

**InFocus Programme on Strengthening Social Dialogue**

**Working Paper**

**Social Dialogue and Social and Economic Development in Kenya**

**Tayo Fashoyin**

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## FOREWORD

Promoting and strengthening social dialogue in member States is one of the strategic objectives of the ILO. In accordance with this objective, the ILO's InFocus Programme on Strengthening Social Dialogue has taken steps to study existing social dialogue institutions, machinery and processes, to advocate the value of social dialogue and to provide technical assistance to member States aimed at strengthening social dialogue in their respective countries.

This paper is one of a number of country studies on social dialogue to be undertaken by the InFocus Programme. The series seeks to elaborate on the concept of social dialogue as practised in member States, analyse the different approaches to social dialogue and identify best practice. In this paper, the author shows that there has been a long history of tripartite cooperation and social dialogue in Kenya. The institutions of social dialogue are entrenched in the labour legislation and supported by an Industrial Relations Charter, which the Government and the social partners voluntarily agreed to in 1962. However, these institutions have not been fully and regularly used, so the potential of these mechanisms is yet to be fully explored. In the 1990s, as a result of a deepening economic crisis, the parties reinvigorated their interest in social dialogue, and the evidence, as provided in this paper, suggests that the experience has been worthwhile.

The paper provides a set of recommendations designed to strengthen social dialogue, including streamlining the functions of the various tripartite bodies so as to remove overlap and duplication, establishing a secretariat for effective servicing of the tripartite institutions, as well as providing adequate funding to enable the institutions to function more effectively. Additionally, the paper recommends that training and capacity building activities are needed in order for the parties to make effective use of social dialogue.

An earlier draft of this paper was the subject of a national tripartite seminar held in Nairobi, Kenya during August, 2001. The report and its recommendations were debated by the tripartite partners and a plan of action intended to ensure the implementation of the recommendations was formulated.

I would like to record my appreciation to the tripartite constituents in Kenya who generously shared their experience and expertise with us and to Tayo Fashoyin, Senior Social Dialogue Specialist in the InFocus Programme, who was responsible for coordinating this country study.

December, 2001

Patricia O'Donovan  
Director  
InFocus Programme on Strengthening  
Social Dialogue



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## INTRODUCTION

The Kenyan economy, like similar economies in Africa, is undergoing a fundamental transformation with important implications for labour market institutions and processes. The obligations imposed on government in a country such as Kenya by global pressures or internally induced structural economic and political reforms have profound effects on policy, and in turn on industrial relations. Certainly, the Government is faced with such enormously complex policy options that it is becoming an acknowledged fact that the only realistic and effective approach to policy formulation on economic and social affairs is one that reflects the combined efforts of the main stakeholders in society. Thus, it is important in an era of phenomenal change to adapt existing modes of labour market relations to the new realities. Unilateral action, be it by the public authority or by employers is not the appropriate approach today. Similarly, a relationship based on confrontation in the labour market is not likely to be the appropriate response.

The recognition of social dialogue as a useful mechanism for building consensus among the key stakeholders on broad development issues is a significant transformation in industrial relations in Kenya. At the same time, the parties to social dialogue have to be internally strong and cohesive in order to engage effectively in negotiations and consultative processes. Weak labour market institutions, inadequate institutional machinery for tripartite consultation, where it exists at all, the lack of capacity to engage meaningfully in social dialogue, particularly in setting the terms and conditions of employment through collective bargaining, the prevention and settlement of disputes - all have serious consequences for the country's ability to maintain social peace, effectively promote productivity and ensure its participation in the global economy.

The challenge is enormous. Not only are the labour market institutions weak but internal and external pressures could easily undermine workers' rights, particularly if deliberate efforts are not made to protect these rights, for example, through social dialogue. Such tripartite efforts include finding jobs for the large number of unemployed and under-employed people, and enhancing social protection so that any benefits of globalization reach all members of society. In other words, social dialogue can be the driving force for achieving a more inclusive society.

Kenya has some of the oldest institutions for tripartite consultation and social dialogue in Africa. Their role has been confined to labour law and industrial relations issues and even in these areas, they have not been consistently and regularly used. However, the period of adverse economic conditions in the 1990s rekindled interest in extending social dialogue beyond the limits of the labour market, to include macroeconomic, social welfare and other development issues. Indeed, the challenge posed by economic reforms, globalization and liberalization are an opportune and crucial moment for the Government and the social partners to renew their commitment to tripartite cooperation and social dialogue to address these development issues. In other words, the unacceptably high level of unemployment and under-employment, and the challenge of poverty reduction through job-creation and improved productivity are important justifications for collaboration.

This paper examines this renewed interest in tripartite cooperation, by identifying the main tripartite institutions, machinery and processes, as well as the challenges facing such institutions in fostering social dialogue and consensus building in Kenya.

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## CHAPTER 1

### THE LABOUR MARKET AND THE ECONOMY

#### *Overview of the economy and its performance*

Although the strategy and focus of public policy in Kenya have changed from time to time over the past four decades, the fight against unemployment and poverty has for long been its cornerstone. Since independence in 1963, Kenya has pursued various development paradigm models aimed at generating sustainable real growth in the economy. This policy thrust has always assumed that the rate of economic growth would outpace population growth, thereby increasing employment and raising incomes. It was this development objective that informed the economic policies of the post-independence period, such as employment generation through agricultural settlement, government participation in business activities, the ‘Kenyanization’ of the public and private sectors, investment in social infrastructure, and an extensive package of industrial protections for Kenyan businesses.

However, while the development policies of the period did result in GDP growth averaging 6.6 per cent annually during 1964 - 73, that growth was not sustained. Several reasons account for this, including an increase in population growth rates, economic emergencies such as droughts and oil shocks, coupled with a bloated public sector and inefficient government agencies. These factors combined to aggravate an already inefficient and uncompetitive domestic economy. Inevitably, post-independence growth halted and the economy remained stagnant. Consistently high inflation, widespread unemployment was high, especially among young people, and under-employment all contributed to unprecedented high levels of poverty.

In the 1980s, the public policy response was to review these interventionist economic development strategies. This led to the adoption of the Structural Adjustment Programmes, first introduced under Sessional Paper No. 1 of 1986 entitled Economic Management for Renewed Growth. In furtherance of this market-oriented economic policy, the Government introduced an economic liberalization and reform programme in 1993, involving the removal of import licensing, price controls and exchange controls. This package of measures was intended to re-focus the economy and integrate it into the global economy.

The support of the World Bank, the International Monetary Fund and other donors for these reforms was probably responsible for the brief turnaround in the economy during 1994-96. As shown in Table 1.1 below, GDP grew at 4.8 per cent in 1995 and by 4.6 per cent in 1996. Inflation was briefly kept under control, but by 1996 it had started to rise again. Moreover, overall economic performance did not seem to respond to the reforms and so the growth rate was in steady decline throughout the last decade. Investment and savings also declined, falling from 20.4 per cent of GDP in 1996 to 18.4 per cent the following year.<sup>1</sup>

Table 1.1: Major Economic Indicators, Kenya 1995-1999

<sup>1</sup> “*The Kenyan Economy, Performance and Prospects*”. Ministry of Labour and Human Resource Development, Nairobi, April 2000.

<b>Indicator</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>
1. Population (in millions)	27.5	28.2	28.9	29.9	28.7
Population Growth (%)	2.7	2.6	2.5	2.4	2.4
2. Real GDP Growth (%)	4.8	4.6	2.3	1.8	1.4
3. Inflation (Annual Average)	1.6	9.0	11.2	6.6	8.7
4. Gross Domestic Investment (% of GDP) at market prices	21.8	20.4	18.4	17.0	16.9
5. Per Capita Income (in US Dollars)	278	284	283	282	279

Source: Central Bureau of Statistics, Central Bank of Kenya, Ministry of Labour and Human Resource Development, 2000.

However, the lack of sustained commitment to reform, coupled with political instability, contributed significantly to the failure of the policies to stimulate economic growth. Towards the end of the 1990s, inadequacies in the infrastructure, such as electricity and water shortages and bad road systems, contributed to the stagnation of the Kenyan economy. With these highly complex economic problems taking place concurrently with political liberalization, which has brought about multi-party democracy after more than 30 years of one-party rule, Kenya is today facing a multiplicity of socio-economic problems.

The social and economic crisis has been compounded by the HIV/AIDS pandemic that has adversely affected the labour market, particularly in terms of labour supply, labour costs and productivity. According to government statistics, the national HIV prevalence rate was estimated at 13.5 per cent in 2000. The urban prevalence rate was much higher – at 17.5 per cent – for the same year.<sup>2</sup> The menace of HIV/AIDS could erode the economic and social progress the country has achieved and undermine the ability of business to compete effectively in domestic and international markets.

One of the strategic responses to the socio-economic problems is the State's determination to involve the key stakeholders by such means as widening the long-established tradition of consensus building through tripartism and other consultative mechanisms which existed before independence. This paper explores this renewed interest in tripartite consultation and social dialogue in the country.

## ***The labour market***

### ***Employment: The challenge and strategies***

Table 1.2 below presents the employment profile for Kenya during 1995-1998. Overall employment climbed during that period, particularly between 1997 and 1998, when it rose from 4.7 million to 5.1 million. Overall employment has continued to grow. Thus, non-farm employment rose

<sup>2</sup> *Economic Survey 2001*. Central Bureau of Statistics, Ministry of Finance and Planning, Nairobi. P. 42. According to one study, the increase in labour costs, such as absenteeism, labour turnover, health care costs, burial fees, recruitment and retraining costs is about 4 per cent for Kenyan businesses. See “*The Status of HIV/AIDS in Kenya and its Impact on the World of Work*”. ILO, Geneva, 2000, pp. 22-23.

to 5.5 million in 1999 and to 5.9 million in 2000. However, most of these jobs were in the so-called *jua kali*, or informal economy, that created over 412,100 jobs during the past 2 years. In contrast, employment in the formal sector grew by only 0.2 per cent to 1.7 million in 2000.<sup>3</sup> In the public sector, where a reform programme is in place, employment declined by 1.4 per cent to 673,000 in the year 2000.<sup>4</sup> The slowdown in the economy, particularly during the latter part of the 1990s, appears to have continued into the new millennium. The employment decline has been pervasive, affecting nearly all the sectors of the economy. Highly important economic sectors, such as agriculture, manufacturing and wholesale, retail and hotels have all experienced a significant decline in employment. In these sectors, employment declined in absolute terms by 3.5 per cent, 2.2 per cent and 1.5 per cent respectively between 1997-98.<sup>5</sup>

**Table 1.2**  
**The Labour Force in Kenya, 1989-1998 ('000)**

<b>Year</b>	<b>Wage Employment</b>	<b>Informal Sector Employment</b>	<b>Total Employment</b>	<b>Total Labour Force</b>	<b>Unemployment as % of labour force</b>
	1	2	3 (1 + 2)	4	5 (4 - 3)
1989	1372.8	390.0	1762.8	7886	6123.2 (7.8)
1990	1409.4	937.4	2346.8	9386	7309.2 (7.9)
1991	1441.7	1063.2	2504.9	10151	7646.1 (7.5)
1992	1462.6	1237.5	2700.1	10700	7999.9 (7.5)
1993	1474.9	1466.5	2941.4	10400	7458.6 (7.2)
1994	1505.5	1792.0	3297.5	11500	8202.5 (7.1)
1995	1557.0	2240.5	3797.5	12050	8252.5 (6.8)
1996	1606.8	2643.8	4250.6	12500	8259.4 (6.6)
1997	1647.4	2986.9	4634.3	14376	9741.7 (6.8)
1998	1664.9	3353.5	5018.4	14876	9857.6 (6.6)

Sources: (i) Economic Survey - Various issues; (ii) Poverty Reduction Strategy. Unpublished paper; (iii) Employment Policy and Programme for Kenya (ILO).

According to Labour Department records, job losses have been significant in these sectors. Thus, 204 cases of redundancies were recorded in these sectors in 1999<sup>6</sup> although it is difficult to establish the number of workers involved. However, this figure probably understates the actual incidence of job losses through redundancy. Most employers took advantage of the extraordinary provision in the 1994 Finance Bill, introduced by the Minister for Finance, which allowed them to undertake reorganization and restructuring without referring proposed redundancies to the Labour Department, as required under the Trade Disputes Act, 1977. In other words, when this factor is taken into account, the records of redundancies grossly understate the scale of this phenomenon.

<sup>3</sup> *Economic Survey 2001*. Central Bureau of Statistics, Ministry of Finance and Planning, Nairobi.

<sup>4</sup> *Ibid.*

<sup>5</sup> "The Kenyan Economy, Performance and Prospects" Ministry of Labour and Human Resource Development, Nairobi, April 2000.

<sup>6</sup> *Annual Report of the Labour Department, 1999*. Schedule II, p.14.

The downward unemployment trend, depicted in Table 1.2, therefore masks the seriousness of the employment challenge. Jobs created in the informal economy are unlikely to have any significant effect on the level of poverty in the country, because these jobs are mostly at subsistence level, with low earnings, poor working conditions and generally unattractive. As shown below, wages in the informal economy are significantly lower than in formal employment.

As part of the macroeconomic reforms, wage controls were removed in order to further liberalize the labour market. However, this objective has not been fully achieved as wage guidelines were issued in June 1994 and continue to be in force.

**Table 1.3**  
Percentage change in average modern sector annual earnings  
per employee, 1995-1998

Sector	Private sector			Public sector		
	1996	1997	1998	1996	1997	1998
Agriculture and forestry	23	20	19	44	20	29
Manufacturing	22	21	21	14	21	29
Wholesale, retail, hotels	23	27	20	398	27	30
Transport & communication	22	20	20	1	20	33
Finance, insurance & business	20	19	22	145	19	37
Total	22	21	21	22	21	25

Source: Economic survey (1999) in The Kenyan economy performance and prospects. Ministry of Labour, April 2000.

The guidelines are intended to serve as a guide to the negotiating parties to take the broader economic imperatives into account during negotiations, including such elements as the company's productivity. The Industrial Court, which serves as the final arbiter in labour disputes, has legal responsibility for ensuring adherence to the guidelines.

As Table 1.3 shows, earnings per employee declined in nearly all economic sectors in the private sector during 1995-98. Employees in the public sector achieved higher wages during the period, and this explains why, comparatively speaking, the rate of increase in wage earnings rose between 1997 and 1998. Earnings in the private sector reflect the general slump in economic activities and the corresponding decline in the rate of increase in wage payments paid by private sector employers.

Earnings are very different in the informal economy, which, as indicated above, has been the main source of employment growth in the country. In this area, the minimum wage is generally applicable and is periodically adjusted by the tripartite General Wages Advisory Board, but the effective minimum wage is the one approved by the Government. As shown in Table 1.4, the wage recommended by the tripartite body was proportionately less than the rate of change in wages in the modern sector (Table 1.3), while the effective rate, i.e. the government-approved rate, was, in nearly all cases, less than that recommended by the GWAB. In other words, in so far as the wage-earning sector is concerned, the contribution of this wages policy to overall income distribution in the country is not likely to be significant.

**Table 1.4**

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### General (Minimum) Wage in Kenya, 1995-1999

Year	GWAB Rate	Govt. Approved
1995	15	12
1996	15	10
1997	12	12
1998	12	15
1999	11	7

Source: Ministry of Labour, April 2000.

The issuing of wage guidelines means that labour market deregulation, in so far as wage regulation is concerned, is yet to be achieved. Instead of the wage guidelines, measures might be introduced to link wages with productivity and performance. This seems to be a major challenge for the labour market. Indeed, conscious of this necessity, the Government and the social partners have all resolved to set up an institution for the promotion of productivity. Not only will such an initiative render unnecessary control measures such as the wage guidelines unnecessary, but it may help to create an awareness of the necessity of linking pay and productivity, at least in some sectors of the economy.

### ***Women in the labour market***

As a general rule, improved access to education and deliberate policy initiatives to remove barriers to women's participation in the labour force have over time led to an increased role for women in the economy. Thus, recent economic surveys in Kenya show that since 1989, when women's employment was 21 per cent of the total modern sector employment, the ratio has steadily increased. In 1999, for example, the proportion of women in modern sector employment was 29 per cent<sup>7</sup>. However, women are more likely to be disadvantaged in the labour market, particularly during periods of economic recession, as the jobs in which women are mostly found are usually the first to be hit by workforce reductions strategies.

Although the statistics available to us are not good enough to confirm this proposition, evidence suggests that, since 1990, the proportion of women in the modern wage employment sector has never been higher than 25 per cent of all wage employment in the formal sector.<sup>8</sup> Indeed, in agriculture, which employs 70 per cent of women workers, only 24 per cent are engaged in wage employment. The situation of women is not much better in the civil service where not more than 15 per cent are in middle-ranking positions and 5 per cent in senior positions. In other words, women are under-represented in modern sector employment, but are predominant in the informal economy where wage employment is insignificant.

It might be pertinent to ask to what extent the conditions of women workers are adequately addressed by public policy, or how responsive to gender issues are the institutions of social dialogue? By custom and tradition, women have a less than satisfactory share of quality jobs. The fact that there are comparatively fewer women in the modern sector, where wages or compensation are better, supports this view. It also points to the low representation of women in decision-making and in

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<sup>7</sup> "The Kenyan Economy, Performance and Prospects". Ministry of Labour and Human Resource Development, Nairobi, April 2000.

<sup>8</sup> K. Gatamah, "The contribution of industrial relations to socio-economic development in Kenya". Paper prepared for the InFocus Programme on Strengthening Social Dialogue, ILO, Geneva March 2001.

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tripartite or bipartite institutions for social dialogue. A recent policy issue demonstrates the lapse in gender balance in the country.

In 2001, the Government introduced an Equality Bill in Parliament, which sought, among other things, to increase maternity benefits. Under the existing provisions, benefits include two months paid leave while the woman forfeits her annual leave. However, under the proposed regulations, the woman would get 4 months paid leave and would not forfeit her annual leave of approximately one month's benefit. This proposal raised a number of issues and dilemmas for labour administration and public policy. The matter was not discussed with the Department of Labour, and so was not brought before the appropriate tripartite forum for consideration. However, when it came to the attention of these bodies, they were concerned that once again there had been an encroachment on their mandate.

When the National Tripartite Consultative Committee discussed the issue, it preferred a less generous option, which included retaining the existing 2 months entitlement, but recognizing the right of the worker to her annual leave entitlement. This position obviously meant that the social partners were faced with the dilemma of having to support a less than favourable policy option for maternity benefits.<sup>9</sup> The case emphasizes two points. The first being the obvious absence of a coherent gender policy, arrived at through consultation and consensus among the stakeholders. Such a policy must seek to mainstream gender into public policy. The second is the fact that developments such as this emphasize the need for gender sensitive tripartite bodies. However, given the situation in Kenya today, a more pragmatic approach by the respective social partners would be needed for the time being.

In summary, globalisation and structural adjustment programmes have led to a worsening of the problem of unemployment and poverty in the country. These forces have intensified employment insecurity. However, the mechanism of social dialogue for consensus building may help to focus attention on the social consequences of these forces and help tackle them in a socially responsible way.

## **CHAPTER 2**

### **THE SOCIAL PARTNERS IN KENYA**

As in all former British colonies, the organization of workers and employers for industrial relations purposes is a tradition that emerged in the colonial period. In Kenya, labour market institutions were established in the 1950s to provide a voice for workers, as well as a platform for the growing organization of employers and workers in the country. As will be shown later, the employers' and workers' organizations, in collaboration with the Government, had a tradition of social dialogue through tripartite cooperation at a very early stage.

#### ***Employers' organizations***

Historically, employers have been well organized in Kenya. Most employers are members of or affiliated to the Federation of Kenya Employers (FKE) which is the main employers' voice, notably in the field of industrial relations and human resource management. The FKE performed this function before independence and continues to do so with considerable expertise and commitment. In

<sup>9</sup> The position of the social partners cannot have been informed by labour market realities, that is, the chronic unemployment situation and the possible reaction of employers who might wish to discourage the recruitment of women workers, while some might indeed covertly retrench their female workers in order to avoid paying the proposed package of benefits.

December, 2000, the FKE had a total membership of some 2,541 in its two categories of membership, i.e. individual company-members and industrial associations as shown in Table 2.1 below. Within the two categories, the FKE represents practically all the medium and large-scale companies operating in the country. Additionally, the Federation represents an increasing segment of businesses operating as small and micro-enterprises, particularly through the latter's membership of industrial associations. In fact, according to FKE officials, about 1,000 businesses, or about 40 per cent of the FKE's total membership, are small-scale. Table 2.1 gives shows the pattern and extent of the FKE's membership.

**Table 2.1**  
**Membership of the Federation of Kenya Employers, 2000**

<b>Year</b>	<b>Membership</b>	<b>% change</b>
1992	2910	+7.6
1994	2915	+0.2
1996	2995	+2.7
1998	2848	-4.9
2000	2541	-10.8

*Industrial Associations:*

Kenya Association of Building and Civil Engineering Contractors (KABCEC)  
 Motor Trade and Allied Industries Employers' Association  
 Distribution and Allied Trades Association (DATA)  
 Engineering and Allied Industries Employers' Association  
 Timber Industries Employers' Association  
 Sisal Growers Employers' Association  
 Kenya Bankers (Employers') Association  
 Agricultural Employers' Association  
 Association of Local Government Employers  
 Kenya Tea Growers' Association  
 Kenya Coffee Growers' and Employers' Association  
 Association of Hotel Keepers and Caterers  
 Kenya Vehicle Manufacturers' Association  
 Kenya Association of Air Operators

Source: Annual Report of the Federation of Kenya Employers, 2000. Nairobi.

The decline in the membership of the FKE in the second half of the 1990s coincided with the wave of retrenchments in its member companies and in industrial associations, which reflected the rapid decline of the economy. However, through its representation across the various economic sectors, FKE remains the most representative employers' body in Kenya.

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Apart from the industrial associations, FKE organizes its work through three branches across the country. These branches are located in the Coastal region, the Western Kenya region and the Rift Valley region. Through these branches, FKE is able to give timely attention to issues affecting its members in the particular geographical areas of the country. In addition, it operates through its industrial associations in addressing issues that are specific to an individual industry or sector of the economy. This structure allows speedy advice in response to the impact on businesses of public policy or global developments.

As the leading employers' voice in the labour market field, FKE plays an important role in the negotiating and signing of collective bargaining agreements<sup>10</sup> on behalf of its member companies, at both the industrial/sectoral level and at company level. This is an important part of the work of the FKE, providing some degree of coordination of the decentralized collective bargaining in the private sector. Also, because in most cases the FKE undertakes this function on behalf of its members, the latter are able to concentrate their efforts on the important issue of managing the business. Other important services provided by the Federation to its members include training and development, human resource management, management in periods of economic difficulty and instability and strategic responses to the impact of liberalization on the competitiveness of Kenyan industries.

The FKE is committed to social dialogue. It was a signatory of the Industrial Relations Charter in 1962. In this respect, it plays a prominent role in tripartite and tripartite *plus* social dialogue in all areas of the labour market, the economy and other community issues. The pressure of global markets and liberalization, which impacts considerably on its members, has buttressed the role it plays in social dialogue. As a result, the FKE has broadened the scope of its work beyond the labour market to other areas of the economy and business, undoubtedly recognizing that labour market issues affecting its members are inextricably linked to broader macroeconomic issues. The FKE's authority to speak for employers on issues that have an impact on the labour market has, in part, been reinforced by its elaborate sophisticated organizational structure and its representation, but above all by bringing some of the sectoral employers' bodies within its fold and maintaining links with smaller businesses.

In December 2000, as part of this deliberate effort to cover areas that affect the labour market, the FKE teamed up with 3 three other local employers' organizations, namely the Kenya Association of Manufacturers, the Kenya National Chamber of Commerce and Industry, and the East African Association which represents foreign investors in Britain and North America, to form what is known as the Kenya Business Consultative Forum. This body is intended to provide a united voice for the business community on matters affecting the economy, particularly through business participation in the top level tripartite *plus* Joint Industrial and Commercial Consultative Committee.

At the same time, establishing this forum may provide a solution, albeit temporary, to the more fundamental issue of the growing overlap in the functions of the various business organizations. Nowadays, the division of functions is increasingly blurred. In any event, whether the formation of the Kenya Business Consultative Forum is the first stage in a process that will lead to the formation of one strong all-purpose employers' body remains to be seen.

### ***Workers' organizations***

The organization of workers into trade unions has historically been based on the principle of one union per industry. On this basis, there were for many years 31 'industry-based' unions in Kenya. However, most of the unions are general unions, which operate beyond individual industries. For example, the Kenya Union of Commercial, Food and Allied Workers covers a number of industrial sectors, including banking, food, financial, retail, shipping and security services. However, during the

<sup>10</sup> Hereafter referred to simply as collective agreements.

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past decade or so, this union structure has come under strain due to internal union divisions. This had resulted in the formation of six new unions. Today, there are 37 unions in the country. All but five of them, including the very large teachers' unions<sup>11</sup>, are affiliated to the country's only trade union federation, the Central Organization of Trade Unions (COTU)<sup>12</sup>. Table 2.2 below shows the current profile of the unions.

Total membership of the COTU affiliated unions is estimated at about 250,000 which is less than half of the membership before the retrenchments which started in 1994. When the membership of the large teachers' union (186,036) is added, organized labour in the country is still less than half a million workers. On the basis of this and the data given in Table 1.2 above, the organized workforce represents slightly less than a third of the formal wage employment sector in the country, yielding a union density of about 26 per cent in 2000. Although contractions in the labour market are given as the main explanation for the significant decline in union membership, the withdrawal of union rights in a large segment of the public sector, as well as the inability of the unions to operate outside the formal sector, contributed to the decline in organized labour in the country. Thus, a major challenge facing the union movement is the development of strategic measures to counter what appears to be a continuing decline in union membership in the formal sector. Given the virtual absence of trade union organization in small and micro-enterprises, including the informal sector, the trade union movement needs to address the potentials for extending union membership to this sector, which badly needs some form of labour representation and protection.<sup>13</sup>

<sup>11</sup> The teachers' union was a member of COTU until 1965 when, along with the civil service union, it was forced out of COTU by government directive.

<sup>12</sup> A split along the East-West ideological division within the Kenya Federation of Labour soon after independence led to the formation of a rival Kenya Workers' Congress. The Government stepped in by disbanding the two competing federations, and subsequently set up COTU in 1965 as the only central labour federation in the country.

<sup>13</sup> COTU has apparently left the responsibility for organizing the informal economy to its affiliated unions. It is engaged in measures such as persuading local government to introduce regulations which enhance the ability of the informal sector operators to access infrastructure and facilities and allow them to conduct their businesses legally.

Table 2.2  
Trade union organizations in Kenya, 2000

<b><u>Name of Union</u></b>	<b><u>Membership</u></b>
Kenya Union of Printing, Publishing, Paper Manufacturing and Allied Workers	5961
Transport and Allied Workers	21972
Tailors and Textiles	13832
Kudheiha Workers	53735
Kenya Building, Construction, Timber, Furniture and Allied Employees' Union	10520
Kenya Local Government Workers' Union	47623
Railway Workers' Union	14150
Dockworkers' Union	4769
Union of Posts and Telecommunication Employees	11170
Kenya Petroleum Workers	1170
Kenya Chemical and Allied Workers' Union	8325
National Seamen's Union	350
Kenya National Union of Teachers*	186036
Kenya Engineering Workers' Union	6920
Kenya Shoe and Leather	3380
Kenya Union of Sugar Plantation Workers	7900
Kenya Quarry and Mine Workers' Union	12100
Kenya Union of Journalists	175
Kenya Game Hunting and Safari Workers' Union	5209
Kenya Plantation and Agricultural Workers	38674
Kenya Union of Entertainment and Music Industry Employees	391
Central Organization of Trade Unions (K)	29
Kenya Union of Commercial Food and Allied Workers	33330
Kenya Airline Pilots' Association	111
Kenya National Union of Fishermen Workers	423
Amalgamated Union of Kenya Metal Workers	10385
Kenya Jockey and Betting Workers	561
Kenya Scientific, Research, International Technical and Allied Instruments Workers' Union	550
Bakery, Confectionery, Manufacturing and Allied Workers' Union (K)	22810
Kenya Union of Employees of Voluntary Association, Trade Unions and Allied Organization*	66
Kenya Electrical Trades and Allied Workers' Union (KETAWU)	5470
Banking, Insurance and Finance Union	2972
Kenya Shipping, Clearing and Warehouses Workers' Union	565
Union of National Research Institutes of Kenya	n.a
Kenya Union of Post Primary Teachers (KUPPET)*	n.a
Kenya Guards and Allied Workers' Union *	n.a
Kenya Hotels and Allied Workers' Union*	n.a

\*Not affiliated to the Central Organization of Trade Unions (COTU)

Source: Registrar of Trade Unions, *Table 2.2*

The trade union movement in Kenya is at present weak in terms of membership and organization. Union leaders attribute their weakness to a number of factors, including the emergence of splinter unions and growing abandonment of the existing tradition, as well as the unabated retrenchment which has tended to informalize the labour market. The union structure in the country has its origin in the tripartite Industrial Relations Charter introduced in 1962. Although the original agreement committed management "to recognize the union appropriate to its particular industry", in a later version of the Charter, the parties clearly set out the principle that recognition of a union should take account of

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the principle of industry-based trade unionism.<sup>14</sup> As will be explained later, this provision, and, indeed, the IRC itself, continue to be critical elements of industrial relations practice in the country.

There is little doubt that the recent spate of splinter unions has been distracting, sapping the energy and resources of the unions affected and thereby reducing their capacity to provide useful and effective service to their members. On the other hand, given the unwieldy structure of those affected unions, the internal division is probably inevitable. Consider, for example, the case of the all-purpose Kenya Union of Commercial, Food and Allied Workers, KUCFAW, established in 1962. Because of its diverse membership, coupled with the union's inability to provide effective organizational support and leadership to its branches, three splinter groups in different industrial sectors have succeeded in forming autonomous unions. The new unions are:

Kenya Shipping, Warehousing, Clearing and Forwarding Workers' Union  
Kenya Guards and Allied Workers' Union  
Banking, Insurance and Finance Union

A brief account of the Banking, Insurance and Finance Union (BIFU) illustrates the inherent problem in the union structure. BIFU was registered by court order in 1986, with the object of recruiting workers in banks, insurance, building societies and other financial institutions, hitherto organized by KUCFAW. The underlying reason for the division was given as the insensitivity of KUCFAW to the specific interests of bank workers. Although the new union did not at first succeed in its recruitment drive, ostensibly because the former union was legally recognized as having reasonable representation of bank employees, BIFU did eventually gather strength. This was greatly helped by the dismissal of about 600 bank workers following an illegal strike in 1998 which induced them to join BIFU *en masse*. The bank workers believed that the strike failed because the main union did not support them and, as a result, a number of them left KUCFAW and joined the Banking, Insurance and Finance Union.<sup>15</sup>

Despite the apparent pressure to change, the social partners, with the support of the Government, are unwilling to jettison the principle of one union per industry. The tripartite parties, and particularly the trade unions, support the industry-based union structure and have usually opposed splinter groups. For its part, the government authority responsible for trade unions, the Registrar of Trade Unions, has normally declined to register splinter groups, drawing its authority mainly from the non-legal provisions of the Industrial Relations Charter. Partly in response to the non-enforceability of the Charter, the partners have proposed to incorporate the Charter into the legal framework.

The question of structures apart, workforce reduction strategies coupled with high unemployment have weakened the voice and capacity of trade unions, including the central labour federation, COTU. Leaders therefore agitate over any action which might jeopardize the job security of members. Besides, due to massive retrenchments, the resource base of trade unions has plummeted and they have not been able to raise adequate resources to meet their needs, including fixed costs such as the wages of their staff.<sup>16</sup> The lack of resources has inhibited the ability of the unions to provide critical services such as defending members' job security and other organizational rights of workers.

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<sup>14</sup> Clause 2 of Annex 'A' to the *Industrial Relations Charter*, 1980.

<sup>15</sup> For more on this, see *BIFU vs. Kenya Bankers (Employers) Association (and the KUCFAW as interested party)*, Cause No. 75 of 1999, Industrial Court of Kenya.

<sup>16</sup> In fact, sometime in 2000, the Department of Labour, exercising its powers under the Trade Disputes Act, took COTU to court for failure to pay the wages of its staff in the labour college for a period of about 8 months. Following an intervention by the National Tripartite Consultative Committee, an undertaking was given by the union whereupon the case was withdrawn.

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The trade union federation, COTU is also weak. Its weakness derives from the structural shortcomings inherent in the trade union movement, a subject which is beyond the scope of this paper. COTU is not involved in collective bargaining, which is left to the industry unions. COTU has become increasingly remote from industrial issues and lacks a meaningful interface with the rank and file. One example of the remoteness of COTU and the decline in its industrial influence was the abortive national strike it organized in 1993 to protest against what it regarded as indiscriminate retrenchment and to seek improved wages. Part of the reason why the strike failed was that workers were not persuaded that the action taken by COTU was in their long-term interest.

To some extent, these problems - internal divisions, reduced representation and resource constraints - are responsible for the tendency of some civil society groups to enter the area of labour relations on the pretext of promoting workers' human rights, seeking to represent workers without the a mandate from those very workers they claim to represent.<sup>17</sup> Some such groups, thought to have generous external funding, are reported to have held themselves out to employers as the voice of the workers. Trade unions have blamed such civil society groups for the increasing division in industry unions. Not only has this tended to confuse the traditional industry-based union structure, but it has further weakened the voice of labour in social dialogue, at both company and national level.

While this concern is critical to the trade unions, it has also affected employers' organizations at industry level, notably in the coffee and sugar sectors. While it may be true that the participation of some civil society groups in labour relations issues has contributed to the weakening of trade unions, it is probably equally true that the failure of the existing unions to address the problems faced by various groups of workers contributed to the emergence of those groups.

### **Public service unions**

In the public sector, workers enjoyed trade union rights before independence. In fact, one of the oldest unions in the country, the Union of Kenya Civil Servants, was established in 1959. Until it was banned and its recognition withdrawn by the Government in April, 1980, this union was the sole bargaining agent for all eligible civil servants. Prior to that, there was also the Union of Senior Civil Servants, catering for middle-ranking and senior government employees. That union was disbanded soon after independence, on the grounds that its members were management representatives. It was replaced by a staff association which caters for the welfare and other interests of *all* civil servants, but without the right to negotiate terms and conditions of employment.

However, internal and external pressure has been continually exerted on the Government to comply with the provisions of ILO Convention No. 98 which Kenya ratified as far back as 1964 and to restore the bargaining rights of the relevant segment of the civil service. In fact, a presidential committee recommended in 1994 that the Government restore the right of civil servants to join trade unions. Also, the ILO Committee of Experts has consistently urged the Government to implement the provisions of the Convention and to bring its laws into conformity with international standards.<sup>18</sup> Recently, the Government appeared to be reconsidering its position on the ban. At the time of this

<sup>17</sup> In 1998, some of the civil society groups joined with opposition political parties to call a national strike. Although COTU was successful in persuading most workers not to join the strike, it demonstrated the confusion that appears to have arisen in some of the unions and in the industrial relations system as a whole.

<sup>18</sup> See for example, the Report of the Committee of Experts in *Observations Concerning Ratified Convention 1997*, p.245.

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study, the policy was under review. If the policy is changed, approximately 150,000 civil servants will have the right to participate in collective bargaining.<sup>19</sup>

The Kenya National Union of Teachers (KNUT) represents about 186,000 teachers in primary and post-primary institutions. KNUT is the largest union in the country, though it is not affiliated to COTU. In the late 1990s, internal divisions within the union led to a split and the eventual formation of a rival union, the Post-Primary Teachers' Union. The new union represents teachers in secondary and post-secondary institutions and has an estimated membership of 70,000 teachers. The new union is not allowed to affiliate to COTU. In both cases, the official explanation for non-affiliation has been that teaching is an essential service.<sup>20</sup> But it would appear also that the Government felt that the enormous size of these unions could create a threat to industrial peace, particularly in the event of any united challenge from COTU and the public service unions.

In relation to other parts of the public sector, such as university teachers and doctors, attempts by them to form unions were seen by the authority as confrontational and were firmly resisted. For example, a strike by university teachers in 1992 to press their rights was broken, with the dismissal of several teachers. In the late 1980s, a strike by doctors with the same aims led to the dismissal of the striking doctors. The official explanation for denying the organizational rights of these groups, unconvincing as it may be, has been that the workers concerned held individual contracts of employment and as such were not eligible for trade union membership although they were free to join their respective professional bodies. In these cases, the fundamental issue is the denial of the right of these groups to organize or engage in collective bargaining.

### ***The Ministry of Labour***

The Ministry of Labour is the key government department responsible for the initiation, elaboration and implementation of government labour policy, including laws and general regulation of industrial relations. In this context, the Government is a key player in the industrial relations system. Organized into six substantive departments<sup>21</sup>, the Ministry plays a unique role in the tripartite institutions in which it serves as the representative of government. Apart from this, the Government, as demonstrated above, is the largest employer of labour in the country and, in this regard, it is bound by the industrial relations framework. The Ministry's Labour Department is responsible for servicing the tripartite bodies such as the Labour Advisory Board, which is responsible for employment and labour legislation, ILO matters, including ratification of Conventions, and overall activities relating to labour relations. The Ministry is also responsible for the National Tripartite Consultative Committee set up under the Industrial Relations Charter and is responsible for all industrial relations and labour market issues that are brought to the Committee by the partners. With respect to wages, the Ministry is responsible for processing and analysing data and information on wage trends in the unorganized sectors, and facilitating the meetings of the General Wages Advisory Board as well as all the other wage councils. In specific areas, such as occupational safety and health, social security and vocational

<sup>19</sup> This figure is the estimated proportion of the 204,200 employees in central government in 2001 that are eligible to be union members. See *Economic Survey 2001*. Central Bureau of Statistics, Ministry of Finance and Planning, Nairobi.

<sup>20</sup> The Trade Disputes Act requires a special procedure for the settlement of trade disputes in the teaching service, and thus restricts the right of workers in the teaching service to strike.

<sup>21</sup> The technical departments are labour, occupational health and safety, human resource management and employment, industrial and vocational training, micro and small enterprise and adult education. The two service departments are finance and administration.

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training, the Ministry facilitates key tripartite and social dialogue institutions that are responsible for policy formulation, implementation and monitoring.

Dispute settlement, is a key function of the labour administration system. In this regard, the Ministry is involved in conciliation and investigation of labour disputes, as well as demarcation or jurisdictional disputes, under both the Trade Disputes Act, 1965 and the Industrial Relations Charter. One of the paramount institutions of industrial relations in the country is the Industrial Court, which is responsible for the effective functioning of collective bargaining and the dispute settlement machinery and is associated with the Ministry of Labour. In other words, responsibility for the effective functioning of social dialogue, both at the tripartite national level and at the company level through the collective bargaining system, lies with the labour administration system.

In spite of its enormous responsibility for promoting social dialogue and other labour administration services, the Ministry's capacity to deliver timely and effective services is inadequate. As will be pointed out in various parts of this report, the delivery of some services is poor and undermines the effectiveness of the industrial relations system. The Labour Department, for example, operates with nearly 300 professional staff who are involved in developing policy, implementation and monitoring services in a network of 32 district labour offices and seven provincial labour offices. As regards its servicing of the tripartite bodies, several of them are not functioning effectively. For example, the National Tripartite Labour Committee did not operate for 15 years.

In general, the obstacles to efficiency and effectiveness are caused by resource constraints, including transportation and communication, equipment, organizational and programming. Although, training is recognized as necessary for effective performance, the capacity of the Ministry to provide all the necessary training and capacity building is restricted by inadequate budgetary resources. This undermines the effectiveness of the industrial relations system.<sup>22</sup> Although it would be misleading to imply that the Ministry alone is responsible for the weaknesses or lapses gaps in the industrial relations system, its shortcomings point to the need for the authority to improve its service delivery.

To conclude, the Government and social partners face important challenges in dealing with the impact of internal organizational and structural pressures and external pressures brought about by globalization and economic reform policies. Both sets of pressures seriously impact on tripartite consultation and cooperation. The Ministry of Labour, which has the mandate for most of the labour market matters, needs to develop creative strategies that will restore its leadership role as the government policy-making agency on labour market issues. The main employers' organization faces the particular challenge of having to address issues that go beyond labour or social policies into economic issues, inevitably bringing it into competition with other employers' organizations that have traditionally occupied this domain. Trade unions need to find ways of adapting their policies and strategies to address issues such as the decline in membership, the challenge of organizing difficult but crucially important groups and sectors, as well as providing relevant and meaningful services to these groups.

Both the workers and employers face a challenge posed by the 'newcomers', notably non-governmental organizations (NGOs), which have entered areas which the unions and employers' organizations considered as their exclusive domain. The exact nature of this evolving conflict of interest is unclear, and it may turn out to be a transient phenomenon. At the same time, it is too critical to be ignored. It might divert attention away from the key objective of jointly pursuing speedy economic recovery in an atmosphere of relative industrial peace. On the other hand, this conflict may have clouded the potentially positive contributions that civil society can make.

<sup>22</sup> See for example the *Annual Report of the Ministry of Labour and Human Resource Development 1999*. Nairobi, pp. 83-87, 92-94.



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## CHAPTER 3

### OVERVIEW OF INDUSTRIAL RELATIONS

#### *The legal and institutional framework*

The legal and institutional framework for social dialogue in Kenya derives from two primary sources. The first is labour legislation, including the Employment Act, 1976 which regulates conditions of employment in workplaces, and the Regulation of Wages and Employment Act, 1951 which provides policy and guidelines for the regulation of wages either by collective bargaining or by Wages Councils. The legal framework also includes the Trade Union Act, 1952 which regulates the formation and management of trade unions and employers' organizations, the Trade Disputes Act, 1965 which regulates dispute settlement mechanisms and establishes institutions for this purpose while the Factories and Other Places of Work Act, 1951 provides the policy framework for occupational health and safety in the country.<sup>23</sup>

This legal foundation is underpinned constitutionally by section 80(1) of the Constitution of Kenya which guarantees freedom of association and the right to form or join trade unions. Kenya has not yet ratified the main international labour standard in this area, the Freedom of Association and Protection of the Right to Organize, Convention, 1948 (No 87).<sup>24</sup> However, the role of the tripartite partners, especially in the formulation and implementation of this legal regime, is very significant. As will be shown in a later section of this paper, tripartite institutions such as the Labour Advisory Board, which have the mandate to address aspects of labour law and international labour standards, play an indispensable role in the formulation and implementation of the country's labour laws.

The second source for the industrial relations framework in the country is the Industrial Relations Charter, first introduced in 1962 on the eve of independence, which has since then become a major voluntary tripartite initiative regulating industrial relations practice in the country. The Charter incorporates important provisions of international labour standards such as agreement by all sides to "respect each other's right to freedom of association". Also, clause 2 on recognition and negotiation of agreements provides that no employee shall be compelled to become a member of a union, while a worker shall not be penalized on account of his or her trade union membership. The Charter cannot be enforced, as it is a voluntary agreement of between the social partners. It has been a major component of the industrial relations system in the country.

Indeed, the principle of one union per industry, the commitment to collective bargaining in the workplace, the tripartite approach to dispute settlement as well as tripartite cooperation, are all covered by the Industrial Relations Charter. This point is of considerable importance bearing in mind that the structure of trade unions has in turn had a fundamental effect on the bargaining structure whether at industry or company level.

<sup>23</sup> There is other legislation, such as the Industrial Training Act and the Workmen's Compensation Act, which regulate specific aspects of the labour market.

<sup>24</sup> As a member State of the ILO, Kenya is bound by the provisions of the Declaration on Fundamental Principles and Rights at Work (1998). At the time of this research, the Government and the social partners were reviewing the labour law as a prelude to the ratification of the Convention.

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Both the labour laws and the Industrial Relations Charter are complementary and, to this extent, the partners' aim is to develop the laws through the latter. The consultative mechanisms of social dialogue, through collective bargaining and tripartite cooperation, are strongly entrenched in both these sources. For example, the various laws have provisions for tripartite consultation but the Charter empowers the parties to set up a Demarcation Committee to adjudicate demarcation disputes between unions. The provision further states that “appeals of the Committee’s demarcation decisions shall lie with the Industrial Court through the established machinery”. The Industrial Relations Charter has been reviewed periodically since its introduction, in 1980, 1984 and 2001, to respond to changing industrial relations conditions. This emphasizes the social partners' high regard for self-regulatory voluntary mechanisms. Given the importance attached to the Charter, it is not surprising that at the most recent review during 2001, the tripartite partners agreed to incorporate the Charter into the country's labour relations laws.

This resolve to legalize the Charter in recent years has been induced primarily by two factors. On the one hand, the enormous strain on labour market institutions caused by globalization has put pressure on the parties to ensure that they maintain a manageable industrial relations framework and the Charter is seen as a key mechanism for achieving this objective. On the other hand, growing divisions within the trade union movement and continuing incursions by the civil courts is seen as an undesirable development, which may have adverse effects on labour relations in the country. However, it is important to bear in mind that legal provisions alone are not enough to address these problems; the goodwill of all the parties and a genuinely collaborative approach to labour market issues is just as important.

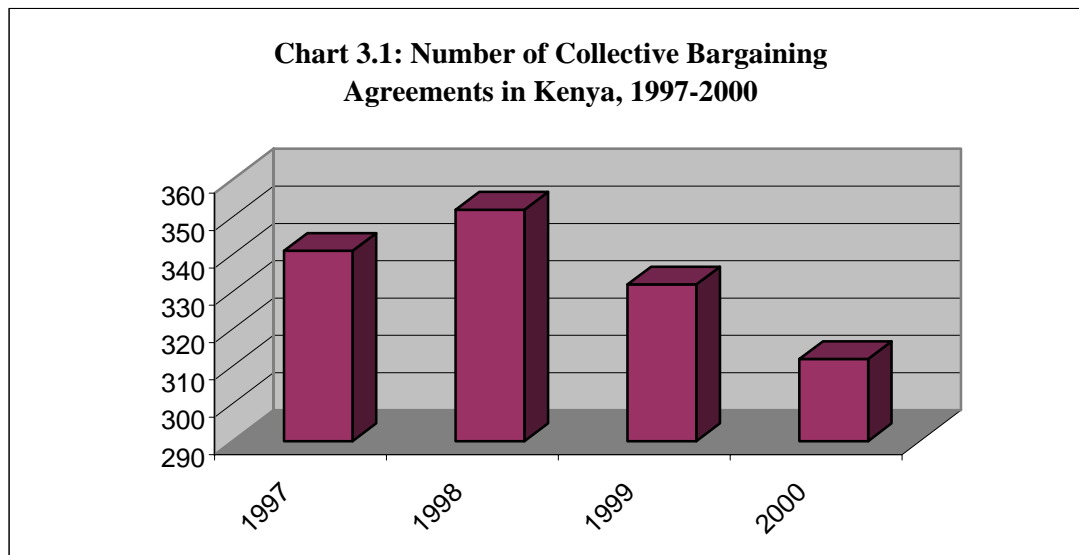
### ***Collective bargaining***

Collective bargaining has a long tradition in Kenya. Today, an average of over 300 collective agreements, mostly made on an individual employer basis, are signed annually in Kenya (see Chart 3.1). During the past 5 five years, 7 seven unions operating in a number of multi\_\_industry sectors have dominated the industrial relations arena. In 2000, for example, more than 76 per cent of collective agreements were made by 7 seven unions, which illustrates the concentration of trade union activity in the country.<sup>25</sup> During the last 2 two years, the number of collective agreements registered has fallen due to growing economic difficulties, which have caused business closures, or have induced the parties to continue with existing conditions or even to abandon the bargaining process altogether. For a collective agreement to be enforceable by law, it must be registered with the Industrial Court. The registration of collective agreements also fulfils the additional need to ensure that the agreement is consistent with existing wage guidelines.

Chart 3.1

Number of Collective Bargaining Agreements in Kenya, 1997 - 2000

<sup>25</sup> The unions are the Kenya Union of Commercial, Food and Allied Workers (71 collective agreements); Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (40); Kenya Engineering Workers’ Union (36); Transport and Allied Workers Union (29); Tailors and Textiles Workers’ Union (22); Kenya Chemical and Allied Workers’ Union (21) and Bakery, Confectionery, Manufacturing and Allied Workers’ Union (20).



Source: Unpublished records of the Ministry of Labour, Nairobi.

Collective bargaining takes place at the industry (or sectoral) level and the company level. Industry level bargaining was most helpful for both sides, but particularly for the national unions which often do not have the logistical and financial resources and the expertise to negotiate individual agreements with employers. Additionally, it was most beneficial for workers, particularly in small enterprises that are not directly members of the employers' association. By establishing an industry-level agreement, such employers are often faced with the moral obligation to come up with a wage structure that reflects the industry wage. However, bargaining at the industry-level has become increasingly unpopular in recent years, and such arrangements are today confined to very few industries, namely mining, engineering, tea plantations, agriculture and banking. Accordingly, there has been a growing shift towards individual bargaining at company level. The growing preference for company-level bargaining has contributed to the weakening of national unions in this vital area.

The economic difficulties of the late 1990s have accentuated the trend towards enterprise company-level bargaining, usually between the individual employer (represented most often by FKE) and the enterprise union, sometimes represented by the national union. Today, company-level bargaining, which leaves room for both sides to adjust employment conditions to their particular situation, is the most prevalent. The role of the FKE on the one hand and the national union on the other in company bargaining has been a factor in coordinating the results of collective bargaining, although this is not an explicitly stated objective.

Most collective agreements cover a two-year period, although this appears to have been changing in recent years, because of unstable economic conditions. Today, more and more collective agreements have a life span of one year or, as in several cases, the wages component, at least, is reviewed annually. Generally, the view is that collective agreements establish minimum levels payable by the employer(s) covered by the agreement. While this may be true, particularly for the largest and oftentimes the most prosperous employers, the minimum levels established in collective agreements have tended to be the going wage rate in most cases. This is especially so in the case of the relatively smaller employers, and equally true of the very small employers who are, in some cases, not party to the agreement in the first place, but nevertheless have the moral obligation to honour the industry wage rate. The exceptions to this are workers in economic sectors covered by wages councils, which are discussed below.

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## **Regulation of wages and conditions of the un-organized workers**

The collective bargaining machinery is confined to the regulation of wages and conditions *in the unionized* (or organized) formal sector. As various estimates show, this group consists of roughly half a million workers, representing nearly 30 per cent of the formal wage employment sector. In terms of the overall labour force, however, unionized workers do not count for more than 15 per cent. This leaves non-organized workers in several industries and sectors without trade union representation. Even on the basis of official statistics, as shown in Table 1.2 earlier, this group could be as large as six million. For this category of workers, the role of the General Wages Advisory Board, (GWAB) in wage regulation and wage-setting is quite significant. This machinery was established under the Regulation of Wages and Conditions of Employment Act 1951 and is responsible for setting wages and conditions of employment for a large segment of the labour force. Under the provisions of the law, the Minister for Labour is empowered to set up wages councils in industries where the boards are mandated to regulate wages and employment conditions. As a social policy, the objective of the law is to protect workers in the specific occupations or industries concerned from exploitation, particularly where unions are either absent, weak or unable to organize the workers into trade unions.<sup>26</sup>

Wages councils regulate wages and conditions of service in the specific industry or trade. In practice, the wage element has been the focus of this annual review, while other conditions of employment have tended to remain the same over a relatively longer period. In other words, much of the work of the respective wages council, particularly the General Order (which is made by the GWAB itself), has tended to focus mainly on wage regulation while leaving the other conditions of employment either to the minimum conditions as provided for in the Employment Act or only occasionally reviewing them. About 15 wages councils exist in various industries, although only three, the Agricultural Industry Wages Council, the Protective Security Services Wages Council and the Building and Construction Industry Wages Council, in addition to the General (Wage) Advisory Board, are presently active.<sup>27</sup>

The Regulation of Wages (General) Order serves two important purposes. Firstly, it covers trades or industries, which are not covered by wages councils. However, as indicated above, only three wages councils are active, so the coverage of the General Order is extensive. Secondly, irrespective of whether or not a wages council exists or functions in a particular trade, the General Order may apply when wages and conditions set in the latter are superior to those obtained under a particular wages council.<sup>28</sup> In any event, probably due to the broad coverage of the General Order, and particularly bearing in mind that the statutory Wages Board reviews it annually, many workers in the other industries are in reality covered by the terms set out under the General Order.

Finally, the issue of whether or not the enforcement machinery is effective in regard to collective agreements or wages councils' orders, is, of course, a totally different matter. The issue of enforcement is a highly important one bearing in mind, as demonstrated above, the broad impact of the work of the Wages Advisory Board and its wages councils. Yet, on the basis of the information

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<sup>26</sup> In principle this policy was meant to be a transitional arrangement, which would theoretically become unnecessary as union organization spread.

<sup>27</sup> These industries/trades include the following: tailoring and garment making; hotel and catering; road transport; motor engineering; baking, flour and confectionery; building and construction; laundry and cleaning; footwear; agriculture; wholesale and retail; petrol and service stations; domestic servants; electrical construction; timber and saw-milling, and furniture, boat, door and window making.

<sup>28</sup> The only exception is agriculture where, in view of its peculiarity, the General Order is not applicable. This sector has a functioning wages council.

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available in the Department of Labour, which has responsibility for enforcement through labour inspection, this is a difficult task which is not carried out very effectively.

There are a number of reasons for this. First, the number of inspectors is inadequate to cover the whole country. The number of inspectors (and employment officers) has been declining over the years. For example, while there were about 220 such officials in 1995, the number had declined, to 144 in 2001. Second, the technical capacity of inspectors needs to be enhanced through regular training and development programmes. Thirdly, transportation and communication resources are grossly inadequate for the Department to spread its net wide enough to cover the expanse of this huge sector. Fourth, it is doubtful whether the machinery for setting wages and conditions in the specific industries or indeed the General Order adequately reflects the economic reality in the sector, as employers always complain about the high rates set which they are unable to meet. This may explain what appears to be a tacit understanding not to police the employers or enforce the wage orders on them.

The problem of monitoring and control, while common to the whole industrial relations system, is probably less critical for the organized sector, for the simple reason that trade unions, whether at national or company level, enforce collective agreements.

### ***The dispute settlement system***

The dispute settlement machinery in Kenya is a web of inter-woven stages in which the tripartite partners play a significant role. First, it is designed to ensure that collective bargaining is adequately used in settling disputes, and second to ensure that disputes concerning rights or interests are appropriately and promptly settled. In this regard, the role of the Tripartite Committee set up under section 4 of the Trade Disputes Act, is quite significant. It has three members, usually a top executive of the employer's federation, a senior representative of the workers' central organization and the permanent secretary of the Ministry of Labour as chairperson. The Tripartite Committee has responsibility for reviewing every declared trade dispute and determining its admissibility and the manner of settlement.<sup>29</sup>

Under the voluntary system, the law requires that all disputes be reviewed by this committee, which then decides on one of three courses of action. It may decide, for example, that the parties have not exhausted the collective bargaining machinery and return the dispute to the parties. If it decides that the internal machinery has been exhausted, it can decide, depending on the nature of the dispute, to send the dispute for investigation or conciliation. Cases for investigation are generally rights disputes such as dismissal or recognition for collective bargaining. Also, some jurisdictional issues are referred for investigation. Here the question to decide is whether or not a union has organized within the appropriate industrial sector or has organized the appropriate group of workers. In the latter case, while some cases are dealt with by the Department of Labour, most jurisdictional cases are handled by a demarcation committee of the social partners, as provided for under the Charter. Where a party does not accept the Department's decision or the steps taken by it, it may appeal to the Industrial Court for a ruling. A number of demarcation cases have ended up in the High Court.

The third course of action open to the Committee is the conciliation of disputes, generally disputes concerning interests relating to one of the many items that are usually covered in collective bargaining agreements. As the records indicate, most disputes are about rights. During 1999-2000, for example, an average of 416 disputes concerning dismissals were reported, while recognition disputes

<sup>29</sup> Only registered trade unions or the employer can declare a trade dispute to the Ministry of Labour.

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averaged 185 cases. On the other hand, interest disputes such as disagreements over terms and conditions of employment averaged 319 cases during the same period.<sup>30</sup>

The Ministry's professional staff are normally responsible for the conciliation of trade disputes. Table 3.2 below shows the number of disputes reported under the provisions of the law and the settlement method of resolution used.

Table 3.2  
Reported Disputes and Settlement Method, 1996-2000

Year	Total disputes reported	Investigation	Conciliation	Industrial Court
1966	916	568	200	103
1997	1147	726	288	71
1998	1001	635	276	128
1999	942	500	136	124
2000	946	413	118	127

Source: Annual Reports of the Labour Department, Nairobi, Kenya.

In either case, under the provisions of the law, the Chief Industrial Relations Officer appoints an experienced labour officer to serve as investigator or conciliator. Whereas the conciliator makes an effort to settle the dispute by facilitating effective dialogue between the two sides, the work of the investigator is primarily to define the nature of the dispute, though he or she may suggest solutions, but does not attempt to settle the dispute directly. However, the Minister may decide whether or not to include the investigator's recommendations when sending the investigator's report to the parties.<sup>31</sup> In either case, the Minister seeks to persuade the parties to settle the dispute on their own, but does not impose any view or solution on them.

This contrasts with the role of the conciliator, who facilitates and guides the two parties for further negotiation, to help them to reach bipartite agreement. The conciliator does not arbitrate the dispute. Very often the issues in dispute, or a substantial part of them, are settled at this level. Where this is the case, a memorandum of agreement is signed by the parties and is ultimately incorporated into the collective agreement and approved by the Industrial Court. However, where the dispute or part of it is not settled, a memorandum of disagreement is signed and forwarded to the Minister who transmits it to the Industrial Court which arbitrates and notifies its verdict directly to the parties. At this point, the dispute resolution machinery comes to an end because the decision of the Court is not subject to appeal.<sup>32</sup>

<sup>30</sup> *Annual Report of the Ministry of Labour, 2000*. Nairobi.

<sup>31</sup> The Minister may decide not to include the solution proffered by the investigator, particularly if he or she believes that the solution might complicate rather than contribute to a solution of the dispute. This may be so where the investigation has not been thorough and therefore the recommendation bears no relevance to the facts of the case.

<sup>32</sup> However, the provision of any collective agreement, either voluntarily agreed by the parties or through conciliation can be referred to the Industrial Court for interpretation.

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## ***The role of the Industrial Court***

The role of the Industrial Court is highly important in the promotion of industrial peace. Established in 1971 under the Trade Disputes Act, the Industrial Court in Kenya is one of the oldest labour courts in Africa. The court is the apex of the dispute settlement machinery in the country. Operating largely as a tripartite body, the court has two judges and a panel of 16 members nominated in equal proportion by the employers' and workers' organizations but appointed by the Minister of Labour. The Court has two chambers, each one staffed by a judge and normally two lay members, chosen respectively from the members nominated by the employers and the workers.<sup>33</sup> The decision of the Court is usually by consensus, and only in the absence of such consensus will the judge make the final decision or award.

The Court has both appellate and original jurisdiction; in the former on cases which have gone through the normal machinery of collective bargaining, investigation or conciliation and ultimately referred to the Court because the earlier procedures have been unsuccessful. In its original jurisdiction, the Court has the function of registering collective agreements, by which means it ensures that collective agreements conform to the law, the prevailing incomes guidelines or industry wage level<sup>34</sup>, or other national macroeconomic requirements. Thus, one of the objectives of the process of registration of collective agreements with the Court is to ensure that collectively agreed rates are not inconsistent with the guidelines that are periodically issued by the Government.<sup>35</sup>

When a collective agreement is registered, it becomes binding and enforceable by law. This provision has an important value for the status of collective agreements. A registered collective agreement commits both sides and binds them during the duration of the agreement.<sup>36</sup> Where however an employer or a union fails to honour any provision of the agreement, the aggrieved party has the right to ask the Court to enforce it.<sup>37</sup> However, because of the commitment of the parties to the collective bargaining process, which is made voluntarily, there have been very few or no instances of recourse to legal action.

Finally, as shown in Table 3.2 above, a large proportion of disputes are settled at the conciliation or investigation level. This emphasizes that, in the final analysis, the dispute resolution settlement machinery has been supportive of the collective bargaining process in the country.

<sup>33</sup> The judge decides, based on the case, whether the nominated members should be one or more. Recently, for example, following a damaging five-day national strike by bank workers, in protest against a benefits levy introduced by Parliament, more than 12,000 workers involved were sacked by the Government, although about 11,500 of them were later re-employed following the intervention of the Minister of Labour. The case against the remaining 600 was referred to the Industrial Court and, given that the issue was not strictly a labour issue but a challenge to the legislative authority, the hearing was composed of a judge and two members each from the nominated members.

<sup>34</sup> It is conceivable, as the officials of the court argue, that the latter could return an agreement which might create problems for some employers not covered by the particular agreement. Specifically, if the wage agreed by the parties is seen as creating problems for other smaller employers in terms of ability to pay, the agreement may be sent back for more realistic rates to be applied such as would not create difficulties for other employers, or cause industrial disputes in the particular sector.

<sup>35</sup> In the exercise of this power, the Court is assisted by a government economist who undertakes economic analysis of collective agreements and ensures that they comply with the wage guidelines and other industry indices.

<sup>36</sup> Section 11 of the Trade Disputes Act.

<sup>37</sup> Exceptions have only occurred in the past few years when, owing to economic difficulties, some employers reneged on agreed terms.

Furthermore, in terms of the overall state of industrial peace in Kenya, the available evidence, as shown in Table 3.3, suggests that there has been a substantial decline in the incidence of strikes and disputes in the country over the years. The number of strikes in 1999 was 38, which represented a decrease of 36 per cent from the preceding year. The number of days lost was 27,844.<sup>38</sup> Most strikes took place in agriculture, local government and textiles. There was a slight increase in the year 2000. In spite of this, the dispute settlement arrangements have contributed to this relative industrial peace, although it is clear that the unfavourable economic environment has also served as a disincentive for workers to use the strike option.

Table 3.3 Strikes and days lost in Kenya 1995-1999

<b>Years</b>	<b>Strikes</b>	<b>Workers involved</b>	<b>Days lost</b>
1995	42	9437	3,037,697
1996	58	29348	317,326
1997	97	270660	57,724
1998	105	214867	35,514
1999	38	9094	27,844
2000	41	17798	51171

Source: *Annual Reports* of the Ministry of Labour (1999) and Federation of Kenyan Employers (1998/2000).

<sup>38</sup> *Annual Report of the Labour Department, 1999*, p. 12.

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## CHAPTER 4

### NATIONAL LEVEL SOCIAL DIALOGUE: INSTITUTIONS AND PERFORMANCE

Tripartism is a well established mechanism in Kenya, although not one that has been used with any degree of consistency. As shown earlier, tripartite consultation has evolved from both the legal framework and the Industrial Relations Charter, the latter being a voluntarily agreed set of tripartite codes of practice and procedures. Both sources incorporate tripartite institutions for social dialogue in specific areas of industrial relations in the country, and are consistent with the objectives of ILO Convention No.144 which Kenya ratified in 1990.<sup>39</sup> This chapter describes and analyses two major national tripartite institutions which are used to address labour market and other socio-economic issues in the country. In the next chapter, a number of tripartite institutions dealing with specific sectoral national issues will also be analysed.

#### *The National Tripartite Consultative Committee*

For quite some time, the national forum for tripartite social dialogue on labour market and related issues has been the National Tripartite Consultative Committee (NTCC). This institution was created when the Industrial Relations Charter (IRC) was first introduced in 1962. While it is true that the Committee has had a chequered history of activity or non-activity, interest in using the machinery has grown, particularly in the late 1990s, with the resolve of the parties to strengthen it and make it an effective medium for social dialogue, especially on labour market issues. Article b(1) of the Charter, for example, empowers the Committee to deal with "matters affecting the economy in general and employment matters in particular". Today, the NTCC is seen as an important forum through which key policy issues on industrial relations and other labour market issues are formulated.

The Committee is a forum for the Government and the social partners to discuss general industrial relations issues and specific problems and challenges facing them individually and collectively. Through it, the Minister can feel the pulse of the industrial relations system as seen by the partners. The direction of public policy can also be discussed. In other words, the Committee serves as a brainstorming forum for policy formulation on important national labour issues. The Committee has 16 members as follows:

- Employers, represented by FKE: 6
- Workers, represented by COTU: 6
- The Ministry of Labour (represented by the Minister who alone can chair the Committee), the Permanent Secretary, the Labour Commissioner and the Chief Industrial Relations Officer.

<sup>39</sup> Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

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Given this structure, the Committee's work of the committee has tended to focus mainly on industrial or labour market issues. However, the Committee has regularly contacted officials in other government departments for guidance and advice, particularly when an issue on its agenda goes beyond labour market issues or when the work of other arms of government have an impact on labour.

Over the years, the Committee has been very useful as a forum for information sharing on labour market issues. It provides a forum for the Ministry of Labour to inform the social partners about its work in the field of industrial relations, labour law, trade disputes and the overall state of industrial relations in the country. For example, the committee members have discussed measures taken by the Ministry to ratify ILO Conventions, and reviewed laws, as well as the application of certain provisions of the Labour Code in Export Processing Zones, plans to establish a productivity institution, employment policy, and the reactivation of the union in the civil service. The NTCC has also been concerned about the state of industrial relations in the country, in particular the growing internal divisions within trade unions, and the potentially damaging role of litigation, especially in the civil courts. It should be recalled that all of the six unions created since the late 1980s were created by court order. Unhappy with this development, the Committee agreed to support legislation which confined the power to register trade unions to the Industrial Court.

The experience of the Committee in the year 2000 is illustrative of the vital role which social dialogue can play in a period of social and economic crisis. In that year, the Committee met on nine occasions (as opposed to the three or four meetings normally required) in response to the serious problem of energy and water shortages, which compounded the economic difficulties and caused considerable hardship for employers and workers. At these meetings, the Committee deliberated on the impact of the energy shortage on industrial production and capacity in business undertakings. Businesses unable to source their power generation energy needs from government sources, resorted to lay-offs and redundancies, which created labour-management conflicts. Officials of the Ministry of Energy were invited to the Committee to brief the tripartite partners on the energy crisis in 2000 and on the short-term measures undertaken by the Government, as well as on sustainable long-term measures.

On the basis of this exchange of information and views, the social partners were able to brief their respective constituencies on the measures being taken by the Government as well as the need for employers not to take premature action such as lay-offs or wage reductions in wages, and for workers to exercise restraint in taking industrial action. This exchange of information through social dialogue is critical to ensuring good labour management relations.

### ***The Joint Industrial and Commercial Consultative Committee***

Since the early 1980s, there have been some ad hoc consultations between government economic policy makers and a cross section of the business community in what was then known as the National Economic Forum. Operating informally and mainly as a bipartite forum for information and sometimes dialogue, it provided the business community with an inside view of the direction of government economic policy and its effects on business. At one such event in 1997, the President announced that his Government was discussing with the Bretton Woods institutions how to address the country's economic problems. In response, the business community suggested that they should be given similar opportunities to have an input into policies intended to solve the economic crisis.

This exchange of views ultimately led to agreement on an institutional arrangement to facilitate the exchange of views among the stakeholders to help solve the country's socio-economic problems in the country. This was the origin of the Joint Industrial and Commercial Consultative Committee (JICCC) established in December, 1997 to provide a forum for key stakeholders in the economy to address economic policy issues, put forward solutions and, where appropriate, direct the relevant agency to implement them.

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The JICCC is a multipartite body with about 50 institutional representatives, including the tripartite partners. The membership of the body includes the following:

**Government**

Ministries of Finance (chair), Trade and Industry; Agriculture and Rural Development; Roads and Public Works; Labour and Manpower Development; Transport and Communication; Local Authorities; Energy; Office of the President and Attorney General.<sup>40</sup>

In addition, the following government agencies are represented: Central Bank of Kenya; Kenya Bureau of Standards; Kenya Revenue Authority; Investment Promotion Centre, Export Promotion Council; Export Processing Zones Authority, and the Nairobi City Council, Retirement Benefits Authority.

**Employers**

Federation of Kenya Employers; Kenya Association of Manufacturers; East African Association; Kenya National Chambers of Commerce and Industry, Association of Kenya Insurers and the Kenya Bankers' Association.

**Workers**

Central Organization of Trade Unions

The members are usually top officials of their respective organizations. On the government side, membership is restricted to permanent secretaries of departments although, in some cases, attendance could be delegated to other officials. On the non-government side, members are usually the chairpersons or chief executives of the member organizations. The Committee meets monthly, an arrangement which has been overwhelmingly agreed to by the members in view of the daunting nature of the economic crisis facing the country.

The range of issues dealt with by the Committee is quite extensive and includes the following:

- regional tariffs under COMESA
- the investment environment, in particular opportunities offered by the African Growth and Opportunities Act,
- imports to Kenya,
- measures to arrest smuggling (sale of counterfeit goods),
- revitalization of the motor vehicle industry,
- labour law reform,
- revival of the civil service union,
- the justice system,
- infrastructure development, such as road rehabilitation and reconstruction,
- energy policy, in particular the monopoly status of the power generation agency,
- world trade, including the role of the ACP countries and the WTO,
- local authority administration,
- security, such as funding and efficiency of the service,

<sup>40</sup> Other government departments are co-opted, particularly if the subject before the Committee affects a department which is not represented on it. Recent examples of co-opted members have included the Immigration Department and the Kenyan Police and the Commissioner of Insurance.

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- water supply,
  - immigration and issues of migrant labour, work permits,
  - transportation, including railways,
  - insurance.

An important innovation in the work of the forum was a decision in December 2000 to establish a secretariat, under the overall supervision of the Permanent Secretary of the Treasury, who is assisted jointly by a government official and a nominee of the private sector. The secretariat not only records the deliberations of the Committee, but is responsible for preparing summaries of conclusions or recommendations, and providing a list of individuals or agencies responsible for implementation of specific conclusions within a given time frame. It is also responsible for follow-up action on the various issues and reporting back to the Committee. The secretariat conducts research on specific issues and provides information for members of the forum. The success of the Committee and its sustainability will in part depend on the proper staffing and functioning of this secretariat, and the provision of adequate resources for it to carry out its duties.

Although it is too early to assess the performance and contribution of the JICCC, it has so far served as an influential national body used by the country's major stakeholders to discuss key social and economic issues. It serves as an important national forum for the sharing of information, views and dialogue on major national issues affecting the labour market, the economy and society. Furthermore, the work of the Committee has the potential to promote good governance and consolidate the evolving democracy in Kenya. Our interviews with leaders of employers' and workers' organizations, as well as government officials, indicate that all sides in the labour market find the JICCC useful as a forum for looking at the broader issues of the economy. They also believe that the effective functioning of institutions such as the JICCC will not only eliminate or at least curtail the practice whereby government agencies make policies that affect labour market performance without consultation with the social partners, but the forum could greatly facilitate the implementation of conclusions reached at the tripartite bodies.

Overall, it is readily admitted by all sides that the JICCC contributes to more effective government, more responsive to the needs of society.<sup>41</sup> Although the Committee has no legal status at present, it may prove useful to endow it with such a status in the future, thus enhancing its standing. In any event, the fact that the Committee has broad representation of the key stakeholders, makes it a valuable forum for joint deliberations on major social and economic issues vital to economic development and national competitiveness. Indeed, the level of representation of government departments increases the prospects of speedier implementation of any conclusions reached by that body. The Committee's future will, however, depend on the dynamism with which it responds to the changing economic conditions in the country and on its capacity to serve as a regular and effective forum for social dialogue on issues of national development.

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<sup>41</sup> As an all-purpose representative body, key community groups, such as non-governmental organizations and bodies representing civil society are not present.

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## CHAPTER 5

### SECTORAL NATIONAL LEVEL SOCIAL DIALOGUE

This section of the paper focuses on a number of important institutions that have been set up for social dialogue on thematic subjects of national significance. These institutions are complementary to each other and are strategically linked to national level social dialogue through the cross membership of the social partners or stakeholders, and also in terms of the linkages in the subject areas they cover.

#### *The Labour Advisory Board*

The Labour Advisory Board (LAB) was set up under the Employment Act, 1976, and has responsibility for advising the Minister of Labour on labour and employment policy. It has a tripartite structure including four representatives each from employers and workers, and three independent members, appointed by the Minister of Labour. Two of these independent members are chosen as chairperson and vice-chairperson respectively, while the Labour Commissioner serves as an ex-officio member in an advisory capacity. While it is true that the selection of the independent members is a government prerogative, these members are not necessarily government representatives, although some of them have been intimately connected with industrial relations issues. Indeed, the current chairperson of the LAB was a former Labour Commissioner in the Ministry of Labour. This arrangement offers an unusual tripartite structure that creates opportunities for the independent members to give an outsider's view on labour issues. In any event, the forum gives adequate opportunity for the social partners to make an input into government policy formulation, with the Labour Commissioner providing as much guidance to the board members as possible. The Department of Labour also provides the Board's secretary.

Although the law assigns to broad responsibility for labour and employment policy to the LAB, a practice has evolved whereby the Board's work has practically been limited to the area of labour relations policy, i.e. formulation and review of legislation and matters pertaining to international labour standards. Even in the area of labour legislation, the Board has operated within the narrow confines of the labour laws that are enforced directly by the Labour Department. Thus, the formulation and implementation of policy, legislation and regulations in such areas as occupational health and safety, or industrial training, is the work of other tripartite forums. This division of functions among tripartite bodies is not specified in writing but it appears to be a practical approach to the matter of labour policy, bearing in mind that all the areas of labour administration, which were at one time performed entirely by the Labour Department, are now the work of other independent units in the Ministry of Labour.

Similarly, the LAB has dealt with fewer and fewer industrial relations issues despite its mandate. The National Tripartite Consultative Committee appears to be dominant in this general area. This attempt to divide the functions of the various bodies is not generally a tidy one, and the lack of a clear-cut division of work among the tripartite bodies in the field of labour administration has led to duplication of effort and responsibility and, inevitably, inefficiency.

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As an advisory body to the Minister, the LAB considers labour issues and makes recommendations to the Minister who, may accept or reject the recommendations.<sup>42</sup> However, recommendations are rarely rejected in practice, in part because the recommendations have already received the approval of the social partners, and also because the Labour Commissioner will have guided the social partners in their deliberations. In other words, the LAB, despite its advisory status, plays an important role in labour law regulation, labour reform and in matters pertaining to international labour standards. It is effectively responsible for initiating or considering proposed legislation put before it by either the social partners or the Government. The ratification in 2001 of three core ILO conventions<sup>43</sup> and the adoption of the related recommendations by the Government, on the basis of the LAB's recommendations is illustrative of this body's useful work.<sup>44</sup>

The LAB's effectiveness is somewhat impaired by the intrusive role of other government departments, notably the Ministry of Finance. For example, in 1994, the Minister for Finance introduced an amendment to both the Regulation of Wages and Conditions of Employment Act and the Trade Disputes Act by which redundancy issues were moved from the latter legislation to the former. The amendment also increased the payment of redundancy benefits from 10 to 15 days for each completed year of service. By these fundamental legislative changes, redundancy, hitherto a subject of trade dispute requiring investigation and determination by the competent authority before redundancy could be legally declared, became a purely employment issue in which the trade union had little or no role to play. As an employment issue, the employer's obligation became limited to informing the workers, as individuals, and the payment of legally binding redundancy benefits.

Also, the irregularity of meetings is a threat to the effectiveness of the LAB. Under its statutes, the Board should meet at least three times a year. But this has not always been the case in practice and it has had long periods of non-inactivity. Very often, the failure to meet arose from the difficulty of arranging mutually convenient meeting periods for the social partners and, at other times it was due to administrative lapses in the Department of Labour. However, as pressure has mounted on the Government to adopt the labour market policies which are needed to aid economic recovery, there has been a renewed interest in using the LAB. The social partners want a labour market policy that will favour competitiveness and at the same time be socially responsive to the workers' needs.

### ***The National Industrial Training Council***

The National Industrial Training Council (NITC) was established under the Industrial Training Act, 1971 to promote industrial training and the equitable sharing of training costs by industry. The scheme also seeks to enhance the quality and supply of properly trained middle-level technical staff for Kenyan industries. In performing these functions, the Council serves in an advisory capacity to the Minister of Labour who, as is the case with similar tripartite institutions discussed in this chapter, has the final decision-making powers. In spite of its advisory status, the NITC is in practice a decision-making body with a tripartite *plus* structure as follows:

- Employers (represented by the Federation of Kenya Employers): 6 members,
- Workers (represented by the Central Organization of Trade Unions): 6 members,

<sup>42</sup> Where the Minister accepts, as he or she normally does, such recommendations then go through the bureaucratic processes involving the Attorney General, the Cabinet and finally the Parliament.

<sup>43</sup> These are the Equal Remuneration Convention, 1951 (no. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Worst Forms of Child Labour Convention, 1999 (No. 182).

<sup>44</sup> See *Sessional Paper No. 1 of 2001*. Nairobi, Government of Kenya, pp. 1-3.

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- Other interests, including government departments: the Ministries of Labour, Education, Industry, and the Treasury, Director of Personnel Management: not more than 6 members.

The body operates a decentralized structure comprising 11 industrial training committees in specific industrial sectors, with each committee having a tripartite plus membership of five from the respective stakeholders. These committees exist in the following industries:<sup>45</sup>

- textiles and allied industries,
- building and civil engineering,
- motor transport and allied industries,
- food processing and allied industries,
- chemical manufacturing,
- general engineering,
- commercial and distributive,
- banks and other financial institutions,
- agricultural and plantations,
- printing and publishing,
- saw-milling, timber and furniture,

In each of the industrial committees, the members determine the training needs and requirements, and take appropriate action to see their implementation. Each industrial committee is responsible for determining and managing the training fund levy charged to employers in the particular sector. At the present time, the levy ranges from Ksh 150 to Ksh 250 payable half yearly, although the actual rate paid by employers depends on the prosperity of the particular industrial sector. In the same manner, training costs are reimbursable in proportions ranging from 25 per cent to 100 per cent of cost depending on the financial viability of the particular industrial sector in which the committee is based. Responsibility for managing the training fund rests with each industrial committee, while the main executive council gives advice from time to time on the optimal ways of using the training fund.

Each employer with five or more workers is required by law to register. Only large and medium-size employers, employing an aggregate of about 10,000 workers, are covered, i.e. probably about 90 per cent of this category of employers. However, this is only part of the story. There is a larger category of businesses, particularly in the small-scale and micro-enterprises, - which are not covered by the scheme. In other words, if the population of potential members is defined to include the latter category of employers, then the Council's membership is probably not more than 25 per cent of its potential coverage. The challenge facing the Council, therefore, is how to spread its net wide enough to include the majority of businesses that ought to be covered, so it can provide relevant training that meets the needs of these employers.

In terms of training activities, the institution trains all types of technicians and craft workers. The institution's four centres train an average of 2,000 technicians and craft workers annually. In addition, it provides support for management and supervisory training to member companies in such areas as computing, information technology and accounting. Also, it provides specific skills improvement and upgrading to member companies on demand. In terms of facilities, whereas the training equipment in the Mombassa and Kisumu training centres are generally state of the art, the training equipment in the two centres in Nairobi is obsolete. This is in spite of the fact that demand for the services of the NITC is larger in the Nairobi centres.

<sup>45</sup> In each case, the industrial committee is chaired by one of the "other members", usually an expert in the business of the particular sector.

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The demand for technicians trained at the centres is quite high. Unlike the trainees from other institutions in the country, the technicians trained in the NITC have the comparative advantage because of hands-on experience in the use of modern equipment. In this respect, the NITC is providing the critical middle-level technical skills for industry, essential for improved productivity, quality and competitiveness.

However, the inflexibility of the law creating the Council which requires a three-year apprenticeship contract with companies has tended to reduce its appeal among employers in a highly unstable business environment. It would appear that such employers are interested in a flexible arrangement that permits quick adjustment of labour demand to changing business dictates. As a result, employers have in recent times increased their recruitment of technicians from the other technical institutions even when such recruits have less hands-on experience. This means that the NITC training scheme needs more flexibility and adaptability in order to be able to respond effectively and quickly to the changing needs of industry.

Finally, the NITC is often seen as a government department, subject to the usual civil service rules and bureaucracy. Employers have traditionally been sceptical about the desirability of government departments providing critical services such as skills development, and have become increasingly wary of supporting the programme in recent years. Employers expect the institution to be able to adapt quickly to changing needs, which they claim is not feasible under the present arrangement. This has tended to reduce business support for the Council.<sup>46</sup>

### ***Social protection: Occupational health and safety***

The National Advisory Committee on Occupational Health and Safety (NACOHS) was set up in 1990 under the Factories and Other Places of Work Act, 1951. Before the Directorate of Factories was created (under the 1990 amendment) as an autonomous unit in the Ministry of Labour, there was no tripartite forum dealing with health and safety. Issues in this field were normally discussed at either the Labour Advisory Board or the National Tripartite and Consultative Committee.<sup>47</sup> However, with the creation of NACOHS, it is responsible for advising the Minister of Labour on occupational health and safety matters. In this role, it is responsible for proposing policy initiatives, regulations and rules on the occupational health and safety regime in the country, as well as playing an important role in its implementation.

NACOHS has a multipartite structure, comprising essentially the traditional tripartite partners, broadly defined. The Committee has the following membership:

- a representative of the Federation of Kenya Employers (FKE),
- a representative of the Central Organization of Trade Unions (COTU),
- representatives of public universities,
- Kenya Bureau of Standards,
- Ministries of: Tourism, Trade and Industry, Water Resources, Health, Agriculture and Environment and Natural Resources,

<sup>46</sup> There is a consensus among the Government and social partners to give the Council a semi-autonomous status which will enable it to be more dynamic in responding to the needs of member companies and technological change, as well as operate in a profit-oriented manner.

<sup>47</sup> Before then factory inspection was carried out under the Department of Labour.

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- Government Chemist Department,
  - National Council of Science and Technology.

Members of the Committee are appointed on an individual basis, though they have institutional representation. In this way, there is a high degree of assurance that members will not only attend meetings, but that they will also follow the discussion on a regular basis. The Chairperson of the Committee is the Director of the Directorate of Occupational Health and Safety, an arrangement which ensures consistency of policy and effective implementation. The Advisory Committee meets at least four times a year although meetings are often held more frequently.

The Directorate of Occupational Health and Safety Services serves as the secretariat of NACOHS, which has also set up an internal technical committee which is responsible for initiating and developing ideas discussed in the Advisory Committee. These, in turn, are ultimately translated into amendments to existing legislation, rules or regulations on health and safety.<sup>48</sup> Matters developed by the technical committee are taken to the Advisory Committee, which examines them and makes recommendations to the Minister of Labour. From evidence currently available, the Minister rarely turns down the recommendations of the Advisory Committee.<sup>49</sup> In these roles, it is NACOHS, and not the Labour Advisory Board, which takes responsibility for both the legal framework, regulations and public policy issues on occupational safety and health. But the implied division of functions is yet to be explicitly clarified.

In recent times, the Advisory Committee has dealt with issues such as regulating noise levels in workplaces, developing regulations to eradicate child labour, following the country's decision to ratify Convention No. 182, and developing regulations on HIV/AIDS. The Committee is also working on developing regulations on the safety and health of women workers in the increasing number of flower farms in the country.

### ***Social protection: Social security***

In Kenya, while the civil service pension fund covers certain categories of public servants, workers in the private sector and all those outside the civil service scheme were not covered by any formal retirement benefit scheme. The limited coverage of that pension fund provided was the rationale for the establishment of the National Social Security Fund (NSSF) in 1965.<sup>50</sup> The case for social protection for workers cannot be better illustrated than by the situation in Kenya.<sup>51</sup> As demonstrated in earlier parts of this paper, economic difficulties have resulted in large-scale redundancies, mainly in the private sector but also in the public sector of the economy.

The social security fund was intended to provide minimum social protection for workers in periods of economic or social distress arising from old age or death, occupational injury, disability, or

<sup>48</sup> In terms of implementation of public policy on occupational health and safety, the Directorate operates through about 80 field offices in a network of 13 zonal offices strategically located throughout the country.

<sup>49</sup> The Minister may make comments on such recommendations for the Advisory Committee to re-examine but rarely rejects recommendations outright.

<sup>50</sup> The Fund was initially set up as a department in the Ministry of Labour and remained so until 1988 when it became a semi-autonomous agency.

<sup>51</sup> ILO, *Social security: Issues, challenges and prospects*. Report VI, 89<sup>th</sup> Session of the International Labour Conference, June 2001, pp. 25-36.

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loss of employment. The fund is a contributory scheme with equal contributions from the worker and the employer. The contribution is a proportion of the worker's monthly salary up to a maximum of Ksh160. The scheme provides the following benefits to its contributors:

- *Withdrawal*: Retirement benefits, aged 55, or withdrawal of benefits aged 50 years and retired from regular employment.
- *Old Age*: Aged 55 years or when an employee retires from remunerative employment, whichever is later.
- *Invalidity*: Permanent disability, rendering the worker incapable of earning a living or when at age 50 a member suffers partial incapacity making it difficult to continue regular occupation.
- *Survivor's Benefit*: Paid to the survivors or dependants of a deceased member.
- *Emigration Grant*: Paid to a member who emigrates permanently from Kenya.

Historically, management of the social security scheme has been under a tripartite body with power to make and implement policies. However recent attempts to jettison the institutional representation of the social partners created a lot of tension between them and the Government.<sup>52</sup> This rather curious action was not only contrary to the principle of tripartism, but tended to cast doubts over the capacity of the management board to exercise control over the management of the fund, particularly in the on-going attempt to reactivate the scheme as a truly broad-based national social protection scheme.

As presently constituted, the Board of Trustees of the Fund is as follows:

- 2 worker representatives (COTU),
- 2 employer representatives (FKE),
- 3 government representatives, i.e. the Permanent Secretaries of the Ministry of Labour and the Treasury, and Office of the President,
- an independent Chairperson,
- the Managing Trustee (chief executive officer) of the Fund.

The Board meets quarterly. However, following current efforts to restructure the Fund with the objective of achieving greater efficiency and relevance, it has met more frequently. The Board has executive powers, even though it is answerable to the Minister for Labour.

In terms of coverage, eligible members include all workers who are not covered by the civil service pension scheme, local government services or members of the armed forces, including the police and prison service. This wide coverage in principle makes NSSF the largest single organization providing basic social security to workers throughout Kenya. As Table 5.1 shows, the Fund had a cumulative registered membership of 2.7 million in 2000. However, the average active membership is between 900,000 and 1.2 million.

<sup>52</sup> In March 2001, an amendment was introduced to the NSSF Act, without consultation with either the Ministry or the social partners, seeking to remove the institutional representation of FKE and COTU. The amendment provided that appointments of employers' and workers' representatives to the Board were to be made without reference to the social partners. Predictably, the FKE and COTU protested, and the amendment, as well as nominations were quickly withdrawn. See *The Nation*, 13 March, 2001

Table 5.1  
Membership of the National Social Security Fund, 1966-2000

Year	Men	Women	Total	.....
1966	252107	n.a	252107	252107
1970	59471	n.a	59471	590730
1975	24089	69340	93429	858784
1980	57109	21148	78257	1217888
1985	48716	16710	63426	1532122
1990	70623	22334	92957	1388062
1995	42213	22456	64669	2294308
2000	43575	24569	68114	2749095

Source: NSSF Members Guide. 2001 Edition, p.14

Currently, the scheme covers wage-earners in the formal sector, defined in terms of employing five or more workers. In practice, the scheme has more or less been confined to large and medium-sized companies, leaving small businesses, the large *jua kali* (the informal economy), micro enterprises and the self-employed without cover. It is estimated that this group today constitutes more than 65 per cent of the labour force. Added to this group are workers who have lost their jobs but could not continue contributing, partly because of the restrictions under the law. Yet, as a result of large-scale unemployment, informal traditional social protection, such as family ties through the extended family system, is breaking down. In an environment where the formal social protection system is limited and generally inefficient, a large proportion of the population is unavoidably exposed to social insecurity and poverty. This explains the critical need for the NSSF to cover a larger segment of the population, particularly bearing in mind that this fund is likely to be the one main provider of social protection for the majority of people in the labour force. Therefore, the extension of the coverage of the scheme to include a larger population, including those in non-wage employment, will assure all workers a basic minimum standard of living particularly in old age or in emergency situations.

The performance of the Fund to date has not been particularly satisfactory. Workers and the social partners argue that the agency has not performed credibly in terms of providing an efficient and adequate service to its contributors, mostly in the organized formal employment in the private sector. According to this view, the management of the scheme has lacked the dynamism that is called for in rapidly changing economic conditions. The first problem is with the level of contribution which was fixed by law in 1977 at a maximum of Ksh320 joint worker and employer contribution. While this was perhaps a realistic rate in 1977, in an era of a rapidly depreciating national currency, this amount is only a token fraction of its 1977 value. Additionally, it is said that the Fund's contribution base has been eroded and narrowed considerably as a result of the pursuit of industrial restructuring and job cuts in the private sector.

Furthermore, it is claimed that the Fund's investments have been poorly managed and that it lacks transparency. Additionally, there has been an absence of real consultation with the stakeholders on the policies and operations of the agency. All these factors appear to have undermined the Fund's capacity to protect those for whom it was intended, thus threatening the security of even the small population of those who do contribute.

In the ongoing restructuring of the Fund, a more innovative management board and professional team may be emerging. As part of this reform, the management board is in the process of reviewing the Fund's legal framework. This will enable contributions to be adjusted to realistic levels, and extending cover to a larger segment of the labour force, including extending the scheme to include

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informal sector operators and the self-employed persons. Indeed, these issues were among those discussed at a first-ever stakeholders' information sharing seminar organized by the agency in 2001. Specifically, the participants identified the following priorities:

- to review the laws, aims and achieve coverage, incorporating the *jua kali*, and benefits to the unemployed,
- to strengthen compliance through regular inspection of employers,
- to make annual statements of accounts available to members
- to improve remittance records,
- to reduce the period used for processing claims,
- to adopt speedy and timely payment of benefits,
- to introduce regular interaction between the Fund, employers and workers for information sharing.<sup>53</sup>

Under the new arrangements, the role of social dialogue is seen as more than just stakeholder representation in policy-making and implementation. The Fund has therefore embarked on an extensive promotional and publicity programme which seeks to create a positive image for the fund and boost its role in providing social protection for workers whether in wage employment or otherwise and irrespective of the economic sector. It also plans to sensitise lawmakers to the role of the social security scheme as a critical welfare service in the country's social and economic development. Additionally, measures being implemented include the organization of a weekly programme on radio and television, a periodic publication in national newspapers, the publication of a members' guide, as well as a house journal, *Hazina* (meaning fund). Several of the publicity programmes are particularly directed at the large informal economy.

The foregoing is part of a proposed new plan of action for revitalizing the scheme. It remains to be seen what effect the various initiatives will have on the performance and effectiveness of this important scheme.

<sup>53</sup> Report of the Stakeholders Seminar. Nairobi, NSSF, 12-13 September 2000.

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## CHAPTER 6

### Key issues in strengthening social dialogue

The main impetus for the renewed interest in social dialogue in the late 1990s in Kenya came from the economic difficulties facing the country. A sound and socially desirable social and economic policy for which the key stakeholders would be responsible requires meaningful consultation among them in order to assure economic recovery and development in an atmosphere of industrial peace. A policy based on consensus can contribute to overall economic growth by fortifying good governance and consolidating democracy. Social dialogue is a useful tool for helping to achieve this consensus, particularly on labour market issues, but also on broader issues of macroeconomic and social policy. Institutions such as the NTCC constitute a useful forum for the tripartite partners to address labour market issues within the larger socio-economic environment. Similarly, the JICCC has provided a forum for stakeholders to contribute to a national response on how to develop appropriate and effective policies to deal with the effects of globalization and liberalization on the economy.

#### ***The legal and institutional framework for social dialogue***

The rekindled interest in tripartite consultation and social dialogue is of historical significance. The strength of the industrial relations system, especially tripartite consultation, is demonstrated by the Industrial Relations Charter, first introduced in 1962 and reviewed periodically thereafter. These voluntary tripartite industrial relations codes continue to be relevant to the country's pursuit of economic recovery. The fact that in 2001, the tripartite partners agreed to make the Charter part of the Labour Code emphasizes the strength of social partnership in the country and is proof of their commitment to social dialogue.

This confidence in the Industrial Relations Charter, notwithstanding its voluntary and non-legal nature, is significant because it emphasizes the acceptance of the concept of tripartism as the path to effective social dialogue. The parties acknowledge the complementary roles which the Charter and the legal code have played and continue to play in maintaining the consultative processes of collective bargaining and tripartite consultation in industrial relations, occupational safety and health, industrial training and social protection. Through these processes, strong and independent unions and employer's organizations have emerged and are contributing to policy making and implementation, thereby assuring a degree of stability in industrial relations in the country.

At the same time, there are, concerns regarding the effectiveness of social dialogue in the country. The first concern is the legal framework itself. While it is true that the national constitution gives recognition to freedom of association of each and every citizen, the relevant ILO Convention needed to realize this is not ratified yet. The fact that a large segment of the workforce, particularly in the public sector, cannot exercise its right to free association and to collectively bargaining is a major gap in public policy. The second concern is the value of social dialogue. While the tripartite mechanism was introduced quite a long time ago, its potential has not been fully and effectively exploited. The result is that the principle of tripartism has from time to time been undermined by the failure or lapses of one party or the other to fully use the consultative process. Critically, the role of government in the functioning of social dialogue is important. Yet, unilateral decisions and policies

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have occurred, usually to the detriment of social dialogue, undermining the very foundation of tripartism. The decision of a government departments, the Ministry of Finance, to amend certain labour laws in 1994, without recourse to the established consultative forum, was completely contrary to the principle of tripartism. This action was repeated in the year 2000, with a proposed amendment to the Workmen's Compensation Act, again without reference to the relevant tripartite body. This practice undermines the principle of tripartism, creates distrust among the parties and weakens the force of public policy.

The Government's action was legal under the country's legislation which recognizes the right of the Minister to introduce legislation under the miscellaneous provisions. However, because this review had an adverse effect on the capacity of unions to effectively defend the right of their members and the fact that it was not brought to the attention of either the competent government department or any of the established tripartite forums such as the Labour Advisory Board, it undermined the value of social dialogue and the credibility of the relevant labour market institutions.

Unilateral actions, regardless of their origin or by which party, undermine trust, cooperation and the credibility of the decision-making process and make joint action for finding the path to economic recovery and social equity extremely difficult. It can only be hoped that, to the extent that institutions such as the NTCC and the JICCC are used regularly and consistently, the tendency to resort to unilateral decision-making by government departments will diminish or disappear completely.

### ***Harmonizing functions and relationships among tripartite institutions***

As shown earlier, there are many tripartite institutions and processes for social dialogue in Kenya. However, several of these institutions operate without a clear demarcation of their jurisdiction and as a result there is a tendency to overlap and often duplicate work. In the case of the Labour Advisory Board and the National Tripartite Consultative Committee, for example, while both institutions draw their respective mandate from different sources, their functions overlap. Thus, while the law setting up the LAB mandates it to provide policy advice to the Minister on labour and employment policy, the National Tripartite Consultative Committee also has responsibility for practically the same areas. Two issues help to emphasize the need for clearly defined procedures as well as a clear-cut division of functions among the institutions so that they become complementary rather than competing forums. In 2000, apparently unhappy with the status of the court as the final arbiter in labour disputes, the NTCC considered a proposal to amend the law so as to create a further step in dispute settlement through the appeals process. The unions strongly opposed this proposal, and the matter was referred to the Labour Advisory Board for consideration. Similarly, the decision of the NTCC to transfer the power to register splinter unions from the High Court to the Industrial Court was not referred to the LAB.

In another context, there are some tripartite institutions which deal with sectoral issues and are responsible for the management of the respective agencies. How to achieve complementarity between the work of these sectoral tripartite institutions and that of the more all-embracing institutions such as the LAB remains an area that needs attention. For example, while the LAB has responsibility for reviewing labour legislation, institutions such as the National Advisory Committee on Occupational Health and Safety and the National Industrial Training Council also have responsibility for reviewing legislation, rules and regulations in their respective sectoral areas. At the same time, both the NTCC and LAB have from time to time considered issues of labour legislation in these areas.

The issue remains whether legislative review functions pertaining to occupational health and safety belong to the Advisory Committee or to the LAB, or whether the former is a stage in the process before the latter. It is necessary to harmonize the relationship between these two institutions. The

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overlapping responsibilities of the LAB and the NTCC, as well as the confusion as to the LAB's role vis-à-vis that of other agencies such as the NSSF and NACOHS, has tended to impact negatively on the work of the LAB. In all these cases, the inconsistencies lead to a lack of clear-cut procedures, emphasizing the need to harmonize the jurisdictions of the various institutions, and ensure that such functions are complementary rather than competitive. It would be useful to re-define the competences responsibilities of the LAB, as well as those of the NTCC and other sectoral institutions. For example, the NTCC might serve the essential purpose of information sharing and debate overall industrial relations issues, while the LAB and the sectoral tripartite bodies could deal with labour law review and reform in their respective domains in a complementary manner.

### ***Sustainability of social dialogue***

An important element in the functioning of effective tripartite institutions is their ability to meet regularly as a source for dissemination of information, consultation, negotiation and decision-making, whether for the purpose of workplace issues through collective bargaining and joint consultation, or at the national level for broader labour market issues, particularly in a rapidly changing environment. Where such institutions do not meet regularly, their effectiveness as forums for consultation or decision-making tends to be less significant, and undermines the principle of consultation and participation. In fact, this lack of sustainable performance may have contributed to the incursion of other government departments or agencies of government into the mandate of the Labour Ministry.

The case of the General Wages Advisory Board illustrates this point. Up to 1999, the Board did not meet for a period of four years. This meant that the work of that body was not carried out, or was performed single-handedly by the Ministry of Labour, thereby undermining the very tenets of consultation. Alternatively, the practice in such circumstances was to carry over existing terms and conditions of employment for the workers involved, even when the economic realities dictated otherwise. The victim was usually the worker whose working conditions were not regularly adjusted in response to rapidly changing economic conditions. The situation was not so different with the Labour Advisory Board which has major responsibility for labour law review and the ratification of international labour standards. The LAB's failure to meet undermined compliance with the requirements of Convention 144, which the country had ratified.

Similarly, having been moribund for approximately 15 years, the NTCC was revived only in 1999, whereafter it held regular meetings, no less than nine in 2000 alone. The Committee's revival and the intensity with which it has been used demonstrate its critical role for information sharing and consensus building on important labour market issues. Therefore, if the Committee is to continue to function consistently and effectively, it may be useful to analyse which factors have been responsible for its non-functioning over the years, and consideration might be given to introducing measures to assure a more consistent performance.

Another consideration linked to the question of sustainability concerns gender balance in tripartite institutions. The relevance of the tripartite system is more significant if its structure and agenda clearly reflect shifts in the labour market. In Kenya, as indeed in most countries, women constitute a large proportion of the labour force. However, the representation in tripartite institutions has been less than commensurate with their growing participation of women in the labour market. Social dialogue institutions, at both national and company levels have not fully reflected this reality and issues that were considered by the tripartite bodies often failed to reflect the gender dimension. Bearing in mind the nature of appointment to tripartite institutions, a realistic approach to promoting a more gender sensitive tripartism must be achieved at the primary level with the partners themselves. This should be enhanced by mainstreaming gender issues in all areas of public policy.

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Another issue is the capacity of the partners. Firstly, there is a need for the social partners to have a level of internal cohesion in their respective constituencies, in order to strengthen their legitimate role and position. Only when this level of cohesiveness is achieved can there be effective social dialogue. The internal dynamics of the social partners have an important bearing on whether social dialogue will be effective or not. The ability and readiness, indeed the capacity of the parties, to effectively participate in bipartite and tripartite institutions is a function of these internal dynamics within the respective institutions. If the unions continue to face internal crises, either arising from divisions or splinter groups or the lack of internal political stability, which diverts attention away from service to members, their ability to devote time to broader national issues is severely limited. Very often, participation in tripartite bodies becomes difficult due to lack of time available to devote to the mandate of the institutions, the lack of time to propose agenda items, and, of course, not finding the time to attend meetings.

Trade unions need to take concrete steps to strengthen their internal cohesion in order to respond effectively to pressures in the labour market that have led to the substantial decline in their membership. Such steps should seek to strengthen representation, and should include the organization of workers that are currently outside their scope. The extent to which the unions can achieve this will depend on how they develop services that address the concerns of the various groups in the labour force. In the same way, employers have to deal with the challenge of competition which appears to be evolving among various employers' or business organizations. The FKE, for example, has found itself addressing issues that are outside direct labour market policy and in competition with other business groups. These groups have recently formed a coordinating body known as the Kenya Business Forum and it remains to be seen whether or not this will lead to a merger or convergence of the work of the various employers' organizations of employers.

There is also the question of the capacity of the parties to make effective use of the processes of consultation and negotiating processes, in terms of understanding the substantive issues for consultation, negotiation or information sharing. Training and capacity building should be a priority function, designed to regularly constantly enhance the ability of the social partners to fruitfully engage in fruitful social dialogue. In this regard, opportunities offered by the technical cooperation project in the country should be used to optimal effect.<sup>54</sup>

### ***Funding of social dialogue institutions***

The under-funding of tripartite institutions inhibits their performance and threatens their continuity. The absence of an adequate budgetary allocation, material resources and staff has undermined the enormous role that tripartite institutions can play in policy formulation and implementation. These shortcomings are reflected into the irregularity of the meetings of the various institutions. As the evidence has suggested, it is one thing for the parties, particularly the Government, to accept social dialogue as a useful mechanism for consensus building, but it is clearly another to ensure the effective use of the machinery. Where funds are not made available to the institutions to operate, or the funds are not adequate, the issue of social dialogue will remain largely academic. Therefore, real and concrete steps ought to be taken to ensure adequate and regular funding for the tripartite institutions.

<sup>54</sup> This is the ILO/US Department of Labour project on Strengthening Labour Relations in East Africa.

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## ***Institutional framework and administrative support***

Social dialogue depends on the belief, willingness and readiness of all the parties to engage in fruitful consultation. There are several complementary approaches to social dialogue. Social dialogue exists through informal and ad hoc consultative mechanisms and in some cases, these are as important as the formal structures. At the same time, formal institutional frameworks, such as the Labour Advisory Board, the NTCC and the JICCC, are absolutely essential to the sustainability of viable and effective social dialogue. Only when such institutional arrangements are in place can the process of consultation become a sustainable mechanism for information sharing, prevention of disputes and problem solving.

The effectiveness of these social dialogue institutions is largely dependent on the organization and work of a secretariat to carry out basic and vital servicing functions. As the case of the Joint Industrial and Commercial Consultative Committee has shown, an adequately funded secretariat, staffed by competent officials, is indispensable if tripartite institutions are to be effective. This is particularly true of such institutions as the Labour Advisory Board and the General Wages Advisory Board. In each case, a secretariat staffed by competent staff who will devote full-time attention to the work of the various boards is crucial to their effectiveness and sustainability.<sup>55</sup>

<sup>55</sup> For details, see *Report of Proceedings, Recommendations and Action Plan of the National Tripartite Seminar on Strengthening Social Dialogue in Kenya*, Nairobi, Ministry of Labour and Human Resource Development, 9 – 10 August 2001.

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## Conclusions: The way forward

Although tripartite consultation is a relatively old tradition in Kenya, it has been used unevenly and irregularly. When it has been used, it has focused primarily on aspects of the labour market. However, growing economic difficulties, especially in the 1990s, created a renewed impetus for the recognition of tripartite consultation and social dialogue in helping to build a consensus around critical development issues. The available evidence, limited as it is, suggests that all the partners recognise the value of this mechanism in addressing the challenges of social and economic development facing the country. Indeed, it has also shown the enormous benefits derived from social dialogue. If effective social dialogue is to be sustained, the parties need to address a number of key issues such as reliance on tripartite consultation as opposed to unilateral decision making, strengthening of the social partners, including providing them with adequate resources, and administrative support for the institutions of social dialogue.

These and related issues were the subject of debate and analysis at a national tripartite seminar held in Nairobi in August, 2001. Participants at the seminar endorsed a set of recommendations around the issues discussed in this paper and formulated an action plan designed to strengthen social dialogue in Kenya.<sup>56</sup>

<sup>56</sup> See Appendix for Recommendations. For full report details, see *Report of Proceedings, Recommendations and Action Plan of the National Tripartite Seminar on Strengthening Social Dialogue in Kenya*, Nairobi, Ministry of Labour and Human Resource Development, 9 – 10 August 2001.

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## Appendix

### Recommendations and Action Plan based on the conclusions of the National Tripartite Seminar on Strengthening Social Dialogue in Kenya

#### 1 Recommendations

A fruitful exchange of views resulted in the following recommendations were made:

##### 1.1 Eliminating overlap and duplication

The functions of the National Tripartite Consultative Committee and Labour Advisory Board should be defined precisely.

The **functions of the National Tripartite Consultative Committee** should be as follows:

- to deliberate on social economic policies
- to serve as a data bank for collecting and disseminating information
- to deal with appeals which cannot be settled in sectoral committees/bodies

The **NTTC** and the **Industrial Relations Charter** should have legal force.

The **functions of the Labour Advisory Board** should be to advise the Minister on all labour matters.

##### 1.2 Sustainability of social dialogue

Trade unions should be industry based, the creation of splinter unions should be discouraged and mergers encouraged.

Section 18 of Chapter 233 should be amended, such that the Industrial Court, not the civil courts, should deal with registration of trade unions and appeals.

Stakeholders and members of civil society most representative of various sectors should be included in social dialogue.

##### 1.3 Funding

Since the Ministry of Labour plays a key role in maintaining industrial peace, which is the base of socio-economic development, the Government should allocate adequate budgetary funding for the operations of the tripartite institutions. That should reflect the needs of all the social partners to train and capacity building at all levels to enable them to make effective use of tripartite consultation.

##### 1.4 Institutional Framework

- A fully fledged multidisciplinary secretariat should be established for all tripartite consultation institutions, staffed by technically competent officials who will provide the tripartite institutions with administrative and technical services including information to their members, servicing their meetings, coordinating information and research and undertaking follow-up on their decisions.

- Existing secretariats should be strengthened through capacity building in order to carry out effective implementation, monitoring and evaluation of recommendations from the tripartite institutions, in line with the above.
- All dormant wage councils should be reactivated to look into wages and conditions in the relevant related industries.

## 2.0 ACTION PLAN

<u>Activities</u>	<u>Action</u>	<u>Time-frame</u>
Preparatory Planning Conduct Institutional Capacity Assessment	Ministry of Labour, PS, LC, COTU, FKE and other substantive departments	September – November
Identify Secretariat Members Convene first meeting of Secretariat Definition and interpretation of terms of reference		
Equipment and sundries budget proposal	MOL, PS, LC	December 2000
Reactivate dormant wages councils Forward Proposals on Labour Law Review	Secretariat members	January 2002
Briefs, monitoring and evaluation	Secretariat members	February 2002