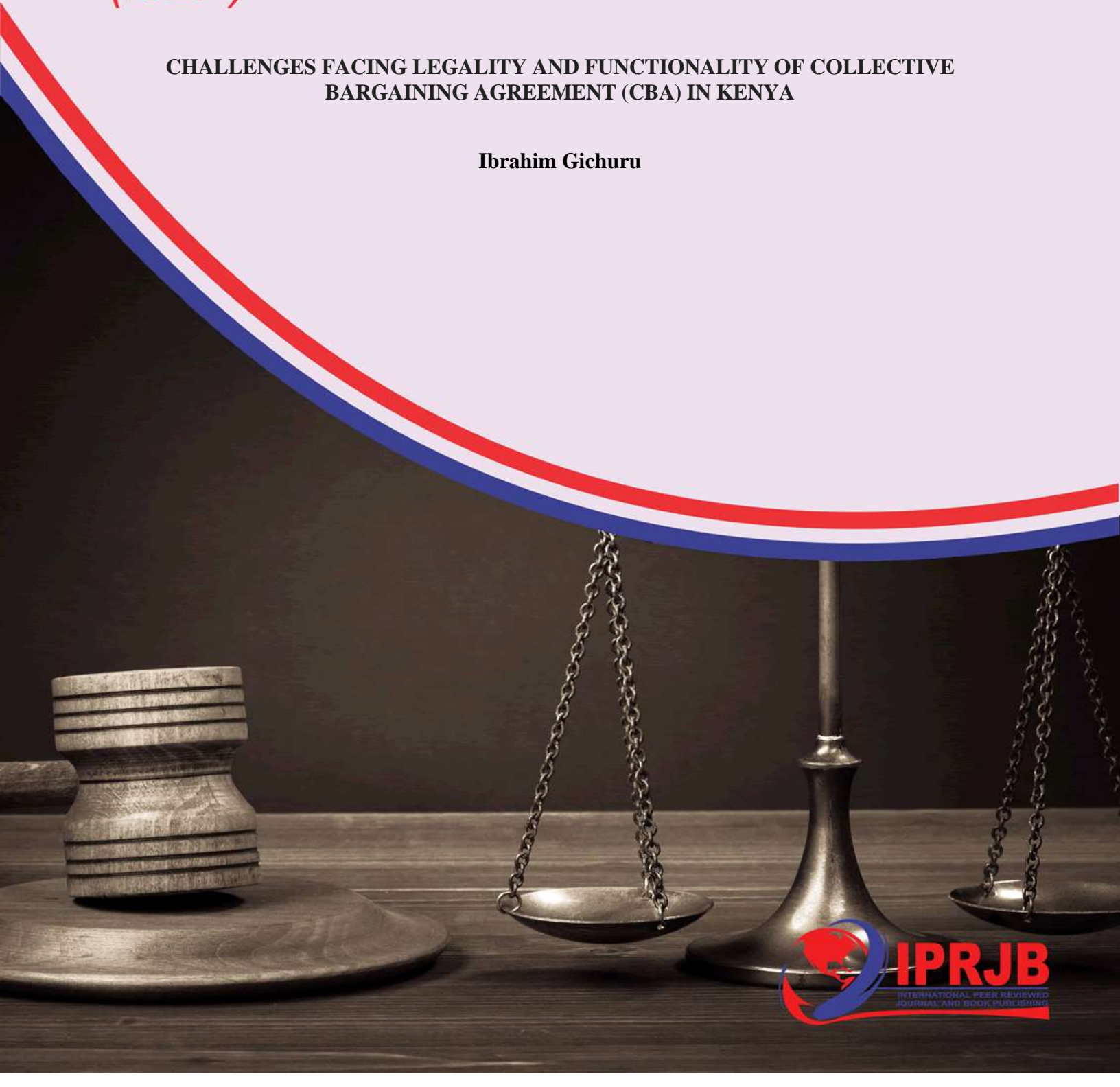


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**CHALLENGES FACING LEGALITY AND FUNCTIONALITY OF COLLECTIVE
BARGAINING AGREEMENT (CBA) IN KENYA**

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Abstract

Purpose: The main purpose of this study was to analyze challenges facing legality and functionality of collective bargaining agreement (CBA) in Kenya.

Methodology: The study employed a desktop descriptive survey research design thus presenting a methodological gap.

Results: The study concluded that legal framework and structures, successes and perceived weaknesses had a significant effect on collective bargaining agreement (CBA) in Kenya. The study also recommended that future studies should be carried out on trade unions role of enhancing better CBAS.

Unique Contribution to Theory, Practice and Policy: Collective bargaining is very important and it brings positive agreements between employer and employees. When trade unions perform this function effectively, it normally brings positive implications to the workplace in general. It increases the bargaining capacity of employees as a group; they restrict management's freedom for arbitrary action against the employees. Moreover, unilateral actions by the employer are also discouraged as everything will be agreed collectively. Effective collective bargaining machinery strengthens the trade unions movement, workers feel motivated as they can approach the management on various matters and bargain for higher benefits. The study thus recommended that future studies should be carried out on trade unions role of enhancing better CBAS.

Keywords: (CBA), challenges, legality, functionality

1.1 INTRODUCTION

Any country's employment relations system is shaped by its history and various socio-political, economic and technological forces both inside and outside the country. It is the legislative framework in particular that helps to shape employment relations paradigms. In turn, the employment relations system helps to shape a country's history, simultaneously affecting other subsystems both inside and outside a country (Nel, 2002:55).

In an attempt to defuse the generation of conflict, most societies have developed rules, institutions and procedures for the regulation of conflict. Some rules are prescribed by the state in various labour laws, other rules have been developed through agreements between employers and unions. These institutionalize the process of collective bargaining, which is accepted by many Western

countries as being the best means of resolving conflict between employers and workers (Le Grange, 1996:8)

Kenya aspires to become a globally competitive and prosperous country with high quality of life by the year 2030 (Republic of Kenya, 2007c). There is no doubt that labor and employment sector will have to play a crucial role if the country's aspiration is to be achieved. One of the labor market reforms that the Kenya government has sought to achieve over time is to remove labour market rigidities and other impediments to employment creation. Specifically, the government has been aiming to align wage determination to labour market mechanisms (Republic of Kenya, 2006; 2007c; 2008a; 2008b).

Efficiency in the determination of wages and that of the labour market in general has been a subject of policy debate in Kenya, especially among government, industrialists, investors, trade unions and development partners (Pollin *et al.*, 2007)

In Kenya, minimum wages are statutory and serves as a base for other wage formation approaches. Wage determination under collective bargaining is, for example, modeled on the framework that it (collective bargaining) should improve on the minimum wages and other statutory terms and conditions of employment (Jaffer, 2005).

Collective bargaining in Kenya is grounded on the provisions of the ILO Convention No. 98 of 1949 on the Right to Organize and Collective Bargaining. Each country that has ratified the Convention is required to encourage and promote the full development and utilization of machinery for voluntary negotiation between employees, employers and/or their representatives in the regulation of the terms and conditions of employment for workers. Kenya ratified the Convention in 1964 and has attempted to domesticate the provisions of the Convention through Section 80 of the National Constitution and the Industrial Relations Charter 1957 (1984 revised). While Section 80 of the Constitution guarantees freedom of association, which is a critical element of collective bargaining, the Industrial Relations Charter defines the boundaries for trade union organization and recruitment, including guidelines on the categories of workers, who by nature of their work, qualify to join a trade union.

While almost all African countries have ratified ILO's Convention on the right to bargain freely, there are large differences across countries in terms of enforcement of the right to collective bargaining. In Burkina Faso, Burundi, Côte d'Ivoire, Namibia, Niger, Senegal and South Africa collective bargaining agreements are in effect in many formal major business enterprises and sectors of the civil service. In several countries there are significant differences between the public and the private sectors. For instance, in Benin, Gambia, Mauritius, Mozambique, Tanzania, Zambia and Zimbabwe, public sector workers are excluded from the right to bargain collectively. On the other hand, in Guinea- Bissau and in Rwanda the right to bargain collectively does not apply to the private sector.

The requirement for voluntary negotiations and collective bargaining are also reinforced through the Employment Act (2007), Labour Institutions Act (2007) and Labour Relations Act (2007). The Employment Act (2007) specifies the minimum terms and conditions of employment, which constitutes the benchmark for collective bargaining. The Labour Institutions Act (2007) governs

establishment of staff associations, employees' associations and employers' organizations besides establishing institutions for labour administration. The Labour Relations Act (2007) establishes the general framework for interaction between an employer, employees and organized labour in terms of collective bargaining, registration and enforcement of collective agreements, and dispute resolution (Republic of Kenya, 2007b)

Kenya's industrial relations machinery provide for collective bargaining between employers and workers' representatives (trade unions). While labour unions in the country are mainly affiliated to COTU, some employers are represented by FKE. The ensuing Collective Bargaining Agreements (CBAs) usually involve staggered long-term contracts, conditions of employment, fringe benefits and union membership drives

Effectiveness of collective bargaining as an approach to wage determination depends on the strength and bargaining powers of trade unions. In a 2007 study on wage determination in the civil service in Kenya, Omolo (2007) argued that trade unions had a positive but statistically insignificant influence on the civil service wages.

1.2 Problem Statement

One of the labour market reforms that the Kenya government has sought to achieve over time is to remove labour market rigidities and other impediments to employment creation. The government has, particularly since the advent of structural adjustment programs in 1980s, consistently articulated the need to align wage determination to labour market mechanisms, so as to make Kenya globally competitive (Republic of Kenya, 1989a; 1997; 2006; 2007c; 2008b). Minimum wage regulation, collective bargaining, administered and flexible approaches to wage fixing, are the wage determination methods applicable in Kenya. Minimum wage regulation has particularly continued to be used as a benchmark for wage setting in all sectors of the economy since independence.

Collective bargaining is very important and it brings positive agreements between employer and employees. When trade unions perform this function effectively, it normally brings positive implications to the workplace in general. It increases the bargaining capacity of employees as a group; they restrict management's freedom for arbitrary action against the employees. Moreover, unilateral actions by the employer are also discouraged as everything will be agreed collectively. Effective collective bargaining machinery strengthens the trade unions movement, workers feel motivated as they can approach the management on various matters and bargain for higher benefits (Shashank 2012).

Labour law in a voluntary system will provide the framework for the conduct of the collective labor relationship. Legislation will provide for freedom of association, freedom from victimization and the right to engage in industrial action. To promote labour peace, dispute settlement procedures may also be provided. Furthermore, it may happen that each party is protected from unfair practices by the other and that collective bargaining is promoted by the body of labour legislation (Bendix, 2001:89).

Collective bargaining has traditionally been concerned with wage/salary determination; its scope has widened considerably over the years and today encompasses working hours, holiday's entitlement, sick pay, promotion policies and pensions. All these expectations should be met by the employer and it is the duty of union leaders to ensure that they are met. Union leaders need a reasonable membership to have their needs addressed by the employer. Membership of KNUT in the early days was mandatory for the newly employed teachers in Kenya; this enabled the union to have the numbers required by TSC to enable collective bargaining. However, despite the several CBAS signed by the government and trade unions a lot needs to be done to stem down the ever increasing scenarios of sit-ins, strikes, fidgeting in both the private and the public sector. Thus this study seeks to contextualise this by to analyzing challenges facing legality and functionality of collective bargaining agreement (CBA) in Kenya

1.3 Research Objectives

1. To determine the legal framework and structures of collective bargaining agreement (CBA) in Kenya
2. To determine successes of collective bargaining agreement (CBA) in Kenya
3. To determine weaknesses facing legality and functionality of collective bargaining agreement (CBA) in Kenya

1.4 Research Questions

1. What are the legal framework and structures of collective bargaining agreement (CBA) in Kenya?
2. Which successes can be pegged on the collective bargaining agreement (CBA) in Kenya?
3. What are the perceived weaknesses facing legality and functionality of collective bargaining agreement (CBA) in Kenya?

2.0 Literature Review

2.1 Theoretical review

A theory is a set of interrelated concepts, definitions, and propositions that present a systematic view of events or situations by specifying relations among variables, in order to explain and predict the events or situations (Van Ryn & Heaney, 1992). Theories are formulated to explain, predict, and understand phenomena and, in many cases, to challenge and extend existing knowledge, within the limits of the critical bounding assumptions.

2.1.1 Monopoly Union Model

There are three main theories that attempt to explain the determination of wages under the collective bargaining approach. The first is the Monopoly Union Model, which was advanced by Dunlop in 1944 (Smith, 1994; Lundborg, 2005). According to this theory, the monopoly union has power to unilaterally maximize the wage rate while the firm chooses the level of employment also on a unilateral basis. This arrangement signals the absence of joint negotiations or bargaining

between the union and the firm. Vogel (2007) argues that the Monopoly Union Model is a special case of the Right-to-Manage Model.

2.1.2 Right-to-Manage Model

The second model is the Right-to-Manage Model, which was developed by Leontieff in 1946 (Heijdra, 2007). In this model, the labour union and the firm are assumed to bargain over the wage rate according to a typical Nash Equilibrium Maximin (Vogel, 2007). The fundamental proposition of this model to trade union behaviour is that while the union has an influence on the wage rate through collective bargaining negotiations, the firm is free to set the level of employment, which will maximize profits at any level of the wage rate.

2.1.3 Efficient Bargain Model

The third model is the Efficient Bargain Model. This model of collective bargaining was advanced by McDonald and Solow in 1981 (Smith, 1994). In this case, the union and the firm bargains over both the wages and the level of employment. The assumption here is that the level of wages and employment that maximizes the objective function of the union is in conformity with the level of wages and employment that is required to facilitate the firm to maximize its objective function. It is noted, however, that in most cases, the objective of the union is in conflict with the objective of the firm. This may lead to an inefficient outcome. The model is thus rarely used in the contemporary world.

2.2 Conceptual Framework

According to Bogdan and Biklen (2003) a conceptual Framework is a basic structure that consists of certain abstract blocks which represent the observational, the experiential and the analytical/synthetically aspects of a process or system being conceived. It is a concise description of the phenomenon under study accompanied by a graphical or visual depiction of the major variables of the study (Mugenda, 2008). According to Young (2009), conceptual framework is a diagrammatical representation that shows the relationship between the dependent variable and independent variables. The purpose of a conceptual framework is to assist the reader to quickly see the proposed relationship and hence its use in this study.

Independent Variables

Dependent Variables

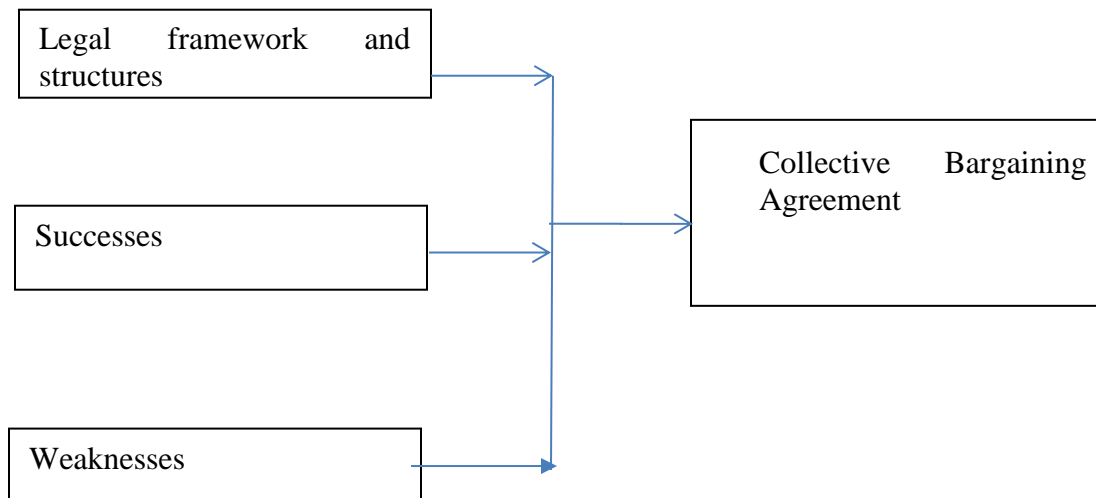


Figure 1: Conceptual Framework

2.3: Empirical Literature

Manda *et al.* (2001) concluded that trade unions in Kenya do help formal sector workers to obtain a wage premium in addition to getting protection from excessively long hours of work and from arbitrary job loss. This means that collective bargaining improves on the statutory minimum terms and conditions of employment

Owoye (1994) used a bargaining model to analyse wage determination in Nigeria's civil service where bi-partite collective bargaining co-exists with government appointed wage commissions. Owoye (1994) expressed the wage level as a function of one year lagged wage rate, consumer price index, unemployment rate, strike frequency, union density and a dummy variable representing the presence or absence of the government's wage commissions. The study established that the parameter estimates of the lagged wage, consumer price index, union density and the wage commissions were positive and statistically significant. The study by Owoye (1994), inclusive of the variables considered and the findings are relevant to the Kenyan situation where wage formation through collective bargaining co-exists with administered approach of wage setting within the civil service and the larger public service.

Omolo(2007) estimated a double log wage model to establish the determinants of civil service wages in Kenya using time-series data for the period 1970 to 2005. The main variables specified in the wage equation included employment, productivity, changes in the consumer price indices, minimum wages, one year lagged wage rate, and dummy variables to capture the influence of trade unions and politics in the determination of civil service wages. The study established that employment, productivity, changes in the consumer price indices and politics were the key civil service wage determinants in Kenya.

Trade unions seem to have remained weak in their major objectives; wages, salaries and working conditions have not been improved by the employers, job security and social policies are not fair to the employees, retired employees get very little retirement benefits from the social security funds and this has led to poor living standards by many retired employees. (Gundula, 2011). The collective bargaining is not fair, the employers have been more powerful in negotiations and sometimes, coercion is used to threaten the trade unions from demanding better pays and working conditions.

Another barrier to the growth of trade unions is the lack of strong leaders. Ibreck, (2009) emphasized that it is the role of a leader to show the organizational mission. Whether or not; trade unions are effectively influencing the positive response of the employers, depending on the smartness of these leaders. However as Babeiya, 2011 commented, the experience in Tanzania shows that trade unions have had weak leadership. It is only two unions; Tanzania Railway Workers Union (TRAWU) and Teachers trade union (CWT) leaders who seem to be at least active in challenging government decisions and actions. The leaders of the two unions have used various means to influence the government; they use boycott, strikes and sometimes media to enable their voice to be heard.

According to Nkomo & Cox (1996) the presence of labour union in an organization results in less management autonomy and flexibility in design and implementation of human resource management policies. Trade unions have been used to settle disputes between members and management, the implementation of changes and securing adequate representation of members in government, public and private sector. Legal assistance to members has been part and parcel of their duty. Mathis & Jackson (2008) assert that the primary determinant of whether employees unionize is management. If management offers competitive compensation, good working environment, effective management and supervision, fair and responsible treatment of workers, they can act as antidote to unionization efforts.

McKenna & Beech (2002) state that the tradition of employee representation through trade unions and collective bargaining as the focus of engagement between the management and unions is being replaced by new relationships in the workplace, but the replacement is not a single type. It is made up of a number of different trends. In some cases the traditional model is retained, in others increased individualism, and yet in other cases a partnership approach is adopted in which unions take some of the concerns of the organisation and work with management in order to maintain the profitability and longevity of the firm.

The view of collective bargaining as a conflict-control mechanism is probably the most dynamic (Finnemore & Van der Merwe, 1994). It is based on the principle of participation and the proactive regulation of the workplace relationship. Collective bargaining alleviates tension by making employers and employees participate with one another. Collective bargaining, therefore, regulates the relationships at the workplace.

2.4 SUMMARY OF RESEARCH GAPS

2.4.1 Conceptual Gap

Manda *et al.* (2001) concluded that trade unions in Kenya do help formal sector workers to obtain a wage premium in addition to getting protection from excessively long hours of work and from arbitrary job loss. This means that collective bargaining improves on the statutory minimum terms and conditions of employment

Trade unions seems to have remained weak in their major objectives; wages, salaries and working conditions have not been improved by the employers, job security and social policies are not fair to the employees, retired employees get very little retirement benefits from the social security funds and this has led to poor living standards by many retired employees. (Gundula, 2011). The collective bargaining is not fair, the employers have been more powerful in negotiations and sometimes, coercion is used to threaten the trade unions from demanding better pays and working conditions. Our study however will delve in analyze challenges facing legality and functionality of collective bargaining agreement (CBA) in Kenya

2.4.2 Methodological Gap

Omolo (2007) estimated a double log wage model to establish the determinants of civil service wages in Kenya using time-series data for the period 1970 to 2005. The main variables specified in the wage equation included employment, productivity, changes in the consumer price indices, minimum wages, one year lagged wage rate, and dummy variables to capture the influence of trade unions and politics in the determination of civil service wages. The study established that employment, productivity, changes in the consumer price indices and politics were the key civil service wage determinants in Kenya. The current study used desktop study research design. Kenya. The study employed a desktop descriptive survey research design thus presenting a methodological gap.

2.4.3 Scope Gap

Owoye (1994) used a bargaining model to analyse wage determination in Nigeria's civil service where bi-partite collective bargaining co-exists with government appointed wage commissions. Owoye (1994) expressed the wage level as a function of one year lagged wage rate, consumer price index, unemployment rate, strike frequency, union density and a dummy variable representing the presence or absence of the government's wage commissions. The study established that the parameter estimates of the lagged wage, consumer price index, union density and the wage commissions were positive and statistically significant. The study by Owoye (1994),

inclusive of the variables considered and the findings are relevant to the Kenyan situation where wage formation through collective bargaining co-exists with administered approach of wage setting within the civil service and the larger public service. However, our study will encompass all the CBAS signed by the Jubilee government.

3.0 Methodology

The study adopted a desktop descriptive research design.

4.0 CONCLUSION AND POLICY IMPLICATION FOR FURTHER STUDY

4.1 Conclusions

The study concluded that legal framework and structures, successes and perceived weaknesses had a significant effect on collective bargaining agreement (CBA) in Kenya. The study also recommended that future studies should be carried out on trade unions role of enhancing better CBAS.

Any country's employment relations system is shaped by its history and various socio-political, economic and technological forces both inside and outside the country. It is the legislative framework in particular that helps to shape employment relations paradigms. Effectiveness of collective bargaining as an approach to wage determination depends on the strength and bargaining powers of trade unions.

4.2 Recommendations

This study provides implications for both policy and practice. Collective bargaining is very important and it brings positive agreements between employer and employees. When trade unions perform this function effectively, it normally brings positive implications to the workplace in general. It increases the bargaining capacity of employees as a group; they restrict management's freedom for arbitrary action against the employees. Moreover, unilateral actions by the employer are also discouraged as everything will be agreed collectively. Effective collective bargaining machinery strengthens the trade unions movement, workers feel motivated as they can approach the management on various matters and bargain for higher benefits

4.3 Area for Future Studies

The general objective of the study was to analyze challenges facing legality and functionality of collective bargaining agreement (CBA) in Kenya. The specific objectives were to analyse legal framework and structures of collective bargaining agreement (CBA), successes that could be pegged on the collective bargaining agreement (CBA) and perceived weaknesses facing legality and functionality of collective bargaining agreement (CBA) in Kenya. The study also recommended that future studies should be carried out on trade unions role of enhancing better CBAS.

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