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Collective bargaining and employment relations in Kenya

Tayo Fashoyin

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1. Introduction

The evolution of tripartism and voluntary industrial relations in Kenya just before independence followed decades of adversity between the colonial authorities and the restive labour movement, whose protests and struggle for freedom and labour rights were brutally suppressed by the authorities.¹ Trade unions' response was equally uncompromising, as they embarked on strikes and other forms of protests across the country. These protests were met with the stiff hands of the authorities, determined to quash worker militancy at all costs; strikes were banned while labour leaders were imprisoned, but these actions generally failed to intimidate the labour leaders or arrest the growing discontent with the colonial authorities. The vexed industrial atmosphere was disturbing enough that it created anxieties in colonial circles about the political role of the labour movement and how it might affect pending political independence.²

The transition from the chaotic relations of the period was a dramatic reversal of acrimonious labour relations in favour of what is today arguably one of the best institutionalized labour market governance systems in Africa. In other words, the employment relationship in Kenya evolved in the voluntary tradition, by which the government provides the legal framework within which the parties freely undertake to relate among themselves in a manner that promotes labour peace and nation-building. It was this resolve to address the labour challenge in a constructive manner that inspired the government, employers and labour to agree on a joint commitment towards industrial harmony and peaceful relations for national development.³

This consensus led the parties to adopt an Industrial Relations Charter, in October 1962. The charter established organizational rights for workers, and committed the parties to tripartite consultation, collective bargaining and peaceful settlement of trade disputes. The historic agreement was without precedent in Africa, and could be seen as an evidence of the commitment of the parties to use industrial relations as a strategic tool for national development. Following the charter, the government established in 1964 an Industrial Court to facilitate the peaceful settlement of trade disputes. The charter itself was a voluntary agreement; it nevertheless represented a genuine commitment of the tripartite parties towards cooperation and peaceful relations in the workplace. The record on trade disputes for the following years attests to this commitment. The number of strikes progressively declined, from 285 in 1962, to 250 the following year, and down to 200 in 1965. By 1968, the number of strikes had declined to 93.⁴ Overall, public policy and the institutional arrangements for industrial and employment relations reflect this thrust of voluntarism and tripartite cooperation.

This paper provides an account of the development of the employment relationship in Kenya, noting the role of public policy and the environment that nurtures social dialogue and collective bargaining in the country. The paper takes the view that, progressively, discernible employment relations through tripartite cooperation and collective bargaining have played a significant role in Kenya's labour market. The paper starts with a profile of the economy and employment situation, followed by a preview of public policy on the legal and institutional framework for employment relations, the structure of the social partners and their interaction in tripartite and bipartite dialogue on social and economic themes that

¹ L.P.A. Aluchio, *Trade unions in Kenya: Development and the system of industrial relations*. Nairobi, Jomo Kenyatta Foundation, 1998, pp. 60-70.

² G. Hagglund, "The development of industrial relations in Kenya" In Geoffrey Wood and Chris Brewster, eds., *Industrial Relations in Africa*. London, Palgrave Macmillan, 2008, pp 28-38.

³ See Aluchio, *Ibid*.

⁴ *Ibid*.

impact on relations in the workplace. This is followed by an analysis of public policy on collective bargaining processes and their outcomes in advancing the employment conditions of workers. The last sections explore the contribution of the institutional arrangement for the settlement of trade disputes and the challenges that the tripartite partners need to address to strengthen the institutions of employment relations in the country.

2. The economy and labour market characteristics

With the exception of the last two years of the present decade, the Kenyan economy experienced comfortable growth. The decade followed years of unstable economic growth, for the most part due to policy inconsistencies, inadequate infrastructure and political uncertainties.⁵ The upturn that heralds nearly a decade of continuous growth is attributable to higher investment rates, exports of apparels, agriculture (mainly tea and horticulture), and tourism.⁶ During the period, investment accounted for nearly 22 per cent of GDP. Tourism was a major source of growth, with the number of tourists rising from 1.6 million to 2 million during 2003-2007, and contributing roughly 12 per cent of GDP. It also accounted for 9 per cent of wage employment.

As in most African economies, agriculture occupies a strategic role in the Kenyan economy, both for the supply of domestic food production and consumption, and as a source of foreign exchange earnings. In Kenya, the total value of marketed production steadily rose from Ksh. 123,270 million in 2004 to Ksh. 178,644 million in 2008 but marginally increased to Ksh. 857 million in 2008.⁷ Horticulture and permanent crops (tea, coffee and sisal) were the two major sources of much of growth of the sector. For example, horticulture grew steadily during the decade, from Ksh. 32,591 million in 2004 to Ksh. 67,254 million in 2007, although it fell to Ksh. 57,966 million in 2008.⁸

However, as the government noted, the political turmoil of 2008 and the current global economic crisis had as early as late 2008 started to impact negatively on the growth momentum of the previous years, even though the full impact of these crises on the economy remains to be determined.⁹

Table 1 below provides some indication of the performance of the key economic and social sectors during the present decade, in the particular context of economic growth, living standard, employment creation and poverty reduction. The sustained growth during the decade is reflected in the GDP per capita increase of 47 per cent during 2004-2008. Inflation more than doubled, from 11.6 per cent in 2004, to 26.2 per cent in 2008, this increase being attributable to high prices of energy and depreciation of the Kenyan Shilling.¹⁰ As government records show, high inflation led to reduced real average earnings of 16.2 per cent in 2008.¹¹

⁵ The Kenyan Economy. Performance and Prospects. Ministry of Labour and Human Resource Development, Government of Kenya, Nairobi, April 2000.

⁶ Edward Zepeda, et. al., The Impact of the Doha Round on Kenya. Carnegie Endowment for International Peace. Washington, D.C., 2009.

⁷ Economic Survey 2009, Table 8.2, p.148. Kenya National Bureau of Statistics, Government of Kenya, Nairobi. The exchange rate of the Kenyan shilling to US dollar was Ksh.. 75 to US\$1 in October 2009.

⁸ Ibid. See also Edward Zepeda, et. al., The impact of the Doha round on Kenya. Carnegie Endowment for International Peace. Washington, DC, 2009.

⁹ Economic Survey 2009, pp. 18-21

¹⁰ Ibid., p.18

¹¹ Ibid. p.3.

Table 1.
National macroeconomic economic and social indicators

Indicator	Unit	Year			% Change
		2004	2006	2008	
GDP Per Capita (Current)	KSh	37,284	44,894	54,895	47.2
Inflation Rate		11.6	14.5	26.2	125.9
Total Employment	('000)	7,998.5	8,993.4	9,946.2	24.4
Wage Employment	('000)	1,764.7	1,857.6	1,943.5	10.1
Informal Employment	('000)	6,167.5	7,068.6	7,935.1	28.7
Population	Million	34.2	36.1	38.3	12.0
Consumer Price Index		163.7	206.7	286.4	74.9
Total Exports	KSh Million	214,793	250,994	344,947	60.6
Total Imports	KSh Million	364,557	521,483	770,651	111.4
Balance of Trade	KSh Million	-149,764	-270,489	-425,705	184.3

Source: *Economic Survey 2009*. Kenya National Bureau of Statistics, Ministry of Planning and National Development, 2009. Tables 4.1, 4.18, 4.23, 7.1.

As the table reveals, there was a rapid expansion of exports, mainly tea, horticulture and coffee, which represent three-fourth of total exports. The export of manufactured process foods and non-process food goods accounted for about 17 per cent of total exports. In other words, during the period 2004-2008, exports rose by nearly 61 per cent.¹² On the other hand, imports of goods and services more than doubled, rising by over 111 per cent during the period. Most imports were manufactured non-food goods and oil, accounting for about 75 per cent of all imports, while services and foods respectively accounted for 20 per cent and 5 per cent respectively.¹³

The structure and distribution of employment

Table 1 also shows that total employment, excluding rural (peasant) agriculture was about 10 million, or 67 per cent of the labour force of 15 million in 2008. As shown, modern wage employment accounted for less than 2 million or about 20 per cent of total employment in 2008. A disaggregation of the employment data shows that private sector employment was 1.3 million; the public sector accounted for 638,000, while self employment was a mere 68,000 in the same year.¹⁴ In contrast, the vast majority of employment, i.e. 78 per cent, was in the informal economy, generally known in Kenya as *Jua Kali*. In other words, the evidence shows that the overwhelming majority of the gainfully employed Kenyans were in informal employment in 2008.

For the private sector, where wage incomes represent the main source of livelihood, additional analysis of recent employment scenarios demonstrates the challenge of expanding wage employment. As the records show, wage employment in manufacturing declined by 4 per cent during 2007-08, as a result of the closure of garment factories in the Export Processing Zones, EPZs, where employment contracted by 8 per cent.¹⁵ In the case of transport and communication, while employment growth dropped by 29.6 per cent in 2007, new employment increased by a paltry 2.7 per cent in 2008, but mainly in the

¹² Zapeda, pp. 17-18

¹³ Ibid. p.19.

¹⁴ Economic Survey, pp. 67-69.

¹⁵ Economic Survey 2009, p.68.

informal mobile phone business. Employment increased slightly in building and construction from 5.7 per cent to 6 per cent during 2007-08, which resulted from increased government spending on road construction and private sector real estate construction.¹⁶

The agricultural sector generally has high employment generating capacity; in fact it remains the third largest source of formal employment, after the public service and community and social services. Thus, according to official figures, a total of about 289,700 workers were engaged in agricultural employment in 2008, representing 8.2 per cent of total formal sector employment.¹⁷ Industry data indicates that about 66 per cent of the workforce was in horticulture, with mixed farming accounting for the remaining third. Furthermore, the data indicates that, in 2001, about 68 per cent of the workers in horticulture were in permanent employment, while various types of atypical employment – temporary, casual and seasonal workers – constituted an additional 32 per cent.¹⁸ When account is taken of workers in other forms of employment, that is, atypical work types, as well as traditional farmers and out-growers who supply to the plantations, the size of employment in agriculture sector can be quite considerable.

Impact of the global financial and economic crisis

There is as yet no coordinated national data that shows the overall impact of the current global financial and economic crisis on employment. However, as government reports indicate, the decline in jobs in the private sector, notably in the EPZs, was attributable to the global crisis, but also to the post-election violence of 2008, both of which contributed to the reduced growth in several industries.¹⁹ As will be shown later, however, enterprise level negotiations, generally based on the tripartite determined minimum wages, were used to cushion the impact of the crisis on workers and business. For example, in the banking sector, the two sides agreed to extend the wage agreement for permanent workers to those workers in atypical employment. Also in agriculture, the agreement for the period 2007-09 included a provision that restricted the use of casual labour beyond three months, while providing greater social protection for workers in this category.

Despite the lack of concrete data on job losses directly related to the global crisis, there is some evidence of the adverse impact of the global financial and economic crisis on several sectors in the country. The two outstanding cases involving relatively large contractions in formal employment can be briefly summarized. The first was the assumed effect of the global financial crisis on jobs and livelihood, which involved the highly publicised case of the failed Pan African Paper Mills (EA) Limited (see box).

The second case relates to indications of employment contraction in some sectors, particularly the highly visible effect on the horticulture sub-sector. As indicated above, the value of agricultural exports over the past 5 years rose, from Ksh. 32.6 billion to Ksh. 67.3 billion, an increase of 106.4 per cent during 2004-2007, before it plummeted to Ksh. 58 billion in 2008, followed by a much higher decrease in 2009.²⁰ The global economic crisis has had an adverse effect on the flower business, with phenomenal decline in demand in the wake of the crisis. For example, contrary to the industry forecast of an estimated growth of 15 per cent in 2009, the sub-sector actually experienced an alarming decline of 40 per cent. The plea of the farms for a government stimulus package had not been honoured, while the drought of the past several years had contributed to the contraction of the industry.²¹ As a

¹⁶ Ibid., p.68

¹⁷ Ibid. Table 4.2, p. 68.

¹⁸ Ibid. pp. 78-9.

¹⁹ Ibid., p.68

²⁰ Economic Survey 2009, Table 8.17, p.157, and The East African, September 21-27, 2009, p.4

²¹ Unpublished information from the industry.

result, farms had to cut back considerably on production. In the process, 3 farms had closed in 2009, while several had declared redundancies, in an attempt to stay afloat.

Box 1.
The Pan African Paper Mills (EA) Limited

The Pan African Paper Mills (EA) Limited was established in 1969 as a joint-venture between the government of Kenya and an Indian company, with the ownership structure of 49-51 per cent. The company supplied about 50 per cent of the total paper products consumption in the country, and had generous access to the supply of raw materials. At the time it collapsed, the paper mill employed about 2000 permanent workers and over 30,000 dependent casuals and suppliers to the factory.

Early in 2009, the company began to experience difficulty in paying for recurrent production costs, such as electricity, oil and spare parts. It sought permission to increase the prices of its products, but the government declined the request. It was also unable to secure further bank loans or guarantees. In this quandary, the company approached the workers' union and subsequently negotiated an agreement by which the workers were paid only 30 per cent of wages, while they stayed at home for 3 months, with effect from February 2009. The union willingly agreed to these proposals in the belief that the concession would help bring the company out of its financial crisis. The agreement was executed, and the workers waited to return to work thereafter. However, before the expiration of the stay at home period, the foreign partners had abandoned the factory and quietly left the country.

What was unknown to the workers and other stakeholders was that the company was already in the hands of Receivers, whose advertisements in national and regional newspapers were the source of information to them and the general public that the company had failed, and worse that the foreign managers had secretly left the country. In the advertisements, the company offered for sale its stock of spare parts and other assets to the general public.²² Thus the over 32,000 workers and dependent suppliers suddenly became jobless. While the failure of the company to secure bank credit and its ultimate collapse might be associated with the global financial crisis, it was most probably also a case of bad management.²³

Given the above scenarios and the strategic role of the horticulture sector in the economy, Kenya was among the first group of African countries to feel the impact of the crisis. Although there was no direct support for either of the agricultural or horticultural sectors, the swift response of the government to support the rural economy had the potential effect of reducing the impact of the crisis on employment and livelihood in the rural communities. Thus, in January 2009, the government unveiled an Economic Stimulus Programme, titled 'Overcoming today's challenges for a better Kenya tomorrow'.²⁴ The package was designed especially to stimulate the economy at the local level in the medium term and towards the path of sustained growth.

The stimulus package targeted investments of about Ksh. 22 billion (approximately \$294 million) in rural infrastructures, and delivery of healthcare and education, support for food security, as well as providing access to ICT for the expansion of economic opportunities to accelerate long-term economic growth. In particular, the stimulus package

²² See for example, the advertisement in the Saturday Nation, 26 September 2009, page 25.

²³ This account is based on interviews with union leaders and Ministry of Labour officials, as well as published reactions in the national dailies.

²⁴ See the Economic Stimulus Programme. Overcoming today's Challenges for a Better Kenya Tomorrow. Nairobi, Government of Kenya, 2009.

aimed to “inspire local level economic development“, such as creating employment opportunities”. In this context, the package was explicit in its objective to create employment in the rural economy. The package had the potential of reducing the negative effects of the crisis in the rural communities, particularly by creating employment and stimulating aggregate demand.

3. The legal and institutional framework

The legal foundation

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

However, after decades of indecisive actualization of labour rights for several categories of workers, the government and the social partners undertook a comprehensive reformulation of the labour code that led to the enactment of 5 major laws in 2007.²⁵ In many respects, the new legal framework can be described as a favourable response to emerging labour market realities, particularly the changing composition of the labour force and the structure of employment, as previously shown. In particular, these realities dictated the critical need for greater social safety nets for the growing proportion of workers with inadequate or lack of social protection. Finding a suitable balance between a socially responsive legal framework and the inevitable flexibility in the highly competitive global environment is a major challenge for the tripartite partners. Also, the thrust of some of the provisions of the legal framework remains a source of anxiety among the labour market actors.²⁶ Be that as it may, I provide in this section of the paper a brief preview of the labour code, in which I show some of the salient improvements in the framework for employment relations in the country.

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

The provisions on dispute management are intended to assure prompt and speedy resolution of disputes. Thus, a dispute lodged with the Ministry of Labour must be settled within 30 days. If the investigation or conciliation role of the ministry fails, the parties

²⁵ The reformulated legal code includes the Employment Relations Act; Employment Act; Labour Institutions Act, Work Injury Benefits Act and the Occupational Safety and Health Act.

²⁶ At the time of writing, some of the laws are being contested in court, by employers and other NGOs, as pertains to a multitude of grievances, including the constitutionality of some provisions, labour rights, the role of the judiciary, flexibility or otherwise, and the very foundation of tripartism in the country.

must take their dispute to the Industrial Court, which also must make a decision within a reasonable time period. In other words, the law frowns at delays in a dispute situation, while protecting the rights of the parties. Thus, where a party gives notice to embark on a strike or lock-out, the party receiving the notice can within 7 days go to the Industrial Court and seek a certificate of urgency to prohibit the issuing party from embarking on the strike or lock-out. This is however possible provided, (a) the strike or lockout is prohibited under the Act or (b) the party that issued the notice has failed to participate in conciliation in good faith with a view to resolving the dispute. The Industrial Court may issue the certification, in which case the matter is before the court and a strike or lock-out is prohibited.

However, where the court refuses to grant the certificate, it becomes a protected strike or lockout. A protected strike is one where, amongst other things, seven days' written notice has been given to the other parties and to the Minister by the authorised representative of the trade union, employer or employers' association.²⁷ In sum, the *Labour Relations Act* streamlines pre-judicial trade dispute resolution machinery and stipulates specific time-frames for dispute disposal, and provides for Alternative Dispute Resolution machinery. It also sets out clear procedures and guidelines for protected industrial action.

The *Employment Act* is a substantial improvement over the old Employment Act (and also the Regulation of Wages and Conditions of Employment Act) which it replaced. The law seeks to discourage the possible recourse to atypical forms of employment. For example, it provides that casual workers cannot be in this type of employment for more than 30 days (in contrast to the 3 months in the old law) of continuous employment. In such cases, the Act converts "casual employment" to "term contract" provided the requirements therein are met.²⁸ Notwithstanding this forthright provision of the law, the question remains whether employers will apply it, or whether the enforcement authority will courageously enforce it.

The Act also extends the maternity leave period to 3 months, and contains an innovation which recognizes two weeks' paternity leave for fathers. Furthermore, the law broadens the scope of its anti-discrimination provision to include prohibition of workplace discrimination on grounds of HIV/AIDS status. Another innovation is the harmonization of the provisions on child labour. Thus in regard to the definition of a "child" as contained in the Children's Act, the law raises the age of a child from 16 to 18 years. The Act also provides for an insurance benefit scheme for employees who suffer redundancy, while also safeguarding workers' dues in the event of an employer's insolvency. However, in the case of the unemployment insurance scheme, the Act gives the Minister discretion in making rules that apply to certain employers under an established national insurance scheme or a private scheme underwritten by a private insurer approved by the Minister.

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

The *Labour Institutions Act* is an innovation in the legal framework, as it creates a number of vitally important bodies for the effective functioning of the labour market. One such institution, the National Labour Board, seeks to strengthen tripartism with an extensive mandate on employment related issues, such as a review on general labour relations, on strikes and lockouts; the number of complaints lodged by employees against employers under the law relating to labour relations and vice-versa; and progress in the

²⁷ Section 76.

²⁸ This requires that continuous employment totalling 30 days and performed on work which cannot be completed in less than 3 months.

settlement of such complaints or disputes. Furthermore, the Board is empowered to advise the Minister on any matters relating to labour relations and trade unionism, the labour inspection system and the administration of labour laws in the country.

Several of the provisions in the law are designed to strengthen tripartism. For example, one key provision reaffirms the Wages Councils system which, as will be shown later, is the foundation for the critically important minimum wage. Thus, the law specifically envisages a general wages council and an agricultural wages council. At the same time, the law endorses sectoral wages councils *only* where this is deemed necessary by the Minister. It will be shown later that most of these sectoral councils have become dormant, ostensibly because, in the view of the Minister, and also the parties, the collective bargaining machinery is reasonably efficient in dealing with wage determination in the industrial sectors. Also to be demonstrated is the evidence that the periodic review of the minimum wage through tripartite negotiations has contributed to ensuring safety nets for workers, irrespective of whether they are in formal or informal employment. The law provides for a reinvigorated Industrial Court, whose judges are elevated to the status of a high court judge, in effect enhancing the respect for the court. The court has expanded powers, including the power to order the parties to share information or the arrest and conviction of a disobedient party.²⁹

The *Work Injury Benefits Act* replaced the workmen compensation provisions in the previous Workmen's Compensation Act of 1949 as amended. The new law disallows common law claims whereas claims could be made under both the old Workmen's Compensation Act and common law. The Act extends insurance cover and ensures adequate compensation for injury and work-related diseases regardless of the employer's insolvency. The new law provides for payment of injury benefits depending on the severity and/or length of disability.³⁰ Related to this is the *Occupational Safety and Health Act*, which repealed the Factories and Other Places of Work Act. The new law seeks to secure safety and health for workers in all workplaces, whether work is performed temporarily or permanently. Also by including the self-employed in this innovative law, the government seeks to ensure that protection is extended beyond the factory or formal workplaces, to a larger segment of the population. The law prohibits employment of children under the age of 18 years, where their safety is at risk.³¹ Furthermore, it seeks to promote a safety culture in workplaces, through education and training in occupational safety and health. The law encourages entrepreneurs to set achievable safety targets for their enterprises, to establish joint health and safety committees in the workplace, and to carry out annual safety and health audits.

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

Yet, the laws have come into effect in circumstances that might have detracted from the extensive consultation and tripartite involvement in every stage of the reform process.

²⁹ Employers differed on this, as they argued that it criminalizes the employment relations system.

³⁰ See, Mark K. Bor, "The New Labour Laws: An Overview". Paper delivered at a seminar on Responding to the Challenges of Fair and Ethical Trade. Nairobi, on the 23rd November 2007. Mr Bok was Permanent Secretary in the Ministry of Labour and Human Resources.

³¹ Section 97.

Specifically, the employers have queried some provisions, on the argument that the final stage in the process was devoid of consultation, because certain provisions were not the outcome of tripartite decision. The controversies highlight the inherent differences on the extent of flexibility that was required from public policy. Notwithstanding the misgivings of the employers, the new labour code is a major innovation of the legal framework of employment relations in the country. As is demonstrated in this paper, the legislative changes have given considerable boost to the collective bargaining process, by generally strengthening organizational rights, creating or strengthening institutions, procedures and rules of engagement, good faith bargaining and access to information. The potential contribution of the legal framework in the realization of labour rights and decent work in Kenya is great, but only time will tell.

4. The parties in collective bargaining and social dialogue

There has been an enduring unity and stability within each of the principal actors in the employment relationship in Kenya. As I argue elsewhere, this stability is largely attributable to a social contract that was established soon after independence.³² This stability is the outcome of a dogged labour policy that, at that early stage, encouraged fewer but strong trade unions, most of which have the capacity to relate with employers on equal terms. On the employers' side, there has also been an internal resolve, for most of the period, to support one body as the sole employers' voice on labour and socioeconomic issues. As will be shown, the peak organizations of employers and of workers have broad appeal in their respective constituencies and have remained the national voice for their members.

The Federation of Kenya Employers

The Federation of Kenya Employers, FKE, is made up of 13 sectoral employers' associations and some 2,000 individual/direct enterprise- members, totalling about 5,000 in membership in 2009. These figures represent a reversal of the decline which started during the mid-1990s up to 2005, when several enterprises withdrew their membership, in part as a result of unfavourable economic conditions and in part due to a brief spell of representational competition among business interests in the country.³³ Evidently, the FKE has survived the rough times, and appears to have restored itself as the main voice of employers on issues of the labour market, and generally in the economic and social development spheres. Today the FKE boasts of a pool of highly informed seasoned professionals, providing quality technical advice and services to members, as well as effective participation in various institutions of social dialogue in the country. Over the years, not only has the FKE become the sole voice of business on labour and social affair issues, it is the main body that negotiates collective agreements for all the sectoral associations and some 200 individual employers in negotiations with the workers' organization.

The role of the FKE in collective bargaining negotiations is however not by design; rather, it arose mainly due to the technical expertise that the federation officials had acquired over the years on the legal and institutional framework for employment relations. Related are the favourable image of the federation and the confidence of the members by which they voluntarily designate the Federation as lead negotiator in collective bargaining, at both enterprise and sectoral levels. Interestingly, this arrangement has for the most part

³² For details, see Tayo Fashoyin, "Industrial relations in Kenya" In Geoff Wood and C. Brewster, eds., *Industrial Relations in Africa*. London, Palgrave Macmillan, 2007, pp.39-58.

³³ Ibid. pp. 45-46. By 2005, FKE membership of 2,995 fell by 21 per cent.

enjoyed the confidence of labour, which also acknowledges the FKE as fair and impartial in upholding the legal and institutional framework for collective bargaining. In this regard, the FKE is not afraid of letting any of its members know when their conduct or practice might be at variance with the legal framework or with what is considered to be good industrial relations practice.³⁴

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

The Central Organization of Trade Unions, COTU

In contrast to most labour movements in Africa, the trade unions in Kenya are united in one strong labour centre, the Central Organization of Trade Unions, COTU. What is particularly peculiar about this structure in the country is that, despite the fact that 3 of the 6 unions which are not affiliated to COTU are among the largest in the country, none of them has shown interest in forming a competing labour centre! By custom or for largely unknown reasons, these unions choose to operate as independent unions.³⁵

In 2009 COTU claimed a membership of about 1 million through its 34 affiliated unions, a claim that is most probably exaggerated.³⁶ Unfortunately, the records of the Registrar of Trade Unions are not helpful. The records are neither regularly updated nor has there been an effort on the part of this government authority to cross check the accuracy of the submissions made to it by the unions. The big unions in the public sector are not its affiliates. Even in the private sector where it draws most of its membership, there has been, in recent years, considerable membership decline in some affiliated unions. For example, the postal and communications union, which a few years ago had a membership of 27,000, was left with about 3,000 members in 2009, ostensibly due to retrenchments and corresponding increase in atypical employment.

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

³⁴ The impartiality and professionalism of the FKE was confirmed by sectoral employers' associations and individual employers, and attested to by the officials of the Ministry of Labour whom I spoke with in the course of research for this paper.

³⁵ It was mentioned to this author that an administrative order of the President, made soon after independence, excluded civil servants and teachers from membership of COTU. It was impossible to obtain this directive, so as to understand its implication for collective bargaining purposes.

³⁶ An earlier research (see footnote 32, above), put COTU's membership at 300,000 in 2005. This was a period of economic decline resulting in collapse of enterprises. While there has been an upturn in recent years, membership of the COTU could not have as a result increased threefold.

As comparative research suggests, union density is higher in Kenya than in several African countries. As Hayter and Stoevska show, union density in Kenya is significantly higher than those observed in Egypt: 26.1 per cent; in Ethiopia: 12.9 per cent; Malawi: 20.6 per cent; and in Tanzania: 18.7 per cent.³⁷ However, in the case of Ghana and South Africa, union density was considerably higher than in Kenya, at 70 per cent and 40 per cent respectively.³⁸ In any event, despite the difficulty of recruiting new members, Kenyan unions have begun to recruit new members, particularly in the growing atypical employment workforce. For example, unions in sugar, electrical and bakery are recruiting casual workers into their membership.

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

The main challenges that the labour centre faces include reversing a declining union membership or appeal, which has arisen from multiple causes, such as employers' push for flexibility that exacerbates the growth of forms of atypical employment. These have been accompanied by the hostility of some employers towards unions.³⁹ In its strategic plan, COTU seeks to address these and several organizational issues, perhaps in the anticipation that the decent work country programme would help create productive and sustainable employment opportunities as has been outlined in the government's long term development strategy. In the plan, COTU promises to intensify membership recruitment, especially of workers in atypical employment, improve service delivery to members, undertake capacity building, and enhance its advocacy role and lobbying to influence public policy on economic and social development.⁴⁰

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

5. Social dialogue on broad socioeconomic issues

The distinguishing feature of the collective bargaining process as a separate analytical and operational element of social dialogue is its role in the determination of wages and conditions of employment, between labour and management. This is the case of Kenya, where the collective bargaining agreement, CBA, represents the outcome of such bipartite

³⁷ Susan Hayter and Valentina Stoevska, "Trade union density and collective bargaining coverage. International Statistical Inquiry 2008-9". Technical Brief. Industrial and Employment Relations Department (DIALOGUE), ILO, 2010.

³⁸ Ibid.

³⁹ Foreword to "A World fit for Workers" Strategic Plan 2007-2012. Nairobi, Central Organization of Trade Unions, May 2007.

⁴⁰ Ibid, chapter 4, pp. 17-20.

negotiations, whether at the sector or enterprise level. On the other hand, tripartite social dialogue occurs between government, labour and employers on labour market and related issues in a particular sector or the entire economy. Such dialogue may involve tripartite negotiations, as is the case with the determination of the minimum wage in Kenya. Generally, however, tripartite social dialogue seeks to build consensus among the parties on specific or general issues that affect the functioning of the economy or the labour market.⁴¹

The consensus reached through tripartite dialogue may simply be a general understanding, or a social pact that outlines what all the sides agreed to do. It may include an indication of the role of the respective partners and a time frame for implementation. Social pacts are widely used in Europe, but are used also in a growing number of developing countries.⁴² Generally, collective bargaining and tripartite social dialogue build on the notion of mutual trust and cooperation among parties that are committed to finding joint solutions to a particular issue that promote specific or societal wellbeing. This section of the paper provides a brief outline of three institutions in which tripartite social dialogue contributes to the functioning of national socioeconomic development and labour market governance.

Collective bargaining and tripartite social dialogue are highly related and mutually reinforcing. Successful use of collective bargaining for the determination of wages and conditions of employment represents a sufficient level of trust and cooperation and can prepare the tripartite partners to find broader solutions for the functioning of the labour market. On the other hand, tripartite dialogue can provide a critical support to collective bargaining, by such means as creating the basis or foundation for substantive negotiation over terms and conditions of employment at the enterprise or sectoral level. As will be shown, this is a major element of the employment relationship in Kenya. These levels of interactions are essential for vertical coordination of the negotiations and consultative processes.

The National Labour Board

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

The membership of the NLB is tripartite, comprising 3 representatives each from the employers and workers, while the government is represented by 6 members. The board also includes 2 independent members and a chairperson who are experienced in labour relations matters. In many respects, this membership structure takes its cue from institutions such as the ILO. Generally the board functions include the monitoring of developments in the broad area of labour, by which it identifies and discusses issues that can in one way or another affect the smooth functioning of the employment relationship and suggest measures which the government could take, either to change, develop or promote specific issues. Measures in this broad category include providing the minister

⁴¹ Tayo Fashoyin, "Tripartite cooperation, social dialogue and national development" *International Labour Review*, Vol. 143, No. 4, 2004, pp. 341-371. See also Peter Auer, *Employment revival in Europe. Labour market success in Austria, Denmark, Ireland and the Netherlands*. Geneva, ILO, 2001.

⁴² See National Level Social Dialogue Institutions. Industrial and Employment Relations Department (DIALOGUE), Geneva ILO, 2009 Unpublished.

with advice on how to promote and sustain peaceful relations in the workplace, or how the government might address a potentially damaging development in particular sectors or workplaces. It also involves a tripartite discussion of international issues on which the government might wish to take a position, such as deliberations at the annual International Labour Conference.

Although the functions of the Board are largely confined to the general area of labour, it is also mandated to investigate or carry out research on “labour, economic and social policy”.⁴³ While there is no evidence available to us that points to dedicated research commissioned by the board, this is nevertheless a critical opening for innovation and creativity in contributing to national issues that may impact on the labour market. In other words, this window places the NLB in a strategic position within the broader dialogue on socioeconomic issues that are important to the labour market, and could facilitate a potentially fruitful interface with institutions such as the National Economic and Social Council.

The foregoing prognoses are possible although they are dependent on the Board being able to develop a proactive agenda and clearly defined strategic plan on how the labour market could effectively respond to the changing nature of the employment relationship in Kenya. It also depends on the availability of adequate manpower and material resources, as well as the readiness of the government to make optimum use of the knowledge and expertise of the board to advance the effectiveness of the labour market.

The National Economic and Social Council

The National Economic and Social Council, NESC, is an advisory body set up in 2004 to provide the government with qualitative advice on policies that are needed to accelerate Kenya’s economic and social development.⁴⁴ Through it the government engages the key stakeholders in business, labour, the civil society and academia on broad and specific policy dialogue relating to economic, social and generally development issues. The council mobilizes the technical resources through knowledge networks with research and academic institutions. The Council, with variable membership, is chaired by the President of the Republic, or in his absence by the Prime Minister.⁴⁵ The first council (2004-2008) had 34 members, while the current council (2008-2012) has 49 members. The FKE and COTU each have one member on the council, while government ministers constitute half of the membership. Curiously, however, the government department responsible for labour market issues is not represented on the council.

The goals of the NESC are salutary, particularly because they cover some of the pillars of the decent work agenda, namely the promotion of sustained economic growth, employment generation, social equity and social protection, all of which are critical to the national goal of poverty reduction and the elimination of all forms of inequality. The Kenyan Decent Work Country Programme broadly incorporates these development goals.⁴⁶

Much of the initial work of the Council was focussed on institutional building, including the creation of a positive image for Kenya, by which the country hopes to attract investments and promote the vast tourism sector. It also included the promotion of integrated employment creation, by which several schemes, such as a Youth Fund (Kazi Kawa Vijana) were created. At another level, the Council has provided policy advice on affordable health care financing and value addition to the production of tea, cotton and textiles, skin and leather products, and nuts and edible oils. Among the council’s technical

⁴³ Labour Institutions Act 2007, Part II, section 7(3)b.

⁴⁴ The National Economic and Social Council, Gazette Notice No. 7699. Government of Kenya, Nairobi, September 2004.

⁴⁵ Prior to recent constitutional changes in the country, the Vice President played this role.

⁴⁶ See Decent Work Country Programme for Kenya, 2007-2011.

advisory guidance has been the commissioning of research studies on growth, poverty and inequality in Kenya. One specific research, which targeted the present global job crisis, was the study on the unemployment challenge facing the country. This study has contributed to government policy in addressing the issues of joblessness, growing informalization and the protection of vulnerable workers across the economic sectors. The broad framework for the government stimulus package, introduced early in 2009, was also discussed at the council.

In other words, the work of the Council during the 5 years of existence evidently suggests that it has not only operated within its mandate, it has also addressed major economic and social development issues that impact on economic growth. Some of these, such as those mentioned above have direct impact on the labour market. However, the disproportionately large number of government participants could create a dilemma for the body. While the relatively large government side could create a useful medium for policy dialogue with other stakeholders, the dominance of government side could also reduce the space for other stakeholders' input, and turn the council to a briefing forum on government plans, rather than serve as a medium for joint brainstorming on ideas and perspectives on the strategic orientation for the economy.

The NSSF: dialogue over social protection

The National Social Security Fund, NSSF, was established in 1965, with the mandate to provide a range of social protection benefits for workers who, in conjunction with their employers, are the sole contributors to the Fund. In effect, it was at the time designed to serve the wage earning population. Today, the originally targeted population represents less than 20 per cent of the labour force.

The Fund has a board of directors of 9 members, two each representing employers and workers, while 4 represent the government. An independent Managing Trustee is appointed by the government, after consultation with the social partners. The board of directors is a policy making body, which places workers and employers at the centre of decision-making over critical policy areas pertaining to investment, prospecting, beneficiaries and other strategic programmes of the Fund. Operationally a quorum for the board is formed when at least a member each from the workers and employers is present, which in effect ensures that the views of the two social partners are important in building consensus around policy and programme issues of the Fund.

The number of employers registered with the NSSF increased from 58,800 in 2007 to 61,800 in 2008, representing an increase of 4.4 per cent.⁴⁷ However, the number of employees registered during the same period declined marginally, from 3.17 million to 3.16 million. This decline may have been the effect of the global crisis, although there is no hard evidence on this as yet. However, the new policy has fundamentally changed the scope and coverage of the Fund beyond the relatively small wage earning population. Thus, beginning in 2009, the Fund was empowered to register any size of employers, particularly the small and micro enterprises, which are obliged to remit statutory contributions to the Fund every month.⁴⁸ In other words, taking account of the prevailing structure of the labour force, an estimated 8 million members can in principle participate in the Fund. Additionally, the new law requires employers to make special contributions to the Fund, on behalf of casual workers.⁴⁹ These innovations, particularly the extension of coverage to new categories of workers, are fundamentally important for the extension of social protection to a larger segment of the population.

⁴⁷ NSSF, Economic Outlook, 2009, pp. 31-2.

⁴⁸ Section 5 of the NSSF Act.

⁴⁹ Section 13 of the Act.

In other areas, the reform also includes a decision of the board to join the Retirement Benefits Authority, the regulator for monitoring nonbanking retirement and financial institutions. In joining this regulatory agency, the NSSF board seeks to ensure that investments of the Fund are proper and safe. It also ensures transparency of the management, choice of investments, and reasonable returns to contributing members. The same reform has seen the Fund appoint a Funds Manager, who is obliged to operate within clearly defined investment guidelines. This represents a reversal of previous policy when the Fund's investment portfolio was heavy in properties, while high income generating equity accounted for just about 25 per cent of total investment. One of the key roles of the Fund Manager is to monitor the performance of investments.

As part of the reform, the board recently resolved to introduce a pension scheme, by which contributing members would collect retirement benefits, as opposed to the present lump sum gratuity for contributors. This fundamentally important policy change is bound to be beneficial to contributors, both in terms of size of benefits and regularity of income after retirement. In fact, this policy reform clearly removes one of the common criticisms of the one-time gratuity benefits scheme. As previous accounts show, it was not uncommon for beneficiaries to be paid as little as KSh.100,000, or \$1,316 in a lifetime!⁵⁰ Finally, the Fund has a plan to cover hitherto the self-employed, by which it will expand its services to a larger income-earning population. This particular product, actively canvassed by both the workers and employers, will extend social protection to the large informal economy workers.

The foregoing menu of qualitative services embodied in the reform of the NSSF is the outcome of tripartite cooperation among the key stakeholders. The various programmes address both financial and labour market implications of one of the key decent work objectives, namely the goal of extending social protection and assurance of social safety nets for all workers. This continual introduction of innovative schemes remains a key challenge in order to broaden the coverage and services in an efficient manner to the population, particularly those who are outside the formal economy. An additional challenge is developing mechanisms to effectively bring the new members into the scheme. Also, given that the scheme at present provides for a limited range of social protection benefits, measures are needed to broaden the benefits for the various categories of contributing members. Existing products or services do not, for example, include unemployment benefits, which are critical in present day global realities. In other words, two key issues for ensuring the effective delivery of the services of the NSSF to contributors are effective implementation of agreed schemes, and continuing innovation that provides critical social protection benefits to the various categories of contributors.

To sum up, the participation of the two key labour market actors in the work of institutions such as those examined here is significant, as it allows them to understand and contribute to shaping major policy issues that directly impact on social and economic well-being of society. In so doing, the social partners and the government are jointly working to position employment relations within the larger economic development programme in the country. Forums such as these allow the two sides of the industry to share their experience and perspectives on the labour market challenges with other stakeholders. The exchange of opinions, views and perspectives are essential to an understanding of how the economy works, how each of the elements of the economy, the institutions and processes interact and contribute to social and economic development. They represent an important evidence of democratic labour market governance.

⁵⁰ Records of the Fund.

6. Public policy, minimum wage and collective bargaining

Collective bargaining in Kenya is heavily influenced by two interrelated public policy regimes, both of which have enormous impact on the determination of wages and conditions of employment. The first is the notion of the general wage, which is the process by which the minimum wage is determined and a major catalyst for collective bargaining. The second is the loosely defined wage policy guidelines, which contains the criteria for negotiations on wages and conditions of employment. First introduced in 1973, the guidelines are reviewed periodically, to take account of changing economic and labour market conditions. Collective bargaining at the sectoral and enterprise levels are overwhelmingly influenced by both policies and, as will be shown in this section, the two constitute the foundation for regulating wages and employment conditions in Kenya.

Wage councils and the minimum wage

The minimum wage was introduced through the wage council system before independence, and at a time when collective bargaining was at its infancy.⁵¹ Wage councils have the goal of putting in place a general (minimum) wage, in addition to a separate council in agriculture and in several industrial sectors, particularly where collective bargaining is weak or nonexistent. In either of these cases, a wage floor is invariably set. Thus, in the private sector, whether collective bargaining takes place at the sectoral or enterprise level, there is the implicit understanding that collective bargaining negotiations that take place are intended to build on or improve on the floor that has been set through the wage council system.

Unlike the sector-specific industrial and agricultural wage councils, the general wage council applies to all unspecified sectors and by far has the broadest coverage. Wage councils are setup by the Minister after consultation with the social partners. There were about 17 wage councils before the recent reform of the labour code, although most of them had been dormant before then. The relative non-use of the industrial wage councils arose from the disinterest among employers who, instead prefer to apply the prevailing CBA, or the industry minimum wage in their workplaces. Generally, wage councils build on the classic notion of the minimum wage, by which a floor is set and below which wages for a defined population of workers should not fall.⁵² The logic of the wage councils is that several wage earners are either unorganized, or for one reason or another, are unable to use the collective bargaining process to improve their employment interests.

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

⁵¹ It is noteworthy that Kenya ratified the Minimum Wage Fixing Machinery Convention (No.26) at independence, in 1964, and later the Minimum Wage Fixing Convention (No.131) in 1979.

⁵² See Francois Eyraud and Catherine Saget, *The fundamentals of minimum wage fixing*. Geneva, ILO 2005, p.40.

consultations with other experts and industry leaders, on the basis of which he decides the applicable wage rates and issues the wage order.⁵³

The wage councils provide the statutory minimum wages which are the outcomes of tripartite negotiations between government, employers and workers, and represent a political consensus that balances, on the one hand, national commitment to protect low wage earners and, on the other, the ability of business to pay, particularly in small and medium size enterprises. Generally, negotiation at industry or enterprise takes its cue from the minimum wage, as determined in these councils.

In this context, the wage councils in Kenya are aligned with a key objective of the Declaration on Social Justice for a Fair Globalization, which emphasizes the importance of the minimum wage in measuring progress towards social justice in the era of globalization. The Declaration obliges ILO member States to implement “policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection”.⁵⁴ This accent on the role of the minimum wage is underscored by the global jobs pact, which was made in response to the global economic crisis. The pact emphasizes that the minimum wage “can reduce poverty and inequality” while it can “increase demand and contribute to economic stability”.⁵⁵

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

Wage policy guidelines and collective bargaining

The wage guidelines are perhaps the only surviving element of a highly articulated incomes policy that was introduced in 1973, as the country sought to put a check on inflation-induced wage decisions, and align the latter with overall macroeconomic policies.⁵⁶ The wages policy, then and now seeks to ensure that government economic and employment policies promote and support ‘harmonious industrial relations’ in the workplace.⁵⁷ The guidelines are based on ‘pertinent economic factors’ that influence overall economic growth, including real GDP growth and the rate of inflation, and factors that propel them. These include weather conditions that affect agricultural output, infrastructural limitations, energy and productivity for sustainable economic growth. The latter is assumed to enhance the capacity of the employers to accommodate increased labour costs.

⁵³ According to information available to this author, this situation rarely occurs, and when it does, the minister’s consultation is aimed at narrowing any differences among the parties.

⁵⁴ ILO Declaration on Social Justice for a Fair Globalization. Adopted by the International Labour Conference at its 97th Session. Geneva, 10 June 2008, Article IA (ii).

⁵⁵ Recovering from the crisis. A Global Jobs Pact. Adopted at the 98th Session of the International Labour Conference in Geneva, 19 June 2009, Article IV (23).

⁵⁶ See a discussion on incomes policy in Kenya and other African countries in Tayo Fashoyin, *Wages and incomes policy in Nigeria*. London, Longmans, 1984, chapter 6.

⁵⁷ “Revised Guidelines for the Determination of Wage Awards”. Issued by the Ministry of Finance, Government of Kenya, Nairobi, 23rd November 2005.

The wage guidelines require the two sides of industry to negotiate taking into account key factors which are spelled out in directives issued by the Minister of Finance. These factors are the wage levels and the general cost of living, and productivity. Yet, while the initial guidelines accompanied the incomes policy of the 1970s, the contemporary wage policy guidelines are not the outcome of consultation with business and labour. So, as a key element of bipartite or tripartite negotiations, they fall short of the consultative tradition in the country's employment relations.

While the guidelines emphasized the primacy of the wage paid to the worker in determining "a just minimum standard of living", they make clear that the ability to pay or otherwise, would not be adequate enough reason in determining wage awards. For example, the government authority responsible for assisting the Industrial Court in its determination will have to examine the agreed wage rates in relation to the movement in consumer prices during the period, and project into the lifespan of the CBA. The wage guidelines oblige workers and employers during negotiations to take account of indicators of the capacity of the economy to absorb the proposed wage without its adverse effect on the sector, for example ability of the employer to pay, the rate of inflation or the cost of living, and productivity indices.⁵⁸

In the case of productivity indices, the guidelines state that the collective agreement "should reflect productivity increases, to safeguard the country's competitiveness and increase employment". However, there does not exist at present generally accepted indices, which imply that either individual enterprises develop their own standard or pay perfunctory attention to productivity during negotiations. Both of these are possible because the Productivity Centre of Kenya, established nearly a decade ago, is yet to produce suitable productivity indices which parties can use in their negotiations. However, notwithstanding this absence of generally acceptable productivity indices, the negotiating parties do use various company data to arrive at simple and practical measures of productivity which guide them in negotiations.

The outcome of the negotiation, as contained in the CBA, must however receive prior approval of the Industrial Court which is authorized to ensure that the wage guidelines are complied with before the CBA could have legal effect. In carrying out this review process, the court is assisted by the economic unit of the Ministry of Labour, which examines the content of each collective agreement and attests to their compliance. In making the attestation, the unit undertakes an analysis of company data, rate of inflation and proxies for productivity growth at company and national levels, to determine whether the agreed wages complied with the guidelines. Only when the court is satisfied will it agree to 'register' the agreement which makes it binding and enforceable.

These measures are ostensibly intended to fulfil what the guidelines call 'a just minimum standard of living' and oblige both the negotiators and the court to ensure that wage agreements "guarantee the worker an existence worthy of human dignity by the attainment of basic human needs."⁵⁹ However, other than the scrutiny of the CBA compliance, it remains uncertain how the court could attest to its meeting the basic needs of workers! Nevertheless, the role of the court is significant not only in ascertaining compliance with the guidelines, but also in ensuring that both sides have no reservations with regard to the terms of the agreement. This may obviate disputes that are bound to arise should one party fail to apply or honour the agreed terms. The process of registration of the agreement gives the parties a last chance to raise any issues that might affect the implementation of the terms of the agreement. Where a party makes such reservation about a particular part of the agreement, the court may return the agreement back to the parties for renegotiation of the particular part, which must be completed within a specified period.

⁵⁸ Ibid, "Revised guidelines" loc.cit.

⁵⁹ Ibid.

One example that illustrates the interplay between collective bargaining and the minimum wage is a CBA reached in the transport sector in September of 2009. The agreement contained a minimum wage of Ksh.6,130 per month, as against the general minimum wage of Ksh. 5,195, which is 18 per cent lower than the former. For the workers covered by the agreement, an 11 per cent wage increase over the 2-year duration of the agreement was awarded. One intuitive element of this particular agreement was the superiority of the negotiated wage to the minimum wage.

The experience also demonstrates the dual employment relationships in workplaces in the country; increasingly, a large proportion of workers in formal employment are in the atypical employment. In this particular CBA, for example, only 60 workers were covered, while a larger group of nearly 100 workers was not unionized and therefore excluded by virtue of being in casual or atypical employment. As a result the general minimum wage applied to them.⁶⁰ This discriminatory wage system naturally provides an inducement for atypical workers to want to be unionized.

The foregoing describes the foundation of collective bargaining generally in the country, although it is applicable primarily to the organized sector, where employers and workers use the collective bargaining machinery. The general (minimum) wage serves as the benchmark or floor upon which the collective bargaining process builds.

7. Content of the collective bargaining agreement

The role of collective bargaining in advancing the employment interest of workers and democratic decision-making can be perceived from the content of the collective agreement, which shows the type and scope of the issues which the parties jointly determine through negotiations. The scope and variety of such issues are a reflection of the extent to which workers, through their union, are able to influence their terms and conditions of employment. This joint determination is a key function of the collective bargaining process and an important measure of the effectiveness of trade unions.

Several of the terms in the collective bargaining agreement are usually established by the legal code or by company policy, although negotiations over their application may still be necessary. On the other hand, there are issues, e.g. tools, shift allowance, and so forth, which might not have been covered by either the labour code or company policy but are nevertheless of interest to workers or in several cases, the employer. Negotiations over the latter set of issues could be more daunting than in the first category. These processes suggest that emerging issues and changing labour market necessitate the widening of the issues for negotiations in the employment relationship.

Table 2 below clearly demonstrates these attributes of the collective agreement and how they bring into the negotiation trajectory an expanding content of the CBA in Kenya. While the table was not constructed from a systematic survey of CBAs, it nevertheless illustrates the content of the CBA as an expanding phenomenon. As the table reveals, quite apart from the basic issues of wages, overtime, medical benefits, and so forth - most of which are established in the legal code - there are new issues, such as paternity and other sector-specific issues, such as the recruitment of foreigners to pensionable posts, or various forms of corruption in the CBA in local authorities.

⁶⁰ In some cases, the rate for this latter category may be below the minimum wage, notwithstanding their being in the formal sector. This would be so particularly where the inspection machinery of the government does not function well enough to capture violation of the wage order.

The dynamic nature of the collective bargaining process ensures this inevitable adaptation to the changing world of work. Also in this context, the role of public policy is significant. Issues such as gender, HIV/AIDS and abolition of child labour, for example, are mandatory in the new labour law regime in Kenya. This role of the legal framework makes the agenda of the negotiations considerably focussed and easier to conclude. Some agreements have also addressed issues of flexibility and employability, training and employment security. One illustrative example is the agreement in the banking industry, where the parties agreed that workers in precarious employment will be paid the prevailing minimum wage in the establishments where they work.

Table 2.
Content of collective bargaining agreements

Cash payments	Other benefits
Wages/allowances	Leave (various)
Merit pay	Maternity*
Overtime	Break periods
Allowances (various)	Hours of work
Benefits (e.g. medical)	Transfers
Gratuity/pension	Transport
Tools/skills allowance	Uniform
Bonus	Meal allowance
	Housing allowance
New issues	Sick leave
Paternity*	Termination/engagement
Child labour*	Redundancy
Sexual harassment	Lay-off
HIV/AIDS*	Training/education leave
Compassionate leave	Agency fee*
	Death benefit
	Contract labour
	Risk/hardship

*Covered by the Employment Act 2007/Labour Relations Act 2007

In trying to address the growing incidence of atypical employment in the large agricultural sector, the parties agreed in their CBA for 2007-9 that temporary labour beyond 3 months of engagement would be treated as seasonal labour, by which they could be employed for up to 8 months. In this context, the affected workers were entitled to maternity leave and other benefits, but more importantly, they had the first priority to be elevated to permanent status, when a vacancy occurred.⁶¹ This provision in the agreement not only places a check on the incidence of casual employment, it increases the prospect for formal employment relationship, while providing greater social protection for the affected workers.

The content of the collective agreement is equally important when its area of impact is larger, i.e. when the agreement covers or influences the conditions of employment of a larger number of workers than originally intended. In such cases, the collective agreement can dramatically improve the wellbeing of a larger working population. Indeed, as official records indicated, some 317 CBAs were registered with the Industrial Court in 2007, and slightly fewer, 297, in 2008. However, the number of unionizable workers covered was

⁶¹ Articles 26-27.

higher in 2008 (82,612) than in 2007 (61,251), which suggests that the CBAs applied to more beneficiaries than was foreseen in the agreements.⁶²

Notwithstanding the foregoing suppositions on the role of collective bargaining, Hayter and Stoevska show in their comparative analysis that collective bargaining coverage in Kenya, expressed as a proportion of wage and salary earners was 3.7 per cent in 2007. However, when expressed as a proportion of total employment, coverage recedes to less than 1 per cent.⁶³ Furthermore, they show that while collective bargaining coverage has remained stable in the advanced economies in Europe, it is generally low in Africa, where less than 20 per cent of wage earners are covered. Across the developing countries, the low coverage is explained partly by deregulation, unemployment and increasing resort to atypical forms of employment.⁶⁴

There is, however, a rider to the international perspective. In the Kenyan case, for example, coverage is made wider by the tripartite (minimum) wage council system. While it is difficult to determine the actual coverage of the negotiations through this means, it is evident that the minimum wage system more or less influences employers' employment relations practice. In the first place, employers who had no formal negotiating relationship with workers normally adopt the minimum wage, as prescribed either by the relevant tripartite wage council, or the model industry employer. Second, employers who negotiate with unions customarily use the minimum wage as the basis for their negotiations. Given then that the minimum wage is the outcome of (tripartite) negotiations, the coverage of the CBA would seem to be much wider than the statistics show.

8. Employment relations and collective bargaining in agriculture

Agricultural workers and employers were among the few that organized soon after independence, although a collective bargaining relationship did not develop until much later, in 1984. Prior to that time, individual farm owners determined the wage and terms of employment of the workers, based on the farm owner's perspective on what was profitable or affordable. However, in 1967, the Agricultural Industry Wages Council, the second most active of the wage councils, was established. In that year, the Agricultural Employers' Association, AEA, and the Kenya Plantation and Agricultural Workers' Union, KPAWU, agreed to ask the government to set up the wage council, for the purpose of determining the minimum wage for the sector. The implicit understanding was that employers who had the capacity were free to top up the minimum, but in practice, the vast majority of farm owners of the period paid the minimum. Over time, however, farm owners began to show a willingness to top up the minimum wage, usually based on profitability.

The minimum wage applied to *all* farms irrespective of whether or not they were members of the AEA. This industry-wide wage policy was adjudged the most realistic approach to guarantee equal treatment of workers in the industry. At the same time, the resolve had the undeclared desire to 'take wages out of competition' by which all farms were obliged to apply the same basic conditions. Nonetheless, the approach may have also reflected the relatively inexperienced parties in the negotiating process. This was despite the fact that the agricultural sector had been one of the most important hubs of union activity, and where the AEA and the KPAWU were among the largest and best

⁶² Economic Survey 2009, Government of Kenya, Table 4.17, p. 82.

⁶³ Hayter and Stoevska, loc.cit.

⁶⁴ Tayo Fashoyin, "Trends and development in employment relations in the developing countries". International Journal of Comparative Labour Law and Industrial Relations, Vol.26, No.2, 2010, 133-135.

organized labour market institutions in the country. The AEA was established in 1966, and had a membership of 167 employers in 2009, or about 80 per cent of the over 200 agricultural establishments in the country. On the workers' side, available information indicates that KPAWU had over 100,000 members, or about a fifth of members of COTU, the national centre in 2009.

From the beginning, the structure of collective bargaining in the sector reflected the employers' structural imperatives where there exist clearly differentiated sub-sectors. Thus, the AEA has two major employer groups. The first comprises farms that are engaged in mixed farming, including general farming mainly in wheat, dairy, ranching and wildlife conservancy. A handful of these farms also combine homa lime, or lime production, to their line of farming. In this group were 93 farms or 56 per cent of all farms in 2009. The second group consisted of 74 farming establishments, or 44 per cent of all farms, which practised horticulture, mainly flower and vegetable farming. Most of the larger employers in this group, numbering 35 in 2009, were members of the employers' association. According to industry data, 39 flower farms, generally smaller and mostly owned by Asian farmers, were not members of the Association, and routinely resisted unionization.

In the unionized horticultural farms, a major decision was taken in 1996 to abandon the general application of the minimum as the going wage rate. This was the outcome of a consensus among the farms and the union to the effect that, in so far as flower business was concerned, there was a certain degree of predictability, by which the climatic effect on production could be determined over a period of time. The decision was also informed by the extensive use of irrigation in flower farms. As a result, the farms were amenable to topping up the wage rates and conditions prescribed by the tripartite Agriculture Wages Council.

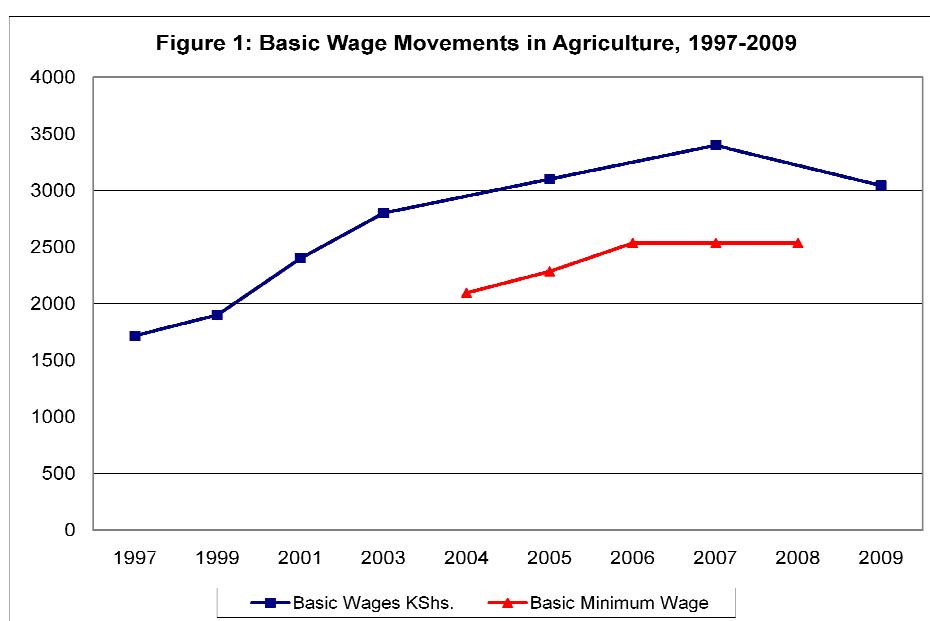
Nevertheless, employment relations in horticulture during the first decade were highly adversarial, due mainly to the poor or often lack of safety and health protection in the sub-sector. The labour and health standards as provided for in national legislation or industry requirements were not complied with by many horticulture farms, as a result of which workers were exposed to dangerous chemicals and working environment. These drew consternation and relentless protests from trade unions, labour inspectors, human rights and nongovernmental organizations.⁶⁵ The campaign for improved compliance with labour and industry standards was helped by the combined effort of the foreign buyers who favoured compliance with national safety and health standards, and also as spelt out in their fair trade agreements.

Generally in the agricultural sector, the first multi-employer collective bargaining agreement was signed in 1997, for a two-year period, and has been reviewed periodically ever since. To-date, the negotiations are part of the institutional framework for minimum wage determination under the agricultural wage council. Nonetheless, there is clearly a rich culture of industry-wide collective bargaining in the sector. In horticulture, for example, a multi-employer bargaining relationship exists for most flower farms, although this operates side by side with 3 relatively large individual company agreements. In the former, collective bargaining had produced a somewhat common terms and conditions of service. Whereas in the three enterprises' bargaining relationships, the workers' union found it relatively easier to secure what it considered to be more generous terms and conditions relative to the multi-employer agreement.

⁶⁵ See for example, Tayo Fashoyin, Ann Herbert and Paola Pinoargote, Uganda: Multinational enterprises in the plantation sector: Labour relations, employment, working conditions and welfare facilities. Working Paper No. 93, Multinational Enterprise and Social Policy, Geneva, ILO, 2003

Recently, this experience in individual bargaining presented a curious but understandable move by the KPAWU, which attempted to reverse the multi-employer bargaining arrangement in favour of individual enterprise negotiations. The union goal was advanced with relentless effort, but matched equally by the employers' stiff resistance. Thus, in the most recent negotiations in 2009, the union refused to sign the multi-employer collective agreement, on the pretext that a member on the employers' negotiating team could not sign the collective agreement. The refusal of the union to sign until the employers acceded to its demand induced the latter to declare a trade dispute, and to seek the intervention of the Industrial Court, as provided for in the Labour Institutions Act. The employers' unanticipated action broke the stalemate and forced the union to drop its demand, and subsequently sign the agreement.⁶⁶ The union's arm-twisting push for enterprise level bargaining had apparently collapsed.

Figure 1 below provides a small but vitally instructive perspective on the outcomes of the two institutional determinants of wage incomes, i.e. the wage council and collective bargaining processes. The Figure illustrates the enormous influence of collective bargaining on wage incomes over and above the floor that is agreed upon in the tripartite minimum wage council. This evidence goes to demonstrate, on the one hand, the critical role of the minimum wage in setting a social protection floor for workers and, on the other hand, the powerful influence of collective bargaining in raising wages over and above the floor set in the former. Both mechanisms are shown to demonstrate the influence of collective bargaining on wage incomes, and also the role of the minimum wage in setting a floor, as well as in ensuring that low pay workers receive a decent income.



Source: Economic Survey 2007. Kenya National Bureau of Statistics, Nairobi. Kenya Ministry of Planning and National Development.

Generally, non-unionized employers apply the agricultural wage order, as minimum wage, although some employers may opt to top up through unilateral individual employer's action. However, such employers commonly implement the wage element of the negotiated multi-employer CBA. In such cases, the non-unionized employers usually apply variants of the negotiated non-wage benefits, which include accommodation, housing allowance, and medical benefits; this package of benefits is of course unilaterally determined by the individual employers.

⁶⁶ See *Agricultural Employers Association v Kenya Plantation & Agricultural Workers Union*. Cause No. 189(N) of 2008. Award of the Industrial Court of Kenya, given on 25 March 2009.

In other words, while wage compensation among members of the non-unionised farms might not be significantly lower than that which prevails in unionised farms, other non-wage conditions of employment are not always the same, or as generous as the negotiated terms. But the most contentious issue remains the persistent disregard of some of the non-unionised farms for safety and health protection for the workers, particularly in the relatively smaller farms.

Furthermore, I show in Table 3 below, the monthly minimum wage in various categories of agricultural labour during 2004-2008. It will be seen that the minimum wage rose by a flat average of 21 per cent during the period. This reflects the combined influence of the tripartite agreed agricultural minimum wage and the bipartite collective bargaining agreements, both of which suggest that there has been a favourable movement in wages in favour of low paid workers in the sector.

However, when these averages are compared to the private sector negotiated minimum wages, or the public sector non-negotiated wages (in Table 5 at p.27), the percentage increase in agriculture was much lower than the respective monthly minimum wages by 9.5 percentage points and 14.5 percentage points during the same period. This reality presents additional evidence of the capacity of the collective bargaining process to substantially improve wages over the tripartite minimum wage orders, even though the size of the increases might be lower than in the public sector, where collective bargaining is not used.

Table 3.
Monthly basic minimum wages for agricultural industry, 2004-2008

Type of Employee	2004	2006	2008	% Change
UNSKILLED EMPLOYEES	2,096	2,536	2,536	21.0
STOCKMAN, HERDSMAN AND WATCHMAN	2,420	2,928	2,928	21.0
SKILLED AND SEMI-SKILLED EMPLOYEES				
House servant or cook	2,392	2,894	2,894	21.0
Farm foreman	3,780	4,573	4,573	21.0
Farm clerk	3,780	4,573	4,573	21.0
Section foreman	2,448	2,961	2,961	21.0
Farm artisan	2,505	3,030	3,030	21.0
Tractor driver	2,656	3,213	3,213	21.0
Combined harvester driver	2,926	3,540	3,540	21.0
Lorry driver or car driver	3,701	3,715	3,715	0.4
AVERAGE	2,870	3,396	3,396	18.3

Source: Economic Survey 2009. Table 4.15. Kenya National Bureau of Statistics, Nairobi. Kenya Ministry of Planning and National Development

9. Collective bargaining in the public sector

In this section of the paper, the collective bargaining experience in two key services of the public sector, namely the civil service and the local authorities is discussed. As Table 4 below shows, there was a modest increase in employment in the public sector, with the central government, its parastatals and enterprises each recording an increase of about 2.3

per cent during the 2007-2008 period. In contrast the local government sector had barely one half of 1 per cent increase in employment during the period.

In the two services which are discussed here are clearly distinguishable employers, where the two levels of government operate openly dissimilar and opposite approaches to the employment relationship. Generally in the central government, the employer officially maintains a bargaining relationship with the Union of Kenya Civil Servants, UKCS. The union had a membership of 60,000, or 30.5 per cent of the total workforce in 2008. In the local government authorities, on the other hand, one union – the Kenya Local Government Workers Union - represents 50,000 workers in the 175 local authorities, or 65 per cent of the total workforce. The union maintains a bargaining relationship with all the municipal and local government authorities in the country.

Table 4.
Wage employment in the public sector (000s)

Wage Employment	2007	2008	% Change
Central Government	192.3	196.8	2.3
Teachers	234.6	236.8	0.9
Parastatal	80.6	82.4	2.2
Partially Owned Private Enterprises	38.8	39.7	2.3
Local Government	81.9	82.3	0.5
Total	628.1	638.0	1.6

Source: Economic Survey 2009. Table 4.3. Kenya Bureau of National Statistics, Nairobi. Ministry of Planning and National Development.

The two unions represent 110,000 members, or 39.4 per cent of all workers in the two services. However in the entire public sector, excluding the partially-owned enterprises, there are four major unions with a combined membership of 310,000 members, which represents nearly 52 per cent of the total workforce in the four services.⁶⁷ In the case of teaching and parastatal services, there are separate approaches to wage determination, while in the government's partially-owned enterprises, the collective bargaining practice in the private sector prevails. This section of the paper does not cover these categories of workers in the public sector.

One important characteristic of the labour relations practice generally in the public sector is the comparatively manageable and predictable collective bargaining practice, far different from that in the private sector. The main explanation for this is the relatively fewer unions and employers in the affected services. The exception to this generalization, as will be shown, is the central government where there is apparent indecision on the part of the employer as to the role of collective bargaining in the central civil service. This is however intriguing because the central government had not only laid out an elaborate legal framework for collective bargaining in all the services; it had also facilitated the processes, notably in the local authorities.⁶⁸

Collective bargaining in the central civil service: reality or fantasy?

Employment relations in the central government civil service has existed before independence, between the employers and what is today known as the Union of Kenya Civil Servants. This union was established in 1959, and has since maintained a consultative

⁶⁷ These services are the central government, local authorities, teaching service and the parastatals.

⁶⁸ See for example the central government commissioned Report of the Local Government Commission of Inquiry. Government of Kenya, Nairobi, 1966.

relationship with the employers, which meant that, for more than four decades, it was without the right to bargain over the terms and conditions of employment for its members. Nevertheless, the union had taken the view that prevailing public policy was not explicitly in opposition to a bargaining relationship.⁶⁹ Lacking therefore, real mitigating reasons to the contrary, the UKCS joined forces with other groups, specifically doctors and university teachers on a nationwide strike in 1980. The action led to the dissolution of the UKCS in that year.

However, following relentless internal and external pressures, the latter coming primarily from the ILO, the union was reinstated in 2001. Then in 2004, the two parties signed the historic Recognition, Negotiation and Grievance Procedures Agreement. The agreement provided for the employers' recognition of the UKCS as a bargaining agent for about 60,000 employees in the public service.⁷⁰ The negotiation that would have produced the first CBA started soon after the signing of the recognition agreement and, after nearly a year of exhaustive negotiations, an agreement was reached in 2007. However, at the point of signing the agreement - which the employer side helped put together - the latter withheld its approval, outwardly on claims that certain provisions in the agreement were unsatisfactory.

Whilst this volte-face put to question the employer's good faith and the status of the institutional process to which both sides had committed themselves, it is important to bear in mind that, for a long time, the employer had developed and managed a highly institutionalized process of its own for the determination of wages and other conditions of employment for various categories of workers in the public service. In fact, in a clearly defined pay policy for the public service, published in 2006, the government-employer sought to rationalize the size of the wage bill in favour of the operation and maintenance of public services.⁷¹ As the document revealed, one of the objectives of the employer was to reduce the public service wage bill from 9.2 per cent in 2001 to 7.2 per cent of GDP by 2008, although this target was not achieved.⁷²

In his explanation of the role of the employer, the Minister for Public Service argued that the pay policy was intended to "define the principles for determining pay for public servants".⁷³ The government paper itself contained the government's concern about the "lack of an explicit, coherent policy" which had led to reliance on numerous processes, and probably resulted in conflicting pay outcomes. These outcomes were a result of multiple institutions for wage determination, such as ad hoc commissions, collective bargaining and other institutional mechanisms. Although the policy did not explicitly state that the processes were being discarded, it noted nevertheless, that the absence of uniform criteria for wage setting had led to "*compensation for inflationary pressures, to political consideration or demands from trade unions*".⁷⁴ (Emphasis added.)

In fact, the 'new' pay policy was no less an affirmation of the human resource management approach, by which compensation had for long been determined in the public service. Thus, the pay policy gave considerable emphasis to linking of pay to economic performance, affordability, right sizing, and harmonization of grading and pay structures, sustainable wage bill, and so forth. These subjects are hardly among those that are negotiated with workers' unions! Furthermore, not only did the policy castigate the role of trade unions in collective bargaining as 'political manipulation', it frowned at the use of the

⁶⁹ See reference 35, above.

⁷⁰ The proportion of civil servants covered by the recognition agreement excludes the armed forces, police, judiciary, prisons, and forestry workers. It also excludes the teaching service and parastatals.

⁷¹ See Pay Policy for the Public Service. Office the President, Directorate of Personnel Management. Republic of Kenya, January 2006.

⁷² Ibid., p.11

⁷³ Foreword to Pay Policy for the Public Service, by the Minister in Ibid.

⁷⁴ Ibid, p.10

inflation criterion. In the event, while the policy did not explicitly renounce the collective bargaining process, it clearly called to question its relevance in the service.

Be that as it may, given the absence of a tradition of collective bargaining in the service, the government tacitly implemented some of the key provisions of the draft CBA. These included salary awards, which averaged 21 per cent, and award of allowances, such as transport and for serving in certain locations. These benefits were incorporated in the government's budgetary provisions, but without reference to the union or the aborted CBA. Seemingly, the government had tacitly avoided a bargaining relationship with the union, by reinforcing its internal human resource management system. This gave the union minimal or mundane role in employment relations and, it was hardly a surprise that some union members and indeed their leaders had begun to question the relevance of the union or the rationale for continuing support for the organization.

The irony of this experience, and in the context of the collective bargaining process is demonstrated in Table 5 below. As the table shows, the absence of collective bargaining in the service does not, on face value, appear to have disadvantaged public service workers relative to the private sector. On the contrary, the average monthly wage of the lowest worker in the public sector rose by 23 per cent between 2004 and 2006 and by 27 per cent in 2008. But this argument begs the key and fundamental question, namely the denial of the fundamental rights of public service workers, to which the employer had consented in the recognition agreement of 2004.

Table 5.
Average monthly wage earnings per employee in private and public sectors

Industry	Private Sector			Public Sector		
	2004	2006	2008	2004	2006	2008
Agriculture and Forestry	10,343.4	11,650.2	13,503.0	12,752.0	14,292.5	17,280.5
Mining and Quarrying	15,927.3	19,393.4	21,908.8	15,823.5	16,359.7	18,148.4
Manufacturing	15,678.7	17,690.4	19,950.9	13,307.2	15,577.9	17,882.5
Electricity and Water	49,504.8	50,632.2	68,390.9	35,726.6	40,304.9	47,905.2
Building and Construction	24,028.4	27,218.1	32,456.8	19,156.8	21,992.9	26,839.9
Trade, Restaurants and Hotels	32,547.0	37,633.7	41,841.1	30,379.3	40,060.7	54,290.2
Transport and Communications	46,971.4	48,785.2	53,920.5	28,555.7	34,756.6	46,649.4
Finance, Insurance, Real Estate and Business Serv.	51,871.4	55,128.8	62,161.6	60,086.8	70,166.4	75,439.6
Community, Social and Personal Services	27,126.4	29,695.7	34,984.5	20,124.6	25,383.8	27,791.9
Total	24,207.5	27,312.0	31,840.8	21,078.9	24,579.9	29,443.5

Source: Economic Survey 2009. Table 4.9. Kenya National Bureau of Statistics, Nairobi. Kenya Ministry of Planning and National Development.

These institutional issues present the perplexing story of the employment relations system in the public service. It is instructive that the government had opted to continue a tradition of unilateral determination of wages and conditions of employment for public service workers. Equally perplexing was the response of the union. Under the legal framework, a party could petition the Industrial Court to force the other party to honour the

provisions of the Recognition Agreement, or give a determination of the status of the unsigned CBA. But for incomprehensible reasons, the union did not choose either path in defence of its rights, or of its members. Neither did it undertake an industrial action in pursuance of these rights.

Collective bargaining in local authorities

The employment relationship in the local authorities presents a sharp contrast to what takes place in the central civil service. In the former, formal employment relations began soon after the local authorities were reconstituted in 1963. The Association of Local Government Authority, ALGA, which represents the 175 local government authorities in the country, had total staff strength of about 82,000 in 2008. As an affiliate of the FKE, the Association presents an instructive emphasis on the importance attached to collective bargaining by the employers. The FKE, as in similar cases in the private sector, is quite active in the negotiations in the local authorities. The workers' counterpart in this bargaining relationship is the Kenya Local Government Workers Union, which was established in 1953, and had a membership of 50,000 in 2009. In other words, about 65 per cent of the total workforce in local authorities was organized, and thus constitutes the highest concentration of union membership in Kenya.

Initially, collective bargaining took place at the level of each local government, an arduous task for both sides, but particularly for the union which lacked the capacity to effectively coordinate local level negotiations in the more than 100 local authorities that existed at the time. In consideration of this operational constraint the union put forward in 1967 the proposal to negotiate a centralized bargaining and a single agreement with all local authorities. This proposal was initially resisted by the employers, supposedly because of their concern that the arrangement would disadvantage smaller local authorities. However, the employers' willingness to discuss the issue resulted in the establishment of the ALGA, and helped to assuage individual employers' concerns. The two sides also agreed to divide the LGAs into 4 groups based on size, status, and hence their financial capacity.⁷⁵

Today the two sides negotiate on behalf of all the local authorities. The collective bargaining experience in the sector is highly advanced, and occurs regularly at intervals of two years. Given that the negotiations cover a large proportion of the workforce in local government workforce, the outcomes of the collective bargaining process are bound to influence the wage compensation of a substantial proportion of non-unionised workers in this service. At the same time, the collective bargaining process has contributed to an orderly adjustment of conditions of employment to the current economic crisis.

10. Trade disputes and their settlement

One of the significant innovations in the legal framework in Kenya is the creation or reform of institutions, rules and procedures to streamline the dispute settlement machinery and the protection of the rights of the parties. One such innovation is the introduction of a Disputes Committee, which advises the minister on which disputes are subject to investigation. The reform goes further by rationalizing the numerous steps in the resolution machinery. For example, in contrast to the open ended time the ministry had to conciliate a dispute, the new law obliges the ministry to take concrete action to resolve a dispute within 30 days of receiving the notice of a dispute. Similarly, the conciliation process provides a timed

⁷⁵ These are (1) Mombasa and Nairobi; (2) all municipal councils; (3) all county councils, and (4) all urban councils. See proposed action by the Government of Kenya on the report of the local government commission of inquiry. Sessional Paper No. 12 of 1967. Nairobi.

sequence of actions, combining some of the separate and time consuming steps into decisive events, which must produce a decision within 30 days. An unresolved dispute may be referred to the Industrial Court.

Another innovation in the code is the right of appeal to the High Court by an aggrieved party. This window provides additional opportunity for the parties to secure justice, beyond the Industrial Court. The essential goal of provisions such as these is to protect the rights of the parties, ensure labour peace and sustained trust and cooperation in the workplace. At the same time, however, critics have argued that the involvement of traditional courts will stretch the resolution machinery, particularly in courts that do not necessarily operate within an employment relations perspective. These critics argue that when a court makes a decision on strictly legalistic basis, it has the potential of damaging trust and confidence rather than building it, and may in the process undermine labour and management cooperation.

Nevertheless, despite what appears to be a generally favourable dispute resolution system with the capacity to prevent or reduce conflict, the records of the labour ministry revealed that disputes have risen rather than decreased, from 336 in 2007 to 462 in 2008, or by 37.5 per cent. Most of the disputes were related to the collective bargaining process: failure to negotiate, issues in implementation, or violation of the CBA. The number of disputes on these rose by 258 per cent during the period. Furthermore, 71 and 273 disputes were referred to conciliation respectively in 2007 and 2008. The explanation for what appears to be an increasing trend in disputes, as advanced by the ministry was that the observed increase was the outcome of more user friendly provisions in the new Labour Relations Act, which motivate more aggrieved parties to take their grievances to the revitalised institutional machinery.⁷⁶

Most of the disputes were settled by conciliation and investigation procedures, while those that were not settled, i.e. 155, were referred to the Industrial Court. A total of 256 disputes were subject to investigation in 2007, while a smaller proportion of 182 were investigated in 2008. Under the Labour Relations Act, the Investigation procedure requires the Ministry of Labour to find the cause(s) of the dispute, on the basis of which the Minister recommends a solution to the parties. If either party or both reject the recommendation, the aggrieved party may appeal to the Industrial Court.⁷⁷

Notwithstanding the relative effectiveness of the institutions in resolving disputes, the above information appears to suggest growing adversarial relations in workplaces. According to COTU, this development arose from multiple causes, including employers' policies and changing structure of the workforce, which have led to growing informality and atypical employment.⁷⁸ Workers in these categories either do not have access to the dispute settlement machinery or are not motivated to explore the option. On the other hand, the increase in disputes does not translate to more industrial action. As explained above, there have been extenuating reasons that contributed to the increase in disputes. First, there is the view that the new changes have created a greater awareness of disputants' rights, which they have apparently exercised. Second, the reporting of violations had been more frequent than before. The third reason, not shown in recent data, is that the new approach removes bureaucracy that had previously clogged the dispute reporting process.

Based on the foregoing observations, the number of strikes actually decreased during 2007-2009, as shown in Table 6 below. Most of the strikes of the period were

⁷⁶ Report of the Ministry of Labour, January 2009.

⁷⁷ See for example the award of the Industrial Court in Cause No. 163 of 2008, between the Kenya Local Government Workers Union vs Town Council of Kendu-Bay. The Minister's recommended solution was not acceptable to the employers, who then appealed to the court.

⁷⁸ COTU, "Economic conditions affecting trade union organizations". Nairobi, 2009.

concentrated in a few industries. In 2007-8, for example, 50 per cent of the strikes occurred in agriculture. In the following year, the number of strikes slightly decreased to 25, of which 60 per cent occurred in agriculture, manufacturing and construction. Most of the strikes were over job security.

Table 6.
Strikes in Kenya 2007-2009

	2007/8	2008/9
Strikes	28	25
Workers involved	21,025	20,974
Man-days-loss	575,803	249,478

Source : Annual report of the Ministry of Labour in Kenya

The main explanation for fewer and declining strikes was the difficult operating environment, which created anxieties over job security among workers. While workers were angered by the prospects of job losses, they were also restrained from deliberately aggravating the situation. However, this concern for restraint was not enough to prevent the most serious strike of the year, involving primarily pilots in the national airlines, Kenya Airways.⁷⁹ In this case, the pilots went on strike in early 2009 for a pay increase of 130 percent. Management offered 10 per cent and lodged a dispute with the Industrial Court. A subsequent injunction against the strike was ignored by the workers. The strike paralyzed the entire fleet of the airline and disrupted air travel throughout the region. The processes of the Industrial Court and informal negotiations, involving top political authority, ultimately led to an agreement after 4 days of the damaging strike.

The unusual demand of the pilots appeared more a test of their strategic importance in the similarly strategic sector. The settlement reached, particularly the 20 per cent wage increase, was far below the demand of the pilots, but twice the size of management offer. The dispute and its resolution were also a test of several aspects of what the new law seeks to do, particularly with respect to its effectiveness, compliance and promotion of fair and equitable settlement, labour-management cooperation and maintenance of labour peace.⁸⁰ However, the contribution of the legal framework to these objectives remains to be seen.

11. Discussion and conclusion

Collective bargaining and tripartism are entrenched social dialogue institutions for employment relations in Kenya. Operating through a network of vertical and horizontal negotiations and consultations at national, sectoral and enterprise levels, these social dialogue processes are important means for labour market governance in the country. One of the most important contributions is the role of the tripartite system of minimum wage determination by which the lowest paid workers are guaranteed decent employment conditions, whether or not they were organized in trade unions. The role of this institutional arrangement is also important in fortifying the bipartite collective bargaining machinery at both the sectoral and enterprise levels. Through these processes, the coverage and outcomes of collective bargaining in the determination of terms and conditions of employment have contributed to national socioeconomic wellbeing.

These institutions and processes of the labour market are reinforced both by the new legal framework and the decent work country programme in Kenya. The determination of

⁷⁹ See unpublished records of the Industrial Court, Nairobi, 2009.

⁸⁰ For embarking on an illegal strike, the union was fined the sum of Sh.50, 000.

the minimum wage as well as collective bargaining at enterprise and sectoral levels are playing essential roles in helping to achieve social equity, safety nets and participation, particularly during this period of global economic crisis. In so doing, these labour market institutions and processes are contributing to sustainable economic recovery and macroeconomic stability.

Quite apart from the continuing resistance of some employers, as well as the indecision of the employer in the public service as to the role of collective bargaining in wage determination, there are a number of critically important issues which need to be addressed so that the institutions of social dialogue and the labour market can fully and effectively support the delivery of decent work to the segments of the Kenyan economy. This final section of the paper highlights a number of such policy challenges that might contribute to ensuring that the labour market is organized in a way to positively impact on the economic and social development in the country.

The first is the capacity of unions to strengthen their voice in the labour market. This emphasizes that trade unions need to broaden their representation of the workforce in the country. This requires that trade unions come up with innovative and practical approaches to increase their membership. An aggressive unionization is essential to broadening the effect of favourable labour market policies across the wage and income earning population. The status of the workers in various forms of atypical or precarious employment represents a huge part of this challenge, particularly as to the extension of the rewards of collective bargaining and the minimum wage to them. As we have seen, the size of this category of workers has generally been large in countries such as Kenya and across Africa, and is more than likely to increase in periods of economic crisis.

In other words, trade unions need to aggressively develop innovative strategies to organize these groups of workers who are outside their customary recruitment range. As demonstrated, the size of such population is growing rather fast, even in enterprises in which the union maintains collective bargaining with employers. It also obliges trade unions to ensure that minimum conditions of employment apply to this group, but without creating doubts in business as to the supportive role of labour for enterprise productivity and sustainability.

The second policy challenge relates to the prospect of real collective bargaining in the public service. The revival of collective bargaining in this service in 2007 constituted a positive re-orientation of public policy in support of labour rights at work. The challenge is how government, as employer of labour will reconcile its internal human resource management processes with its commitment to social dialogue with the workers' union on the determination of wages and conditions of employment. This is the least that the government, as an employer, needs to do to be seen as complying with its obligation under the signed recognition agreement, but also because collective bargaining is a public policy that applies to *all* employers. The apparent contradiction between the employer's stance and public policy thus needs to be removed. Besides, bearing in mind the example of the local government authorities, there does not appear to be any compelling reason why the central government, as an employer, cannot engage in collective bargaining.

The need to strengthen collective bargaining in the public service is particularly critical in difficult times such as the prevailing global economic crisis. This is because the government, as employer, needs to lead by example to dissuade other employers who might be tempted to push for unilateral downward review of employment conditions. The challenge is dealing with this possibility through the collective bargaining and social dialogue processes, to arrive at a mutually acceptable agreement that protects the respective interests of workers and of employers. This role of collective bargaining is equally

important in building joint consensus on the protection of jobs and against deflationary wage policies.

The third policy challenge is the role of tripartism. As shown, tripartite institutions for social dialogue have played a central role in the overall employment relations framework, and in helping to promote collective bargaining at both sectoral and enterprise levels. Indeed, the Kenya experience is unequivocal in demonstrating how the tripartite process serves as a foundation for negotiations at the enterprise level. In this respect it helps to identify, develop or create the basis for negotiations on specific employment terms. The critical role that the wage council system plays is demonstrative. As such, tripartism fortifies collective bargaining where it exists, and provides succour for workers in industries or enterprises where it does not exist. As the operation of the general (minimum) wage council suggests, nowhere has tripartism had the greatest outcome for workers than in the negotiation of the minimum wage. Generally the wage order that emerges from the wage councils serves as a floor for enterprise negotiations, but it is equally important for workers who had no access to collective bargaining. In times of crisis as the one the world is witnessing, this is critical to the well-being of such workers.

In Kenya, these synergies have been demonstrated by the present tripartite response to the global crisis. Indeed, the commitment of the government and the social partners to tripartite cooperation has been perhaps the most significant policy measure on labour market governance originating in the social contract of 1962. There had been occasional problems in the use of tripartite consultation, such as the apparent dissatisfaction over the process that led to the enactment of the new laws. However, this emphasizes the necessity for the parties to recommit themselves to tripartism and collective bargaining as the institutional mechanisms for regulating the labour market.

As a party to the tripartite process in which it has played a major role in laying the foundation, the government - as an employer - needs to ensure that its internal processes are not at variance with the commitment to tripartism and collective bargaining. Specifically, government authority needs to inform the relevant units of their obligation, as employers, to labour market institutions and therefore of the need to engage in collective bargaining.

Bibliography

- Aluchio L.P.A., Trade unions in Kenya: Development and the system of industrial relations. Nairobi, Jomo Kenyatta Foundation, 1998.
- Auer, P Employment revival in Europe. Labour market success in Austria, Denmark, Ireland and the Netherlands. Geneva, ILO, 2001.
- Brewster, eds., Industrial Relations in Africa. London, Palgrave Macmillan, 2008, pp 28-38.
- Government of Kenya Economic Stimulus Programme, The. Overcoming today's Challenges for a Better Kenya Tomorrow. Nairobi, , 2009.
- Government of Kenya Economic Survey 2009.
- Government of Kenya National Economic and Social Council The, Gazette Notice No. 7699., Nairobi, September 2004.
- Fashoyin, T. "Trends and development in employment relations in the developing countries". International Journal of Comparative Labour Law and Industrial Relations, Vol.26, No.2, 2010, 133-135.
- Fashoyin, T. "Industrial relations in Kenya" In Wood, G. and Brewster, C. eds., Industrial Relations in Africa. London, Palgrave Macmillan, 2007, pp.39-58.
- Fashoyin, T. "Tripartite cooperation, social dialogue and national development" International Labour Review, Vol. 143, No. 4, 2004, pp. 341.
- Fashoyin, T. Wages and incomes policy in Nigeria. London, Longmans, 1984, chapter 6.
- Fashoyin, T.; Herbert A and Pinoargote P, Uganda: Multinational enterprises in the plantation sector: Labour relations, employment, working conditions and welfare facilities. Working Paper No. 93, Multinational Enterprise and Social Policy, Geneva, ILO, 2003.
- Eyraud, F. and Saget, C. The fundamentals of minimum wage fixing. Geneva, ILO 2005.
- Hagglund, G. "The development of industrial relations in Kenya" In Wood, G. and Brewster, C. eds., *Industrial Relations in Africa*. London, Palgrave Macmillan, 2008, pp 28-38.
- Hayter, S. and Stoevska, V "Trade union density and collective bargaining coverage. International Statistical Inquiry 2008-9". Technical Brief. Industrial and Employment Relations Department (DIALOGUE), ILO, 2010.
- ILO Declaration on Social Justice for a Fair Globalization. Adopted by the International Labour Conference at its 97th Session. Geneva, 10/06/2008, Article IA (ii).
- Government of Kenya. The. Performance and Prospects. Ministry of Labour and Human Resource Development, , Nairobi, April 2000.
- Bor, M.K. "The New Labour Laws: An Overview". Paper delivered at a seminar on Responding to the Challenges of Fair and Ethical Trade. Nairobi, on the 23rd November 2007
- National Level Social Dialogue Institutions ILO, Industrial and Employment Relations Department (DIALOGUE), Geneva ILO, 2009 Unpublished
- NSSF, Economic Outlook, 2009
- ILO, Recovering from the crisis. A Global Jobs Pact. Adopted at the 98th Session of the International Labour Conference in Geneva, 19 June 2009, Article IV (23).
- "Revised Guidelines for the Determination of Wage Awards". Issued by the Ministry of Finance, Government of Kenya, Nairobi, 23rd November 2005.

Zepeda, E. et. al., The Impact of the Doha Round on Kenya. Carnegie Endowment for International Peace. Washington, D.C., 2009.