

UNIVERSITY OF NAIROBI

FACULTY OF ARTS

DEPARTMENT OF SOCIOLOGY & SOCIAL WORK

**AN ANALYSIS OF TRIPARTITE LABOUR INSTITUTIONS AND THEIR
CONTRIBUTION TO SOCIAL DIALOGUE IN KENYA**

BY

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DECLARATION

I, Marilyn Wanjiru Mbugua, do solemnly declare that this study was conducted by myself and has not been submitted to any Institution of learning for examination purposes or otherwise.

SIGNATURE M Wanjiru DATE 06/11/07

We have supervised this work and are satisfied it is original work.

SUPERVISORS

- 1. Professor Edward Mburugu

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Date: 06/11/2007

DEDICATION

I dedicate this work to my children, Esther and Allan for their support throughout the course.

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This work would not have been possible without the reference to the work of others and the unwavering support of my Supervisors, Professor Edward Mburugu and Beneah Mutsotso, who worked tirelessly and willingly availed themselves despite their busy work schedules.

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I also wish to acknowledge my Sister Wangechi and my Special Friend Chaddar for being there for me always. To my Mother, thank you for your wonderful prayers. God Bless you all.

LIST OF ACRONYMS AND ABBREVIATIONS

- NTTC - National Tripartite Consultative Council
- GWAB - General Wages Advisory Board
- NITC - National Industrial Training Council
- NACOHS - National Advisory Committee on Occupational Health and Safety
- JICC - Joint Industrial and Consultative Committee
- COTU - Central Organization of Trade Unions
- FKE - Federation of Kenya Employers.
- ILO - International Labour Organization
- IRC - Industrial Relations Charter
- UN - United Nations
- NJCC - National Joint Consultative Council
- IMF - International Monetary Fund
- NSSF - National Social Security Fund
- KNUT - Kenya National Union of Teachers

DEFINATION OF KEY CONCEPTS

Social Dialogue:

Social dialogue is the continuous consultation between the three social partners namely the government, employers' representatives and employee representatives. The basic principle underlying the system is to cater satisfactorily for the interests of the three aforementioned partners to enable them attain consensus on labour issues.

Industrial Relations Charter:

This is an informal agreement uniting the three social partners, i.e., the government, employers and workers, to co-operate in all matters relating to labour and committing themselves to the principle and practice of social dialogue.

Tripartism:

The practice and cohesiveness of the three social partners that enables them to effectively engage in negotiation and consultative processes.

CHAPTER ONE: BACKGROUND AND PROBLEM STATEMENT

1.0 BACKGROUND

In Kenya, the organization of workers and employees for industrial relations purposes has been a tradition that emerged with colonialism. The colonialists introduced a capitalist mode of production which distorted the customary working practices which were based on family and community needs. Their goal was to extract surplus from their colonies in order to enable them accumulate capital for Britain. In order to achieve this labour was exceedingly exploited. The colonial capitalist set up gave birth to the concept of wage labour and consequently the colonial government was faced with a need to pass legislation that would ensure adequate supply of cheap labour to serve in their emerging capitalist ventures especially in plantation agriculture, industrial manufacturing and in the service sector. Out of this, a set of labour laws was born with an aim of regulating labour relations in the country.

As the working class population grew in size, it also became politically socialized and sensitized about their rights, which were being exploited and is a manifest characteristic of capitalism wherever it takes root. The development of agitation and pressure from the working class forced the colonial administration to progressively amend or abandon through Acts of parliament, most offending labour laws, regulations and practice. This eventually led to a set of labour legislation that was favourable to all parties involved i.e. the employer, employee and the government. These three parties formed the basis for industrial relations and the need for social dialogue.

The labour legislation in Kenya originates from several sources besides natural justice and fair play. Other sources are;

The constitution of Kenya

This is the supreme law of the land and to which all other laws are subject. The constitution provides the standard measure and direction to which other laws are pegged. It also has provisions, which are important to labour legislation for example freedom of speech, association and access to an independent judiciary.

The industrial relations charter

This is an informal agreement uniting the three social partners which are the government, employers and workers to cooperate in all matters relating to labour and committing themselves to the principle and practice of social dialogue. The industrial relations charter was signed in 1962 between the government of Kenya, the federation of labour now known as COTU and The Federation of Employers (FKE).

The ILO Conventions and recommendations

The ILO is a tripartite body whose primary duty is to set international labour standards on labour laws and practices through the adoption of conventions. It develops conventions and recommendations designed to protect the interests of government, employer and employees on matters of labour relations. National governments are expected to ratify and adopt ILO labour standards and translate them into labour legislations as they find them relevant to their situation. Kenya has ratified several conventions and therefore the ILO greatly influences labour laws in Kenya.

1.2 STATEMENT OF THE PROBLEM

Industrial peace is very crucial for development and more so for Kenya which is undergoing economic recovery. Social dialogue is therefore a useful tool for achieving a consensus between various stakeholders through impressing good governance, transparency and industrial peace. It is particularly useful as an avenue for attaining consensus especially on labour market issues as well as on broader issues of the economy and social policy.

Social dialogue is enshrined in the Industrial Relations Charter whose members voluntarily continue to play a crucial role in industrial relations. The parties concerned acknowledge the complementary role, which the charter has played and continues to play in maintaining the consultative processes of collective bargaining and tripartite consultation in industrial relations. Through these processes, strong and representative social dialogue has contributed immensely to the existing stability in industrial relations in the country.

In the promotion of social dialogue in Kenya, many institutions, committees or Boards have been formed with the aim of strengthening social dialogue and achieve industrial peace. Some of these

are government departments while others draw representation from diverse arms of government and private sectors.

Various studies have been conducted both locally and internationally with the aim of understanding and prompting the process in which workers and employers make claims upon each other and resolve them through a process of collective agreements that are mutually beneficial.

Some of these studies include:- Kimathi (2003) on the role of Labour inspections in the prevention of disputes in a industry in Kenya; Kibuna (2005) on the terms and conditions of employment in the EPZ's in Athi River; Oketch (1990) on the right of employee in Kenya; Omollo (2001) wage determination in the unionized private sector in Kenya.

These studies concentrated in the area of workers and employers right to freely form and join labour organizations to promote and defend their interest without interference from one another or the state. Employers and workers organizations by their very nature have different interests and objectives and therefore conflict must exist between these two parties.

Social dialogue as an area of research is newly emerging as opposed to traditional studies which mostly concentrate on collective bargaining and trade unionism. Therefore this study is investigating an emerging area of social research.

The aim of this study is to find out the contribution of the various institutions towards enhancement of social dialogue in the country. As indicated earlier, there are many tripartite institutions some of which operate without clear demarcation of jurisdiction in their work. As a result there is a tendency towards overlapping and duplication of effort especially the Labour Advisory Board (LAB) and the National Tripartite Consultative Council (NTCC). While both institutions draw their respective mandate from different sources, they function in an overlapping manner. The law setting up the LAB mandates it to provide policy advice to the Minister on labour and employment policy while the NTCC has responsibility on practically the same areas; that is to propose amendments to existing labour laws and procedures. It has been reported that there is overlap (Fashoyin 2001). However, the extent of the overlap and duplication is not clear hence the concern of this study. Further, if two or more institutions have overlap mandates, then each encroaches on the territory of the other which makes it possible that social dialogue may be undermined and not reinforced by these institutions.

Other institutions with duplicative roles include the National Advisory Committee on Occupational Health and Safety (NACOHS) and the National Industrial Training Council (NITC). Both have responsibility for the review of legislation, rules and regulations in their respective sectoral areas. At the same time, both NTCC and the LAB have from time to time considered issues of labour legislation in these areas.

There is also a problem in the lack of coordination of these overlaps and duplication of roles in these institutions. The issue for determination remains whether legislative review functions pertaining to NACOHS belong to the Advisory committee or LAB, or whether the former is a stage before the latter. It is necessary to understand and investigate the relationship between these two institutions. The overlapping responsibilities between the LAB and the NTCC, as well as the confusion as to the role of the LAB vis-avis that of other agencies like NACOHS or NITC has tended to create confusion in industrial relations in the country. It is clear that all these inconsistencies create a lack of clear cut procedures and emphasize the need to harmonize the jurisdictions of the various institutions and also ensure that such functions are complementary rather than competitive. Where there is competition, social dialogue is not reinforced but undermined.

An important aspect in the functioning of effective tripartite institutions is their ability to meet regularly. For example it has been reported the General Wages Advisory Board did not meet for a period of four years from 1995 to 1999 (Min of labour annual report 2000). The NTTC was moribund for almost fifteen years and was only revived in 1999. It has been argued that out of lack of frequent consultation and coordination, civil society organizations have preyed on labour issues in industry, a domain that is traditionally the responsibility of tripartite members. A case in point was the exposure to hazardous chemicals in the flower industry which was brought to limelight by the Kenya Human Right Commission. Another question that this study seeks to answer is what happens when an institution with such a glorious or noble task fail to meet for such a long period to resolve issues or give guidance yet there are many industrial relations issues in Kenya. There is also the question - what makes these institutions not to have regular meetings?

The legal framework is also a great concern regarding the effectiveness of social dialogue. While it is true that the Constitution gives recognition to the freedom of association to all citizens, a large proportion of public workers do not exercise this freedom to associate and collectively bargain and it is just recently in 2004 when the government grudgingly accepted the existence of the civil servants union and lifted a ban on it. They however have not accepted the dialogue and many a time have displayed a contemptuous attitude towards social dialogue. For example when the civil servants went on strike the government refused to negotiate, went ahead and sacked some employees and intimidated the rest to go back to work. In light of such events, the government has at times failed to promote social dialogue.

There are indications pointing out that the tripartite mechanism has not fully and effectively exploited its potential. The result being that the principle of tripartism has from time to time been undermined by the failure or lapses of one party to fully use the consultative process. Sometimes the government has undermined this principle by taking decisions unilaterally. An example is in 1994 when the ministry of finance amended some parts of the labour laws without reference to relevant social partners. This was to do with retrenchment whereby other partners like unions were to be consulted but instead the minister amended the laws allowing employers to retrench. This action was repeated in the year 2000 through the amendment of the work men's compensation Act, which gave employers power to undertake compensation without reference to the tripartite body.

Such examples have to a large extent undermined the principle social dialogue in labour relations. Therefore the study is designed around investigating how such unilateral decisions affect social dialogue and its implementation within the country. It is true that practice undermines the principle of tripartism and creates mistrust among the parties and serves to entrench the feeling that the government is not a keen player in tripartism.

The purpose of this study is to develop an inventory of existing labour institutions, their mandate and roles and consequently carry out an assessment of their relevance and effectiveness in steering labour relations in Kenya.

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1.3 RESEARCH QUESTIONS

- To what extent is social dialogue practiced in Kenya?
- How has social dialogue contributed to industrial peace?
- What are the perspectives of the tripartite partners of the involvement of civil society in labour matters?

1.4 OBJECTIVES OF THE STUDY

The overall objective of this study is to carry out an assessment of existing tripartite labour institutions and their contribution to social dialogue in Kenya.

The specific objectives of this study are:

1. To identify the roles and functions of the labour institutions in industrial relations matters.
2. To find out the level, nature and extent of institutional interaction.
3. To examine the extent to which social dialogue is promoted and practiced by the partners in labour relations.

1.5 SIGNIFICANCE OF THE STUDY

Social dialogue is a very important factor in regard to national development. This is due to the fact that development and economic growth are largely based on prosperity brought about by an increase in productivity and an increase in revenue. Therefore when there is industrial peace we have more revenue. Labour institutions are the machinery through which human resource can be organized to achieve industrial democracy through representation of workers' and employers' interests, and providing regulation in order to achieve industrial peace and harmonious labour relations. The assessment of these institutions will help to pinpoint where they have failed or where their shortcomings are; therefore they can use this information to work towards an improvement. Secondly, the government through this study will be able to understand specific areas for appropriate policy intervention to streamline industrial and labour relations in the country. Thirdly, development agencies such as the ILO, World Bank and IMF, will be able to determine specific areas of interventions in the development of institutional networks and instruments for effective labour market managements. Lastly, researchers and labour analysts will be able to identify research and policy gaps that need to be addressed for sustainable development of human capital.

1.6 SCOPE AND LIMITATIONS OF THE STUDY

The scope of this study covers the identification of social dialogue and the review of the performance of social dialogue institutions in order to identify gaps and to make proposals on how to improve social dialogue delivery by these institutions to the labour force.

The study is limited to the tripartite partners only.

CHAPTER TWO: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.0 Tripartism and Social Dialogue

Tripartism has been defined by the ILO (Tripartite Consultation, 2000) as the contribution of social partners to labour market and social and economic policies. There is the evolution of a socially responsive public policy that is fair, equitable and sustainable both internationally and locally. Fashoyin (2002), says that tripartism is a concept that is basic and fundamental to all nations because it is the cornerstone of achieving the goal of sustainable social and economic development.

Growing evidence and analysis including experience gathered by ILO and its constituent point to the importance of an infrastructure of social and economic institutions that promote industrial peace through resolution of conflicts by means of dialogue. It provides the social partners with a forum to engage in regular consultation, allows economic policies to be explained and if there are negative effects, they can be discussed and conclusions be found through consensus.

In its study of trade and labour standards, the Organization for Economic Corporation and Development (2006), concluded that enhancing the contribution of working men and women to productivity growth is an integral part of all development and goes hand in hand with measures to enable workers to organize and express their views in a manner that also provides employers with a mechanism of dialogue and negotiation.

2.01 The industrial relations charter

Social dialogue is enshrined in the industrial relations charter, drafted in 1962 just before the country got independence. The industrial relations charter is an informal agreement that forms the framework on which the three social partners namely the government, employers and workers organizations engage in social dialogue Omolo&Apiyo(2003). Since its introduction, the charter has been periodically reviewed in the years 1990, 1984 and 2001 a move that enables it to reflect new realities in the industrial relations systems as the charter continues to guide the exercise of industrial relations.

In the year 2001 the three social partners agreed to make the charter part of the labour code. This is an implication that all parties have faith in democratic principles and undertake to settle all future differences, disputes and grievances by mutual negotiation, conciliation and voluntary arbitration in accordance with the laid down machinery. To a large extent the charter incorporates important provisions of international labour standards, for example, the agreement that all sides respect each others rights to freedom of association and that no employee shall be forced to join union membership or be penalized on account of his trade union membership.

The industrial relations charter works on the basis of voluntarism and has no law enforcement powers meaning that it has no legal backing and therefore one cannot be penalized for not joining. So far the charter has guided reasonably well in the exercise of industrial relations in Kenya. The three social partners also undertook to educate labour officers, management and employees regarding their obligations to one another for the purpose of good industrial relations. Under the charter, a National Joint Consultative Council (NJCC) made up of representatives of FKE, COTU and the ministry of labour was formed. This council was to deal with general industrial relations issues concerning policy formulation (ILO 1999) and has power to adjudicate on disputes. Appeals against it are forwarded to the industrial court through established machinery.

The labour code and the industrial relations charter are both complimentary and therefore the aim of the partners is to elaborate certain provisions of the law through the charter. This way the consultative mechanism of social dialogue through collective bargaining and tripartite consultation are strongly entrenched. For example, the social partners have an agreement to fully cooperate with reconciliators and facilitators as well as to sign form "A" as soon as possible in order to speed up the final settlement of trade disputes. They have also agreed to deal with correspondence between them promptly. Another agreement between the partners is that none of them will engage in activities which are contrary to the spirit expressed in the charter.

The following are the responsibilities of the three tripartite partners;

Government's responsibilities;

- To ensure speedy settlements of disputes at all stages.
- To promote industrial trade unionism – this means that the government should not inhibit trade unions but instead come up with laws that promote them.

Employer's responsibilities;

- Recognize trade unions appropriate to their industry as negotiating bodies to their employees.
- Not to interfere with the rights of employee, most importantly freedom of association and not to discriminate, restrain or coerce any employees on the basis of union membership and participation.
- To respect the provisions of the ILO convention No. 98 on application of the principles of the right to organize and to bargain collectively.

Union responsibilities;

- Discourage any breach of peace or civil commotion by union members.
- Not to engage in union activities during working hours unless by permission from management.
- Discourage practices like negligence of duty, damage to property, careless operation and disturbing of normal work.

All the parties agree to give full support to the constitution and regulations of the NJCC as well as other joint machinery or boards set up under the law. The charter gives the management (employers/ FKE) the task to facilitate the proper functioning of joint machinery by availing facilities for meetings and allowing essential staff to take part in those meetings without loss of pay. The management has played this role well.

The undertaking by FKE and COTU to avoid issuing of press statements during negotiations or trade disputes is a good commitment since it guards against misinformation and negation of the negotiation process. However, the undertaking by all the partners to educate their members on the recognized discussion and negotiation procedure has not been adequately done.

The charter clearly sets the pace for dispute settlement machinery in Kenya and with its emphasis on joint consultation in all labour issues based on mutual understanding and confidence; it forms the basis of social dialogue.

2.1 SOCIAL DIALOGUE INSTITUTIONS IN KENYA

2.1.0 The Ministry of Labour and manpower development.

The Ministry is the main government agency responsible for initiation, processing and implementation of government policies on labour, labour laws and the general exercise of industrial relations (Fashoyin 2001). It is concerned with the management of public affairs in the field of labour which in its broad context can be taken to mean all matters relating to the economically active human resource in the whole country. The main activities of the Ministry of Labour include the following:

- Policy formation including the formal enactment or proclamation of labour laws and regulations.
- Policy shaping involving advising, drafting and discussion on new policy initiatives.
- Policy implementation, involving the enforcement of labour laws, the provision of advisory services, information and policy education on policy matters and the coordination and management of the implementation process.

The Ministry of Labour has seven departments namely; finance, administration, occupational health and safety, human resource management and employment, industrial and vocational training, micro and small enterprise, adult education and labour. Administration and finance are service departments, which the rest are technical. The Ministry is headed by the minister for labour and plays a unique role in the tripartite arrangements in which it represents the government of Kenya. The ministry is also a leading employer in the country, a fact which makes it bound by the framework of industrial relations. It houses important tripartite bodies like the labour advisory board and also deals with international labour organization issues like ratification of the ILO conventions, represent government in ILO congresses and all other activities related to labour. The ministry also houses the secretariat of the National tripartite consultative committee set up under the industrial relations charter chaired by the minister. The committee handles all labour issues brought to it by any of the three social partners.

The Ministry of Labour and manpower development undertakes data and processes it on wage trends in the country especially in those sectors that are not represented in the tripartite

agreement. It also facilitates the meetings of the wage Advisory Board as well as of all other wage councils in various sectors. Other sectors housed by the ministry include the Directorate of occupational safety and health, national social security fund, and directorate of industrial training.

With regard to labour administration, the ministry covers a wide range of functional responsibilities including; industrial relations, factory inspection, labour inspection, conciliation, investigation and demarcation of disputes as stipulated in the industrial relations charter and the trade disputes act. Other functions include, occupational hygiene, employment services, social security, workers compensation, labour research, labour migration and work permits. The industrial court, a key institution in the functioning of collective bargaining and general labour administration especially dispute settlement is housed by the Ministry of Labour.

As much as the Ministry of Labour plays an important role to promote social dialogued, it is also riddled with numerous limitations. It has not been able to provide a full range of services and the services which are provided are not coordinated as part of a unified system resulting in bureaucracy, duplication and confusion. The clients are not aware of the services which are in fact provided by labour administration system and where clients do actually know of the existence of available services, they do not know how to actually gain access to them, and when they do actually gain access to the available services, they do not receive real service.

The ministry and components of the labour administration system frequently complain about lack of resources whether it be vehicles, staff, operational funds, office accommodation, stationery, telephone etc which make provision of services ineffective and inadequate, for example the annual report of the ministry of labour and human resource development, 2000 page 6 reported that labour officers could not visit all areas of the country due to lack of transport.

The ministry also inadequately services the tripartite bodies, for example the National tripartite committee was not operational for a decade but is now back to its feet after some intervention. Labour administration in Kenya continues to embrace a range of traditional protectionist functions which although important have tended to dominate over its potential development role for example its feet after some intervention. Labour administration in Kenya continues to

embrace a range of traditional protectionist functions which although important have tended to dominate over its potential development role. for example its concentration on the modern formal sector which employs less than 10% of the workforce and neglecting the rest 90% which is in the informal sector. There is a need to examine policies, functions and structures to serve a wider range of clients.

2.1.1 The industrial court of Kenya

The industrial court is one of the important institutions within the industrial relations framework in Kenya as it plays an important role in promoting industrial peace and harmony (Cockar 1991). Generally, the court is guided by the principle of industrial law that it should conserve peace and equitable relations between employers and employees. Therefore its approach is reconciliatory. It is not bound by the strict rules of evidence, it can choose to hear disputes in public or private, it is flexible in its work unlike the rigidity found in ordinary courts. It was established in 1964 under the Trade Disputes Act. It is the final in the labour dispute settlement machinery in Kenya. Its decisions are not usually subject to appeal. It operates as a tripartite body with two judges, five court members and three executive officers.

The court also registers Collective Bargaining Agreements. It also acts as an arbitrator and ensures that it is impartial in the judgment of trade disputes. It closely works with FKE and COTU in all its activities. In 1997, the court had two judges, two personal secretariats, five members, three executive officers, six clerks, three copy typists, one driver and two subordinate staffs. The court is therefore understaffed.

FKE and COTU have each equal representation in the membership of the court. There are two courts, one and two, each court has one judge and other members who are not judges but knowledgeable in labour matters. In actual conduct of disputes, the judge decides best on the nature of the dispute whether all or some of the nominated members listen e.g. during the National strike by bank workers protesting against a benefit levy withdrawn by the government, about 12,000 workers were effectively sacked by government though most of them were later re-employed, following the successful intervention from the minister for labour. Those who were not re-employed went to the industrial court, even though the dispute was not a labour one but a parliamentary one. In this dispute the hearing was composed of a judge and two nominated members.

The court usually arrives at its decisions based on consensus, but if there is not consensus, the judge makes the final decision, which is not contestant.

On registration of collective agreements, the court studies them first to ensure they are within the law. Those which are not are rejected and sent back for review e.g. if wages agreed on between an employer and employees in a particular sector have the potential of creating problems for other employers in the same sector in terms of ability to pay, the agreement may be rejected and sent back to the negotiating parties to propose more realistic figures based on prevailing circumstances.

To determine wage levels, the court employs the services of economists who analyze the agreements in view of the prevailing economic circumstances in the country. Once registered, the agreement must be in force period of two years before another one is negotiated. This is in line with section 11 of the trade disputes Act.

In most cases, employers comply unlike in the 1990's when economic difficulties forced many employers to fail. The court discourages the parties in a dispute from extreme measures and instead encourage them to recognize the mutual responsibility in ensuring industrial growth. The court also protects workers against unfair labor practices and in some circumstances the court has power to review a Collective Bargaining Agreements or part of it. The court also ensures that national interests are given paramount importance and the rewards made. The court exercises impartiality in its awards as indicated in table 1 below which shows a relatively high number of agreements in comparison to the number of disputes arbitrated during the same period of 2000 – 2002.

Table 1: Collective Agreements and Trade Disputes 2000 – 2002

Year	Collective agreement		No. of disputes
	No. Registered	No. of employees covered	
2000	316	71,586	127
2001	247	43,031	113
2002	306	-	100

Source: Republic of Kenya: Kenya economic survey 2002, Ministry of Labour and Human Resource Development, Annual Report 2002.

The court can also initiate revision of an act of parliament for the benefit of workers especially in wages and conditions of work. The court also advises unions and employers on handling industrial relations matters because they are human relations matters. The courts awards are final but a dissatisfied party can appeal to the same court for reconsideration. There is no much consensus on whether, there should be an industrial court of appeal because it is argued, its creation would lead to more disputes and delays in implementation of awards. The court also does not enforce its awards, but a party requiring enforcement has to apply to the ordinary court for enforcement. The award takes effect from the date of publication in the Kenya Gazette. The Kenya Gazette is the official publication through which the government informs the public on decisions taken.

There has been a suggestion that the industrial court responsibilities should be expanded to include;

- Registration of trade unions.
- The court be given power to enforce its own awards
- The judges should be increased to six.
- There is a strong argument that the court services should be decentralized to provincial levels and national level to preside appeal and national issues.

- There has been the mobile court that sits in Mombasa and this needs to be extended to other parts of the country.
- Judges handle sensitive issues hence they need security of tenure in their appointments which they have.

2.1.2 The National Tripartite Consultative Committee (NTCC)

This is a National level committee which was created by the industrial relations charter giving it power to handle matters affecting the economy in general and employment matters in particular (industrial relations charter, article (b) (1). It is therefore within the framework of social dialogue. The committee has been docile for many years after its inception but its importance as machinery for dispute settlement led to its rejuvenation by the tripartite social partners in the late 1980's (Fashoyin, 2001). Currently, it is an important forum through which policy issues on industrial relations and labour issues are formulated. An example is the June 2002 sacking of the managing Trustee of the National Social Security Fund (NSSF) by the minister without consultation with other social partners. What followed was a boycott by workers and employer representatives of subsequent meetings called by the minister until the decision was rescinded and new managing trustee appointed in accordance to established procedures.

The NTCC is the barometer of industrial relations in the country as well as a convenient forum for sharing information between the social partners (Fashoyin, 2001). It discusses the status of the conventions and the steps the government is taking towards their ratification and implementation. It seeks advice from other government officials in special circumstances. The committee comprises of;

- 6 workers represented by COTU,
- 6 employers represented by FKE
- 4 ministry of labour officials

The minister for labour chairs the NTCC. Other ministry representatives include the permanent secretary, commissioner for labor and the chief industrial relations officer.

It has been argued that the government representatives are too high powered therefore making it easy to veto discussion of issues but on other hand, the seniority of government representatives is an indication of the seriousness which the government attaches to the mandate of this committee in industrial relations and disputes settlement.

2.1.3 The Labour Advisory board (LAB)

The Labour Advisory Board membership is comprised of four representatives from workers and employers respectively and three independent members who must be knowledgeable in labour matters appointed by the minister. The ministry also provides the board secretary. The inclusion of independent members allows the Board to have the opportunity to get an outsider point of view on labour matters.

The LAB is provided for in the employment Act CAP 226. Its main role is to advise the minister for labour on labour and employment issues. However despite this mandate its work has been limited to labour relations policy i.e. formulating and reviewing legislation and matters relating to international labour standards. In industrial relations issues LAB has done little because this has been the domain of the National Tripartite consultative committee.

With the guidance of the commissioner for labour, the LAB makes recommendations to the minister, which is often used to initiate proposed changes put to it by the government or one of the social partners. For example in 2001 the LAB played a key role in the government's ratification on these conventions; equal remuneration convention, 1951 (No 100). Discrimination in employment and occupation Convention, 1958 (No 111) and the worst forms of child labour convention, 1999 (No 1820) Fashoyin(2001). The workings of the LAB have sometimes been rendered ineffective by the Ministry of finance. In 1994 the minister of finance introduced an amendment to the regulation of wages and conditions of Employment Act and also the Trade Disputes Act. The amendments shifted redundancy issues from the Trade Disputes Act to the regulation of wages of Employment Act. It also revised days for payments for each year served from 10 to 15. With these changes redundancy which was previously a trade dispute subject to investigation and determination by an independent body before it could be come legal, was simply reduced to an employment affair in which trade union has litter or no role to play at all. Consequently, the obligation of the employer is to simply inform the workers individually and pay the legally approved redundancy benefits. The LAB is mandated to meet at least three times a year which is inadequate due to the magnitude of labour issues in the country.

2.1.4 The General wages Advisory Board (GWAB)

The collective bargaining machinery in Kenya only applies to unionized workers Cockar(1981). Hence GWAB is very important in that it deals with a huge chunk of the workforce that is not unionized numbering in millions scattered across many sectors. GWAB is concerned with wage regulation and wage setting for this many groups of unionized workers Cockar(1981).

The Board is provided for in the Regulation of wages and conditions of Employment Act of 1951. Its purpose is to protect workers in certain sectors from exploitation or in situations where unions do not exist or are too weak to have effect. The minister for labour under this Act has power to form wage councils in sectors where the Board has power to regulate wages and conditions of employment.

GWABs main activity has been to review wages and other conditions of work which have tended to be neglected. Presently there are 15 wage councils in Kenya. The ministry of labour has the responsibility to ensure that wage councils' orders are implemented and adhered to through routine labour inspections. This has not been the case due to many factors; however unions are usually at the forefront in monitoring enforcement of collective agreements.

2.1.5 The joint industrial and commercial consultative committee (JICC)

It was established in 1997 as a forum for key stakeholders in the economy to have a chance to address or influence economic policy issues suggest solutions and sometimes appoint the relevant agency to implement Fashoyin(2001).

The committee is made up of 50 members who mainly represent institutions and is chaired by Ministry of Finance. Transport and Communication, local authorities, labour and manpower development, Attorney General among others.

Employees are represented by the central organization of Trade Union while employers are represented by several bodies among them; federation of Kenya employers, Association of Kenya insurers, Kenya Bankers Association, Kenya Associations of manufactures, the East African Association and the Kenya National Chamber of Commerce and Industry.

The committee gives business people a view of the government's economic policy and how it affects business in Kenya. This gives the business community and opportunity to have an input in solving economic crises facing the country consequently fostering the process of social dialogue. The subject matter of the committee widely varies and includes the following; labour law reform, the justice system, imports, regional tariffs, infrastructure just to name a few. In this regard, JICC serves as an important body in which the country's top stakeholders discuss social and economic issues and serves as an indicator of the Kenyan government's commitment to the tripartite committee and consultations with social partners on issues which affect labour both directly and indirectly.

2.1.6 The National Advisory Committee on Occupational Health and Safety (NACOHS)

This committee was set up under the (1951) factories and other places of work Act in 1990. The amendment also created the Directorate of Factories as an independent unit within the ministry of labour. It was the first institutional forum for dealing with health and safety on a tripartite basis. Previously factory inspection was carried out by the department of labour and issues relating to it were discussed by the National tripartite consultative committee or the Labour Advisory Board.

The NACOHS now advises the minister for labour on occupational health and safety matters. It also initiates policy changes, rules and regulations on occupational health and safety in Kenya and also oversees their implementation and adherence. Its membership consists of the following.

- Ministry of Agriculture, Health, Environment, and Natural Resources, Trade and Industry and Tourism.
- Kenya Bureau of standards.
- Government chemist
- Public universities
- National Council of Science and Technology
- Central Organization of Trade Union
- Federation of Kenya Employee

The committee is chaired by the Directorate of occupational health and safety. It has an internal technical committee responsible for initiation and development issues for example those which

are discussed in the Labour Advisory Committee before they are passed as recommendations to the minister of Labour.

In this regard NACOHs is responsible for legal, regulation and policy matters on occupational health and safety and not the, LAB. However, the demarcation of functions is not clearly specified, and there is clearly a duplication of roles because both committee NACOHs and LAB can initiate legislation Review.

2.1.7 The National Industrial Training Council (NITC)

Established in 1971, its aim is promoting industrial training and sharing training costs equally within the industry. The council evolved out of the Industrial Training Act of 1971 and by addressing middle –level technical staff, it seeks to improve the quality and supply of well trained staff for industries in Kenya. The council also advises the minister for labour on issues relating to industrial training. Tripartite membership within NITC includes the Government of Kenya. It has six members in this council represented by ministry of labour, ministry of finance, directorate of personnel management, ministry of education and ministry of tourism and industry.

The NITC has eleven training committee in specific industrial sectors namely;

1. Printing and publishing
2. Food processing and allied industries
3. Chemical manufacturing
4. Banks and other financial institutions
5. Agricultural and plantations
6. General engineering
7. Motor transport and allied industries
8. Building and civil engineering
9. Saw milling, timber and furniture
10. Textiles and allied industries
11. Commercial and distributive

The law requires that every employer with five or more workers should register with NITC but the three-year apprenticeship contract with enterprises has led into a reduction in its appeal among employers because the business environment is usually unstable.

2.2 WORKERS ORGANISATIONS

Trade unions are one of the most important social movements underpinning employees' development, democracy and good governance. Workers' right to freedom of association and thus to take collective action, therefore, lies at the core of trade union activities.

The trade union movement started after the industrial revolution in Europe and was later adopted in Kenya during the British colonial times. Historically, the organization of workers into trade unions has been based on the principle of one union per given industry or sector Okoth(1982) Therefore in unions in Kenya are sector based although most are general unions in the sense that they operate on a broader context than they were intended. For example, the Kenya Union of Commercial, Food and Allied Workers represents workers in multiple industrial sectors like banking, food .retail financial, protection and shipping services. However, during the past decade or so this union structure has come under strain due internal union division and wrangles.

Majority of trade unions in Kenya are affiliated to The Central Organization of Trade Unions (COTU) which is the country's only federation of trade unions mutsotso(2002) However, the giant teachers union (Kenya National Union of Teachers (KNUT) is not affiliated to COTU. The total membership of COTU affiliated membership is today estimated at about 250,000. This figure is less than half the membership before the mid 1990's when retrenchment was introduced. There has been a big decline in trade union membership mainly due to the shrinkage in the economy as well as withdrawal of union rights in large segment of the public sector especially when the civil servants union was deregistered in the early 1990's. The ban has recently been lifted but not all civil servants are unionisable and as it is only lower cadre staff who are allowed to join the union.

It has been argued (Owiti 1990) that the main function of a trade union is to protect the interests of its members. Other important roles of trade unions include; regulate and improve relations at work by initiating collective bargaining agreements, improve working conditions through

negotiations, conduct research on various trends affecting labour, provide training opportunities for their members for self improvement and performance improvement. Trade unions are also supposed to recruit new members, handle grievances at shop floor level, represent members at the industrial court and tripartite meetings, invest on behalf of members and also organize strikes and boycotts. However, trade unions in Kenya hardly undertake research, invest or educate their members.

2.3 EMPLOYER ORGANIZATIONS

Most employer organizations are affiliated to or associated to the Federation of Kenya Employers (FKE). The Federation was registered as an employers' association in Jan 1959 under the provisions of the Trade Unions Act (cap 233). It has remained the undisputable voice of employers especially in the field of Industrial relations and human resource management. FKE performed this function before independence and continues to do so with considerable expertise and commitment.

According to the FKE Annual report (2004), the federation's membership, including the associations affiliated to it had continued to decline from 2484 in December 2002, to 2456 in December 2003, and to 2429 in December 2004 of which 1558 were direct members and 871 were members of the associations affiliated to it. The decline has been primarily caused by the continued poor performance of the economy.

In the year 2004, the secretariat continued to act as a secretariat to the following nine (9) employers associations;

- The Association of Local Government Employers.
- The Kenya Association of Building and Civil Engineering Contractors.
- The Distributive and Allied Trades Association.
- The Sisal Growers' and Employers' Associations.
- The Engineering and Allied Industries Employers' Association.
- The Timber Industries Employers' Association.
- The Motor Trade And Allied Industries Employers' Association.
- The Agricultural Employers, Association.
- The Kenya Coffee Growers' and Employers' Association.

Source: FKE annual report (2004)

There were also eight (8) trade associations affiliated to the Federation but were providing their own secretariat services in the year 2004. These were;

- The Kenya Tea Growers' Association.
- The Association of Hotel Keepers' and Caterers.
- The Kenya Bankers' Association.
- The Kenya Vehicle Manufacturers' Association.
- The Kenya Association of Air Operators.
- The Kenya Security Industry Association.
- The Association of Kenya Insurers.
- The Protective Security Industry Association.

Source: FKE annual report (2004)

The role of employers in Labour relations is to continuously raise the social consciousness of Kenyan employers by way of promoting sound management and industrial relations practices. To this end, FKE is structured in such a manner that labour relations occupy a prominent part within the organization. An industrial relations department exists that concerns itself with the following areas among others; negotiations, consultations, conciliation/investigation, Industrial court, legal advice, Advisory Tripartite meetings and Management Training in Industrial relations.

The Federation of Kenya employers organizes itself by having branches across the country, through which it is able to give timely attention to issues affecting its members in the particular geographical area. In addition, it operates through its industrial associations in addressing issues that are specific to the individual industry or sectors of the economy.

2.4 Critique of labour institutions

There are many tripartite institutions and processes for social dialogue in Kenya. However, several of these institutions operate without clear demarcation of jurisdiction in their work. The result of this is the tendency to overlap and often duplicate work. There is a need to remove these overlaps.

There is also a need to achieve complementarity between the work sectoral tripartite institutions for example NACOHS and the more all-embracing institutions like the LAB, So that the institutions can play a complementary role rather than a competitive one that kills the spirit of tripartism. The emphasis here should be on the need to harmonize the jurisdictions of the various institutions as well as to ensure that such functions are complimentary rather than competitive.

Another important element in the functioning of effective tripartite institutions is their ability to meet regularly to facilitate consultation, sharing of information and decision making in matters that affect labour either at work places or at the national levels. When such institutions fail to meet regularly, their effectiveness becomes less significant and undermines the principle of consultation and participation. It also implies that workers conditions of service and remuneration remain static despite changes in lifestyles and costs of living.

Another important concern is the low representation and the apparent gap in gender balance in tripartite institutions. There are very few female representatives which do not commensurate with the fact that women form a dominant and rapidly growing proportion of the labour force. Social dialogue institutions at both the national and enterprise level have not fully reflected this reality.

There is also the need for social partners to have a level of internal cohesion in their respective constituency in order to be able to strengthen their legitimate role and position. Of particular concern are the numerous internal strife and splinter groups in unions. This strife divert their attention from their mandate of championing the interest of workers and has led to the substantial decline in the union membership.

Trade unions need to take some steps to develop measures that will strengthen their internal cohesion to enable them to make effective response to pressures in the labour market for example increasing technology and mechanization.

Similarly employers will have to deal with the challenge of competition that seems to be emerging among various employers and business organizations. There is the recent formation of the Kenya Business Forum and it's only a question of time to see how the FKE and new forum will relate and whether they will merge or coordinate in their work.

Another factor that inhibits performance and is an outright threat to the continuity of labour institutions is funding shortages. There is absence of adequate budgetary allocation, material resources and manpower a fact that has undermined the important role that these institutions can play in policy formulation and implementation. The ministry of labour has many deficiencies both human and financial. There has been reported shortage of staff and funds as well as other machinery and equipment like vehicles.

2.5 THEORETICAL FRAMEWORK

I will use two theories namely structural functionalism and conflict theory to explain social dialogue and industrial peace in Kenya.

a) Structural Functionalism

According to Thomas Bernard (1988) Structural functionalism is placed in a broader context among consensus theories whereas the sociological conflict theory is placed among conflict theories. Consensus theories emphasize shared norms and values as fundamental to society. They focus on social order based on tacit agreements and are of the assumption that social change occurs slowly and in an orderly manner. Conflict theories on the other hand put emphasis on the dominance of some social groups by others and to them social order is based on the manipulation and control of less dominant groups. They view social change as occurring rapidly and in a disorderly fashion as subordinate groups overthrow dominant groups. However, it should be noted that however much these two theories seem to be different, they are both macro level theories focally concerned with large scale social structures and social institutions, in this case social dialogue, industrial peace and labour institutions.

The primary concern of structural functionalism is the social structures and institutions of society, their interrelationships and their constraining effects on actors (Ritzer, 1992). This approach as posed by Auguste Comte, Herbert Spencer and Emile Durkheim draws analogies between societies and biological/mechanical organisms. The society is looked at as a whole which functions with the contributions of small organisms or parts within it.

Structural functionalism focuses on the social system as a whole as well as on the impact of the various parts for example social structures and institutions on it. Functionalists tend to see the components of the system as contributing positively to its continued operation (Ritzer: 1992). The parts of the system, as well as the system as a whole are seen as existing in a state of equilibrium, such that a change in one part leads to a change in other parts. Changes in parts may balance each other so that there is no change in the system as a whole but if they do not achieve this balance then the entire system probably changes. Therefore structural functionalism adopts an equilibrium perspective which is not necessarily a static point of view but rather one that sees the changes that occur as doing so in an orderly and not a revolutionary way.

One of the major concerns of structural functionalists is an analysis of things – the structures, and particularly the functions that a social system needs in order to survive (Ritzer, 1992). Talcott Parsons defined four functional prerequisites of any action system. These are: adaptation, goal attainment, integration and pattern maintenance. Although Parson views social system as a system of interaction, he does not take interaction as his fundamental unit in the study of social action but rather chooses to use the status role complex as the basic unit of the system. Status refers to a structural position within the social system and role is what the actor does in such a position which is looked at in the context of its functional significance for the larger system.

In this instance we can look at social dialogue and industrial peace as social systems because they fulfill or operate within the functional prerequisites of a social system as delineated by Talcott Parsons and other functionalists. The first one is that social systems must be structured so that they operate compatibly with other social systems. The three tripartite partners namely the government, employee organizations and employer organizations are social structures within which the social system of social dialogue and industrial peace is entrenched in a way that they are able to operate compatibly with each other as part of the whole.

Second to survive the social system must have the requisite support from other systems, a point which is illustrated by the fact that social dialogue and industrial peace have the support of both local and international laws, the national constitution and the government as well. Third the system must meet a significant proportion of the needs of the actors and we have seen that social dialogue and industrial peace have the support of both local and international laws, the

national constitution and the government as well. Third the system must meet a significant proportion of the needs of its actors and we have seen that social dialogue and industrial peace ensure that the needs of all the parties concerned are addressed. The system must elicit adequate participation from its members as well as have at least minimum control over potentially disruptive behavior and it is for this reason that tripartite members are all bound by the industrial relations charter in which social dialogue is enshrined. Each partner has a well defined role and is expected to abide by it in order to minimize disruptive behavior.

Finally, if conflict becomes sufficiently disruptive, it must be controlled and this is what social dialogue is all about. It seeks to control and maintain good industrial relations and ensure this is upheld by quickly and amicably enduring to solve all trade disputes.

Parsons identified four structures or sub-systems within which the prerequisites of any action system operate; the economy is the sub system that does the function of adapting to the environment through labour, production and allocation of sources. The polity (or the political system) does the function of goal attainment by pursuing societal objectives and mobilizing actors and resources towards that end. The fiduciary system for example schools and family handles the latency function of transmitting culture (norms and values), in this regard of the existing labour force and finally the societal community, for example the law performs the integration function which coordinates various components of society.

Robert Merton is another proponent of functional theory but disagrees with some functionalist views and maintains that although it may be true of small primitive societies, the generalizations cannot be extended to larger more complex societies. Merton argues that the view that all standardized social and cultural forms and structure have positive function – contradicts what we find in the real world. Ritzer (1992) gives an example of rabid nationalism in a world of proliferating nuclear arms, which can be highly dysfunctional.

Merton also disagrees on the postulate of indispensability. He argues that not all standardized aspects of society have positive functions and represent indispensable parts of the working whole. According to him we must at least admit that there are various and alternatives found

within society. Merton also noted there could be dysfunction of parts where they have negative effects, due to consequences brought about by latent functions which are unintended.

Merton's clarifications are of great utility and his ideas may be called neo-functionalists. By realizing that not all structures are indispensable to the working of the social system and that some can be eliminated helps the functional theory overcome some of its conservative biases and opens the way for meaningful social change where institutions continue to exist and improve by doing away with dysfunctional parts and dealing with unintended consequences.

b) Conflict Theory

The other theory that we can use to explain social dialogue and industrial peace is conflict theory. Conflict theorists, like functionalists are also oriented towards the study of social structures and institutions. Conflict theory can be seen as a development that took place in reaction to structural functionalism. Conflict theorists have their roots in Marxism which recognizes that ultimately it is coercion rather than consensus that maintains social order. Society is depicted as constantly engaged in the process of change resulting from the social conflict and dissent which exists at every point in the social system.

Rather than equilibrium and consensus, conflict theory focuses on disintegration and coercion where those with power dominate and control those who are less powerful. Due to this conflict every society at every point is subject to the processes of change. This is true of industrial peace because it is periodic and has been maintained through continuous negotiations, agreements and consultations over various conflicts or points of disagreements at the work place. In recent years, an increasing number of industrial and commercial enterprises have introduced the position of personnel manager to cope with matters of hiring and firing, advice to employees etc and these have to work in collaboration with employee representatives (unions) to ensure that the interests of each party is protected because they both have conflicting interests. The interests of the commercial enterprises are more likely to be profit maximization while the interest of the employee may be fair wage for his labour to enable him meet social obligations like feeding, educating and sheltering his family.

Conflict theorists ranging from Marx, Dahrendorf, C. W. Mills and Habbermas stipulate the existence of two opposed groupings in any given society. Each of these groups share certain features and each differs from the other by the contradictory orientations of interests. They see conflict arising from these two different groups, one being oppressor and exploiter and the other being the opposed and exploited. Those in dominant positions seek to maintain the status quo while those in subordinate positions seek change.

George Simmel, another conflict theorist differs with the opinion and is of the opinion that conflict can arise from within a group in search of a common goal. Simmel agrees that conflict is inevitable and is part of every society and that a purely peaceful and harmonious society is “empirically unreal and cannot support real life processes” Abraham F. M. (1982). He however sees conflict as functional in society. It may be a way of preserving relations and an important ingredient to relationships in society. According to Simmel there is a bond between conflict and unity which brings about growth of social structures. Victory is not always the end of a conflict but provides a peaceful period for new conflict to simmer. This is because those involved in conflict are the same ones who set the rules of the game and usually have shared interests. They may realize they are victims of one oppressing force for example when workers go on strike because of poor wages and on the other hand the capitalist trying to keep all surplus profits to him. The interests of these two parties, the worker and the capitalists, are conflicting because both are driven by a common interest of economic gain. In order for each party to achieve what they desire their conflict will lead them to make collective bargaining agreements or employment contracts and hence the importance of social dialogue. In this regard, conflict is a means to solving divergent dualisms that lead to a unity of purpose in the end.

CHAPTER 3: METHODOLOGY

3.1 Study population

Data was collected from a wide range of parties and stakeholders involved in social dialogue in Kenya. These included senior COTU officials, FKE members and officials from labour institutions. The unit of analysis tripartite labour institutions and the observation units were key officers working those institutions and were directly involved in the process of social dialogue.

3.2 Site Selection and Justification

The study was conducted in - Nairobi, the reason because it is the headquarters of the respective organizations and areas of operation for the committees that are key sources of information for the study.

3.3 Sampling Procedure (Design)

Due to the nature of the study, non-probability sampling method was used and specifically purposive sampling criteria. I did seek information from definite key informants who were be purposively identified due to the nature of their work as representatives of their respective institutions' interest in tripartite relationship and social dialogue. These representatives are specific people who are known to all, for example, labour commissioner, senior industrial relations officers, secretary of the various boards from the labour institutions mentioned. These institutions are:

- Ministry of labour
- Industrial court
- The National Tripartite Consultative Council (NTTC)
- The General Wages Advisory Board (GWAB)
- The National Industrial Training Council (NITC)
- The National Advisory Committee on Occupational Health and Safety (NACOHS)
- The joint Industrial and Commercial Consultative Committee (JICC)
- Central Organization of Trade Unions (COTU)
- Federation of Kenya Employers (FKE)

3.4 Methods of Data Collection

Two methods were used to collect information for this research. These methods were qualitative and quantitative.

3.5 Tools of Data Collection

1. Interview Guide

It was used to hold key informants interviews for in-depth discussions. There were 25 key informants who participated in the social dialogue meetings and were directly involved in industrial relations matters. They included industrial relations officers, labour commissioners, COTU officials and employees of the FKE etc. The aim was to find out what is the purpose of social dialogue, its relevance, the stakeholders and their level of attendance, how social dialogue is enshrined, its contribution to industrial peace and the commitment of the partners. It capitalized on the special knowledge, experience, and insights over the subject of study.

2. Secondary Data

This included reports from the Ministry of Labour and Human Resource Development, performance reports, seminar reports minutes of meetings, resolutions, reviews of performance, and books.

Since I was seeking to interview people holding key positions in the identified labour institutions, I only interviewed officers who attend meetings and are knowledgeable in labour relations from each Institution.

CHAPTER 4: DATA PRESENTATION AND DISCUSSION

4.1 The Basis of Social Dialogue in Kenya.

The Industrial Labour Code and the Industrial Relations Charter form the basis of social dialogue in Kenya. The respondents provided a good insight into the basis of social dialogue by emphasizing that the relationship between the Industrial Relations Charter and the Labour Code is complimentary and therefore the two aim to elaborate certain provisions of the law through the charter. By so doing, the consultative mechanism of social dialogue through collective bargaining and tripartite consultation are strongly entrenched.

The labour code is divided into the following categories:

- Terms and Conditions of Service.
- Machinery for Association and Dispute Solving.
- Harmonization of Government, Employers and Workers Interests.
- Health, Safety and Insurance.
- Social Security and Training

4.1.1 Terms and Conditions of Service.

The Terms and Conditions of Employment are the general rules that govern the relationships between employees and employers. Under this category are the Employment Act CAP 226 and the Regulation of Wages and Conditions of Employment Act CAP 229. The two legal instruments stipulate the general terms and conditions of employment and also the establishment of Wage Councils for determination of the same. The law does not determine how much an employee is worth, but rather leaves this to the parties concerned to negotiate to the best of their capabilities through dialogue. However, the law sets the basic minimum wage below which employers are not supposed to go. But employers are allowed to go above the minimum wage. The Labour Department of Ministry of Labour is charged with the responsibility of ensuring that these rules are followed. Apart from authorized deductions, the employee receives the entire amount of wages agreed. The two Acts CAP 226 and 229 also define the nature and the type of contracts of employment.

4.1.2 Machinery for Association and Dispute Solving.

The Trade Unions Act CAP 234 allows employers and employees to form associations for the purpose of organizing themselves and exercising their collective strength.

Collective disputes are reported through labour officers and labour commissioner and eventually to the Minister. The commissioner files them in the industrial court which handles them unless a special tribunal or Board of enquiry is set up.

It was also noted that generally, individual disputes are handled either through the Ministry of Labour or through ordinary courts. It is only collective disputes that are handled by the Industrial Court. Information from the Ministry of Labour indicated that individual employee complaints are handled by the Minister for Labour through the labour department which has power to prosecute the employer for breach of any law. Employees however, have the option of going to ordinary courts in civil suits under the relevant statutes and the common law. The cases reported are an indication that social dialogue is not working effectively.

Table 1: Individual Reported Disputes and Method of Resolution, 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: Ministry of Labour and Human Resource Development, Annual Report 2000.

4.1.3 Health, Safety and Insurance.

The health and safety of workers (employees) is also an important aspect and is provided for in the Workmen's Compensation Act CAP 236 and the factories and other places of work Act CAP 514. The Workmen's Compensation Act is an insurance scheme that compensates employees for injuries that occur in the course of duty. The factories other places of work Act is basically a hygiene law that sets standards of health and safety in factory premises.

It was apparently clear that the health and safety of employees is a major concern of Unions. They expressed the need and importance of inspection of chemicals and substances that are harmful to the workers and that where such exposure occurs the workers are provided with protective clothing and other requirements stipulated by the law. The researcher observed that the Unions were doing a poor job in playing this role they seemed to perceive as important because employers were consistently and openly flouting these regulations concerning health and safety at work without much intervention from unions. This has been cited repeatedly in flower farms where workers were exposed to hazardous chemicals as well as in the building sites, like the building that recently collapsed in River Road on 24th January 2006 where workers are supposed to be wearing protective gear.

4.1.4 Social Security and Training

The NSSF was established by an Act of Parliament (CAP 258) of the Laws of Kenya. Its mission is to provide basic social security services and welfare support to all workers in Kenya. A contributing member of the fund must be registered with the fund and both employee and employer share contributions to the fund. It is therefore a tripartite entity with governments employer and employee participation.

However, part II of the Act that establishes the fund stipulates that it be operated and managed by a Board of Trustees under the Ministry of Labour and Manpower Development. Therefore, the fund operates like a part of the Ministry while COTU and FKE are only invited to participate. This does not reflect tripartism and social dialogue which is the basis upon which labour relations is exercised. Representation at the Board of Trustees is not enough participation and there is need to amend the NSSF Act to reflect true tripartism.

Finally the labour code category that deals with training and industrial development is captured in the industrial training Act CAP 237. This Act set up the department of Directorate of Industrial Training whose role is to contribute towards training and regulations as well as facilitate training of employees. Here there is no dialogue because the three partners don't meet to agree but rather rely on the directorate to give guidance.

4.2 Labour Inspections

Kenya laws have no provision for tripartite labour inspections and therefore there wasn't much the Unions could do about this issue other than engineer strikes when the issue came to their attention. This shows a weakness in the social dialogue mechanism which needs to be addressed. The government through the Ministry of Labour conducts all labour inspections but if FKE gets a report on non-compliance of one of its members, it can assist the government with investigations.

However tripartite inspections occur only when there is a crisis or disaster for example the environmental pollution that caused acid rain in Webuye and the risky exposure of workers to chemicals in flower farms in Naivasha that was brought to limelight by human rights activists. There was also the case of deplorable working terms and conditions at the Del Monte farm in Thika which was brought to limelight again by civil society. These examples demonstrate that social dialogue tends to be triggered by crisis in some cases but not that it is fully entrenched in the existing mechanisms.

4.3 National Level Social Dialogue and Institutional Framework

There are two major national tripartite institutions namely the National Tripartite Consultative Committee (NTCC) and the National Industrial and Commercial Consultative Council (NICC). The two councils are purely consultative forums where social partners discuss general industrial relations and specific problems and challenges facing the partners both individually and collectively. Their contribution to social dialogue is in the areas of public policy formulation, guidance and advice especially when issues in the committee agenda go beyond labour market issues or when the work of other arms of government have an impact on labour.

The NTCC has 16 members consisting of the following:

- 6 employers, represented by FKE
- 6 workers, represented by COTU
- 4 government officials represented by the Minister, the Permanent Secretary, the Labour Commissioner and the Chief Industrial Relations Officer.

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Only the Minister can chair the committee and he is also the one who calls for such meetings. In principle it was noted that they are supposed to meet quarterly i.e. four times in a year. However, in practice they only meet once or twice a year. In recent meetings, members discussed measures being taken by the Ministry to ratify ILO conventions, review labour laws, employment policy and were instrumental in the reactivation of the union in the civil service. The NTTC has also been concerned about the state of industrial relations in the country, in particular the growing internal division in the trade unions and the potentially damaging role of litigation especially in civil courts. For example all the six unions created since the late 1980s were on the orders of the court. They are unhappy with this development and therefore the committee has agreed to support legislation which confines the power to register trade unions to the industrial court. This also means that since the late 1980's social dialogue has not been strong hence the recourse to courts to resolve issues that would have been amicably resolved amongst them.

Another concern of the committee is the application of certain provisions of the labour code in EPZs. In its effort to attract investors the government in the 1990s banned union activities in EPZ zones. According to COTU this led to massive exploitation of workers leading to considerable disharmony in the industry. Ugly incidents of labour unrest started to make headlines in the local press in 2003 and this saw workers down their tools as they pressed and agitated for better terms and conditions of service and the right to be represented by a Union. The strikes ended with a loss of 8000 jobs and revenue/profitability estimated at twelve billion shillings occasioned by lost man-hours. The many strikes in reference mark a reflection of weak or absence of social dialogue structures in the country since the government had unilaterally changed the law to favour its concerns without involving other partners. This in itself is against the spirit enshrined in the charter.

In all these circumstances, FKE, the Ministry and the Workers' Unions came into focus. The challenge that faced FKE and COTU related to mediation in a situation where EPZ factories were not registered members of the federation and the workers had no Union representation. Peace was restored only after the involvement of all the three social partners - the employers' umbrella organization (FKE), COTU and the government itself. This was done and harmony was restored in the affected establishments. Currently the NTCC is deliberating employment

policy and application of certain provisions of the labour code in EPZs. The case of the EPZ demonstrates that where a partner does not embrace social dialogue, industrial peace is undermined. It also underscores the importance of continuous consultation as the basis for industrial peace and entrenchment of social dialogue in Kenya.

Exchange of information and strategies through continuous consultation is critical to ensuring good industrial relations and is evidence of social dialogue. On the basis of this exchange, the social partners are able to brief their respective members on the measures being considered by either partner as well as the need for them not to take premature actions such as lay offs or reduction of wages and how to dissuade workers from negative industrial actions.

4.4 Institutional Framework and Performance

4.4.1 Labour Advisory Board

This is an advisory body to the Minister and he is the one who calls and chairs the meetings. All the partners recognize their role as mainly policy advisors of matters relating to employment. FKE and COTU said that their recommendations are hardly rejected because before they are presented to the Minister, they have to be approved by all the social partners.

The Board meets at least three times annually but there was a reported irregularity of meetings and interviewees stated that they had only met twice since last year. Very often, the failure to meet arose from the difficulty of mutually convenient meeting periods for social partners and two of the social partners i.e. FKE and COTU blamed the government for administrative lapses at the secretariat.

The secretariat on the other hand defended itself saying that it suffered low budgetary allocations and this was made worse by the government circular that required members to the Board to be paid a fee of kshs.10,000 as sitting allowance. This makes it very expensive for the secretariat to arrange such meetings.

However, the members felt that despite the Board's advisory status, it plays an important role in labour law regulation and in matters pertaining to international labour standards. It emerged that despite its long periods of inactivity, the Board has been effective in initiating proposed

legislation put before it either by the social partners or the government. An example of its effectiveness is the recent ratification in May 2001 of three core conventions (C100 – concerning equal remuneration for men and women for work of equal value, C111 – against discrimination of employment and occupation due to social or status cultural and C182 – against worst forms of child labour) and the adoption of related recommendations by the government on the basis of recommendations of the LAB.

Respondents felt that there is lack of clear cut division between LAB and NTTC when it comes to proposed policy formulation and there seems to be duplication of effort creating overlaps which have led to inefficiency because each party can easily ignore matters hoping the other party will sort it out.

4.4.2 The General Wages Advisory Board (GWAB)

The GWAB has thirteen wage councils which have tripartite representation. Information gathered revealed that the main activity of these councils is to review wages annually but it emerged that only two operate and these are the General Wages and Wages in Agriculture. All the rest are dormant and have not met for many years.

Again the question of low budgetary allocations by the government was raised and the government circular requiring members to be paid 10,000 Ksh as sitting allowance for meeting and additional monies in terms of transport and accommodation if the members are from outside Nairobi. Both FKE and COTU felt that the government does not give the secretariat of the Board which is at the Ministry of Labour the prominence and status it deserves and hence the low budgetary allocations and failure to provide basic necessities like stationery, and even staff to enable the Board carry out its mandate.

The Union it appeared had moved in to close this gap of wage review by monitoring enforcement of collective agreements to ensure wages are not exploitative.

4.4.3 The National Advisory Committee on Occupational Health and Safety(NACOHS)

This committee is headed by the Director of Occupational Health and Safety. It deals with health and safety of workers on a tripartite basis. Information collected from respondents

indicate that the Board proposes public policy initiatives, regulations and rules on the same and therefore the work of enforcement is left to the government who is the only party authorized to carry out labour inspections. Both the Union and FKE admitted that they rarely undertake inspections but they do prompt and demand the government to carry out inspections when they get reported cases of transgressions.

Members of this committee reported that they were supposed to meet at least four times in a year, although meetings are held more frequently. Respondents indicated that in recent times, the committee has dealt with issues such as regulating noise level in work places, developing regulations to eradicate child labour following the country's decision to ratify convention no.182. Currently the committee is working on developing rules and regulations regarding HIV/AIDs at work places. Another of their major concern is development of health and safety measures of the workers in flower farms in the country.

4.4.4 The National Industrial Training Council

According to information gathered, this Board is also advisory in nature. It seeks to promote industrial training and ensures that training costs are equitably shared by industries. The researcher could not get much information on this council because it seems to be dead and has been for many years. Both COTU and FKE admitted that they have not been invited for any meetings by the secretariat based at the Ministry of Labour for a period exceeding 5 years.

The Ministry decried lack of funds and said most of their activities have almost grinded to a halt and that virtually all activities at their training centres have been suspended. The council was however allocated some money in the 2006 budget which was indicated as inadequate and that the government is in the process of looking for alternative sources of funding in order to kick start this institution.

The under-funding and/or low budgetary allocations to tripartite institutions inhibit performance and threatens the continuity of social dialogue. The absence of adequate budgetary allocations, material resources and manpower has undermined the enormous role that tripartite institutions can play in policy formulation and implementation.

Table 2: Tripartite Committee Meetings Held in 2005

Month	1 st meeting	2 nd meeting
January	06.01.05	27.01.05
February	03.02.05	24.05.05
March	03.03.05	24.03.05
April	07.04.05	28.04.05
May	05.05.05	26.05.05
June	09.06.05	23.06.05
July	14.07.05	28.07.05
August	11.08.05	25.08.05
September	15.09.05	29.09.05
October	13.10.05	27.10.05
November	10.11.05	24.11.05
December	08.12.05	22.12.05

Source: Ministry of Labour Annual Report-2005

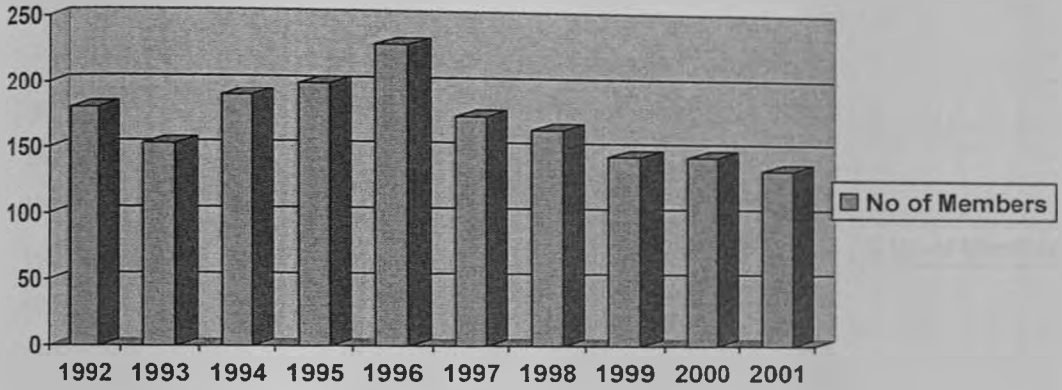
During the year 2005 a total of 1266 cases were handled during the 24 tripartite committee meetings held during the year. This figure represents an increase of 9.0 % when compared with the year 2004 in which a total of 1152 disputes were reported. The many meetings demonstrate negotiation or social dialogue between the parties.

4.5 Federation of Kenya Employers

FKE respondents indicated that they enjoy good rapport with the other social partners namely the government and COTU. Its core service is industrial relations though it has other specialized services like management training, consultancy, entrepreneurship development and productivity improvement.

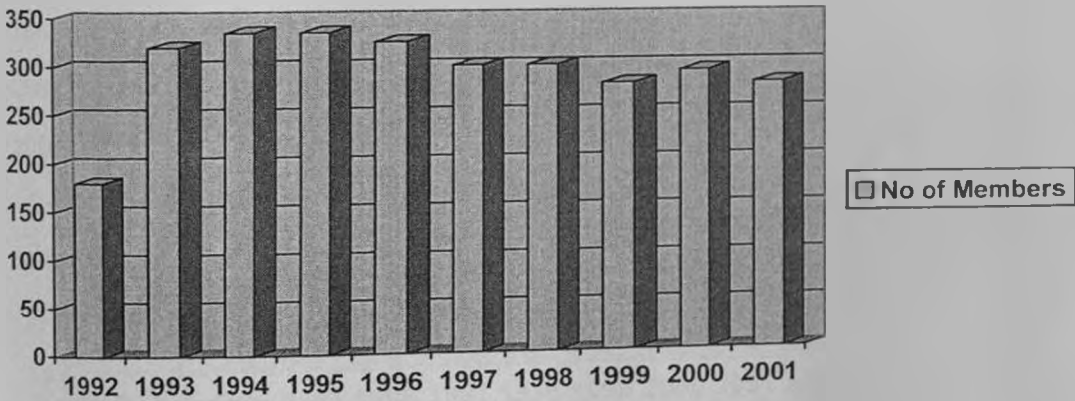
A study of the federation's annual reports from 1996 shows a declining trend in membership

Figure 1: FKE individual Membership trend: Western Kenya Branch 1992 - 2001



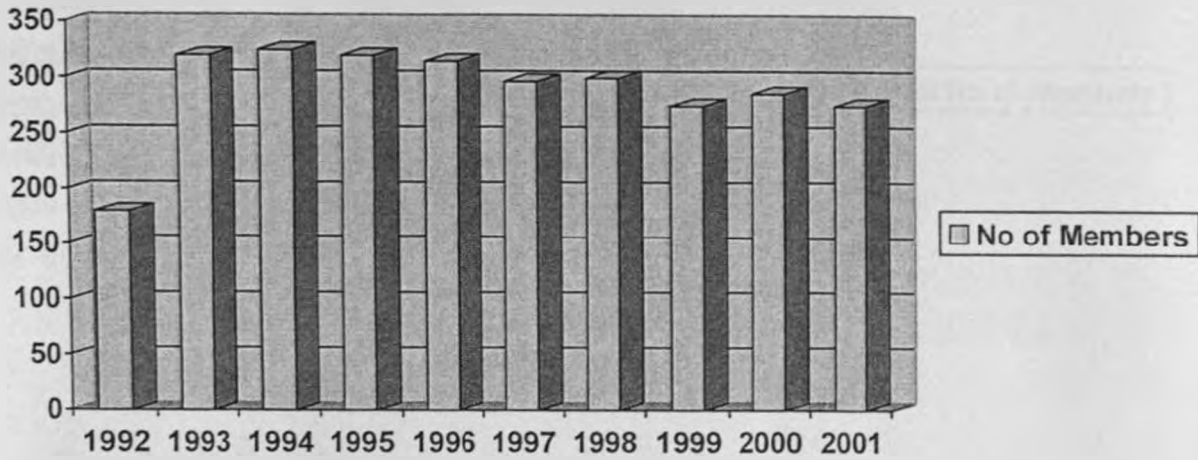
Source: FKE Annual Report 2001

Figure 2: FKE Individual Membership trend – Coast Branch, 1992 -2001



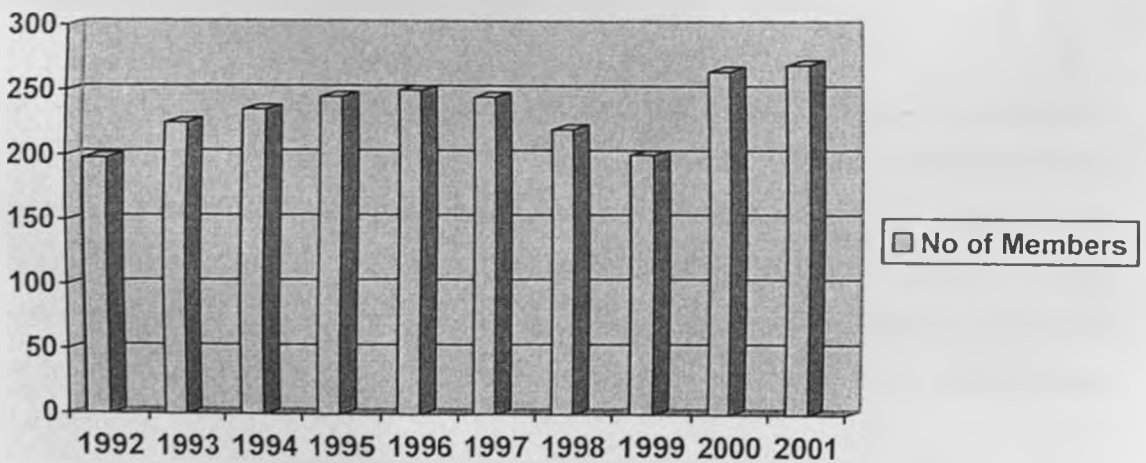
Source: FKE Annual Report 2001

Figure 3: FKE Individual Membership trend – the Rural Sector 1992 – 2001



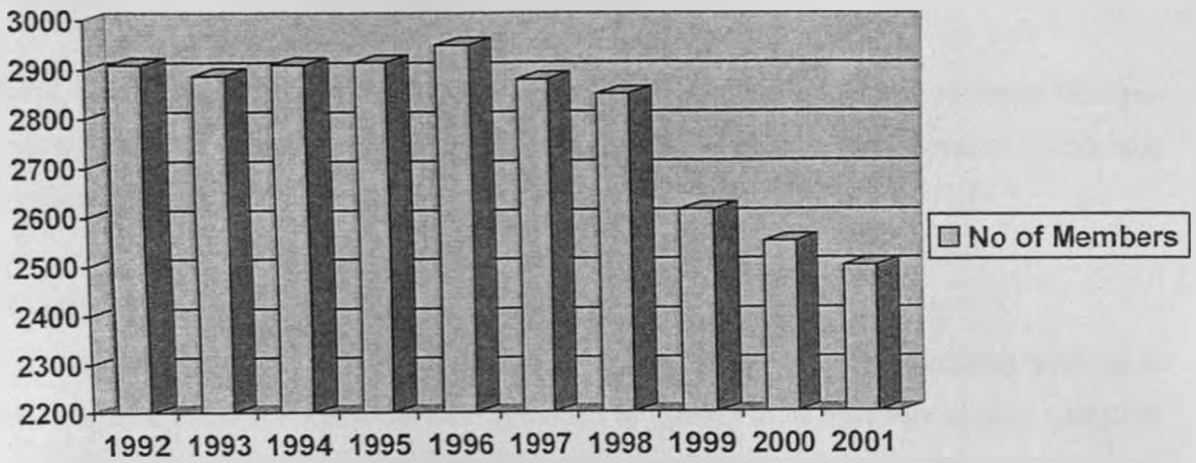
Source: FKE Annual Report 2001

Figure 4: FKE Individual Membership trend – Rift Valley Branch, 1992 – 2001



Source: FKE Annual Report 2001

Figure 5: Total Individual Membership Trend, 1992 – 2002



Source: FKE Annual Report 2001

As can be seen from the tables, the membership has been dwindling over time. For example, 1996 the membership was 2995 (FKE Annual report, 1998). By April 2003, the membership had plummeted to 1585, giving a decline of 47.1% in approximately seven years.

Sources at FKE attributed this decline to harsh economic conditions between 1990s and 2002 which contributed to the closure of many companies and merger of others.

However, some respondents from the other social partners blame FKE whom they see as reactive rather than proactive. In support of this view, some of the interviewees cited the spate of industrial unrest at Mumias Sugar Company and the flower industry where FKE stepped in long after matters had come to a head. The argument here is that if FKE does not revamp its services to members in a way it will be seen that they are taking care of their interests, then it will continue to loose membership and hence diminish its role and importance in the matters of industrial relations.

The respondents predicted that it might not be long before small sprinter groups follow the move taken up by the Kenya Association of Manufacturers (which the respondents described as more forceful and more focused on members' needs) to fill some perceived gap in service delivery if

FKE does not become more proactive. For its own survival, FKE should do everything possible to avoid such a development as it is likely to lead to an exodus of members.

However, the social partners were quick to point that FKE plays a key role in social dialogue process and maintenance of industrial peace in work places and therefore because of this role they will continue to get their support.

4.6 Central Organization of Trade Unions (COTU)

COTU is an umbrella worker's body. It is made up of affiliate unions representing workers in different sectors of the economy. Services provided by COTU to its members include education and training, representation in tripartite committee, provision of legal and advisory services and initial arbitration on cases involving affiliate members.

However, it emerged that the level of provision of these services is done on a limited scale. This is constrained by the union's financial, human and managerial capacities. Secondary data shows that COTU's membership declined by 20 percent between 1990 and 2001 (Karega & Makoffu 2003). This means that COTU's financial base decreased by that margin because the main source of its funding is membership fees. The decline in COTU membership reflects badly on its strength to pursue and promote dialoguing since much time is used on resolving matters involving splinter unions.

Respondents from COTU indicated there was a general weakness in the enforcement mechanisms of labour conventions, laws and other legal instruments governing industrial and labour relations in the country. They blamed the government for this lapse and felt that the government did not give the existing labour institutions the prominence and status they deserve, especially when it comes to the issues of funding and manpower resources. FKE was in agreement on this note and felt that the institutions were understaffed and under funded and that this should be reviewed. They also felt that at times the government ignores recommendations made in reports and discussions held with stakeholders all in the interest of fostering the persistence of social dialogue.

The other two social partners (the government and FKE) felt that COTU should do something to strengthen its management mechanism which is characterized by union splits, leadership wrangles and weak membership representation. It was further indicated that the other partners did not appreciate the militant attitude of union officials which gives the unions the image-gap that results into lack of effective communication and sustainable social dialogue with the stakeholders. They felt this would effectively reduce the integration of worker issues and affairs in policy formulation and implementation.

Other partners felt that most employees were not well informed about their rights and blamed this lapse on unions who have a responsibility to educate their members. Instead of being proactive, union activities are reactive in nature.

Despite this the social partners felt that COTU plays a crucial role in maintaining of good industrial relations in the country. It is core in maintaining industrial peace and its active participation is necessary for continuation of social dialogue.

4.7 Efforts Towards Strengthening Social Dialogue in Kenya

All the respondents were in agreement that social dialogue was a useful tool for maintaining industrial peace and good labour relations which are important for a country undergoing the process of economic recovery and development. Currently, there are joint efforts by the tripartite partners towards strengthening social dialogue through the following efforts;

- There is a new labour institutions bill that has been published and is due to be discussed in parliament and passed into law. The bill proposes that there be a review of current labour laws to reflect current social and economic periods. Some of the proposed amendments include; the relocation of excessive powers of the Minister for Labour over all matters relating to labour which are incompatible with democracy; penalties and which is not deterrent enough to be revised upwards; allowances for workers as those working in hazardous areas to be revised upwards to reflect current economic realities; decentralization of the industrial court to provincial levels as a way of speeding up labour disputes and power to enable the court to enforce its own awards.

- Merging of the Employment Act (Cap 226) and the Regulation of Wages and Conditions of Employment Act (Cap 229).
- Strengthen existing labour institutions by expanding the secretariats. All members of departments will be members and also civil society members as well as representatives from other government sectors will be included in the new secretariat in addition to the traditional social partners.
- Merging of the Labour Advisory Board (LAB) and the General Wages Advisory Board (GWAB) to form the National labour Board (NLB). All the other wage councils under GWAB will be dissolved and all matters relating to wages will be handled by the new NLB.
- There is a proposal that the power to call and chair meetings in the tripartite institutions be done by the secretary of each secretariat and that such meeting be regular and more frequent.
- Sensitise the members of parliament on the role of the ministry of labour and the importance of its work in order to make them understand the need and support for higher budgetary allocations. Already there was a retreat of the Parliamentary Accounts committee in September 2006 at Egerton University to sensitise them on the role and importance of the Ministry of Labour, making them understand and support higher budgetary allocations. These funds will then be used to fund the institutions of social dialogue.
- The three social partners have also undertaken to market their services in an effort to create awareness among the general public of workers. The Ministry of Labour through use of media now informs the public and employers about the services offered including; inspections, advisory services, grievance handling and labour dispute settlement. There plenty was of educative brochures at the Ministry of Labour stand at this year's international made fair in September 2006.
- The social partners are also in the process of designing and developing relevant educational programmes in conflict resolution in order to make them more effective in handling labour disputes and social dialogue issues more professionally.

CHAPTER 5: SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

The recognition of social dialogue as a useful mechanism for building consensus among the key stakeholders on broad issues is significant to industrial relations in Kenya. In order for social dialogue to be continually effective and sustainable, the parties to social dialogue have to be internally strong and cohesive so as to enable them to engage in negotiation and consultative process.

Weak labour institutions, inadequate institutional machinery for tripartite consultation and the lack of capacity to meaningfully engage in social dialogue especially in the determination of terms and conditions of employment through collective bargaining, and the prevention and resolution of conflicts could have serious consequences for the ability of the country to assure social peace and effectively promote productivity. The challenge is enormous and therefore deliberate efforts have to be made towards maintenance of stable and peaceful industrial relations in the country.

It is quite clear that the existence of laws and regulations does not in itself constitute a full guarantee of good and peaceful industrial relations. Although the law has a highly practical role to play in enhancing industrial harmony, its effectiveness in policy formulation and implementation largely lies within the framework of consultation, negotiation and dialogue. This process needs the concerted effort of the government employers and workers and hence the importance of tripartite institutions.

It has been noted during this research that the effectiveness of these social dialogue institutions is largely dependent on the organization and work of their secretariats to carry out basic and vital servicing functions. Not only are the secretariats inadequately manned but also the responsible officials do not devote full attention to the work of the various boards. Their ability to devote time to broader national issues relating to the work force is severely limited, a fact that is reflected by the infrequent and irregular number of meetings.

5.2 RECOMMENDATIONS

1. There is need for increased budgetary allocation from the central government for the Ministry of Labour and Human Resource development and other social dialogue institutions under it. This will ensure that they have the necessary material resources required to facilitate smooth working of the institutions.
2. Since the effectiveness of social dialogue institutions is largely dependent on the organization and work of the secretariat, then an independent multi-disciplinary secretariat should be established for all the tripartite institutions which would serve as a consultative forum. The secretariat should have competent personnel who will provide the institutions with technical service, disseminate information and make follow-ups on the decisions taken.
3. Tripartite committees should meet more regularly and often in order to allow themselves more time for consultation and negotiation as well as give them adequate time to propose agenda items.
4. Civil society needs to be integrated in the process of social dialogue (eg. NGO's) since workers rights are also human rights issues.
5. Social partners should have a high level of internal cohesion in their respective constituencies in order to strengthen the legitimate role and position of the parties. Trade unions need to take steps to develop measures to strengthen their internal cohesion and FKE should seek to collaborate with other stakeholders like Kenya Association of manufacturers in order to share information and ideas.
6. Continuous training on labour relations as well as principles of and practice of social dialogue is essential for the tripartite partners to enhance the exercise of good labour relations. The training on conflict resolution will be an added advantage in handling labour disputes in a professional manner.
7. The government should ensure that there is proper and timely enforcement of labour conventions and laws and other legal instruments governing industrial and labour relations in the country. These should be reviewed periodically and adjusted accordingly to reflect current social and economic realities.

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