complete prevention of their occurrence, which is an ideal that may not be easily attained.

Another key recommendation in the above guideline is that the peaceful resolution of industrial disputes should be primarily through the efforts of the disputing parties themselves.⁹³ This is in harmony with the idea that disputes arise basically because of divergent interests of the parties involved. According to Ury,⁹⁴ in interest-based dispute resolution, the parties do take a central role in the resolution of the disputes, as it is indeed they who know and appreciate the nature of their interests.⁹⁵ Thus, the proposal for reform of the Kenyan industrial dispute resolution system should take into account the underlying interests of the parties and provide a framework by which the parties can solve their disputes with minimal third party intervention. The guidelines strongly advise recommend that a consensus-based approach be implemented in respect of an industrial dispute resolution. This would be more effective than the use of power or force — both of which are usually applied when a dispute moves to the purview and ambit of a court and litigation processes.

This section concludes with the suggestion that the recommendation expressed in the guidelines should also considered in the event of any amendments being made in respect of the Kenyan industrial resolution framework. The Kenyan system needs to move from an adversarial

⁹² Ibid Ibid. Should this not refer to the guidelines? Ibid

⁹³ Ibid.

⁹⁴ William Ury *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (1988) 6.

⁹⁵ Ibid.

system of industrial dispute resolution to a more consensus-based system that addresses the underlying concerns and interests of the various parties to a dispute. The next section discusses the I.L.O. Recommendation 92 on Voluntary Conciliation and Arbitration.

(ii) *Analysis of the I.L.O. Recommendation Number 92 on Voluntary Conciliation and Arbitration*

The I.L.O. passed the Recommendation on Voluntary Conciliation and Arbitration on 6 June 1951 with an intention of creating a framework guideline on voluntary conciliation and arbitration in industrial disputes. The Recommendation suggests the setting up of appropriate conciliatory machinery to assist in the prevention and settlement of industrial disputes between employers and workers.⁹⁶ According to this recommendation, the conciliation machinery would first and foremost be voluntary in nature and secondly come to play not only in the resolution of industrial disputes but also in the prevention of the disputes. This recommendation applies to the Kenyan system as the system only provides for a compulsory conciliation process after a dispute has already been referred.⁹⁷ This would thus be a point of call for system reform to create a conciliation institutional framework to encourage dialogue and a prevention of the occurrence of a dispute or conflict. The voluntary nature of the process would be more effective in ensuring the parties relate and dialogue with goodfaith and would also ensure that are able to abide by the settlement that is agreed upon after the process. The I.L.O. labour legislation guidelines distinction between conciliation and mediation in the following terms:

In some countries, *conciliation and mediation* refer to the same type of procedure, while in others they denote distinct procedures. However, in both cases they consist of a means of assisting the parties to the dispute, through neutral third party intervention, to reach a mutually agreed settlement. The conciliator or mediator assists the parties to settle the dispute by themselves when negotiations have failed or reached an impasse. The conciliator or mediator is not empowered to impose a settlement on the parties. Conciliation/mediation in its least interventionist form is the most widely used method of dispute settlement under government auspices. In most industrialized market economy countries, it is by far the most common procedure employed for the settlement of collective interest disputes. Voluntary arbitration tends to be used much less frequently, if at all. While conciliation or mediation is the primary method used to resolve *interests or collective labour disputes*, it is often a compulsory preliminary step before the adjudication of a *rights or individual dispute*. *Mediation* is sometimes distinguished from conciliation as a separate method of dispute settlement in cases where, even though the dispute still has to be settled by

⁹⁶ Article 1 of the Recommendation.

⁹⁷ See the discussion on the Kenyan Industrial Dispute Resolution system in Chapter One of this work.

agreement of the parties, the third party is somewhat more active than in conciliation and may have the authority (and in some cases the duty) to submit formal proposals for the settlement of the dispute. A distinction between conciliation and mediation is sometimes found in labour legislation, although it is not always reflected in the legislative definition of "mediation".⁹⁸

It can be seen from the above that, conciliation, being more voluntary and non-coercive in nature, can be used in pre-dispute prevention procedure. Mediation on the other hand, being a more coercive process by a third party, can be used in a situation where there is an already existing dispute that needs to be resolved.

In order to promote goodfaith in the dispute resolution process through conciliation, the recommendation states that if a dispute has been submitted to conciliation with the consent of the parties concerned, the parties should be encouraged to abstain from strikes and lockouts while the conciliation process is still ongoing.⁹⁹ This recommendation is worded as an encouragement rather than a mandatory recommendation primarily because the parties have a constitutional right to engage in a strike and a lockout.¹⁰⁰ The same encouragement provisions are stated with regard to voluntary arbitration.¹⁰¹ However noteworthy even though arbitration can be commenced on a voluntary nature, once an arbitration award has been granted it becomes binding on the parties who were subject to the arbitration process.

II. CONCLUSION

This chapter has analyzed various issues in industrial dispute resolution from an international perspective. First, the chapter engaged in a debate on achieving the perfect balance between the legitimate expectations of finality in an industrial arbitration award, versus the expectation of fairness that comes with the right to seek a review of the arbitral award. This chapter has suggested a different approach — that of having another appellate arbitral tribunal take charge of the review of an arbitral award. This could serve as a compromise strategy that would realize the benefits of arbitration as an out-of-court process for the settlement of disputes while retaining the

⁹⁸ I.L.O. Labour Legislation Guidelines, available at <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch4.htm>, accessed <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch4.htm> on 28 May 2015..

⁹⁹ Article 4 of the Recommendation.

¹⁰⁰ Note 89.

¹⁰¹ Article 6 of the Recommendation.

right of an aggrieved party to review the award. The practicalities of this approach, however, still need to be debated further.

This chapter has also discussed the I.L.O's commitment to social justice and has illustrated the fact that if social justice to be attainable, there an effective and efficient industrial dispute resolution system must be in place — since disputes and conflicts are inevitable in any society.

Finally, also discussed is a proposal for the reform of the Kenyan system aimed at encouraging the prevention of industrial disputes rather than their resolution once they have arisen. Conciliation could be used in the furtherance of that aim, as it is a process that encourages the building and formation of consensus. The next chapter of this work analyses the South African industrial dispute resolution system and draws similarities and differences between it and the system in Kenya ; the ultimate aim here being to propose reforms to the Kenyan system based on the industrial dispute resolution regime in South Africa.

CHAPTER THREE

SOUTH AFRICAN INDUSTRIAL DISPUTE RESOLUTION SYSTEM

I. INTRODUCTION

The previous chapter of this work discussed the global framework for industrial dispute resolution. It commenced with a discussion on balancing the expectation of finality with the right of review of an industrial arbitration award. It was noted that arbitration, as an alternative dispute resolution process, is intended to offer a forum for the expeditious resolution of industrial disputes, because the nature of industrial disputes requires their expeditious resolution. This is because, as was noted, industrial disputes have far-reaching consequences for society, as they interrupt the smooth and orderly development of the economy and the maintenance of law and order. Furthermore, what needs to be put in place is a system that not only expedites the resolution of such industrial disputes, but also provides both procedural and substantive fairness.

As was further noted, arbitration as an alternative dispute resolution process is intended to be final and conclusive, and exclusive of the court process, especially in situations where the parties have entered into an agreement that clearly stipulates the finality of arbitration. However, an arbitration process that would be entirely immune from review would cause injustice to the victims if the process were flawed.¹⁰² The second chapter thus analyzed three different approaches to striking the balance between fairness and finality. The first was to restrict review to procedural irregularities, the second to restrict the review to questions of law, and the third was in the form of a suggestion that arbitral awards should be reviewed by another arbitral tribunal independent of the supervision and control of the judiciary.

The second chapter also discussed the I.L.O framework for the promotion of alternative dispute resolution. It was noted that by promoting social justice, the I.L.O. was indirectly also

¹⁰² Amy Schmitz 'Ending a Mud Bowl: Defining Arbitration' finality through functional analysis' (2002) 37 *Georgia Law Review* 123 at 132

promoting the best mechanism for dispute resolution, one that would ensure the realization of social justice, as most conflicts and disputes originate from perceived injustices. The chapter also analyzed the I.L.O.'s Labour Dispute System guidelines for improved performance whose purpose, as was noted, is to help individual states to arrive at a more effective dispute resolution framework. It was also noted that the guidelines established the inevitability of conflict due to the inherent power imbalance in an employment relationship. With this in mind, it was shown the guidelines recommend that an effective dispute resolution mechanism should be aimed, in the first instance, at the prevention of a dispute. Another key recommendation made was that the peaceful resolution of industrial disputes should primarily be through the efforts of the disputing parties themselves. This would be giving effect to the non-coercive forms of alternative dispute resolution that would focus on the primary disputants themselves.

In conclusion the second chapter discussed the I.L.O. Recommendation Number 92 on Voluntary Conciliation and Arbitration, noting that the promotion of a voluntary means of dispute resolution will ensure that parties would be able to dialogue in good faith, as well as promoting the prevention of disputes from arising. This is in direct contrast to the Kenyan framework that provides for compulsory conciliation and compulsory arbitration when an agreement to arbitrate is in force.

This third chapter analyses the South African industrial dispute resolution system for comparative purposes. It discusses the South African system in the light of recommendations made in the second chapter of this work. The chapter thus begins by analyzing the impact of the Constitution of the Republic of South Africa, 1996 on the resolution of industrial disputes and then discusses the dispute resolution procedure enshrined in South Africa's Labour Relations Act of 1995. The discussion in this chapter describe similarities between Kenya and South Africa, and draw a comparison between the South African model used in industrial dispute resolution and that of Kenya..

(a) *Impact of the South African Constitution*

Constitutions play the role of a foundational ‘*grundnorm*’, the basis on which modern governments and states run. Thus entrenchment of values and principles in a constitution gives the values a greater force in law, as opposed to situations in which they are merely recognized by legislation. Constitutions are said to be an embodiment of the will of the people,¹⁰³ unlike acts of parliament, which are considered to be reflective of the will of the legislature.¹⁰⁴ Thus when an ideal is constitutionalized it is given greater legitimacy and authority in terms of enforcement as compared to situations in which it is reflected in the statutory books.

Unlike the Kenyan Constitution, the South African Constitution does not refer directly to alternative dispute resolution methods of resolving civil disputes.¹⁰⁵ However, a possible inference can be drawn from s34 that states that everyone has the right to have any dispute, which can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another impartial tribunal or forum.¹⁰⁶ Thus this creates a possibility for legislative development and promotion of alternative dispute resolution methods. Just as is common in any other jurisdiction, the cost of litigation in South Africa is prohibitive and impedes an access to justice. It is for that reason that alternative dispute resolution methods appear to be an attractive option for dispute resolution and settlement in South Africa.

As noted by the South African Law Commission,¹⁰⁷ the most common general complaint about the justice system in South Africa is that the cost of litigation is prohibitive and this prevents meaningful access to courts — even those who have access to the courts are often victims of delay.¹⁰⁸ The Commission further notes that the incomprehensibility and adversarial nature of the process with a resulting lack of control leads to a sense of frustration and disempowerment as courts are often limited in their response to legal issues, with litigation creating winners and losers, and with winners who may end up feeling like losers due to the

¹⁰³ J Byrnes ‘The constitution and the people’ *American Bar Association Journal* (1939)25(8)) 671–671,

¹⁰⁴ *Ibid.*

¹⁰⁵ Article 159 (2)(c) of the Kenyan Constitution provides that alternative forms of dispute resolution including, mediation, arbitration, and traditional dispute resolution mechanism shall be promoted

¹⁰⁶ Section 34 Constitution of the Republic of South Africa 1996.

¹⁰⁷ Mr. Justice J.H Steyn *South African Law Commission Issue paper 8 Project 94* 15th July 1997.

¹⁰⁸ *Ibid* at 15

many legal remedies that may be imposed.¹⁰⁹ This underscores the great importance of having an alternative dispute resolution system for resolution of disputes in South Africa.

The labour sector attempts at setting pace of dispute resolution by making provision for the Commission for Conciliation Mediation and Arbitration (CCMA) established under the Labour Relations Act with jurisdiction to resolve industrial disputes, a system which shall be discussed at a later stage in this chapter with a view to draw inspiration from the South African approach.

The importance of constitutional recognition of alternative dispute resolution methods, which is a proposal for possible future amendment of the South African Constitution, lies in the origin of constitutional conception which views the constitution as a social contract between the citizens of a state and the sovereign government.

The social contract theory is set up as the legitimate basis for modern day government. It is to the effect that at the early stages of life, man would live a life of solitude in which everyone was a sovereign over his own affairs,¹¹⁰ which meant that each human being has the right to enforce his/her own rights in a way he/she deems best. The situation gradually changed with an increase in population and the diminishing of resources, which eventually led to great insecurity where it was every man for himself, and life thus became nasty, brutish and short.¹¹¹ There was thus need for a sovereign who would regulate the resources and also adjudicate and enforce the rights of the people who were governed.¹¹² This led largely to the existence of modern day arms of government being the legislative arm, the executive arm and the judicial arm.

It is the judicial arm of government that is of particular interest to this discussion. This is the arm that is tasked with dispute resolution and adjudication. An inference can be safely

¹⁰⁹ Ibid

¹¹⁰ This is noted by Thomas Hobbes in Oakeshott, Ed *Leviathan: or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* Oxford Basil Blackwell, as well as Vinnicombe 'Thomas Hobbes and the displacement of political philosophy' (2005) 2 *International Journal of Social Economics* as well as Laslett (ed.) (1960). *John Locke: Two Treatises of Government* Cambridge University Press.

¹¹¹ Ibid.

¹¹² As noted by Abenga *Religious Liberty: Freedom of Worship under the Kenyan Constitution* Lambert Academic Publishers (2012), the state of nature is signified largely by two stages, the first stage in which life was filled with bliss and happiness with limitless resources, and the second stage where life was nasty and brutish due to the diminished resources and increased human population, as noted by John Locke and Thomas Hobbes

drawn from the social contract theory, as summarised above, that dispute resolution was once one of the individual functions that were yielded to the sovereign to exercise on behalf of the people.¹¹³ This is mainly because dispute resolution almost always calls for the determination of the nature, scope and extent of rights, which as was noted in the earlier summary on the social contract theory, were submitted to the sovereign to enforce them on behalf of the people.

The South African Constitution seems to have adopted this approach of letting the sovereign (in this case the state) take charge of dispute resolution, as evidenced by s165 of the South African Constitution, which states that the judicial authority of the Republic is vested in the courts.¹¹⁴ This gives constitutional anchorage to the traditional role of courts as the proper arena for dispute resolution. The lack of direct reference to alternative dispute resolution methods in the Constitution of the Republic of South Africa 1996 would make any alternative dispute resolution method, including methods for the resolution of industrial disputes, subservient to court processes. On the other hand, the constitutional promotion of alternative dispute resolution methods would give them more validity and respect by governmental institutions and officials, leading to an enhanced access to justice.

The next section of this chapter analyses the efficacy of alternative forms of dispute resolution as employed in the resolution of industrial disputes in South Africa. This, as earlier mentioned, is intended to help draw inspiration from the common challenges shared by the South African system and the Kenyan system of industrial dispute resolution. It is also intended to identify the possibility there being unique challenges, peculiar to the Republic of South Africa, and the South African approach to the resolution of such challenges. The South African system is here considered as being suitable for comparative purposes because of the similarities found in the South African legal system and its Kenyan counterpart with regard to the development and application of the common law in dispute adjudication and resolution.

¹¹³ From Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) *International Journal of Constitutional Law* 8 (3) 385–420 it is noteworthy that the existence of rights and their enjoyment generally requires judicial assistance for enforcement purposes, especially in circumstances where the enjoyment of one's right is in direct conflict and preventive of another person's enjoyment of his/her rights.

¹¹⁴ Article 165 (1) of the Constitution of the Republic of South Africa 1996.

Regardless of the fact that South Africa has a more diverse socio-cultural heritage than Kenya, and is economically more developed than Kenya, both are African countries with challenges that are peculiar to Africa, hence their suitability for comparison.

(b) History of Industrial Dispute Resolution in South Africa

A brief historical analysis is always important when any system is reviewed. This is because for the most part, structures in use today, including the legal system, arose from historical events. Ferreira¹¹⁵ comments on the importance of reviewing history especially with regard to labour relations in South Africa as follows:

Knowledge about history of a phenomenon can contribute to a greater understanding of the present by placing it in context and showing how it has evolved. This applies particularly to labour relations in South Africa. In the past labour relations was characterized by the domination of one group of workers over another group. The development of labour relations was mainly determined by the historical position of black workers.¹¹⁶

This section thus seeks to state briefly the history of industrial dispute resolution in South Africa with a view to identifying the key events that brought about its current system of industrial dispute resolution. According to Ferreira,¹¹⁷ the history of labour relations in South Africa can be explained in terms of three distinct periods; the first being from the seventeenth that between the century and the late twentieth century. This was characterized by agricultural activity until the discovery of diamonds and gold in 1867 and 1886 respectively.¹¹⁸ These discoveries brought about the industrial revolution, leading and the consequent development and formation of trade unions to which only trained workers were allowed to belong.¹¹⁹ It is worth noting that the first dispute resolution mechanism used took the form of industrial councils, structures established to resolve disputes after the general strike of 1922 that was ended by the

¹¹⁵ Gera Ferreira 'The Commission for Conciliation, Mediation and Arbitration: Its effectiveness in dispute resolution in labour relations'(2004)23 (2) *Politeia*.

¹¹⁶ *Ibid.* 2

¹¹⁷ *Ibid* at 73.

¹¹⁸ *Ibid* at 74.

¹¹⁹ *Ibid.* It is noteworthy that the paper mentions the fact that at that time there was poor literacy levels among blacks and thus restricting trade unions to only the trained workers would have the effect of locking black workers from accessing union benefits of representation. This is actually not so, prior to 1948, as the ICU was formed in the second decade of the twentieth century and the South African Trades and Labour Council (in the 1930s)- and a union like the Food and Canning Workers Union (1941) catered for the needs of all (mostly black – generic) workers.

use of force by the state. Socio-political developments in the country played a role in the establishment of dispute resolution mechanisms and labour relations procedures. Ferreira notes as follows:

When the National Party came to power in 1948, greater emphasis was placed on the policy of separate development. There was no clear distinction between the political and the labour relations systems during this period. Legislation restricted trade union activities and strikes. The trade union movement became established as a permanent factor in the South African system of labour relations. By 1976 it became clear that the Black Labour Relations Act of 1973 had not solved the problem of black worker labour problems. South Africa's major trading partners, partly because of the 1976 riots, became aware of the labour position of the black worker (Bendy 2001, 74). In the wake of the tension in the labour sphere, the government appointed a Commission of Inquiry into Labour Legislation in 1977, commonly known as the Wiehahn Commission, to seek possible means of adapting the industrial relations system to changing needs by rationalizing the then existent labour legislation to eliminate bottlenecks and other problems experienced in the labour sphere.¹²⁰

As noted in the above excerpt, race was considered to be a factor in the formulation of labour systems. Thus one of the recommendations that was reached by the Wiehahn Commission was that race should cease to be a criterion for the recognition of trade unions by the government. According to Ferreira, this recommendation was accepted by the government as it encouraged the mobilization of black workers since they would no longer be classified and distinguished on the basis of their race.¹²¹

The second period identified by Ferreira,¹²² is that of between 1988 and 1994 that was characterized by significant socio-political changes. These changes resulted in the amendment and expansion of labour legislation, of the establishment of forums for joint consultations, and the adoption of dispute resolution as part of labour relations.

The final period, after 1995, saw the passing of the Labour Relations Act of 1995 that, as noted by Ferreira, was an attempt by the democratic government to achieve a balance of power between employee and employer and ensure the cooperation of all the parties involved in the labour process.¹²³ According to Sipiwo,¹²⁴ before the Labour Relations Act of 1995 came into force the dispute resolution system in South Africa was marred by problems especially with

¹²⁰ Ibid at 77.

¹²¹ Ibid. This could be said to have marked a positive step towards equality of labour rights between the various races in South Africa.

¹²² Ibid

¹²³ Ibid.

¹²⁴ B Sipiwo 'A Critique of *Dispute Resolution in Public Service*' (Unpublished Magister Legum dissertation for Nelson Mandela Metropolitan University 2008.)

regards to statutory procedures that which were complex and full of technicalities so that, instead of reducing the disputes, they created additional disputes and intensified industrial action.¹²⁵ He refers to Backer & Oliver¹²⁶ who state that research has shown that the South African adjudication system of unfair dismissals was the most lengthy and expensive in the world and neither delivered meaningful results nor enjoyed the confidence of its users.¹²⁷ He further notes that due to the ineffective statutory conciliation procedures which were also lengthy and complex, there often was an undesirable outcome in which the merits of a case could be lost on the basis of technicalities of procedure.¹²⁸

The next section of this work begins with a discussion on the dispute resolution procedures of for the resolution of industrial disputes in the Republic of South Africa, as provided for under the Labour Relations Act of 1995.

(c) *Industrial Dispute Resolution Procedures under the Labour Relations Act 96 of 1995 (LRA)*

As stated earlier in the discussion on the history of industrial dispute resolution, the Labour Relations Act 96 of 1995 was passed in order to create a forum in which all the parties to industrial relations procedures are able to relate, as well as to provide. It also provided a simplified and more flexible dispute resolution framework in the form of the Commission for Conciliation Mediation and Arbitration (CCMA).

This was established in terms of the LRA as a specialized body tasked with the resolution of industrial disputes. The CCMA is an autonomous body¹²⁹ with all juristic capabilities such as ability to have its own seal, and to purchase and hold property. It is independent of the state, political parties, trade unions, employers, or employers' organisations.¹³⁰ However, while the CCMA is said to be independent of the state, and not liable for any acts or omission done in good

¹²⁵ Ibid.

¹²⁶ Backer & Oliver *Guide to the New Labour Relations Act 1996*.

¹²⁷ Ibid.

¹²⁸ Ibid. This would be termed unfair as the system could be used to defeat its purposes by slaying justice on the altar of technicalities. This is because procedure is meant to be the handmaiden of justice and not the master thereof.

¹²⁹ Section 112.

¹³⁰ Section 113.

faith,¹³¹ it is not excluded from the purview of the constitutional right to fair administrative action.¹³² The view held in this work is that this is a contradiction, in the sense that although the CCMA is a statutory body, it is still independent of the state.

Under Section 117 (2) of the LRA, the CCMA commissioners are appointed on a fixed-term contract basis without any security of tenure and guarantee of reemployment.¹³³ This is further expounded by the Constitutional Court in *Sidumo v. Rustenburg Platinum Mines Ltd* (2007).¹³⁴ There it was stated that the CCMA is not a court of law a commissioner is empowered to conduct the arbitration under s138 (1) in any manner he or she deems appropriate in order to determine the dispute fairly and quickly and with minimal formalities.¹³⁵ The court linked the lack of security of tenure of CCMA commissioners with the question as to whether CCMA decisions can come under review within the ambit of the Promotion of Administrative Justice Act (PAJA). It quoted Brassey¹³⁶ who states that, unlike the Labour Court, the CCMA does not enjoy the same status as a court and thus does not exercise judicial authority within the context of the Constitution.¹³⁷

S.115 of the LRA lists the functions of the CCMA as follows:

- (a) Attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;

¹³¹ Section 126 (2).

¹³² This is illustrated from the judgement in the case of *Sidumo v. Rustenburg Platinum Mines Ltd* (2007) 12 BLLR 1297, where the court stated that compulsory statutory arbitration under the LRA undertaken by the CCMA constitutes administrative action as defined by Section 1 of the Promotion of Administrative Justice Act 3 of 2000 and therefore is subject to the standard of review that is set out in the Act and not that which is set out in the LRA. Various decisions have followed in the determination of this question.

¹³³ D du Toit e al *Labour Relations Law-A Comprehensive Guide* 2015. For a further discussion on the review of CCMA awards, see Emma Fergus and Allan Rycroft 'Refining Review'(2012) *Acta Juridica* 170

¹³⁴ *Supra* .

¹³⁵ The fact that the CCMA is not a court of law is explicative of the rationale why the CCMA commissioners should not enjoy the same security of tenure as judges in the courts of law.

¹³⁶ Brassey, *Employment and Labour Law: Commentary on the Labour Relations Act*, vol.3 at A7-1 to A702

¹³⁷ The non-judicial nature of the CCMA raises questions with due regard to s 143(1) of the LRA which provides that an arbitration award issued by a commissioner is final and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued unless it is an advisory award. Thus clearly a CCMA award has the same binding and compulsory nature as an award of the court thus leading to a possible conclusion that the concept of the CCMA not being a judicial institution may be moot and theoretical rather than practical. It is further noteworthy that unlike any other arbitration that is private and consensual, CCMA arbitrations are compulsory and non-consensual and thus in practice the CCMA could be said to have some judicial or quasi-judicial functions.

- (b) If a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if-
 - (i) This Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or
 - (ii) All the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission;
- (c) Assist in the establishment of workplace forums in the manner contemplated in Chapter V; and
- (d) Compile and publish information and statistics about its activities.
- (e) At least every second year, review the rules made under this section¹³⁸

It is noteworthy that the first dispute resolution mechanism and process that is applied by the CCMA is that of conciliation, which is similar to the Kenyan system.¹³⁹ As was discussed in the first chapter to this work, there the minister upon reception of a statement of the dispute appoints a conciliator to attempt and resolve it by way of conciliation.¹⁴⁰ One difference between the Kenyan and South African situation is that, in Kenya the only alternative dispute resolution process that is recognized and given statutory backing in industrial dispute resolution is conciliation, in South Africa the LRA provides for arbitration as a mechanism.¹⁴¹ One advantage with having both conciliation and arbitration as mandatory industrial relation processes are applied is that both offer the parties greater opportunity to resolve their dispute without a necessary recourse to the mainstream judicial processes.

Under s 115(2) of the LRA the CCMA has the discretion, if asked, to advise a party to the dispute as to the procedure to follow in terms of the Act,¹⁴² to assist a party to the dispute to obtain legal advice, assistance or representation,¹⁴³ It may also provide administrative assistance to employees earning below the earning threshold as prescribed by the minister,¹⁴⁴ as well as

¹³⁸ Section 115 of the LRA

¹³⁹ Section 15 of the Kenyan Labour Relations Act.

¹⁴⁰ Ibid.

¹⁴¹ Section 115 (b) of LRA South Africa.

¹⁴² Section 115(2)(a). This is progressive in the sense that it caters for situations in which disputants are lay persons who may not be very well versed with the law and the procedures to be followed under the Labour Relations Act. Thus this enhances access to justice for all persons including persons who are not very well knowledgeable with the law.

¹⁴³ Section 115 (2)(b)

¹⁴⁴ Section 115(2)(bA).)

offer to resolve a dispute that has not been referred to the Commission by conciliation.¹⁴⁵ These provisions have set up the CCMA as a user-friendly body that is accessible to any member of the public.

For the CCMA to be able to attempt resolution and adjudication of a dispute, the dispute must be properly classified as dispute that can be resolved by the proper exercise of CCMA jurisdiction. Under s 133 it provides the commission must appoint a commissioner to attempt resolution the dispute through conciliation:

- (a) Any dispute referred to it in terms of Section 134
- (b) Any other dispute referred to in terms of the Act¹⁴⁶

Section 134 relates to disputes on matters of mutual interest. In this case a party to such a dispute may refer the dispute to the commission in writing where the parties to the dispute are:

- (a) On the one side:-
 - (i) One or more trade unions;
 - (ii) One or more employees; or
 - (iii) One or more trade unions and one or more employees
- (b) On the other side
 - (i) One or more employers' organization
 - (ii) One or more employers; or
 - (iii) One or more employers' organization and one or more employers.¹⁴⁷

From the foregoing, it is clear that in the South African labour relation system there is a clear distinction between disputes that are of right, that are disputes 'in terms of the Act',¹⁴⁸ and disputes that are of interest.¹⁴⁹ Disputes of right are said to be disputes that occur when there is a violation of an actual entitlement or obligation as set out in contracts of employment, collective agreements, or in various pieces of legislation and regulations governing the employment

¹⁴⁵ Section 115(2)(c) which is read in conjunction with Section 150 which provides that despite any provision to the contrary in the Act, the director may appoint one or more commissioners who must attempt to resolve the dispute through conciliation whether or not that dispute has been referred to the commission or to a bargaining council. This provision of Section 150 basically entails disputes in that raise public interest issues.

¹⁴⁶ Section 133 LRA.

¹⁴⁷ Section 134

¹⁴⁸ Section 133 (1)(b).

¹⁴⁹ Note 146

relation which come with the entitlement to strike.¹⁵⁰ Disputes of interest on the other hand, as noted by Ferreira, arise when a party to the employment relationship feels that he or she should be entitled to something but is not entitled to it.¹⁵¹ Ferreira further notes that should the entitlement be established after negotiation, the interest becomes a right.¹⁵² Commenting on the issue of benefits, which have been contentious as to whether they should be categorized as disputes of rights or of interests, the Labour Court, vide Marcus AJ in the case of *Trans-Caledon Tunnel Authority vs. CCMA and others*,¹⁵³ stated as follows:

It seems to me the need for preserving the distinction between “rights” and “interests” disputes, highlighted in *Hospersa*, in the CCMA’s assumption of jurisdiction to arbitrate ulp (sic) disputes relating to benefits, which distinction underlies the scheme of dispute resolution established by the LRA, would be adequately addressed by limiting the scope and application of the unfair labour practice jurisdiction relating to the provision of benefits, to those benefits for which the employee is entitled to apply to the employer in terms of his employment or under the existing employment structure or conditions, in the sense that the basis or potential for conferring the benefit already exists in the employment structure, whether in terms of his conditions of employment, existing policies or simply past practice of the employer in awarding the benefit in question as occurred in *IMATU*, where the basis of the employee’s claim for an acting allowance was that he had received the benefit on another occasion. In *Hospersa* on the other hand, where no present basis for granting an acting allowance was found to exist in terms of the employee’s conditions of service or the employer’s policy, procedure or practice, apart from the employee’s perception that a failure to pay such allowance was unfair, the court was justified in rejecting jurisdiction to arbitrate, in as much as the dispute was concerned with a matter of mutual interest which, as noted by Todd AJ, “the LRA clearly contemplates should be left to a process of bargaining between the parties”.¹⁵⁴

Thus from the above that the primary jurisdiction of the CCMA is to disputes of interest rather than disputes of rights, except where specifically provided for by the LRA. This limits the application of alternative dispute resolution methods to only interest-based disputes. Thus, as a proposal for reform, the alternative dispute resolution processes of conciliation and arbitration within the auspices of the CCMA could be extended to include rights-based disputes. The South African system can be compared with Kenyan system, in contrast, whereby in the Kenyan

¹⁵⁰ Supra.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ (2013) 34 *ILJ* 2643

¹⁵⁴ Supra note 152.

system, as discussed in the first chapter of this work, such a distinction in effect between disputes of right and of interest does not exist.

Once a dispute has been referred to the CCMA, the appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of receipt of the referral of the, even though the parties can agree to extend the 30-day period.¹⁵⁵ This is similar to the Kenyan situation where the conciliator is also given 30 days to attempt a resolution of the dispute.¹⁵⁶ The setting of definite timelines for resolution of industrial disputes is important in the sense that parties can predict when the process shall come to a conclusion.

As elaborated in the second chapter of this work, industrial disputes generally have a far-reaching effect on the economy and on the parties that are involved in the dispute, thus necessitating their speedy and effective resolution. A commissioner, in attempting the resolution of disputes may employ any of the following measures:

- (1) Mediating the dispute
- (2) Conducting a fact-finding exercise; and
- (3) Making a recommendation to the parties which may be in the form of an advisory arbitration award.¹⁵⁷

When the conciliation has failed, or at the end of the 30-day period, the commissioner is mandated to issue a certificate stating whether or not the dispute has been resolved. The commission must serve a copy of the certificate to all the parties in the dispute, while the commissioner files the original certificate.¹⁵⁸ This pattern is similar to that of Kenya, where the conciliator after 30 days also files a certificate stating whether or not the dispute has been resolved.¹⁵⁹

In instances when the LRA requires that a dispute be resolved by way of arbitration, the commission must appoint a commissioner to arbitrate after a commissioner has issued the abovementioned certificate to the effect that the dispute remains unresolved. Within 90 days of the issuance of the certificate, any party can request that the dispute be resolved through

¹⁵⁵ Section 135 (2) LRA.

¹⁵⁶ Section 67 (1) of the Kenyan LRA.

¹⁵⁷ Section 135 (3) LRA.

¹⁵⁸ Section 135(5).

¹⁵⁹ Section 70(2) of the Kenyan LRA.

arbitration.¹⁶⁰ Under s 136(2) the commissioner who performed the conciliation can be the same commissioner who performs the arbitration. However, a party may object to the arbitration being conducted by the same commissioner who performed the conciliation.¹⁶¹ The concept of the same commissioner performing both the conciliation and arbitration can be subject to debate, in the sense that the impartiality that is needed for arbitrators may be lacking or compromised in such a situation.

Upon the conclusion of the arbitration proceedings, the commissioner then proceeds to make a settlement award upon the agreement of the parties to the dispute or on application of either party to the dispute.¹⁶² An arbitral award marks the conclusion of the process, is final and binding, and enforced as if it were an order of the Labour Court.¹⁶³ Arbitration awards, however, are subject to review under s 145 where a party alleges the existence of a defect in the arbitration proceedings. Such an application for review is made to the Labour Court within six weeks from the date on which the award was served upon the applicant. The defect must be either in relation to the commissioner committing a gross misconduct as to his or her duties as an arbitrator, committing gross irregularities in the conduct of the arbitration, or acting in excess of his or her powers.¹⁶⁴ A review is also available where an award has been improperly obtained.¹⁶⁵

(d) Challenges associated with the South African Industrial Dispute Resolution System

No system is perfect; every system suffers its own share of challenges. How a system responds to the challenges determines, to a great extent the success or failure of the system. This section seeks to analyse the challenges that are experienced in the South African industrial dispute resolution system in a bid to identify the common challenges that may be shared between South Africa and Kenya and the problem-solving approaches that Kenya can learn from South Africa.

¹⁶⁰ Section 136 (b).

¹⁶¹ Section 136(3) allows such a party to file an objection within 7 days of the issuance of a commissioner's certificate and under clause (4) when such an objection is received, the commission must appoint another commissioner to arbitrate the dispute.

¹⁶² Section 142A of the LRA

¹⁶³ Section 143 (1).

¹⁶⁴ Section 143(2).)

¹⁶⁵ Ibid.

One of the challenges experienced in the South African industrial dispute resolution system is what is termed as that of flagrant disregard of the law by employers.¹⁶⁶ This, as noted by Bendeman,¹⁶⁷ is as a result of the considerable ignorance of the employers as to the applicable laws and procedures largely because the LRA was designed and drafted very legalistically.¹⁶⁸ This calls for a reform for future purposes in which such laws can be drafted in a simple format so as to enable lay people to interact with the law without facing any challenges as to interpretation. The employers' ignorance of the law can be addressed by the creation of special forums where employers and employees alike can be educated and an awareness created as to the dictates of the law with regard to employer and employee relationships, with a specific interest in dispute avoidance and resolution.

Connected to the challenge of lack of awareness is the fact that employers lack adequate procedures in the workplace for the resolution of disputes. This increases the number of referrals of disputes to the CCMA. However, as Bendeman notes, the most important prerequisite for the handling of conflicts is the credibility of procedures.¹⁶⁹ This applies directly to the case of employees who refer the disputes to the CCMA as they consider themselves disadvantaged due to the inequality in bargaining power. Thus the internal procedures for the resolution of the disputes must be considered to be fair and credible by all the parties, as this will reduce the occurrence of such referrals. This is a point of reform that can also be applied to the Kenyan legal system where organisations. Organizations and employers can be encouraged to develop credible and fair procedures that will enhance the prevention of disputes and their early resolution upon occurrence, without necessary referrals to the more formal and state-controlled systems of dispute resolution.

Further, it is noted that the South African dispute resolution system is mostly designed largely for big employers. This means it offers thus little flexibility to the small- and medium-sized employers.¹⁷⁰ This thus leads to a situation where small employers are more willing and

¹⁶⁶H Bendeman 'An analysis of the problems of Labour Dispute Resolution in South Africa', available at www.kmsl.isn.ethz.ch/serviceengine/Files/ISN/98118/.../Chapter5.pdf, accessed on 08 September 2015.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

ready to engage with employer organisations and even to take out insurance policies against CCMA awards.¹⁷¹ Although Bendeman notes that one cannot change the system to suit small- and medium-sized employers, a system can be structurally adapted and designed in a way that it can be used in businesses of all sizes..

Accessibility to the CCMA, though considered as an advantage, can also be a disadvantage that leads to its being overburdened by disputes. This, as noted by Bendeman,¹⁷² is generally because of unfair dismissal practices. This is further compounded by the fact, that while the employer has the benefit of a legally trained industrial relations practitioner or consultant, the employee is not afforded legal representation. It would thus be worthwhile to introduce a reform which would enable the employee in a disciplinary hearing, even though a member of a union, to have access to legal counsel.¹⁷³ The CCMA code of good practice has come in to help bridge the gap to smaller employers.

II. CONCLUSION

This chapter has attempted a comparative analysis of the industrial dispute resolution system in South Africa, taking note of points of similarities. These include the fact that in both it and the Kenyan system, the process begins with conciliation with specifically set timelines that must be observed, and that. Further in both systems the conciliator issues a certificate at the end of the process. While most industrial disputes proceed to CCMA arbitration in South Africa, disputes in Kenya proceed to the Industrial Court. This is because Kenya lacks a statutory body such as the CCMA to specifically deal with industrial dispute resolution. It is thus recommended here that the Kenyan industrial system be reformed so as to adopt a similar approach. The next chapter of this work comparatively analyses the Australian industrial dispute resolution system. This is because Australia is considered to have one of the most robust and progressive industrial dispute resolution systems in the world, especially with regard to alternative dispute resolution. It is hoped that this could be another instance when the reform of the Kenyan industrial dispute resolution system is inspired by developments that have taken place in foreign jurisdictions.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

CHAPTER FOUR

THE AUSTRALIAN INDUSTRIAL DISPUTE RESOLUTION FRAMEWORK

I. INTRODUCTION

The previous chapter entailed a comparative analysis of the South African industrial dispute resolution process. A distinction was noted between the Constitution of the Republic of South Africa and the Constitution of Kenya, in terms of making provision for alternative dispute resolution mechanisms. While the Kenyan Constitution makes express provision for the promotion of alternative dispute resolution,¹⁷⁴ the South African Constitution makes an inference by implication, as noted in s 34, that states that everyone has a right to have any dispute which can be resolved by the application of law, decided in a fair public hearing before a court, or, where appropriate, another impartial tribunal or forum. The ‘other impartial tribunal’ could possibly refer to an alternative dispute resolution process that does not necessarily involve or entail court intervention and action.

It was also noted that the importance of constitutional recognition of such values in alternative dispute resolution lies in the fact that the constitution is regarded as an embodiment of the will of the people. This, as discussed in the previous chapter, derives from the social contract theory. This is to the effect that initially man lived in solitude and resources were plenty, but as the population increased these, greatly diminished to the extent that life became a competition and there was a need to install a sovereign who would manage resources and enforce individual persons’ rights.¹⁷⁵ It was further noted that one of the functions and responsibilities under the social contract theory that was submitted and yielded to the sovereign was that of dispute adjudication and resolution. This means that recognition of alternative dispute resolution methods by the constitution, would give such methods more validity and legitimacy as they would be reflective of the will of the people, rather than a merely a reflection of the will of the legislature...

¹⁷⁴ Article 159.

¹⁷⁵ Supra

Recognition of alternative dispute resolution methods by the constitution, would give the methods more validity and legitimacy as they would be reflective of the will of the people. This has more authority than mere legislative recognition which is considered to be a reflection of the will of the legislature. The history of industrial dispute resolution in South Africa was also discussed. It was noted that knowledge of the history of industrial dispute resolution is necessary if there is to be an understanding of its current or future application. The first attempt to resolve industrial disputes was made during the period of South Africa's industrial revolution with the establishment of industrial councils. Of critical importance was the fact that the developments in labour relations in South Africa took place concurrently with the socio-political developments in the country, especially as regards the black struggle for freedom from discrimination. The previous chapter categorised the history of labour relations in South Africa into three distinct periods. The first period was which, following the discovery of gold and diamonds in the nineteenth century and the rapid expansion and development of labour legislation from 1988 to 1994, culminated in the passing of 19th. The second was, the Labour Relations Act of 1995.

The chapter proceeded to discuss the process of industrial dispute resolution under the Labour Relations Act in terms of which the CCMA was established as a primary dispute resolution body under the Labour Relations Act, the CCMA undertaking and performing its dispute resolution processes mainly by means of conciliation and arbitration. This is similar to the system operating in Kenya, for in both countries it is the process of conciliation that is applied in the first instance, with. In both countries the conciliator performs similar duties with similar timelines, such as attempting to resolve a dispute within 30 days of its reference to conciliation. Further having to issue a certificate to the effect that the dispute has remained unsolved even after the conciliatory process is similar to both countries.

An important difference between the two is, however, that Kenya does not have a statutory arbitration process of resolving industrial disputes as South Africa, nor does it have a body like the CCMA to handle and process industrial disputes under the Labour Relations Act. It is for this reason that it is suggested that the Kenyan system be reformed so that it can provide for a statutory body similar to the CCMA.

In its conclusion the chapter briefly discussed the challenges faced by the South African model of industrial dispute resolution. The first of these was the flagrant disregard of the law by

employers, partly because most are ignorant of the requirements that the law imposes on them. The second is that the South African model seems as if it has been designed to meet the needs of big employers, and thus small- and medium-sized employers would rather resort to measures such as insuring themselves against CCMA awards, something that could be followed in Kenya, were the country to adopt the South African model. Before concluding this work and making a proposal for reform of the Kenyan system to adapt to the positives of the South African system, it is wise to consider Australia as another jurisdiction with industrial relations that can afford lessons for Kenyan regime.

The comparison that follows will form the basis of the proposals for reform to be discussed in the last chapter of this work. This chapter adopts the format of the previous chapter by commencing with a brief historical overview of the development of the industrial and labour relations in Australia, with a bias towards the development of a dispute resolution mechanism. The industrial dispute resolution procedures will then be discussed within the ambit of the Workplace Relations Act, (WRA)¹⁷⁶ as well as the Fair Work Act (FWA).¹⁷⁷ A discussion on the challenges faced by the Australian model of industrial dispute resolution will conclude as it seeks positive aspects that can be adopted into the Kenyan system

(a) *Historical Development of Industrial Dispute Resolution in Australia*

The Australian industrial dispute resolution system generally draws its origins from the Commonwealth Conciliation and Arbitration Act of 1904. This provided for the establishment of the Commonwealth Court of Conciliation and Arbitration (CCCA). According to Hamilton,¹⁷⁸ around 1890, during a period of drought and recession in colonial Australia extensive strikes took place in the maritime, shearing and mining industries.¹⁷⁹ The Royal Commission on Strikes, appointed earlier in an attempt to find a solution to the problem, experimented with the system of voluntary conciliation and arbitration. This failed, leading to the

¹⁷⁶ Australian Workplace Relations Act 1996 (Act no. 86 of 1988 as amended)

¹⁷⁷ Australian Fair Work Act 2009 (Act no 28 of 2009 as amended)

¹⁷⁸ R Hamilton, *Industrial Dispute: A President's Term on Australia's Employment Tribunal 1997-2012/The Honorable Reg Hamilton* (2012).

¹⁷⁹ Ibid at 6.

promulgation of legislation for compulsory conciliation and arbitration of industrial disputes.¹⁸⁰ The CCCA would try all means to resolve a dispute through conciliation and where it ended up unresolved after conciliation; the same body would administer arbitration of the dispute and issue an award.¹⁸¹ This seems similar to the South African system where the CCMA conducts both conciliation and arbitration with the processes at times running consecutively, in the form of what is generally known in Australia as ‘Con-Arbs’.¹⁸² As noted by Hamilton, an award was defined as follows by one judge in 1819:

‘...An award is a decree made by a judge or judges, deriving authority from the choice of the parties. The power of such Judge or Judges to decide, and the duty incumbent on the parties to obey the decision, arise solely from the contract of submission. In order therefore to support an action on an award, the contract of submission must be proved. The award itself is no evidence of contract, but when made in pursuance of a proper submission, then the parties may be said to have contracted to pay that, which the arbitrators, so empowered, have by the award directed to pay.’¹⁸³

This definition of an award and its scope indicates that it applied to consensual arbitration that was non-coercive in nature and where the parties had agreed to submit the industrial dispute to resolution by way of arbitration. However, because this did not work out well for most types of disputes, legislation for compulsory conciliation in and arbitration of industrial disputes was enacted. Thus, arbitration of industrial disputes became a matter of law rather than merely one of contract. This was most evident after the Commonwealth Conciliation and Arbitration Act defined an award to include an order,¹⁸⁴ thus giving it greater force in law.

It is noteworthy, however, that the Australian conceptualization of an award was slightly different from that in other jurisdictions in the sense that awards were not merely adjudicative in nature, but were also declaratory of principles and the law and thus in a sense legislative in nature.¹⁸⁵ For instance, minimum wage entitlements, penalty rates and allowances were developed early by awards, while entitlement to annual leave was developed in 1935 in the

¹⁸⁰New South Wales, Royal Commission on Strikes, *Report of the Royal Commission on Strikes* appointed 25 November 1890(1891),, 25 as quoted by Hamilton. It is noteworthy that the compulsory conciliation and arbitration of industrial disputes was not performed by a private body but rather by a court.

¹⁸¹Ibid.

¹⁸² Section 136 (2) South African LRA

¹⁸³ Op cit note 177

¹⁸⁴ Section 4 of the Act.

¹⁸⁵ Op cit note 177

printing industry.¹⁸⁶ This shows that most of the labour entitlements enjoyed in Australia were developed from the large body of awards, which had clauses that were interpreted and applied, and were meant to be a means of dispute prevention, not only dispute resolution... The period between the year 1987 and 1995, as noted by Hamilton, saw the beginning of a process of the reformation of the award system, by consolidating previous awards and simplifying their use.¹⁸⁷

In conclusion, from a reading of the history of industrial dispute resolution process, the award system played a considerable role in the formulation of the current labour entitlements. The next section of this work briefly discusses the constitutional position of Australia with regard to alternative dispute resolution in civil disputes as well as industrial and labour relations disputes.

(b) Australian Constitutional Position on Alternative Dispute Resolution

As noted in the previous chapter, constitutional recognition and enshrinement of a particular ideal gives it more validity and enforceability as the constitution is an embodiment of the will of the people. The Constitution of Australia provides for alternative dispute resolution mechanisms of arbitration and conciliation to deal specifically with industrial disputes. Article 51 (xxxv) of the Australian Constitution 9th July 1900 gives Parliament the powers to make laws in respect of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.¹⁸⁸ This provision in the Australian Constitution distinguishes it from the Kenyan and South African constitutions, in the sense that it provides specifically for the enactment of legislation that makes it possible for the alternative dispute resolution methods of conciliation and arbitration to be applied to industrial disputes. However, the industrial disputes referred to by the constitution are those that ‘extend beyond the limits’ of any one state.¹⁸⁹ This is more so because Australia is a federal state and thus individual states have the power to make their own legislation for the application of such alternative dispute resolution methods within their territories.¹⁹⁰ The next section analyses the industrial dispute resolution

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Article 51 (xxxv) Australian Constitution [Commonwealth of Australia Constitution 9th July 1900].

¹⁸⁹ Ibid.

¹⁹⁰ Per Wilson M *The Constitution of the Commonwealth of Australia* University of Sydney Library (2000) at 146

procedure as set out in the Workplace Relations Act and the Fair Work Act, both passed in accordance with the constitutional mandate discussed above.

(c) Industrial Dispute Resolution under the Workplace Relations Act (Repealed)

Australia's Workplace Relations Act¹⁹¹ was among the acts important of the acts of Parliament that were applicable to industrial relations. The Act provided a detailed model system for industrial dispute resolution that may be applied in the various states that form part of the Commonwealth of Australia. This section analyses and appraises the industrial dispute resolution process set out in the Act, with a view to drawing inspiration for proposals for the possible reform of the Kenyan system.

The Act stated that the model dispute resolution process does not apply in any particular dispute unless it applies to the dispute by way of provision of the Act.¹⁹² Disputes that could be resolved by this procedure would thus have to be creatures of the statute as well as the processes being non-coercive. Furthermore, the application of the model dispute resolution process could be invoked if it was included in the terms of a workplace agreement or award.¹⁹³ The Act listed types of dispute the process can relate to:

- (a) Disputes about entitlements under the Australian Fair Pay and Conditions Standard (see section 175); and
- (b) Disputes about the terms of a workplace agreement, where the agreement itself includes the model dispute resolution process or is taken to include that process (see section 353); and
- (c) Disputes about the application of a workplace determination (see section 504); and
- (d) Disputes about the application of awards (see section 514); and
- (e) Disputes under Division 1 of Part 12, which deals with meal breaks (see section 609); and
- (f) Disputes under Division 2 of Part 12, which deals with public holidays (see section 614); and
- (g) Disputes under Division 6 of Part 12, which deals with parental leave (see section 691).¹⁹⁴

¹⁹¹ Op cit note 175.

¹⁹² Section 694 of the Workplace Relations Act.

¹⁹³ Ibid

¹⁹⁴ Ibid.

The disputes categorised above could thus be dealt with by the type of process was set out in the model dispute resolution process. As may be noted, the above disputes were rights based having their origins either from workplace agreements, or awards. The use of the word ‘including’ in the wording of the note to s 694 of the Workplace Relations Act implies non-exclusivity, which meant that the above list of industrial disputes is not an exhaustive.¹⁹⁵ Thus a jurisdiction like that of Kenya can adopt a similar process and include a broader range of disputes to be covered.¹⁹⁶

The preliminary recommendation in dispute resolution under the model process, was that the parties to the dispute genuinely attempt to resolve the dispute at workplace level, which, as noted, would involve an affected individual first discussing the matter in dispute with his or her supervisor and then with senior management. This is in line with the I.L.O. Labour Disputes System guidelines, as discussed above. It was also noted in the second chapter that resolution of disputes should be primarily through the efforts of the disputing parties themselves.¹⁹⁷ This flows from the general principle in dispute resolution which is to the effect that it is the parties themselves who know the nature of their interests in the dispute and thus are able to formulate their solutions. Such a provision for resolution of the dispute via internal is healthy, as it creates a forum for the preservation of the continued relationship between the parties, which would otherwise have deteriorated in necessitating the intervention of a third party.

In circumstances where the dispute still remains unresolved at the workplace level, the Act provided that a party may resolve or elect to use an alternative dispute resolution process conducted by a person that has been previously agreed, on.,¹⁹⁸ If the parties failed to agree on who is to conduct the alternative dispute resolution process, either party would notify the Industrial Registrar,¹⁹⁹ who upon notification was obligated to give the parties the prescribed information.²⁰⁰ It is noteworthy that the Act at this stage did not state what the prescribed

¹⁹⁵ This is because the model procedure can be adapted to suit to different kinds of industrial disputes in Kenya.

¹⁹⁶ The note to s 694 states as follows ‘The model dispute resolution process applies in relation to a variety of disputes, ‘including’...

¹⁹⁷ I.L.O. *Labour Disputes System Guidelines for Improved Performance* (2013),)

¹⁹⁸ Section 696 (2)

¹⁹⁹ Section 696(3)

²⁰⁰ Section 696 (4)

information is. The Industrial Registrar's dispute resolution powers seems to be limited to the giving of information in addition to registration functions. This is in contrast to the position in Kenya, where the minister has the power to appoint conciliators.²⁰¹

The WRA also provided that alternative dispute resolution processes could also be conducted by the Australian Fair Pay Commission in situation where the parties have failed to agree on who should conduct the process.²⁰² The WRA further provided that where such a process had been instituted, the parties would need to genuinely try to resolve the dispute by use of that process.²⁰³ This provision, by extension, provided a goodfaith approach by both parties to resolve the dispute. This approach, as was noted in the second chapter, is part of the I.L.O. Labour Dispute Systems Guidelines. The Act also preserved the status quo of the parties to the dispute resolution process by stating that an employee who is a party to the dispute must continue to work in accordance with the terms of the contract,²⁰⁴ as well as comply with any reasonable direction given by his or her employer.²⁰⁵ This had the effect of preempting any case of employee victimization during the process.²⁰⁶

The following are the alternative dispute resolution processes that were set out under the repealed Act and the model procedure:

- (a) Conferencing; and
- (b) Mediation; and
- (c) Assisted negotiation; and
- (d) Neutral evaluation; and
- (e) Case appraisal; and
- (f) Conciliation; and
- (g) Arbitration, or other determination of the rights and obligations of the parties in dispute; and

²⁰¹ Section 65(a) of the Kenyan Labour Relations Act

²⁰² Section 696 (5)

²⁰³ Section 696(6)

²⁰⁴ Section (697)(1)(a).)

²⁰⁵ Section 697 (1)(b).)

²⁰⁶ Employee victimization could potentially occur in a situation where the employer varies the terms of the employment contract to the detriment of the employee on the ground that the employee raised a grievance.

(h) A procedure or service specified in the regulations.²⁰⁷

As noted above, the Act distinguished and listed conciliation as a different process from mediation, which is generally in line with the I.L.O Legislation Guidelines. These guidelines, as noted earlier, distinguish the two processes of mediation and conciliation.²⁰⁸ The main distinction between the process of mediation and conciliation set out in the guidelines relates to the role of the third party intervener. While both processes are similar in terms of outcome and general process, according to the guidelines, in mediation the third party has a more active role and a greater mandate and authority than in the conciliation process.²⁰⁹ Kenya, however, does not distinguish between the two.

The parties commenced the process by making an application to the Commission in the prescribed format, describing in detail the matters in dispute that the parties need to apply the alternative dispute resolution methods to, as well as specifying the kind of procedure they wish to be followed.²¹⁰ At this point the parties had a choice as to which of the processes on the list mentioned above they would wish to pursue. As was noted in the discussion of the guidelines in the second chapter of this work,²¹¹ this autonomy enables whatever outcome of the process to be completely binding on the parties, as the parties have voluntarily chosen the method of resolution of the dispute. This is in line with the I.L.O. Recommendation Number 92 on Voluntary Conciliation and Mediation of disputes.

(i) *Powers of the Commission*²¹²

If the Commission agreed to undertake any alternative dispute resolution process selected by the parties, it would be required to take any action that is deemed appropriate for the resolution and settlement of the dispute.²¹³ This included arranging conferences of the parties or their representatives at which the Commission is present; and arranging for the parties or their

²⁰⁷ Section 698.

²⁰⁸ I.L.O Labour Legislation accessed via I.L.O. Labour Legislation Guidelines, available at <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch4.htm>, accessed <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch4.htm> on 28 May 2015.

²⁰⁹ Ibid.

²¹⁰ Section 699 (2).)

²¹¹ Supra.

²¹² The Australian Industrial Relations Commission

²¹³ Section 701 (1).)

representatives to confer among themselves at conferences at which the Commission is not present.²¹⁴ The arrangement for a time for the representatives of the parties to meet in the absence of the Commission is akin to assisted negotiation. The usefulness of the meeting is debatable, especially in circumstances where the parties have previously had bilateral meetings and workplace forums where settlement was reached. The commission is required to act quickly and in a way that avoids unnecessary technicalities and legal forms. Further, if the parties have agreed that an aspect of the process is to be conducted in a particular way the commission is bound to respect the agreement of the parties in dispute.²¹⁵ The expediency requirement is inherent in any process that is alternative to litigation in court. As was discussed in the second chapter, above, industrial disputes have far-reaching consequences well beyond the individual disputants themselves. For instance, the economy of a country can suffer losses during a protracted strike, thus it is more important that industrial disputes are resolved than are others which may be more private in nature.

Regardless of the above powers and functions of the commission, the WRA indicates that the Commission lacks the power :

- (a) To compel a person to do anything; or
- (b) To arbitrate the matter, or matters, in dispute; or
- (c) To otherwise determine the rights or obligations of a party to the dispute; or
- (d) To make an award in relation to the matter, or matters, in dispute; or
- (e) To make an order in relation to the matter, or matters, in dispute; or
- (f) To appoint a board of reference..²¹⁶

This limitation of the powers of the commission appears to contradict the dispute resolution processes set out in s 698, which included arbitration and the determination of rights.²¹⁷ This should be noted if the Australian model is adopted in some aspects in Kenya. It is, in fact, South African CCMA's quasi-authoritative role that would serve as the best example to be followed by

²¹⁴ Ibid.

²¹⁵ Subsection (3)).)

²¹⁶ Subsection (4)).)

²¹⁷ Section 698 (1)(g)).)

Kenya .The Commission is mandated to conduct private sessions during the dispute resolution process.²¹⁸ It must, however, not disclose or use any document given to the Commission in the course of this process unless the information or document is disclosed or used for the purpose of conducting the process; or the parties to the process consent to the disclosure or use; or the information or document is disclosed or used in circumstances specified in Regulations made or the disclosure or use is otherwise required or authorized by law.²¹⁹

All the information that is shared during the proceedings is entirely inadmissible in court. The Act states that evidence of anything said, or any act done, in the alternative dispute resolution process is not admissible in proceedings relating to the dispute: in any court or before a person authorized by a law of the Commonwealth or of a State or Territory to hear evidence; or before a person authorized by the consent of the parties to hear evidence unless the parties agree to the evidence being admissible; or the evidence is admitted in circumstances specified in Regulations.²²⁰ The provision for inadmissibility of the evidence or material disclosed in the interactions and negotiations within the ambit of the Commission plays a role to ensure that bargaining is done without any perceived inhibition in any way. The process of dispute resolution is considered to be completed when the issues in the dispute are resolved or the party, who elected to use the Commission as a dispute resolver, informs the Commission that it no longer wishes to continue with the process.

It is worth noting that the extent of court intervention in the process under the Model Law was limited to appeals as contemplated by Section 120 of the repealed Workplace Relations Act which provided for appeals against an order of the Australian Industrial Relation Commission. Further, the Commission itself could make a reference to the court on matters of law. This minimal interference by the court in matters governed by the Model law is part of the reason why the Model law is endearing.

This is the process that is set out in the model procedure for industrial dispute resolution. In the final chapter of this work, various proposals for reform will be discussed, and analysed for adoption and incorporation into the Kenyan system. The next section critiques the model

²¹⁸ Section 702(1).

²¹⁹ Section 702 (2).

²²⁰ Section 702(3).

procedure before the last section of this chapter discusses the dispute resolution process under the Fair Work Act.

(ii) *Appraisal of the Model Dispute Resolution Procedure*

As noted in the above discussion, the Workplace Relations Act provided for a model procedure for the resolution of industrial disputes. In this section the model procedure is critiqued in order to establish whether it is able to serve as a model for an appropriate dispute resolution process for the resolution of industrial disputes in Kenya.

The first challenge raised by the procedure, as noted by B Wolski,²²¹ relates to uncertainty regarding its scope.. This is because the Act stated that the model procedure would cover any matter that may be in dispute between the parties to a workplace agreement.²²² This, as noted by Wolski, is essentially a rights-based approach to the resolution of the dispute since the disputes would deal with matters incidental to and related to existing rights provided for under the workplace agreement. This would be in contrast to the provision for an application of the model procedure to extend to interest disputes that occur in the context of the negotiation for and varying of workplace agreements. This concurs with the finding made by MacDermott & Riley,²²³ who note that the model dispute resolution process, which attempted to push potential litigants to the ADR, applied significantly to complaints concerning breaches of the Act and other basic rights and entitlements.²²⁴ The above authors note that the laws were repealed before their impact could fully be ascertained. Further, as noted by Wolski, the lack of definition of a dispute by in model procedure may lead to a situation in which parties may contest the existence of a dispute in the context of the Act.²²⁵ Thus if the model procedure were to be applied in Kenya, there would be need to extend it to cover both interest-based and just-rights

²²¹ Bobette Wolski 'The Model Dispute Resolution Procedure for Australian Workplace Agreements: A dispute design perspective' (1998) 10 (1) *Dispute Design Perspective* *Bond Law Review*. 7–38.

²²² Section 326 of the Workplace Relations Act makes provision for workplace agreements which are agreements that are made by an employer with any person who is in employment at that time. The workplace agreements provided for dispute resolution procedures as mandated by s 353 of the Act.

²²³ Therese McDermott & Joellen Riley 'Alternative Dispute Resolution and Individual Workplace Rights: The Evolving Role of Fair Work Australia' (2011) *Journal of Industrial Relations* 718-732

²²⁴ *Ibid.*

²²⁵ *Supra.*

disputes.²²⁶ This is because both types of disputes have far reaching implications, as noted earlier, that go beyond individual disputants.

Another challenge that is noted by Wolski relates to the fact that there was limited access to the system for the employee who could only access it through the employee supervisor.²²⁷ This is especially because s 695 of the Act provides that the employee would need to first discuss the matter in contention with the supervisor before accessing the system. This is meant to promote the genuine efforts of the parties to resolve the dispute as much as possible. The only limit to this is the fact that the supervisor, as noted by Wolski, might generally be part of the problem in question and hence the employee may feel intimidated.²²⁸

Wolski comments that the model procedure as provided for in the Workplace Relations Act fell short of providing an elaborate mechanism for the prevention of disputes: there was no obligation on the part of employers to establish notification and consultation procedures that may be used to ensure that the dispute is adequately prevented and managed at the pre-dispute level.²²⁹ She further notes that the general lack of procedural certainty and acts as a stumbling block to some procedures that are mentioned in the model procedure such as mediation and negotiation. She notes as follows:

‘Without the aid of a definition and a set of procedural rules, the extent of mediator authority is uncertain. It seems clear that mediators do not have power to make binding determinations and they generally lack power to give directions and to make orders. They may make certain requests of the parties, for example, they may request that the parties provide documents relevant to the dispute or that parties exchange such information as is required to allow a fruitful exploration of disputed issues and possible options for resolution. Since the model clause provides that the parties agree to participate in mediation in good faith, they may be obliged to comply with all reasonable requests made by the mediator. Unfortunately, what constitutes a reasonable request and the exact parameters of what is required by ‘good faith’ participation are not entirely clear. To some extent, the question may be a moot one for mediators cannot take default

²²⁶ The importance of the applicability of the processes mentioned in the model procedure to disputes of interest was noted in the *High Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts* 18–19 October 2007, available at www.ilo.org/wcmsp5/groups/public/---/wcms_366949.pdf, accessed www.ilo.org/wcmsp5/groups/public/---/wcms_366949.pdf on 27 August 2015.

²²⁷ Op cit.

²²⁸ Op cit

²²⁹ Ibid.

measures against a party who fails to comply with a request²³⁰ and they are unable to call upon the Commission for support and assistance.²³⁰

The challenges faced by the model law were such that it was repealed together with the Workplace Relations Act. However, this research proposes that Kenya should adopt an amended version of the model contained in the Workplace Relations Act. These amendments are necessary if the challenges discussed are addressed.²³¹ The Australian legislature replaced the Workplace Relations Act with the 2009 Fair Work Act, discussed below.

(d) Industrial Dispute Resolution under the Fair Work Act

The Fair Work Act provides a more standard format and procedure for the settlement of industrial disputes of differing nature, such as unlawful dismissal, termination of employment, collective agreements and industrial actions. This section summarises the dispute resolution procedure for the settlement of termination of employment disputes. Under s 773 of the Act, if an employer has terminated an employee's employment, and the employee, or an industrial association that is entitled to represent the industrial interests of the employee, alleges that the employee's employment was terminated in contravention of s 772(1); the employee, or the industrial association may apply to the Fair Work Authority (FWA) for the FWA to deal with the dispute.²³² An application is to be made within 60 days after the employment was terminated or within such further period as the FWA allows.²³³ The FWA may extend the period for the filing of the complaint in exceptional circumstances, taking the following into account:

- (a) The reason for the delay; and
- (b) Any action taken by the employee to dispute the termination; and
- (c) Prejudice to the employer (including prejudice caused by the delay); and
- (d) The merits of the application; and

²³⁰ Wolski B 'The Model Dispute Resolution Procedure for Australian Workplace Agreements :A Dispute Design Perspective' *Bond Law Review* Vol. 10 Iss.1, Article 2 1998

²³¹ Among the reasons for selection of the model found in the Workplace Relations Act, is the fact that it has a near comprehensive dispute resolution procedure that minimizes court intervention.

²³² Section 773 of the Fair Work Act (2009).

²³³ Section 774.

(e) Fairness as between the person and other persons in a like position.²³⁴

After the dispute has been properly refereed, the FWA conducts a conference,²³⁵ issues a certificate if the dispute is not resolved.²³⁶ The FWA then advises the parties on whether they should go to court or not.²³⁷ It is worth noting that the FWA plays a minimal role in ensuring that the dispute is resolved. The Act does not mention that the FWA has a mandate to apply alternative dispute resolution processes in order to resolve industrial disputes. The nature of the conferences and hearings is also not specified.

(i) *Appraisal of the Dispute Resolution Regime under the Fair Work Act*

As noted in the previous section, the dispute resolution process in the Fair Work Act is not as elaborate as that set out in the model procedure in terms of the repealed Workplace Relations Act. This is because the procedure is similar under the various headings of causes of action in the Act. This is in contrast to a legislative system that proposes a uniform system for dispute resolution that would apply to all the causes of action under the Act. However, for purposes of this section, the appraisal shall relate specifically to the resolution of disputes regarding unfair dismissal under the Australian Fair Work Act.

According to MacDermott & Riley,²³⁸ the process set out in the Fair Work Act can be distinguished from that in the repealed Workplace Relations Act, in the sense that the 2009 Act does not actively encourage parties to engage the services of private ADR providers, though it does provide for more informal processes towards the resolution of disputes. They further note that the dispute resolution procedures under the Fair Work Act (FWA) are only mandatory if it is alleged that there has been a dismissal in contravention of the general protection provisions of the Act. Further, if a person has not been dismissed but still alleges that there has been some

²³⁴ Ibid.

²³⁵ Section 775.

²³⁶ Section 773.

²³⁷ Section 778.

²³⁸ Op cit 222.

contravention of the general protection provisions of the Act, then the dispute resolution processes would be dependent on the concurrence of all the parties to the dispute.²³⁹

Making the processes voluntary and dependent on the concurrence and agreement of the other parties to the dispute serves as both as an advantage and a disadvantage, as was noted in the preceding chapters of this work. In summary, a dispute resolution process that has been administered with the parties' free volition ensures a higher chance of their engaging in good faith and reduces the likelihood of litigation after the alternative dispute resolution processes have been exhausted. Alternatively, if the processes are voluntary this could result in the parties completely ignoring them and moving directly to litigation too.²⁴⁰

Quoting Meredith,²⁴¹ MacDermott and Riley²⁴² note that his study found that the use of conciliation in unfair dismissal applications was almost guaranteed as it satisfied the dispute resolution criteria as to accessibility, timeliness, cost effectiveness and fairness. However while. Further, finality, particularly this was seemingly due to the fact that the costs associated with proceeding beyond conciliation were prohibitive –, was a major factor that influenced the employees' attitude towards settlement of the disputes. This finding further justifies an extension of the mandatory nature of the dispute resolution processes, one that will include other disputes and causes of action and go beyond just the dispute resolution of unfair dismissal disputes. This could have the same ripple effect on all the other kinds of disputes that are governed by the Act.

II. CONCLUSION

This chapter has analysed the Australian industrial dispute resolution system framework and traced it from its historical roots to the system .operating presently. It was noted that, unlike the South African system, the Australian system makes provision for a model procedure for the resolution of such disputes. In the final chapter of this work, various proposals for the reform of

²³⁹ The procedures listed as dispute resolution procedures include mediation, conciliation, making a recommendation or expressing an opinion. It is noteworthy that mediation and conciliation are listed as distinct dispute resolution processes.

²⁴⁰ It is noteworthy that in various sections of the Fair Workers Act, appeal to court is limited to matters that are in the public interest to appeal. An example of such a section is Section 400 of the Act.

²⁴¹ F Meredith 'Alternative Dispute Resolution in an Industrial Tribunal: Conciliation of Unfair Dismissal Disputes in South Australia' (2001) 14(I):*Australian Journal of Labour Law* 36.

²⁴² Op cit note 222

the Kenyan system will be analysed while bearing in mind arguments and recommendations presented in this work.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

I. INTRODUCTION

As was noted in the first chapter, an efficient and functional industrial dispute resolution framework is important for the well ordering and growth of industry. There has been a general shift to service-based industries and this has led to the growth and development of the labour sector and, by extension, the development of industrial dispute resolution systems. An increase in the occurrence of industrial disputes has meant that courts are overwhelmed with a backlog of cases, which has the effect of frustrating litigants, resulting in delays and considerable expense. This led to calls for alternative dispute resolution mechanisms for the resolution of industrial disputes.

The first chapter noted that the Kenyan Constitution, while providing for access to justice for all persons, made an independent provision for alternative dispute resolution in article 159(2) (c). These procedures are listed in the article and include reconciliation, mediation, arbitration and traditional dispute resolution methods. This was followed by a discussion on the various forms of alternative dispute resolution, commencing with arbitration, a procedure that was always conducted under the cloud of litigation and court intervention, thereby defeating its very purpose as an alternative to court litigation.

Also discussed was the mediation process. It was recognized that, while it has various advantages in dispute resolution, mediation is not necessarily effective in situations in which there is a power imbalance between the parties, as is often the case in industrial disputes between employer and employee and is something that would need to be addressed.

It was further noted that In the Kenyan industrial dispute resolution system it is conciliation, a process similar to mediation, that is the favoured method of the resolution of disputes. Conciliation is provided for in the Kenyan Labour Relations Act: the minister is required to appoint a conciliator who attempts a conciliation to resolve the dispute. This conciliation process thus can, if necessary, be adjusted according to ensure that any actual or perceived power imbalance is addressed. The court in Kenya plays a major role, in the enforcement, review of, and appeal against arbitral awards, all of which defeat the purpose of having an alternative dispute resolution process that is completely extra-judicial. The second

chapter stressed that it was essential that a labour dispute resolution, procedure was efficient, as a reduction in cost and time would mitigate any negative impact that a labour dispute could have on the economy and other persons who are not party to the dispute.²⁴³ This need for efficiency is sufficient justification for a recommendation for the development of a comprehensive alternative dispute resolution system for industrial dispute resolution that is self-sufficient in nature, without the need for judicial recourse.

The second chapter also discussed the global framework for industrial dispute resolution. It commenced with a discussion on balancing the finality expectation with the right of review of an industrial arbitration award. It was also pointed out that arbitration, as an alternative dispute resolution process, is intended to offer a forum for the expeditious resolution of industrial disputes, because their very nature of requires an expeditious resolution. This is because industrial disputes have far-reaching consequences to the society as they interrupt the smooth and orderly development of the economy and the maintenance of law and order. Further, it to the advantage of anyone involved in any dispute, whether labour or private in nature, that the dispute is resolved expeditiously. .

The Constitution of Kenya recognizes social justice as one of the core values of the State,²⁴⁴ and thus individual social justice requirements, and economic requirements are catered for by the expeditious resolution of disputes. There is thus a need, as was noted, for the development of a dispute resolution system that will not only expedite the resolution of such industrial disputes, but will also provide both procedural and substantive fairness.

As was further noted, arbitration as an alternative dispute resolution process is intended to be final and conclusive, and exclusive of the court process, especially in situations where the parties have entered into an agreement that clearly stipulates the finality of arbitration. However, establishment of any arbitration process entirely immune from review would cause an injustice to the victims of an arbitration process that was flawed. It is for this reason that the second chapter analysed three different approaches that could be used to strike a balance between fairness and finality. The first was to restrict review to procedural irregularities; the second to

²⁴³ This was observed by AK Ubeku in *Industrial Relations in Developing Countries: The Case of Nigeria* (1983).

²⁴⁴ Social justice is mentioned in the Preamble of the Kenyan Constitution, as a national value in Article 10 (2)(b) and as a principle in the Kenyan Bill of Rights in art 19(2)).)

restrict it to questions of law,; and the third suggested arbitral award reviewed by another arbitral tribunal independent of the supervision and control of the judiciary. This

The chapter also discussed the I.L.O.'s framework for the promotion of alternative dispute resolution. It was noted that in promoting social justice, the I.L.O. was also indirectly promoting the best dispute resolution, one that would ensure the realisation of social justice, as most conflicts and disputes originate from perceived injustice. The chapter also analysed of the I.L.O. Labour Dispute System Guidelines for improved performance, their purpose being to help individual states to come up with a more effective dispute resolution framework. The Guidelines acknowledged the inevitability of conflict due to the power imbalance inherent in an employment relationship.²⁴⁵ To this end, it was noted that the Guidelines put forth a recommendation that an effective dispute resolution mechanism should, in the first instance, be aimed at preventing disputes.

Another key recommendation in the guidelines was that the peaceful resolution of industrial disputes should be primarily through the efforts of the disputing parties themselves. This would thus be giving effect to the non-coercive forms of alternative dispute resolution that would focus on the primary disputants themselves. A discussion of the I.L.O. Recommendation Number 92 on Voluntary Conciliation and Arbitration concluded the second chapter, taking note that in promoting the voluntary means of dispute resolution not only ensures that parties are able to engage with each other in good faith, but also assists with preventing disputes from arising. This is in direct contrast to the Kenyan framework that provides for compulsory conciliation and arbitration where there an agreement to arbitrate is in force.

The third chapter entails a comparative analysis of the South African industrial dispute resolution process. It was noted that there are differences between the Constitution of the Republic of South Africa and the Constitution of Kenya, as regards the provision for alternative dispute resolution mechanisms. While the Kenyan Constitution makes express provision for alternative dispute resolution,²⁴⁶ the South African Constitution only does so by implication in its s 34. This section states that everyone has a right to have any dispute, which can be resolved by

²⁴⁵This was noted by Kahn Freud in Davies & Freedland *Kahn-Freund's Labour and the Law* (1983) 18.

²⁴⁶ Article 159.

the application of law, decided in a fair public hearing before a court, or where appropriate, another impartial tribunal or forum. The other 'impartial tribunal' referred to includes alternative dispute resolution mechanisms that do not necessarily involve or entail court intervention and action.

It was also noted that the importance of constitutional recognition of such values in alternative dispute resolution lies in the fact that the constitution is regarded as an embodiment of the will of the people. This, as was discussed in the previous chapter, is based on social contract theory that posits that initially man lived in solitude with access to plentiful resources. As the population increased, these resources were greatly diminished, to the extent that life became a competition. There arose a need to install a sovereign who would manage resources and enforce the rights of an individual.²⁴⁷ It was further noted that under this theory, one of the functions and responsibilities submitted and yielded to the sovereign was that of dispute adjudication and resolution. Recognition of alternative dispute resolution methods by the constitution would similarly therefore give them more validity and legitimacy, as they would be reflective of the will of the people, rather than merely that of the legislature.

The history of industrial dispute resolution in South Africa was discussed in the third chapter. It was noted that in order to understand the concept of industrial dispute resolution, it is essential that its historical context is also understood. It is important, too, that the current application of the concept is understood if new ideas are to be formulated in the future. Industries were first regulated in South Africa during its industrial revolution in the form of industrial councils, established to resolve industrial disputes that would arise. Of critical importance was the fact that the South African labour relations movement developed contemporaneously with the political developments in the country, -especially the black struggle for freedom and democracy. The chapter discussed the process of industrial dispute resolution under the South African Labour Relations Act and noted that the CCMA was established as a primary dispute resolution body under the Labour Relations Act; it undertakes and performs its dispute resolution processes largely through conciliation and arbitration. The South African system is similar to that of Kenya as conciliation is the first process that it applied. The conciliator performs similar duties with

²⁴⁷ Michael Oakeshott, Ed *Leviathan: or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (1960) Oxford Basil Blackwell.

similar timelines — such as attempting a resolution of the dispute within 30 days of reference to conciliation and the issuance of a certificate to the effect that the dispute has remained unresolved, even after the conciliatory process.

A marked contrast was, however, noted between the two jurisdictions, for Kenya does not have a statutory arbitration process as a means for the resolution of industrial disputes as is the case in South Africa; neither does it have a body like the CCMA to handle and process industrial disputes. It was suggested that the Kenyan system should be reformed to provide for a statutory body similar to South Africa's CCMA. The chapter ended with a brief discussion on the challenges presented by the South African model of industrial dispute resolution.

The first of these challenges to be acknowledged was that of the employers' flagrant disregard of the law, partly due to their ignorance of the requirements that the law imposes on them. Another problem is that the Labour Relations Act and the dispute resolution model under it largely address the needs of big employers. This is not to say that it does not address the needs of small-sized employers at all,²⁴⁸ but it appears that the model is inadequate for their needs. This means that small- and medium-sized employers therefore have challenges with it, which they would rather address via extraneous measures.²⁴⁹ Such challenges would be shared with Kenya, if Kenya were to adopt the South African model in its entirety.

The fourth chapter of this work comprised a comparative analysis of the Australian industrial dispute resolution system. It was noted that the concept of industrial awards within the Australian jurisdiction entailed a slightly different meaning from the contemporary knowledge of the meaning and scope of awards, in the sense that Australian awards are considered pronouncements of industrial rights rather than mere adjudications. It was further noted that the Australian Constitution, while not providing for alternative dispute resolution measures directly, distinguishes itself from the Kenyan and South African Constitutions by providing for the development of legislation that would give effect to alternative dispute resolution.

²⁴⁸ Such as Schedule 8 to the South African Labour Relations Act which mandates commissioners to take into consideration the needs of small employers in determining unfair dismissal disputes.

²⁴⁹ This was argued by Bendeman op cit (n 161) 94. www.kms1.isn.ethz.ch/serviceengine/Files/ISN/98118/.../Chapter5.pdf accessed on 15/09/2014.

The Fair Work Act and the repealed Workplace Relations Act were also discussed, and the system provided for in the model dispute resolution procedure under the Workplace Relations Act preferred because of its promotion of the disputants' role in the dispute resolution processes as well as its expediency requirements. However, even that would have to be amended before its adoption in Kenya if it were to adequately cater for challenges as regards the uncertainty as to the scope of the system, its limitation of access by employees, as well as its provision for dispute prevention methods.

The next section discusses a few principles of industrial systems design that can be considered in the redesigning of the Kenyan industrial dispute resolution framework. These principles act as guidelines rather than rules.

(a) Principles for Industrial Dispute Systems Design

In view of the findings summarized above, there is a clear need for developing and designing a working dispute system for the Kenyan labour relations sector. Such a system would take in the above recommendations into consideration. This include the establishment of a body to handle labour disputes, like the South Africa's CCMA and providing a system that would be as conclusive as possible. Thus, such a system should conform to the best practices in the industry and the principles of industrial systems design that are discussed in this section.

Wolski²⁵⁰ identifies a few principles for industrial dispute systems design, principles which this work proposes should be adopted in the design of an effective dispute resolution system in the context of the Kenyan industrial relation system. The first principle is the definition of the scope of the system, which was one of the challenges noted in the application of the model dispute resolution procedure. She opines that the scope of what amounts to a dispute within the context of the system ought to be accurately defined so that the parties to a dispute are able to understand what can and cannot be referred to it. She further states that the criteria for the selection of cases needs to be identified and publicised and the relationship of these to external avenues of redress clearly elaborated.²⁵¹

²⁵⁰ Wolski op cit (n207).

²⁵¹ Ibid.

Related to the above, is the need for the establishment of easily accessible systems of dispute resolution. In terms of the principle of accessibility, South Africa's CCMA that is devoid of numerous technicalities of procedure and is accessible more so to employees, can be considered an ideal worthy of emulation.. The accessibility of such a system does not, however, come without challenges of its own, one of these being that it can be overwhelmed by disputants seeking relief, thereby reducing its efficacy and replicating the position of the law courts, for these are similarly overwhelmed.

Emphasis should be given to the prevention of disputes rather than their resolution. Such prevention would greatly reduce the burden of resolving disputes that have already arisen as well as the costs involved in dispute resolution. In this regard Wolski observes as follows:

'Procedures aimed at prevention of disputes may be incorporated at both the pre-dispute and post-dispute levels of a dispute resolution system. Notification and consultation procedures, informal counselling, and informal third party intervention in the form of shuttle diplomacy might be used at the pre-dispute level, before differences escalate into disputes. At the post-dispute stage, it is advisable to incorporate procedures for systematically recording and analyzing complaint and dispute data. The data can be used to identify and rectify systemic and recurring problems and to prevent future disputes.'²⁵²

The adoption of such procedures before and after the dispute will have the overall effect of reducing the occurrence of disputes as well as promoting dialogue and consensus in instances where the dispute has already occurred. Such procedures, as she notes, should give preference to interest-based processes of dispute resolution, such as mediation and conciliation, over rights-based processes like arbitration and litigation. Wolski identifies a good dispute resolution system as one that incorporates procedures whereby persons who are already engaged in rights-based processes such as litigation and arbitration can revert to interest-based procedures. This process is identified by Wolski as a loop-back procedure.²⁵³ Apart from that, there should be in existence procedures that would ensure that disputes that are uniquely rights-based are dealt with via the rights-based alternative processes of arbitration and adjudication rather than costly litigation.

²⁵² Ibid.

²⁵³ Ibid.

Further, as discussed in the preceding chapters of this work, such rights-based approaches should be conclusive.²⁵⁴ For instance, instead of the parties needing to appeal or seek higher review of arbitral awards, procedures could be set in place for their review by other arbitral panels rather than by courts of law. This kind of procedure can be provided for by law, or by agreement between the parties involved.

II. CONCLUSION

This work has discussed the industrial dispute resolution system in Kenya and made proposals drawn from the experiences of the South African and Australian jurisdictions. As dispute resolution is an area of law that develops as societies become more complex, it is hoped that Kenya will find ways to incorporate best practices into the delicate arena of its industrial dispute resolution procedures. . More research should continuously be undertaken on the development of best practices in the industry.

²⁵⁴ Rights-based dispute resolution procedures are procedures that entail the interpretation and application of legal rights to the resolution of disputes. Interest based procedures focus on the parties' interests rather than rights in dispute resolution. They include negotiation, conciliation and mediation.

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