

UNIVERSITY OF NAIROBI

FACULTY OF LAW.

"THE IMPACT OF TRADE UNION LEGISLATIONS ON
COLLECTIVE BARGAINING IN KENYA TO 1974: A
HISTORICAL SURVEY":

A dissertation submitted in partial fulfillment of the requirement for the LL.B. Degree,
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BY

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Sincerely speaking it takes more than one person to produce a work of this calibre. At every stage assistance was crucial. Hence it would be mean of me to pose as if I were the sole brain and hand in this venture. That being the case, I feel morally obligated to thank the following for their assistance without which the work could not have been a success.

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He ~~did~~ not correct
this one. dont thank him.

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I N T R O D U C T I O N

Prior to the declaration of a protectorate in 1895 over much of what is now Kenya, there existed dual economy. In the interior the economy was subsistence while at the coast it was slave economy. British imperialism merged the dual economy into one - monetized economy.¹

Imperialism is a belief in the value of colonies. It is the policy of extending a country's empire and influence. This policy was pursued by the British for various reasons viz. to provide market for their surplus goods, provide sources of raw-materials, provide areas of investment for their capital, to ease population pressure and last but not least for prestige.

Pursuant to this policy Britain acquired a territory in East Africa Protectorate later to be named Kenya. Imperialism was logically followed by capitalism which entails an economic system in which a country's trade and industry are organised and controlled by owners of capital.

To facilitate imperialism in Kenya, the imperial government built a railway from the coast to the interior. The railway reached Kisumu in 1901

Then the colonial government, with the acquiescence of the imperial government, invited settlers into Kenya. The settlers were to develop agricultural industry and hence there arose a need for land and labour.² As for land the imperial government with the aid of colonial administration enacted various legislations to validate the alienation of Africans land. The land so alienated was the best agricultural land obtained in Kenya. This rendered a considerable number of Africans landless and others owners of poorer tracts of land which in the long run they had to abandon due to population pressure, soil erosion and colonial administration legal pressures to drive Africans out of the reserves to undertake wage labour on European plantations which had started in earnest by 1903.

From the foregoing, we shall therefore argue in the case of Kenya that imperialism gave birth to a distinct class society.³ Henceforth there was the landed gentry with capital and African labour to develop a capitalist economy, then there were two groups of Africans - one completely landless and the other owner of poorer tracts of land in the reserves - the proletariat and the peasants. There was a third group - the Asian petty commercialbourgeoisie - whose members undertook commerce, some worked for the

Europeans in plantations and some in the Railway. This third group had come to build the Uganda railway and had decided to stay.⁴

The completely landless Africans were left with no alternative save to sell their labour. This group for want of better word shall be labelled the proletariat.⁵ The labour they undertook was surplus labour because it was over and above their subsistence needs. This surplus labour produced surplus product which was converted into surplus value and pocketed by the owners of capital to augment their capital. This capital was never invested in Kenya. This state of affairs was hardly surprising for the primitive accumulation of capital could only succeed by the exploitation of the African labour by paying very low wages and offering poor conditions of work.

The Africans did not take it kindly. Apart from the low wages and deplorable conditions of work their land had been alienated. This led to the politicization of the Africans who had taken employment in urban centres. That they were politicised manifested itself in the formation of political parties. In 1921 Harry Thuku, a treasury telephone operator in Nairobi, formed the Young Kikuyu Association at a time when the burning issues were forced labour,

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the abolition of the 'Kipande' and a reduction in wages. Later in the same year the people of Nyanza formed the Kavirondo Association, these political movements showed that the Africans had realised the need for concerted action as a means of improving the economic lot of their people. The colonial administration realised the implications of the political movements and undertook to pre-empt the same before they gained nationalistic outlook. In 1922 the Young Kikuyu Association which had changed its name to East Africa Association and still under Thuku, was the first to be banned and Thuku deported. However, this merely drove the movement underground. Next was the Kavirondo Association. By giving the example of what happened to the Young Kikuyu Association under Thuku, the colonial administration was able to 'compel' the Kavirondos to form an association with completely non-political aims, thus emerged the Kavirondo Taxpayers Welfare Association, which replaced the Kavirondo Association.

Sensing political consciousness among the workers the colonial administration encouraged the formation of Staff Associations henceforth. This was not a new policy, however. Soon after the first imperialist war the Europeans, Indians and Africans staff of the government and the railway had formed similar

associations at the instigation of the colonial administration. However, from 1922 the policy was pursued with much keenness for fear that trade unions might be borne in Kenya. Thus the workers in Kenya formed organisations built on the basis of the various industries. These were the forerunners of the present day trade unions.

Despite the colonial administration's hostility to the formation of trade unions pressure from both internal and external sources as reflected and applied through I.L.O. and its conventions in Geneva made changes to occur in colonial labour policy. This was because Britain was a signatory to these conventions. This made her have a sense of international legal obligation to try and implement these conventions in her colonies.⁶ In this respect, the Labour Party's prominence in British politics between 1924 and 1930 merit special mention. The successive labour government's encouraged greatly the organisations in the colonies. In 1930 the Labour government regarded the development of Labour Unions in the Colonies as a natural consequence of social and economic progress, and that the unions were the only desirable method of protecting the colonial labour force from the excessive demands of the colonial employers. In 1940 Parliament in

Britain passed the Colonial Development and Welfare Act. The Act provided that before any economic aid would be granted to any dependency, the secretary of state must be satisfied that the dependency provided reasonable facilities for the activities of the trade Unions. In 1941, the Colonial Office prepared model trade union ordinances and circulated them to colonies. The models provided for the registration of 'bona-fide' unions and included provisions for their immunity from actions' arising from their lawful industrial acts as well as providing for the machinery for the regulation of the settlement of labour disputes.⁷

The colonial administration ⁱⁿ Kenya was adamantly recalcitrant in its attempts to carry out this policy the result was that the law was accepted as a matter of form only. However, on the basis of the 1937 trade union ordinance,⁸ enacted that year, the first trade union of East Africa under the leadership of Markhan Singh was registered in Kenya.

Right from the start of registered trade unions in 1937, the colonial administration chose to antagonise the unions. The government's hostility to the unions was based on the belief that they .../7

meant riots and communism. The 1937 Ordinance itself was a restrictive piece of legislation to the extent that it required compulsory registration of the unions as opposed to the voluntary practice in Britain. The 1937 Ordinance was amended by the Trade Union (Amendment) ordinance 1940.⁹ The 1940 amendment restricted the scope of trade union activities to limited range of economic objectives, especially those embraced within the narrowest definition of 'employment'. In 1943 the Trade Union and Trade Disputes Ordinance was enacted.¹⁰ This Ordinance repealed the Trade Union Ordinance 1937, as amended by the Trade Unions (Amendment) Ordinance 1940. To the extent that the 1943 Ordinance incorporated the provisions of the 1937 Ordinance as amended in 1940, it can be argued that the Ordinance was also restrictive. In 1950 the essential services (Arbitration) Ordinance was enacted.¹¹ This Ordinance provided for compulsory arbitration in Water, Electricity, Health, Hospital, Sanitary and Transport Services. It is submitted that this Ordinance excluded from the purview of free collective bargaining the services where most of the workers were engaged. To that extent the two sides of industry could not obtain an equilibrium, since the colonial administration would henceforth

influence the agreements through the set machinery. It is significant that this Ordinance also outlawed strikes and lock-outs in essential services. Last but not least in 1952, the trade Unions Ordinance was enacted.¹² This Ordinance repealed the Trade Union and Trade Disputes Ordinance 1943. The 1952 Ordinance marked the highest stage in the drama of conflict between the colonial administration and the trade Unions.

From the foregoing synopsis of the legal constraints, we shall argue that if the 'raison d'etre' of trade union movement is collective bargaining, which is orthodoxly conceived as a process whereby employers and trade unions establish employment standards through the free play of bargaining strengths, with ultimate recourse to strikes and lockouts barring the intervention of the state, third parties, or the law,¹³ then there was no collective bargaining in the colonial era. But even after softening a bit and allowing for departures from the orthodox conception on the grounds that in underdeveloped economies departures are inevitable, we shall still hold that there is irreducible minima below which departures may not depart, except at the risk of stultifying the concept. To us this irreducible minima constitute the core of collective bargaining.

In any such list of the minima we would include, one, the right to strike, two, a strong workers organisation, and three a limitation of state intervention to the task of setting minimums e.g. in the case of wages, and not maximum.¹⁴ To the extent that trade union legislation in the colonial era / robbed the unions of this irreducible minima, as the analysis of legal constraints shall show, collective bargaining was robbed of its meaning.

Though the legal constraints emasculated the unions during this era, they did their best if and when opportunity presented itself to improve the wages and conditions of work for their members. By the '50s when all political parties were banned due to the 'Mau-Mau' rebellion, the then existing trade unions movements under the umbrella of the Kenya Federation of Labour filled the vacuum left by the political parties and voiced the African grievances political and economic alike. Thus when independence came, the trade unions contemplated a situation whereby the legal constraints on the path of their objectives witnessed in the colonial era would be repealed and thereby have the freedom to undertake collective bargaining as orthodoxly conceived. In this the trade unions have been disappointed.

Political independence entailed neo-colonialism. In common parlance, neo-colonialism means the continuing influence of the former colonial power sometimes political but often socio-political, which effectively undermines the political independence of the new state.¹⁵ What is absolutely central to neo-colonialism is the formation of classes, or strata, within a colony, which are closely allied to and dependent on foreign capital, and which form the real basis of support for the regime which succeeds the colonial administration.¹⁶ In Kenya the conditions for neo-colonialism existed at independence, indeed they were more or less carefully prepared in the years prior to independence. At independence and as of now, three distinct classes are obtaining in Kenya viz. the elites, the workers and the peasants.¹⁷ The imperial government handed the reins of power to the elites who were and still are interested in maintaining the status-quo. When therefore the workers or organised labour during the infancy of independence started vehement agitation for a fair share of surplus value in the form of high wages and better working conditions, the elites saw in this group a force which would bring the government down. Hence the politics of independent Kenya have been characterised by a struggle

between the elite and organised labour. Accordingly, the unions were portrayed as selfish, shortsighted organisations devoted to grasping higher wages and better working conditions for their already privileged members, without regard for public interest in economic development, social justice and political stability. The political class thus arrogated unto itself the right to control union activity.¹⁸ To this end, therefore, several legislations have been enacted. The Trade Union Act 1967,¹⁹ for one, while purporting to grant certain privileges and immunities to registered trade unions confines permissible union activities to very limited range of economic objectives, specifically those which are embraced within the narrowest definition of 'employment'. The Trade Disputes Act 1965,²⁰ for another, is so restrictive in its approach to dispute settlement. The Act sets the industrial court whose decision is binding on the parties. The court itself has to abide by wage guidelines published by the Ministry of Economic Planning. Last but not least the Act outlaws the unions only potent weapon in the last resort-Strike-unless under certain extreme conditions. However, the death knell on strikes was the 1974 Presidential decree outlawing strike in the republic

From the foregoing synopsis of the legal constraints in the independence era, We shall argue that collective bargaining as orthodoxly conceived does not occur in Kenya. Equally collective bargaining as conceived after allowing departures in the interest of the dynamics of our political system is unobtainable in Kenya so long as the irreducible minima which constitute the core of collective bargaining has been taken away by legislations.

It is with the foregoing in mind that we put forward the hypothesis of this study that the impact of trade union legislations have been such as to render collective bargaining non-existent in the pre and post independence Kenya. If collective bargaining existed or exists today, then we submit that it is in form rather than substance.

FOOTNOTES TO INTRODUCTION

1. Markhan Singh, 'History of Kenya's Trade Union Movement to 1952, EAPH political studies No.97, p.1.
2. Colin Leys, 'Underdevelopment in Kenya: The Political Economy of Neo-Colonialism 1964-1971' HEB Paperback, 1975, p.28
3. Sandbrook, R., 'Proletarians and African Capitalism: The Kenya Case, 1960-1972, Cambridge University Press, 1975, pp. 10-15.
4. Lijungu, C.N., 'Industrial Relations and personnel Management in Kenya; University of Nairobi, (M.B.A.) thesis, 1976, pp. 34 - 35.
5. Sandbrook, R., Op. cit. p.15, wrote:

'To what extent can Kenya wage earners be regarded as a proletariat? A proletariat, in the full Marxian sense of word, is composed of workers who, owning no means of production, having nothing to sell but their labour power. Proletarians are thus necessarily committed to wage-labour on the long-term basis. Most Kenyan workers retain some rights to land and hence are not entirely lacking in the means of production. Yet these workers are now increasingly committed to long term employment; to this extent they constitute an embryonic proletariat.'
6. Amsden, A.H., 'International Firms and Labour

in Kenya: 1945-70', Frank Cass & Co. Ltd., 19717, Prologue pp. 3-5.

7. Roberts, B.C., 'Labour in the Tropical Territories of the Commonwealth', London: G. Bell and Sons Ltd. for for the London School of Economics and Political Science, 19647, pp. 187 - 188.
8. Colony and Protectorate of Kenya, Ordinance No.28 of 1937.
9. Colony and Protectorate of Kenya, Ordinance No.1 of 1940.
10. Colony and Protectorate of Kenya, Ordinance No.1 of 1943.
11. Colony and Protectorate of Kenya, Ordinance No.4 of 1950.
- 1 2. Turner, H.A., 'Wages Trends, Wage Policies, and Collective Bargaining: The Problems for underdeveloped countries?' Cambridge University Press, 19667, p.75
- 1 3. Colony and Protectorate of Kenya, Ordinance No.23 of 1952.

14. View expressed in H.A. Turner, Op.cit., and noted by A. Okoth-Owiro in his LL.M. Labour Law Seminar Paper - 'Politics, Public Policy & Collective Agreements' - 1979. p.3
 15. Mboya, T.J., 'Freedom and After: 1930-1969', Deutsch, London, 19637, Paperback edition, p. 178
 16. Colin Leys, Op.cit. p. 26
 17. Sandbrook, R. Op.cit p. 15 - 24
 18. Sandbrook, R. Op.cit p.23
 19. Cap 233 Laws of Kenya, Act No.9 of 1967
 20. Cap 234 Laws of Kenya, Act No.15 of 1965
~~Sandbrook, R., Op.cit. p.~~
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C H A P T E R I

Proceeding from the Marxist analysis of the stages of social development viz. communalism, slavery, feudalism, and communism with an observation that socialism is a transitional stage prior to communism,¹ we shall argue in the case of Kenya that the pre-colonial era in the interior was still at the stage of communalism, while the coastal region under the sultan of Zanzibar was still at the stage of slavery.²

In the slave economy of the coastal region the labour relations obtaining was initially non-contractual, in that the slave owners never undertook a contract to remunerate the slaves for their services rendered. Thus the labour of the slaves were appropriated and in Marxist-Leninist parlance such labour is termed surplus labour. It is surplus labour because it is not necessary for the slaves subsistence, the surplus labour realised surplus product which was converted into surplus value and pocketed by the slave owners. This property relations was predominant in the coast and is a clear evidence of the existence of a class of landlords and slave - owners on the one hand and slaves on the other hand. However, it was not so widespread all over the coast. In fact it covered only the area which was under the control of the Sultan of Zanzibar - the 10 miles coastal strip.

This state of labour relations was brought to an end gradually following the Sultan's declaration of the 1890 slave decree, which decree was later translated into a legal status by the Slavery Ordinance of 1907. This Ordinance abolished slave trade and slavery in the Sultan's territory. The impact of the 1907 Ordinance on labour relations was significant to the extent that henceforth the former slave owners had to remunerate the freed slaves for the services rendered. In effect there emerged a master-servant relationship in which money was used to pay wages. This then formed the first ever contract of personal service in Kenya even though of a rudimentary form.

The new form of labour relations did not, however operate wholly in that form. While some Arabs paid their servants in monetary form, others reverted to giving tenancies of land in return for services rendered. That being the case, we shall therefore argue that the coastal strip was in a transitional period between feudalism and capitalism with the demise of slave economy. Feudalism because the granting of tenancies of land in return for services rendered resembled that of 16th century feudal era in England in which the feudal-lords granted serfs

possession of land in return for services rendered. Capitalism because the surplus labour which servants undertook realized surplus value after the sale of surplus products. The difference between the total surplus value and the cost of production was pocketed by the Arab Masters.

Be that as it may, there was hardly any legislation to regulate the labour relations obtaining in this region. We shall therefore argue that custom and usage of the parties in their trade or calling regulated the labour relations in the coastal region.

In the interior, on the other hand, the society was at the stage of communalism - to use Marx's analysis of stages of social development. At this stage the economy was by and large subsistence. The society was concerned with the production of necessary products. In Marxist's parlance the society undertook necessary labour. There existed agricultural industry among the agriculturalist, cattle rearing among the nomadic tribes and last but not least sculpturing industry among the Kamba. However, all these industries were in rudimentary form and such trade as existed among them was predominantly barter in which, say, the Kamba exchanged their handicrafts for grains with the agricultural tribe like the Kikuyu.

With regard to communal work, a clan or tribe could be mobilized for, say, defence purposes or to build a house for a fellow kinsman or cultivate his shamba and even to work on such communal projects like clearing of bush, digging a common well or bridging a stream. Some societies were accustomed to exchange of labour or labour in return for maintenance, but there was no equivalent to cash earnings in the pre-colonial era.³ It was not infrequent for elders to enforce undertaking of labour, however, there was no legislation in the form we have them today, to regulate the communal labour. Custom and long standing traditions of the society regulated the labour relations. Thus this was a form of African socialism in which the economy was subsistence.

Pursuant to the imperialist policy Britain negotiated a treaty of protection with the sultan of Zanzibar in 1890. This was followed by the declaration of a Protectorate over much of the interior that is now Kenya in 1895. The two episodes had far reaching consequences on the economic order of Kenya. The economy of the coast and that of the interior was gradually merged into one capitalist economy. The capitalist economy was logically followed by the introduction of English legal institutions and as labour law and relations is an aspect of this legal system, we shall

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argue that it was borne against this background.

Capitalist economy introduced by the British empire builders was characterised by appropriation of surplus labour. The first group of people on whom it squarely operated were the Asian Coolies. The coolies had been coopted by the imperial government to build a railway, to facilitate the exploitation of the resources in the interior, because the African population at hand was largely dependent upon and content with subsistence economy and so reluctant to adapt themselves to the new economic order of cash wage. The employment of the coolies marked the first time in the history of the East African Protectorate in which organised labour relations was established on a contractual basis with rights created and duties imposed between the employers and the workers. This state of affairs **inevitably** gave birth to industrial disputes. The disputes were contested in the courts of the protectorate and the judicial decisions which followed formed the first ever case law on industrial relations in Kenya. This body of case law was later to form judicial precedence on industrial relations in this country. Such case law is exemplified by POSTWALLER v. SECRETARY OF STATE⁴, in which an Indian employee of the railway was dismissed by the chief

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engineer for alleged misconduct. In reaching the decision to dismiss, the chief engineer had investigated his conduct and had also acted as the sole judge. In the ensuing suit claiming wrongful dismissal, it was held that the dismissal was repugnant to natural justice and unlawful to the extent that the chief engineer should investigate the misconduct of the employee and proceed to sit as a sole judge. The employee was awarded damages, the cost of his return voyage to India, 3 months pay in lieu of notice and payment of salary up to the day he received the dismissal notice.

Having built the railway which opened the hinterland, the imperial government embarked on a policy of inviting settlers to undertake agricultural industry. They rationalised this policy by arguing that only in this way could the railway pay its cost with the transportation of freight⁵. This policy entailed the demand for labour. The Asian Coolies were the first in mind but having regard to the experiences of problems which coolies had engendered, the idea was dropped. The alternative was to coopt the Africans into wage economy. Since the Africans were reluctant to adopt themselves to the new economic order, the colonial administration conspired with the

settlers with the acquiescence of the imperial government to generate the badly needed labour by various institutional pressures which amounted to "compulsion" to drive able-bodied men from the reserves to the settlers plantations. The colonial government's labour policy was outlined unequivocally by the then Governor of Kenya Sir Belfield thus:

'I am prepared to make the natives useful citizens and we consider the best means of doing this is to induce him to work for a period of his life for the European. We further desire by humane and properly regulated pressure within the reserves to induce natives to go out and work either as individuals or as residents with the families in occupied farms.'⁶

Pursuant to the foregoing policy, several measures were adopted to 'compel' the Africans to undertake wage labour featuring prominently among them were: land alienation, taxation, forced labour, native resident labour and penal sanctions. Land alienation: Basically this policy entailed the appropriation of African land and vesting the same in the crown, which in turn vested it with the incoming European Settlers. Only the best agricultural land was appropriated. Towards this end, various legislations were enacted. The 1897 Land Regulations⁷ empowered the Commissioner of East Africa Protectorate to offer certificates of occupancy valid for

99 years. The 1898 East Africa order in council defined crown lands as meaning 'all public lands which are subject to the control of his majesty'⁸ and empowered the Commissioner to make grants or leases of any crown lands on such terms as he may think fit, subject to any direction of the Secretary of State for Colonies. In 1902, the Commissioner promulgated the Crown lands Ordinance,⁹ which Ordinance introduced the principle that the ownership of interests in land was dependent upon the development and gave a residual power to public authorities to enforce it. This ordinance limited recognition of African rights in land to that of actual occupancy. Any possible doubts as to the extent of the power of the crown to alienate land was finally set to rest by the passing of 1915 Crown Lands Ordinance.¹⁰ The effect of the 1915 Ordinance was outlined in the case of WAINAINA v. MURITO,¹¹ where Barth, J. held that the effect of the 1915 Crown Lands Ordinance and the two orders in council which converted a Protectorate into a Colony was to take away all the native rights in Land, vest all the land in the crown, and leave Africans as tenants at will of the crown in the land actually occupied. This judgment was followed in KAHAHU v. A.G.¹²

The direct effect of these Ordinances and regulations was to make Africans landless or occupiers of poorer tracts of land. This in turn led to the disruption of self-sufficiency of Africans subsistence economy thus making it easy to drive the impoverished African population into employment on the settlers farms for wage labour. Therefore we shall argue that land alienation was one of the ways by which the colonial labour policy was effected.

Taxation: The Colonial Administrators argued that if Africans were not compelled to work by law, they should be indirectly forced by law through taxation. Taxation was to be paid in money form and this inevitably forced the Africans to undertake wage labour in order to fulfill their political obligation - taxes. The legal basis of taxation policy in Kenya was the 1901 Hut Tax Regulations¹³ which was translated into the Hut Tax and Poll Tax Ordinance of 1910.¹⁴ The 1910 Ordinance imposed liability on the natives to pay either Poll tax or Hut tax. This law was discriminatory insofar as it applied only to the Africans and evidences the fact that it was aimed at generating African labour.

Forced Labour: The chiefs and the elders were the vehicles through which the forced labour policy was effected. They were required to exercise their

traditional powers of levying a labour tribute and supply the needed labour to the administration and the settler's plantations. An appropriate legislation was brought into effect to legalise forced labour - the East Africa Protectorate Native Authority Ordinance 1917.¹⁵ This Ordinance empowered the native chiefs and headmen to order "natives residing within the limits of their jurisdiction to offer themselves as able bodied men to work in maintaining work of any public nature constructed or to be constructed or maintained for the benefit of the community provided that no persons were required to or ordered to work for more than thirty days in any one year."¹⁶ This labour was to be undertaken without any remuneration at all. We shall therefore argue that it was an indirect way of forcing able-bodied natives to seek wage labour in the settler plantations or colonial administration.

The recruitment of labour was chaotic, hence in 1926, the Kenya employment of Natives Ordinance¹⁷ was enacted. The ordinance was aimed at regulating and legalizing recruitment. However, the law did not work as smoothly as was contemplated.

Native Resident Labourers alias squatters:

In Kenya, the land alienation measures had given rise to pockets of 'native squatters'. In 1918

the Resident Native Ordinance¹⁸ was enacted to allow the native family to reside on a European farm in consideration of an undertaking by the head of the family and any male member of the family who was of the apparent age of sixteen years or over to work for the settler for a period of not less than one hundred and eighty days in any one year. The native family had right to their crops planted on a plot designed to it, or payment of compensation in lieu thereof in case of disturbance. The preamble to the ordinance declared that it was desirable to encourage resident native labour on farms and to take measures for the regulation of squatting or living of natives in places other than those appointed for them by the government. The squatter system could not produce the expected flow of labour. A family consisted of 'an able bodied native male together with his wife or wives and children if any' the viability of the system depended on the amount of labour a family could provide. Too many families on a farm would mean ruinous encroachment on land much wanted for European farming.

'Kipande' System: Although pressure on chiefs and other traditional authorities had made all male population to offer themselves for wage labour, and also various institutional pressures amounting to compulsion

had generated labour, large numbers ran away due to low wages and deplorable working conditions. To cure the desertion the Native Registration Ordinance of 1921¹⁹ was enacted. The Ordinance compelled under a penalty of a month's imprisonment or a Shs.20/= fine every adult African male to carry on his person a dossier (Kipande) bearing personal detailed particulars of his employment history.

The Master and Servants Ordinance:

The foregoing measures having driven Africans out of the reserves to undertake employment in plantations and government administration, there was need to develop laws which would regulate the contractual relations so created. To this end the Masters and Servants Ordinance 1910²⁰ was enacted. Apart from prescribing rights and duties of the parties, this law introduced penal sanctions to enforce contractual breaches, to the extent that the law of Masters and Servants provided for enforcement of contracts of personal service by penal sanctions, it diverted from the common law position. At common law, the employers remedy lay in a civil suit. The policy behind the penal sanctions was clearly to maintain a stable and efficient labour force.

From the foregoing discussion it is safe to

draw the conclusion that the establishment of the colonial labour system was achieved by 'compulsion' through the force of law. In so doing the African dignity was by and large lowered by subjecting them to deplorable working conditions and exceedingly low wages as chapter two shall show.

FOOTNOTES TO CHAPTER 1

1. Walter Rodney, 'A contribution to a critique of Political Economy' in the preface quotes Marx thus:

Marx wrote:

In social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitute the economic foundations on which arises a legal and political superstructure and which correspond definite forms of social consciousness At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or - this expresses the same thing in legal terms - with the property relations within the framework of which they operated hitherto. From forms of development of productive forces these relations of production turn into fetters. Then begins an era of socialist revolution, the changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure.

2. Markhan Singh, 'History of Kenya's Trade Union Movement to 1952'. E.A.P.H. Political Studies No. 97, P.1
3. Lal Patel, 'East African Labour Regime: Kenya and Tanganyika' p.4

4. (1) K.L.R. 1898
5. Colin Leys, 'Underdevelopment in Kenya: The Political Economy of Neo-Colonialism',
[H.E.B. Paperback, 1975_7 p.28
6. Proceedings of Kenya Legislative Council,
first session 1917, p.3.
7. 1897 Lands Regulations, Sections 1 and 10.
8. The East African Order in Council 1898.
9. East Africa Protectorate, Ordinance No.21 of 1902.
10. East Africa Protectorate, Ordinance No.12 of 1915.
11. (1923), 9 (2) K.L.R. 102
12. 18, K.L.R.5.
13. East Africa Protectorate, Regulations No.18 of
1901.
14. East Africa Protectorate, Ordinance No. 15
of 1910.
15. East Africa Protectorate, Ordinance No. 22
of 1917.
16. East Africa Protectorate, Ordinance No. 22
of 1917.
17. Colony and Protectorate of Kenya, Ordinance
No. 7 of 1926.
18. East Africa Protectorate, Ordinance No.33 of 1918.
19. Colony and Protectorate of Kenya, Ordinance No.
56 of 1921.
20. East Africa Protectorate, Ordinance No.4 of 1910.

CHAPTER 2:

Following the alienation of large tracts of the most agriculturally viable African land and the subsequent establishment of the labour system by force of law, various industries were set up in Kenya, the industries absorbed Europeans, Asians and Africans. However, from the very outset racial discrimination characterised the labour relations. Only Europeans and Asians, for instance, could be employed as Managers of the settlers plantation. But even though an Indian could be employed as a Manager, a European Manager earned more salary than his Indian counterpart though the two did the same job.¹ In a nutshell Europeans were treated as first class homo-sapiens. Indians as second class and Africans as third class.

Be that as it may, it was however, the Africans who were the hardest hit by the discrimination especially in the plantation industry. They were subjected to inhuman conditions of work, low wages and the employers attitude generally was such as to suggest that they were an inferior race. The African wages was hardly enough to cover bare minimum of subsistence. There was no arrangement with regard to standard wages.

In fact payment of wages was based on what the employer thought was enough for Africans and was based on the assumption that the standard of living of Africans was very low. The cost of living was set on the very basic minimum and to crown it all the pay was not even ~~ir~~regular. In many cases a farmer would wait until few days to pay day and then dismiss his staff without payment. When the prospects of the season was bleak, farmers were very obstinate with their workers. It is recorded that in certain instances they refused to pay their workers for ⁿmay months because of having lost a great part of the harvest. In this way the victim of the bad season was not the farmer himself but the Africans who worked for him.² Despite all these injustices the African could not lawfully question the^m(injustices suffered at the hands of the settlers) as there was no way by which they could channel their grievances to the government. But even if there was there could not have been any drastic change as the employers were supported by the government of the day in their exploitation of the African labour.

The conditions of work were deplorable especially in the plantations. Many employers did not believe that money spent in betterment of conditions could be repaid in productivity. The Africans were employed

at an average of one rupee a month, throughout the period of his employment the normal diet offered by employers was two pounds of maize (posho) and a little salt. One result was that estate employees suffered from scurvy if green vegetables was not available. For accomodation, they were provided with a bed-space hut and except for squatters labourers were not supposed to bring their women folk along with them.³ If he happened to be a new recruit he performed 10 hours of work depending on the mood of the employer. At times the piece of work given was more than humanly possible and failure to finish his piece of work was not counted as a full day's work to warrant a full day's pay. Thus all evidence was to the effect that the conditions for the African labourer was deplorable

The prevailing state of affairs was recognised through the legislation which laid down minimum conditions concerning housing, food and proper medical services. This was the Masters and Servants Ordinance 1910,⁴ Section 24 to 32 of which ordinance spelt out for 'masters' of their obligation to their servants. According to the law they were to be 'properly housed' and given a supply of adequate medicine. The ordinance absolved from medical liability where the illness was caused by the neglect or the default

of the servant. These obligations were, however, left unenforced because of the unwillingness on the part of the colonial administration to antagonise the employers and also due to inadequately staffed inspectorates. The labour inspectorate was unlikely to ameliorate the conditions of labour because they leant on personal persuasion rather than legal enforcement as their purpose was only to limit the abuses of the labour laws.

In 1942 Colin Maher summed up the first forty years of 'civilization' in Kenya thus:

'The housing on the most farms consists of thatched mud and wattle huts deficient in light and often in bad repair, damp and rat ridden Better housing is not up for African farm labourers (due to) the high expense of doing especially where large number of workers are employed for the production of maize, coffee, sisal, pyrethrum and flax'. 'The average labourer,' he continued, 'on an average farm is very poorly fed. His ration consists of two pounds of maize meal, often of poor quality, together with a small amount of salt ... he rarely eats meat.'⁵

The attitude of the Europeans to Africans is best illustrated by the following discourse between an African Worker and a European lady, who happened to come to a place of work and only to find the African present:

'Good morning Madam' I said. when I spoke, she turned round and asked. 'Is there anybody here?'⁶

This attitude pervaded the entire employer-employee relationship in the plantations and the colonial administrations alike. Apart from this the employers had very considerable powers over employees. They often operated a system of fines for minor offences which involved cutting a man's monthly wages. Many of the plantations were isolated and therefore in most questions of disputes farmers acted as prosecutor, judge and jury. The mechanism of the law was of little use in these situations. The majority of the Africans did not have the sophistication to use the law courts; and in any case there was no equity before the law.⁷ The foregoing therefore, explain why the Africans and the Asians were the ones to take the lead in the struggle against imperialism and demand the abolition of racial discrimination.

Due to the need for a forum to channel the workers grievances, there emerged Staff Associations in the various industries. These workers organisations were started in the Urban areas first because there was relatively high politicisation of the workers in urban centres due to the ease of mixing freely of workers of different tribes and to a lesser extent races. The earliest Staff Associations

were the Railway European Subordinate Staff Associations and the Railway Indien Staff Associations. In 1900, these two Associations in collaboration with the African Workers in the rail industry championed a strike which started in Mombasa and spread to other centres along the line. The immediate course of the strike was the railway authorities announcement of withdrawal of certain privileges previously enjoyed by staff and considered as terms of service. The railway authorities reacted by the dismissal of the strike leaders and deportation of the same from East Africa. However, the authorities were forced to settle the dispute by restoring most of the privileges they had announced as withdrawn.^B The success of the strike was on the one hand to enhance the morale of the workers and on the other hand to frighten the railway authorities. Further, the colonial administration was also frightened. The colonial administration and the railway authorities therefore resolved not to allow a situation such as the 1901 to arise in future where trade union needs could spread and be put into practice by a concerted action. They decided on a new policy of divide and rule with a view to averting the dangers of trade Unionism gaining root in Kenya. In accordance with the new policy the European employees began to be kept in a

privileged position and made to feel that being members of the ruling race it was their prime duty to avoid situations similar to that of 1901 railway strike. But despite this strategy there were other strikes in the rail industry in 1902, 1908, 1912 and 1914.⁹ Meanwhile the first imperialist War 1914-18 set in and overshadowed events taking place in the country.

Meanwhile in the workers arena the Europeans formed 'Workers Federation of British East Africa', while the Indians formed the 'Indians employees Association'. However, both organisations lasted only a few years. On the political arena on the other hand the end of the war witnessed the formation of 'Conventions of Association' by the Europeans to fight for the continuation of white mans rule and the establishment of a settlers government in Kenya. The European Convention was also an employers' organisation to deal with the questions of labour wages. The Indians also formed their organisation, 'The East Africa National Congress' to fight for equal rights on a basis of a common roll for all. In 1921 therefore, partly inspired by these racial political organisations and partly by the frustrating social milieu of the early colonial era, the Africans formed the Young Kikuyu Association.

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At this time the burning issues among Africans were forced labour, the 'Kipande' and a threatened reduction in wages to a third. The newly formed Young Kikuyu Association sent a memorandum advising the government of the day not to proceed with the proposed reduction of African Salaries, to abolish the 'Kipande' and to abolish forced labour. The rise of this organisation and its agitation were a new feature in Kenya. It frightened the colonial administration so that when the Young Kikuyu Association changed its name to East Africa Association with a membership open to all tribes, the colonial administration apprehended that it would unify the Africans into a formidable political movement. The colonial administration was even further threatened when later in 1921 the people of Nyanza formed the Kavirondo Association. The colonial administration reacted by arresting the leader of Young Kikuyu Association Harry Thuku on 24th March, 1922. Thuku's arrest sparked off a general strike in Nairobi in which troops were used. Several Africans lost their lives in the process. Thuku was subsequently deported and the period which followed witnessed intimidation and repression of Africans. The government banned the East Africa Association but was still faced with the Kavirondo Association. The colonial administration

again embarked on the policy of *divide and rule*. Pursuant to this policy, it was made known to the Kavirondo Association that if they could operate at tribal or provincial level the administration would not interfere with it. With the advise of the Missionary Archdeacon Owen the Kavirondo Association changed its name to 'Kavirondo Welfare Tax Payers Association' with non political aims. Meanwhile the East Africa Association was continuing its activities in secret. By banning it the colonial administration had merely driven the movement underground. The colonial administration got panicky about the activities of this group especially when its agitation among the squatters in 1924 compelled the colonial secretary to disallow the new Masters and Servants Ordinance 1924.¹⁰ The Ordinance provided that residence and work of the squatters would be regulated not only by the Resident Native Ordinance, 1918¹¹ but also by the Masters and Servants Ordinance which previously did not apply to them. To avert the dangers of this group the Colonial administration once again embarked on the policy of *divide and rule*. Through the good offices of the Deputy Native Commissioner the Kikuyu were advised to form an association along tribal lines or at provincial level. Consequent upon this advise the East Africa Association changed its name to Kikuyu Central Association.

From the foregoing it is clear that internal pressure occasioned by the frustrating social milieu of this era was building up. However, the colonial labour policy in Kenya did not escape the liberal and clerical circles in Britain. Open criticisms and public demonstrations were occasioned by such institutions as the anti-slavery and Aborigines protection society, the Labour Party, the non-Roman Churches, newspapers and journals such as 'New Statesman' in Britain. These criticisms were often based on first hand information relayed by missionaries to the embarrassment of the colonial administration which had promised to preach peace and progress to the benefit of all races in the Colony. In 1930 the Labour government in Britain appointed a colonial office committee to consider a basic formulation of colonial office labour policy. As a result of these efforts the first trade union ordinance was passed in Kenya in 1937.¹² In the same year, the first trade union was registered in Kenya - 'The Trade Union of East Africa' under Markhan Singh.

Both the Asians and the Africans shared the pain of their European masters and it was to be expected that workers organisations were to be championed by the two. However, the Asians unlike their African

counterparts were educated, skilled and relatively experienced in formal organisation. They had the advantage of working for a single employer, the Uganda railway. They spoke one main language, Gujarati and looked at their common origin and common destiny in a foreign country as a rallying point for effective organisation to fight their source of frustration. The African workers on the other hand were predominantly illiterate. They spoke different languages worked for different employers scattered all over the country and fell back to their tribal wombs for leadership and direction against an external force. Effective organisation at inter-tribal level was heavily hampered by communication barrier, the disadvantage of illiteracy and inhibitive regulation of the colonial government. In light of the foregoing advantages of the Asian Community it was therefore not surprising that the development of the first formal trade union in Kenya should be championed by the Asians.¹³

Although both the Asians and Africans shared the pain of their European masters, in practice, they differed in details regarding their objectives in attacking their employers and the colonial administration. While Asians mainly strove for social justice in the realm of employment relationship, Africans struggled

for complete liberation of the entire African Society for the benefit of the whole African populace. Hence in the initial stages, the Asian trade unionism differed from their African counterpart in race, aim and outlook.¹⁴ Later, the two races worked hand in hand for the betterment of working conditions and increment of wages. Other than that the trade unions under the umbrella of Kenya Federation of Labour fought for political emancipation during the emergency period when political parties were banned.

FOOTNOTES TO CHAPTER 2:

1. Lubembe, C.K., 'The Inside of Labour Movement in Kenya', [Equatorial Publishers, 1965] p. 51.
2. Lubembe, C.K. 'The Inside of Labour Movement in Kenya', [Equatorial Publishers, 1965] p. 43
3. R.M.A., Van Zwanenberg, 'Primitive Colonial Accumulation in Kenya, 1919 - 1939: A study of the Process and Determinants in the Development of a Wage Labour Force,' University of Sussex, (Ph.D) thesis 1971, p. 147.
4. East Africa Protectorate, Ordinance No.A of 1910.
5. Maher, C., 'African Labour on the farm in Kenya Colony,' in East Africa Agricultural Journal April 1942, pp. 228-38.
6. Mboya, T.J., 'Freedom and After: 1930-1969' [Deutsch, London, 1963], Paperback edition, p. 29
7. R.M.A. Van Zwanenberg, op.cit., p. 154
8. Markhan Singh, 'History of Kenya's Trade Union; Movement to 1952, [E.A.P.H., Political Studies No.9] p.6
9. Markhan Singh, op.cit. p.7

10. Amendments to Masters' and Servants Ordinance,
No. 4 of 1910
11. East Africa Protectorate, Ordinance No.33 of
1918.
12. Colony and Protectorate of Kenya, Ordinance No.
28 of 1937.
13. Lijungu, C.N., 'Industrial Relations and Personnel
Management in Kenya', University of Nairobi
(M.B.A.) Thesis, 1976, p.34.
14. Lijungu, R.N., op.cit. p.35.

CHAPTER 3.

The foregoing two chapters builds a case for the emergence of Trade Unions and with them the British practice of collective bargaining. Concomitantly, the foregoing chapters reveal the economic structure in which collective bargaining was to operate. As a matter of passing reference we may sum up this economic structure as an embryonic capitalism in which the individual capitalists and the colonial administration worked hand in hand in the exploitation of African Wage labour.

So stated we deem it fit to proceed to discuss the impact of trade union legislations on collective bargaining in the colonial era. To this end, we conceive that^a working definition of the concept of collective bargaining is a pre-requisite. In our task, the contribution of eminent scholars in elucidating the concept is hereby summoned.

In agreement with Beatrice Webb, we state that collective bargaining is an agreement concerning pay and conditions of work settled between trade unions on the one hand and employers or employers organisation on the other hand. It is a negotiation in which employees do not take part individually, and on their own behalf, but do so collectively through representatives.¹

In agreement with Otto Kahn-Freund, we state that by collectively bargaining with organised labour, management seeks to ensure that the planning of production, distribution etc., should not be frustrated through interruption of work. On the other hand by collectively bargaining with management, organised labour seeks to ensure that legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence, should not be frustrated.² We submit that Kahn-Freund's definition, though by no means exhaustive, indicates that the principal interest of management in collective bargaining has always been the maintenance of industrial peace over a given area and period. While the interests of organised labour on the other hand has always been the creation of certain standards over a given area and period standards of distribution of work, of rewards and of stability of employment.

In agreement with Joseph Shister, we state that collective bargaining is, one evolutionary in character, two, interacts with the socio-economic climate, and three, though private, at times involves public interest and governmental action.³

The foregoing definitions noted, we may proceed to make a summation that as is orthodoxly conceived, collective bargaining is a process where employers and

trade unions establish employment standards through the free play of bargaining strengths, with ultimate recourse to strikes and lockouts, barring the intervention of third parties or the law.⁴

Departures from the orthodox conception will be necessitated by the dynamics of a given political system. We agree that in the context of underdeveloped economies departure is almost inevitable but hasten to add that there is irreducible minima below which departures may not depart, except at the risk of stultifying the concept. This irreducible minima to us constitutes the core of collective bargaining. In any such list of the minima we would include, one, the right to strike, two, a strong workers' organisation, and three a limitation of state intervention to the task of setting minimums e.g. in the case of wages, not maximums.⁵

Our stand noted, we proceed to argue that insofar as the various trade union legislations in the colonial era departed below the irreducible minima, to that extent was collective bargaining robbed of substance. In all fairness the concept was present in form rather than substance during this period. With this observation we proceed to show the impact of the various legislations on collective bargaining empirically.

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Prior to the second world war, both the influential settler community and the colonial administration were agreed that conditions were not yet ripe for the emergence of trade unions. The official policy was therefore against development of workers organisations. This policy was based on the belief that such organisations would be used for political agitation. This explains why even after emergence of trade unions later on legislations were geared towards checking political trade unions. Notwithstanding the hostility to unionism, internal and external pressure made the colonial administration to succumb to the demands of ^{the} times. Hence in 1935, Markhan Singh formed the Labour Trade Union. This Union which later changed its name to Labour Trade Union of East Africa, initiated a strike against Nairobi Asian and European builders and constructors in April and May 1937. "To prevent all irresponsible agitators from causing trouble among labour in the Colony,"⁶ the colonial legislative council passed the trade union ordinance in 1937.⁷ In substance, the ordinance required the compulsory registration of trade unions as opposed to the English voluntary practice of registration. To this extent, we question the 'bona-fide' of this legislation. The ordinance neither legalised peaceful picketting nor protected unions from actions of tort.

Yet the immunities were crucial if unions were to undertake collective bargaining, having regard to the economic structure in which unions were to operate. That being the position of the 1937 Ordinance, we take the view that it was half-hearted legislation and, in the circumstances therefore, no strong workers organisation could be formed. Yet, strong workers organisation is one of the pre-requisites as we conceived of in our hypothesis of the irreducible minima. It therefore goes without saying that any trade union having as its legal basis the 1937 ordinance was prone to gross governmental intervention and to that extent could not achieve the legitimate objects. So that when in the same year two trade unions were registered viz. East African Standard Union and the East African Standard and Staff Union, they would not effectively participate in collective bargaining. We may therefore, sum up by saying that the impact of this particular Ordinance had a negative effect on the time honoured practice of collective bargaining.

In 1940, the English Parliament passed the Colonial Development and Welfare Act, the purpose of that act as stated was "to promote the prosperity and the happiness of the peoples in the colonial empire."⁸ Under the terms of the act due to pressure from the new labour government, funds were to be made available

to finance the development of the colonies contingent on the passage of protective trade union legislations. It is arguable whether the demands of this act prompted the colonial legislature to amend the 1937 trade union ordinance in 1940, by adding a new section, 3A immediately after section 3, legalizing peaceful picketing and in 1943 to enact a Trade Union and Trade Disputes Ordinance to repeal the 1937 Ordinance.¹⁰ However, it is our view that the demands of the 1940 Colonial Development and Welfare Act made the Colonial legislature to take the steps it did take.

Be that as it may, both the 1940 amendment and the 1943 Ordinance in our view were half-hearted legislations just as much as the 1937 Ordinance. This view is based on the fact that while the 1940 amendment only legalised peaceful picketting thus leaving out immunities from other torts, the 1943 Ordinance introduced no substantial changes necessary for the protection of the existing trade unions in their pursuit of collective bargaining. In a large measure the 1943 Ordinance incorporated the half-hearted provisions of the 1937 Trade Unions Ordinance as amended by the 1940 Trade Unions (Amendment) Ordinance. That being the position of the 1943 Ordinance, we take the view that just as much as the 1937 Ordinances provisions could not enhance the

development of strong workers organisation so was the 1943 ordinance. As we maintained in our hypothesis that a strong workers organisation is crucial to the effective working of the institution of collective bargain, to the extent that the 1943^{ordinance} rendered no strong unions obtaining in Kenya to that extent was collective bargaining robbed of substance.

Justice Holmes said, "A page of history is worth a volume of logic"¹¹. Take section 5(1) of the ordinance for instance. It stipulated that no employees organisation could continue in existence without the approval of the registrar in writing as opposed to the English voluntary nature of registration as embodied in the 1875 Trade Union Act. Section 10 for another gave the registrar the discretion to refuse to register any trade union on various specified grounds. By virtue of Section 11 (1) the registrar could lawfully cancel the registration of any trade union inter-alia that the certificate of registration had been obtained by fraud or mistake, or that such trade union has wilfully and after the notice from the registrar, violated any of the provisions of the ordinance etc. Having regard to the fact that non registration amounted to an offence punishable by a fine not exceeding £5 for each day it remained unregistered under section 8(2), and further having regard to the

fact that registration was at the discretion of the registrar who was appointed by the government of the day which government was antagonistic to the development of strong unions, we can safely assert that unions in existence could be expected to keep a very low profile. Such unions in our view could not effectively participate in collective bargaining.

Registration apart, we shall still maintain that given the definition of a trade dispute as embodied in the 1943 Ordinance, no strong unions could be expected in this era. Section 17, part II of the Ordinance defined a trade dispute as:

"any dispute between the employers and workmen or between workmen and workmen, which is connected with the employment or non employment or with the terms of the employment, or with the conditions of labour of any person."

In the light of the above definition we submit rather firmly that permissible union activity were confined to a very limited range of economic objectives especially those which are embraced within the narrowest definition of 'employment'. Excluded from the purview and hence from the conferred legitimacy of the statute are the union activities and purposes which are political or of such sweeping nature as to address government policies and wage guidelines rather than

specific job related aims and grievances. Given the frustrating social milieu of this era such a restriction amounted indirectly^{to} the rejection of the institution of collective bargaining, Since in this era and as of now political and industrial questions have been inextricably mixed up in the industrial combats that it needs a Solomon to distinguish one from the other. As a matter of passing reference we may note that this restrictive definition of a trade dispute as embodied in the 1943 Ordinance have been incorporated in the Trade Disputes Act 1965, Section 2.¹² In this regard, we assert that the attitude of the nationalist government towards industrial disputes is not different from that of the colonial administration. In the circumstances, therefore, it is small wonder that by 1943, there were only 10 unions registered in Kenya and most of them concentrated in urban settings.¹³ This meant that the agricultural industry was not involved in the practice of collective bargaining yet the industry accounted for a very considerable labour force in this era. Indeed it was not until 1958 that agricultural unions began to sprout in Kenya. In numerical terms, collective bargaining by 1943 was negligible since unions were few.

The post-second world war period demonstrated that the policy of restricting unions to solely economic

goals would not succeed without further legislation. The 1947 Mombasa general strike involving 15,000 African workers was the first major incident to suggest that matters of economic nature could not be divorced from politics. The economic demands of the workers had political undertone. This pays homage to the assertion that in Africa Trade Union Power in the pre-independence era was derived from the participation in the politics of liberation.¹⁴ In 1949 therefore, the colonial legislature introduced amendments to the 1943 Trade Union and Trade Disputes Ordinance. Section 3 of the 1949 amendment ordinance enjoined trade unions registered before 20th April 1948 to apply for re-registration. This we believe was a screening method. By section 5 if no application for re-registration was made within one month from the commencement of the ordinance by any trade union to which the ordinance applied, the registrar had to cancel the registration. Cancelling of registration meant that the trade union in question was not eligible for protection under the Ordinance. By virtue of section 5, cancellation of registration was not subject to appeal or calling for question in any court of law.

The first trade union on which the 1949 amendment squarely impinged on was the East Africa Trade Union Congress (EATUC) formed by Markhan Singh in May 1949. The body was refused registration on the grounds

that it was not a trade union as defined by the relevant ordinance. However, this action did not deter EATUC, it continued to function, arguing that as a federation of trade unions, it was not legally a trade union but a society. As such, registration was not required. This was the correct legal position of a federation of trade unions under the English law. The colonial administration aware of this law, grudgingly allowed EATUC to function. In 1950 EATUC championed the boycotting of celebrations accompanying the granting of the Royal Charter to Nairobi protesting against the 'racial and anti-trade union policies of the government'. The immediate reaction of the colonial administration was to arrest Markhan Singh and Fred Kubai, secretary and president respectively of EATUC and charging them with being officers of an illegal trade union notwithstanding the English legal position that a trade union federation is a society and needs no registration. To protest against the leaders arrest EATUC called a general strike which paralysed all services in Nairobi. The strike was only defeated by a massive show of force. In the same year a new Ordinance, the Essential Service (Arbitration) was enacted.¹⁶ It is arguable whether the 1950 strike prompted the enactment of this Ordinance. However, we are of the view that it did. The aim of

the ordinance as stated was to provide an arbitration tribunal for the settlement of disputes in essential services. Section 2 of the ordinance defined essential services as menning.

'Services by whomsoever rendered and whether rendered to the crown or to any other person, which are mentioned in the schedule to this ordinance, and any services so rendered which the Governor shall at any time hereafter by the notice in the Gazettee add to the schedule.'

The schedule included the usual six services. Later in the year in pursuance of the powers conferred to him under section 2, the Governor added three more services to the essential services pool. In 1954, pursuant to the same powers the Governor added another four services to the schedule. Part III of the Ordinance compulsory arbitration was introduced to the essential services. Thus by 1954 the principle of compulsory arbitration had been extended to almost all major industries. It is not in dispute that every government must legislate to ensure that the public is protected from the consequences of work stoppages especially in essential services. But what we are saying is that when the essential services legislation is extended to include almost all major industries, we have grounds for asserting that the colonial administration was reluctant to accept, in practice, their pronounced policy of encouraging free collective

bargaining through voluntary machinery. More evidence of the government of the days reluctance to accept collective bargaining is afforded by Part V of the 1950 Ordinance. Section 17(1) of the said Ordinance prohibited lockouts and strikes in essential services. In our view this part of the Ordinance attacked the very basis of the collective bargaining institution.

As noted in our hypothesis, though there is an Orthodox conception of collective bargaining departures from this orthodox conception will be necessitated by the dynamics of a given political system. We hastened to add, however, that there is irreducible minima below which departures cannot depart, except at the risk of stultifying the concept. In such list of minima we included inter-alia the right to strike. That noted, we proceed to argue that to the extent that the 1950 Ordinance extended the principle of compulsory arbitration to almost all major industries and went further to outlaw strikes in them, to that extent did collective bargaining in the colonial era lack credibility. One eminent scholar and one eminent jurist support our view and we hereby take the liberty to quote them. Otto Kahn-Freund the scholar take the view that:

"If workers could not in the last resort, collectively refuse to work, they could not bargain collectively. The power of management to shut down the plant (which is inherent in the right of property) would not be matched by a corresponding power on the side of labour. These are the ultimate sanctions without which the bargaining power of the two sides would lack 'credibility'. There can be no equilibrium in industrial relations without a freedom to strike."¹⁷

On Kahn-Freund's view we would hasten to add that, in practice, a lockout has never played such an important role in the labour relations as the strikes since employers generally attempt to preserve the status-quo not to change it. Hence a legislation such as the 1950 Ordinance which prohibits both lockouts and strikes, limits the activities of employees more than those of employers. So argued we may make a summation that an ordinance of 1950 nature therefore alters radically, the equilibrium in industrial relations in favour of the employer. In so doing collective bargaining cannot be effectively pursued.

The jurist, Lord Wright take the view that,

"The right of workmen to strike is an essential element in the principle of collective bargaining."¹⁸

The two views noted, we may safely conclude that up to 1950 collective bargaining to us was not obtaining in Kenya.

In 1952, the colonial legislature enacted a new trade union ordinance repealing the 1943 ordinance.¹⁹ It is arguable what prompted its enactment. However, we take the view that the Mau-Mau rebellion in part influenced its enactment. Some salient features of the ordinance emerge from the analysis of its provisions. Section 48 imposed strict control over union finances. The registrar could inspect the books of account, lists of members and other allied documents of registered trade unions at any time. We take the view that this provision was designed to prevent trade unions sympathetic to the cause of Mau-Mau rebellion from assisting the movement with funds. Section 29 provided for all union executives to be employees in the particular trade or industry whose union they purported to represent. We take the view that this provision was aimed at preventing politicians whose political parties had been banned due to the Mau-Mau rebellion from using unions as vehicles of protests against colonialism. But it had also side effects with regard to the development of strong unions. It meant a dearth of officers who had both the requisite work background and a sufficient level of literacy and sophistication. It fragmented the limited skills and human resources crucial to the viability of trade unions. Section 16

empowered the registrar to register a union immediately on application or to place the prospective union on probation or alternatively to refuse to register it altogether. Section 20 empowered the registrar to cancel registration or suspend it the grounds on which he could do so were broad. We take the view that both sections 16 and 20 fulfilled the duty of executive control. The registrar could use them to screen and eliminate unions which were deemed subversive by the colonial administration.

On the totality of the evidence of the foregoing, we may safely conclude that the period up to 1952 was characterised by various legislative measures designed to curtail economic and political trade unionism alike. In the circumstances, the existing unions could not effectively participate in collective bargaining. Thus up to this period collective bargaining was existing in form rather than substance. All the facets of the irreducible minima vis-a-vis collective bargaining as we hypothesised were impinged upon by various legislations as shown. However, the tide began to turn gradually with the outbreak of Mau-Mau and as independence became less of a remote possibility.

The most important developments in the '50s were: Firstly, the entry of international firms in the Kenyan industrial scene. These firms conceived rightly that inter-alia bad industrial relations had in part been at the root of Mau-Mau rebellion. Indeed before the Mau-Mau outbreak labour and management were divided in racial lines. These firms wanted to correct this picture they viewed collective bargaining as a medium of co-existence for the two sides of industry could confront one another in their conventional roles as management and labour and not as a whiteman and a blackman.²⁰ We take the view that this was not a mere benevolent move on the part of the international firms. The truth is that these firms unlike the individual capitalists of the pre-'50s envisaged a long span of existence of monopoly capitalism. Seen in that light, industrial peace was therefore a pre-requisite and collective bargaining was the only medium through which it could be achieved. Hence unlike the individual capitalists of the pre-'50s who were leant on the extreme exploitation of Africans wage labour, uncompromising with employees or their representatives, except in times of strikes or protests, these firms were ready to discuss wages and conditions of work. Secondly, the entry of international firms on the Kenya industrial scene, entailed

the concentration of employment into large industrial units which leant itself to the organisation of trade unions at unprecedented level.²¹

Pursuant to the demands of monopoly capitalism, the international firms laid the groundwork for collective bargaining properly so called. Firstly, they set to establish a local employer organisation. Thus emerged in 1956 the Association of Commercial and Industrial Employers (A.C.I.E.). From its birth ACIE accepted in principle the practice of collective bargaining. Since the presence of trade unions is crucial to the working of the institution of collective bargaining, ACIE paid considerable attention to union growth. The type of union which was in the best interest of monopoly capitalism had to be forced on the trade unions. But in order that the structure of the union and the machinery of settling disputes should not appear to be imposed the ACIE deemed that it appear like an agreed programme. To this end on 22nd November, 1957 ACIE's joint consultation report was laid before KFL under the chairmanship of the Minister for Labour. Most of the issues were agreed on except for demarcation of spheres of operation of various unions. However, a demarcation agreement was drafted on May, 1958. Apart from minor exceptions the May 8th demarcation agreement embodied the principle of industry wide unions. It set precise limitations on the .../56

scope of the unions already in existence and, more important, called for the creation of other unions with carefully delimited sphere of influence. Consequent upon this 10 major unions emerged in Kenya.

Meanwhile not to be outdone, steps were taken by the ACIE to organise employers into industry wide associations. The basic purpose for so doing being to present a united front of the employer in an industry to the united front which the corresponding trade union present in negotiation over wages and terms of service. To this end the group organisation committee was formed. The committee sub-divided private industry into some thirty categories each qualified for the formation of an employer association. Next, leading firms were urged to pioneer association within their own jurisdiction. The leading firms were then prevailed upon to organise the smaller companies. Apart from this, the ACIE was also engaged in negotiation over the formation of a colony-wide federation with the Mombasa and Coast Province Employers Association. This was finally accomplished in 1959 and the merger of the two bodies was named the Federation of Kenya Employers (FKE) which was formally registered under the societies ordinance on 1st of January 1959. The creation of a colony-wide federation considerably strengthened the efficiency and the scope

of the employers movement. In a more united front, the FKE turned its attention to establishing ground rules for collective bargaining.²² As Amsden aptly puts it,

"When the jousts of collective bargaining were about to begin in the late '50s, the structural characteristics of the players had been determined and the rules governing the behaviour of each team established."²³

By the end of 1963 roughly 150 collective agreements were being drafted each year, many of which embraced larger number of firms. Approximately 60% of all employees within the private industrial sector (or 100,000 workers) were covered by collective bargaining agreement.²⁴ While a predominantly African unions existed in 1956, approximately 30 unions were operative by 1962. Negotiations were also under way in the plantations. While union membership totalled 17,000 in 1956, it reached 100,000 by 1963.²⁵

FOOTNOTES TO CHAPTER 3:

1. The 1965 Royal Commission under Lord Denovan set to inquire into the problems of industrial relations in England reported its findings in June 1968. It stated 'inter-alia' vis-a-vis collective bargaining: "Collective bargain", is a term coined by Beatrice Webb to describe an agreement concerning pay and conditions of work settled between trade unions on the one hand and employer or association of employers' on the other hand"
2. OMD Kahn-Freund, 'Labour and the Law', the Hamlyn Lectures Twenty-fourth series, (Stevens & Sons, London 1975), pp.52-56.
3. Quoted in Marshall and Marshall, 'Collective Bargaining', (Random House, New York, 1971), p.4
4. Turner, H.A., 'Wages trends, wages policies, and Collective Bargaining: The problems for underdeveloped countries', (Cambridge Univ. press, 1966), p.34
5. Views expressed in H.A. Turner, Supra, and noted by A. Okoth-Owiro in his LL.M. Labour Law Seminar Paper 'Politics, Public Policy and Collective Agreements' 1979, p.5.

6. Attorney-General, H.C. Willan, described the object of the bill in these terms in his speech moving the bill. See Kenya Colony, legislative Debates, 11 (1937), Col. 48
7. Kenya Colony and Protectorate Ordinance No.28 of 1937.
8. Great Britain, Statement of policy on Colonial Development and Welfare, Cmd. 6175,1946,p.8
9. Kenya Colony and Protectorate, Ordinance No.1 of 1940.
10. Kenya Colony and Protectorate, Ordinance No. 1 of 1943.
11. New York Trust v Eisner (1921) 256 U.S.345 at p. 349.
12. Cap 234, s.2, Laws of Kenya.
13. The ten unions registered were:
 1. East Africa Standard Staff Union
 2. East Africa Standard Asian Union
 3. Labour Trade Union of East Africa
 4. A European Trade Union.
 5. Thika Motor Drivers Association
 6. Kenya Asian Civil Service Association.
 7. Kenya African Road Transport and Mechanic Union.
 8. Typographical Union of Kenya.

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9. Kenya Colony and Protectorate, Ordinance No.1 of 1940.
10. Kenya Colony and Protectorate, Ordinance No. 1 of 1943.
11. New York Trust v Eisner (1921) 256 U.S.345 at p. 349.
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 7. Kenya African Road Transport and Mechanic Union.
 8. Typographical Union of Kenya.

13. 9. East Africa Ramargarhia Artisan Union.
 10. Kenya and Ugand Railway Asian Union.
 14. Ioan Davis, 'African Trade Unions', (Penguin Books Ltd., Nicholls & Co. Ltd., 1966), pp. 10-11
 15. Kenya Colony and Protectorate, Trade Union and Trade Disputes (Amendments) Ordinance, No. 35 of 1949.
 16. Kenya Colony and Protectorate, The Essential Services (Arbitration) Ordinance, No.4 of 1950.
 17. Otto Kahn-Freund, op.cit. p.224.
 18. Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, (1942) A.C. at p. 463.
 19. Kenya Colony and Protectorate, Trade Union Ordinance, No. 23 of 1952.
 20. Amsden, A.H., 'International Firms and Labour in Kenya,' (Frank Cass & Co. Ltd., London, 1971), p.54.
 21. Amsden, A.H., op.cit. p. 51.
 22. Amsden, A.H., op.cit. pp.52-54.
 23. Amsden, A.H., op.cit. p.74
 24. Amsden, A.H., op.cit. p. 143-4
 25. Amsden, A.H., loc.cit.
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CHAPTER 4:

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The foregoing Chapter sets the stage for the discussion of collective bargaining in the post-colonial Kenya context. By 1963 the institution of collective bargaining had fully gained root in Kenya 'inter-alia' organised labour, a pre-condition for the effective working of the institution, was strong enough to negotiate. yet too strong did the institution of collective bargaining threaten to become that control of the unions became a political necessity. To this end, the nationalist government have 'inter-alia' employed legislative measures. We conceive of our task in this chapter as that of analysing the impact which these legislative measures have had on collective bargaining. As 'a priori' conclusion we assert that the legislative measures to which union activity have been subjected in past-colonial Kenya have had the effect of limiting the Unions to economic matters - to mere bread and butter issues. Like in the colonial era, the effect of the nationalist governments legislative measures have been such as to weaken the standing of the Unions tremendously.

We may observe as a matter of passing reference that the logic behind the nationalist governments' action lies in the marrying of interests between

them and foreign capital - the majority investment in Kenya.¹ This pays homage to Mohiddin's assertion that independence was granted on the basis of the continuation of the system and not its destruction.² Indeed as independence became less of a remote possibility, the powers-that-be coopted the nationalists into the socio-economic structure which they had built -- embryonic capitalism. They conceived rightly that this class, given political authority, would be a bulwark in the preservation of the embryonic capitalism and the Europeans interest in it. Hence the nationalist were handed the reigns of power on that understanding. The nationalist government came to accept their role as guardians of the colonial society and developers of existing socio-economic structure. The most alteration they conceive is that of integrating part of the African popula^{ce} / in the structure and of preventing the rest from altering the status-quo.³ In this they have found opponents in the trade unions.

As Chapter two reveals, the low wages and miserable conditions of service provided the context in which African unions emerged. The colonial regime and the European employers had been the co-architects of this frustrating social milieu. Naturally, in the post-colonial Kenya, the Unions expected tremendous support from government of the day in their endeavour

to promote the economic lot of their members. In this the trade unions have been by and large disappointed. They have realised that the employers who yesterday were the arch-supporters of the colonial regime are today the colleagues of the nationalist government. In support of this assertion empirical evidence is hereby summoned.

The late Tom Mboya, the Minister mostly closely associated with organised labour clearly articulated the nationalist government's stand in a 1964 paper entitled, 'Trade Unions and Development'. With respect to wage increases, Mboya called upon unions to recognise the public interest in capital formation and social equality which might conflict with the immediate economic interests of workers.

"If unions concentrate too much upon the wage interest, they may end up by producing a new elite of paid workers, as against the poorer self-employed peasant farmers."⁴

He recommended that instead the primary objective of union leaders should be to increase the size of the total economic pie rather than to seek a larger slice of the existing pie for its members. Finally, Mboya appealed to unions to desist from strike action and instead dedicate themselves to increasing production for the good of all. He hinted that if unions did not co-operate voluntarily with the government's pleas, they might be forced to do so.

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With a view to showing the context in which Mboya articulated the government's expectations, once again we summon empirical evidence of the atmosphere that pervaded the Kenya industrial scene prior to the introduction of legal constraints by the nationalist government. The years 1960 and 1962 were particularly marked by industrial unrest. In 1960, out of a total of 756,806 manday's lost in the private sector, 637,933 were accounted for by the agricultural industry.⁵ The effects of these strikes on Kenya's economy in that year can best be appreciated in the light of the small size of the modern sector labour force in a predominantly agricultural economy. In 1962, the number of manday's lost were greater than the cumulative record for 1948-59.⁶ In the circumstances industrial peace was therefore deemed necessary. To this end, a series of conferences were convened between Kenya Federation of Labour and the Federation of Kenya Employers under Mboya's Chairmanship. The result of these meetings was the 'Industrial Relations Charter' 1962. Essentially, the charter was a statement of faith by the government and the two sides of industry to relieve tension so as to allow for economic reconstruction. Thus as KANU swept into office in 1963, it brought with it the 'Industrial Relations Charter'.

We take the view that the charter was a fiasco. With a view to buttressing the argument we once again summon empirical evidence. In 1963 there were 283 strikes. In 1964, there were 231 strikes. In 1965 there were 186 strikes.⁷ Consequent upon the industrial actions, the government released "Sessional Paper No. 10 of 1965." After enumerating the detrimental effects of the strikes on the economy, the paper went on to advocate legislation providing for the 'compulsory arbitration of major issues not resolved through the regular bargaining process.' Further, the paper noted that 'special legislation may be needed in sensitive industries to avoid the economic paralysis that could result from work stoppages in these areas.'

Pursuant to the suggestions embodied in the 1965 White paper, the nationalist government enacted, firstly, the Trade Disputes Act 1965⁸ and amended it in 1971.⁹ Secondly in 1967 the Trade Union Act was enacted.¹⁰ Last but not least in 1974, the President of the republic promulgated a decree outlawing strikes throughout the country. It is the impact of these legislations and the decree on collective bargaining that this / chapter sets out to examine. To this end we reiterate our stand as noted in Chapter Two that there is an irreducible minima for the effective working

of the institution of collective bargaining. To us, this minima is constituted by one, the right to strike, two, limitation of state intervention to the task of setting minimum, for instance, in the case of wages, not maximums, and three a strong workers organisation. This minima, we maintain constitutes the core of collective bargaining.¹¹

Our stand noted, we proceed to show the impact of the 1965 Trade Disputes Act on the core of collective bargaining. Section 4 of the ordinance provides:

"Any dispute, whether existing or apprehended may be reported to the Minister, by or on behalf of any party to the dispute."

By virtue of section 5, the Minister, having been so informed may undertake to (i) accept or reject the report, (ii) refer the matter back to the parties, (iii) effect conciliation according to pre-existing machinery, (iv) cause an investigation, (v) appoint a person or a body of persons to commence conciliation procedure (section 6), or recommend the referral of the matter to the industrial court (sections 9-11), the awards of which are to become:

"an implied term of every contract of employment between the employers and the employees to whom the award relates ... (and hence enforceable) (Sections 10(6)).

Most significant is, however, Part IV, 'Adherence to Agreements and Awards', which declares sympathetic strikes and lockouts to be illegal (sections 19-21) and confers on the Minister the power to declare certain strikes and lockouts to be illegal when he is of the opinion that settlement machinery has not been exhausted or that the dispute has been the subject of a settlement or an award (section 20)

Being of the view that the right to strike is an essential element in the principle of collective bargaining,¹² we re-assert our argument in Chapter 3 that to the extent that Part IV of the 1965 Act outlaws especially strikes to that extent has collective bargaining institution ~~have~~ been robbed of substance. We hasten to add that the apparently equal handed treatment of the unions and employers in part IV by imposition of equal limitation upon the proscription of both lockouts and strikes is illusory. As argued in Chapter 3 a lockout has never played such an important role in the labour relations as the strike since employers generally attempt to preserve the status-quo not to change it. Hence the carefully preserved balance of effective bargaining has been radically altered in favour of the employers. Moreover, if a strike is the only most potent weapon of the unions, a lockout is only one and not necessarily

the most effective device in the armoury that includes court action, police suppression and termination of strikers' services as embodied in Part IV which sets out the penalties for contravention of the Act.

Part V of the Act further limits industrial action in the "Essential Services" and permits the Minister by notice in the Gazettee to:

...add only service to, or delete any service from, the first schedule to this Act ... and may specify any particular undertaking ... as an essential service. (Section 34(1)).

The Act further extended the list of essential services by five and provided that the Labour Minister could refer a trade dispute in essential services to arbitration by the industrial court.¹³ This provision, we submit, is reminiscent of the 1950 'Essential Services (Arbitration) Ordinance and has the same effect as that ordinance. Finally the negative effect of the 1965 Act arguably lies in the vesting of the Labour Minister with broad discretionary powers. Although the Ministers decisions are appealeable to the High Court, nonetheless, by concurrence or denial, by abstention or delay he may influence the outcome of the dispute.¹⁴

The Trade Disputes (Amendment) Act,¹⁵ passed in July 1971 embodied further restrictions on the right to strike. One of the amendments expanded the .../66

definition of 'Strike' to include 'go-slows', while another narrowed the definition of what was acceptable 'trade disputes'.¹⁶ The Act extended the 'cooling off' period of strike notice.¹⁷ Our stand on the right to strike is well known and the arguments for it alike. We may add that the 1971 amendment further weakened the employees bargaining power.

However, the most important part of the 1971 amendment lies in that part which deals with the implementation of income policy.¹⁸ In its 'Development Plan 1970-74, the government had announced its intention to secure a 'just distribution of national income' through the regulation of urban wages. This was to be accomplished by requiring that all collective bargaining agreements/^{be} approved and registered by a reconstituted industrial court. This body was to decide whether increases in wages and fringe benefits were justified on the basis of the guidelines established by a committee of the cabinet. The 1971 amendment incorporated the proposals contained in the 'Development Plan 1970-74, except that the guidelines for the industrial court were to be issued by the Minister for Finance instead of a Cabinet Committee. Up to 1972 the provisions of the income policy had not come into operation. The delay was partly as a result of complexity of machinery for .../67

fixing wages and prices. But by 1973 the machinery was already established and in operation.¹⁹ This, we submit, has gravely restricted the scope of collective bargaining in Kenya.

The Industrial Court procedure has been criticized to a large measure. The critics argue that with the Ministry of Labour required to guide all deadlocked disputes through the statutory machinery and the consequent increase in the Ministry's workload, there is a proportionately increased tolerance for extended period of negotiation between the parties before extensive involvement on the part of the Ministry. They add that with an increasing caseload in the industrial court, there is addition to the duration of the pendency of Industrial disputes. So that when a no strike obligation becomes mandatory the unions come to lose some of their bargaining power. They continue to argue that this is more true where management and workers understand that a lengthy period for negotiation, conciliation and hearing will precede any change in the items bargained for. In these circumstances, they assert, the unions may be tempted to accept much less than they demand. It is arguable whether the lengthy pre-settlement procedures before the 'right to strike' may be exercised

(if ever), curtail the unions bargaining power without any comparable reduction upon the leverage exercised by the management.²⁰ In agreement with the critics, we take the ^{view} that given the economic strengths of the two sides of industry, the lengthy pre-settlement procedure does curtail the unions bargaining power to the advantage of management.

The Trade Union Act 1967 is yet another legislation which limits the scope of collective bargaining in Kenya.²¹ In this respect the definition of 'trade union', 'trade dispute' and 'strike' under the Act is held culpable. We observe as a matter of passing reference that the 1967 Trade Union Act in so far as it defines 'trade union', 'trade dispute' and 'strike' is a **replica** of the 1943 Trade Union and Trade Dispute Ordinance. As the arguments pointing the limitation of these definition on collective bargaining have been pursued in Chapter 3 in relation to the 1943 Ordinance we feel a further attempt to reiterate them would be repetitious and therefore humbly refer our reader. That noted, we proceed to discuss specific sections that are equally deemed culpable.

Section 16(1) of the 1967 Act vests the Registrar of Trade Unions with broad powers. There are nine grounds on which the Registrar may cancel the registration of

any union on any one of the specified grounds. Appeal from the Registrar's decision is to the High Court (Section 18). However, the heart of the 1967 Act is found in Sections 22-25, which enumerated the rights and liabilities of registered trade unions. Any union not registered or has its registration cancelled is ineligible to enjoy any of the rights, immunities or privileges of a registered union but is subject to liabilities. In this respect the major difference between the Trade Union Act of Kenya and the English Trade Union Act, 1871 is manifest. Under the English Act registration was voluntary and unregistered unions were eligible for privileges and immunities afforded by the Act. While under the Kenya Act, registration is the 'sine qua non' of a unions very existence. In consequence of the importance of a decision concerning eligibility for registration under the Kenyan Act, the broad discretionary powers of the Registrar became that much more important as a means of exercising executive control. Section 16(1) above have been used to disqualify unions which have, arguably, political purposes. Thus the dispute over international affiliation between rival unions allegedly representing Eastern bloc nations (the Kenya Workers' Congress) and the United States sympathizers (the Kenya Federation of Labour), led to the deregistration of both the Unions, the detention of the supposedly left-leaning leaders,²² and

the creation of (coŕu), the constitution for which was drawn by the Attorney-General on the basis of recommendations made by a presidentially-mandated Ministerial Commission. In ~~the~~ circumstances unions and their officials keep very low profile, though on intermittent occasions cases of unions pressing militantly for workers demands are not uncommon. In our view occasional unions militant oratory is an indicator of their frustration and are really designed to win the confidence of the rank and file whose financial and personal support enable the national and union leaders to stay in office.

Last but not least, the 1974 Presidential decree outlawing strikes in the whole country was the death knell to the institution of collective bargaining having regard to our stand that the right to strike is the 'ultimate weapon' of union power. The 1965 Trade Disputes Act did not completely outlaw strikes, though sympathetic strikes were outlawed. What this means is that a union could strike after exhausting the machinery laid down by the Act. While agreeing that after 1965 a strike was unlikely event in industrial relations in Kenya, concomitantly we assert that it was a life-line which the unions could count on however remote the possibility. So that when the

1974 Presidential decree completely outlawed strikes, the unions bargaining power were by and large affected and with this the effective collective bargaining. We may only surmise that in post 1974, the institution of collective bargaining will only remain in form rather than substance.

FOOTNOTES TO CHAPTER 4 :

1. Colin Leys, 'Underdevelopment in Kenya: the Political Economy of Neo-Colonialism 1964-1971', (H.E.B. Paperback, London, 1975) p.257.
2. Quoted by Garrey Wasserman in 'The Independence Bargain: Kenya Europeans and, the Land Issue 1960-62', Journal of Commonwealth Political Studies (1973) Vol.II No.2, p.1
3. Garrey Wasserman, op.cit. pp. 1-3.
4. Tom Mboya, 'Trade Unions and Development', as quoted by Sandbrook in 'Proletarians and African Capitalism: The Kenya Case, 1966-1972', (Cambridge University Press, 1975)p.43
5. Republic of Kenya, Statistical Abstract, 1966, p.127
6. Republic of Kenya, Statistical Abstract, 1966, p.127
7. Strikes statistics for Kenya 1963-73. Source: J.D. Muir and J.L. Brown, 'Labour legislation and Industrial disputes: The Kenyan Case', British Journal of Industrial Relations Vol. XIII No.3 '(1975), pp.338-339.
8. Act No. 15 of 1965, Cap. 234 Laws of Kenya.
9. Trade Disputes (Amendment) Act No.22of 1971, Cap. 234 Laws of Kenya.
10. Trade Union Act; No.9 of 1967, Cap. 233 Laws of Kenya.

11. Views expressed in H.A. Turner, 'Wage Trend, Wage Policies, and Collective bargaining: the problems for underdeveloped countries' and noted by A. Okoth-Owiro, in his LL.M. Seminar Paper, 'Politics, Public Policy and Collective Agreements', 1979, p.5.
12. View expressed by Lord Wright in the course of his judgment in the case of CROFTER HAND WOVEN HARRIS TWEED, Co. LTD. v. VEITCH, (1942) A.C., at p. 463.
13. Trade Disputes Act, No. 15 of 1965, Section 27
See First Schedule for the full list of services under essential services pool.
14. View expressed by L.I.S. Gilmore, 'Organised Labour and Government Controls in Kenya', E.A.L.J., 1975, No.1 at p.14
15. Trade Disputes (Amendment) Act, No. 22 of 1971.
16. Section 2 of Trade Disputes (Amendment) Act, No. 22 of 1971.
17. Section 18A of 1971 Trade Disputes (Amendment) Act, No.22 of 1971.
18. Section 5 of the Trade Disputes (Amendment) Act, NO. 22 of 1971.
19. Wage guidelines were first introduced on 29th August 1973 by activating section 5 of the Trade Disputes (Amendment) Act 1971. /3

19. Amendments to the guidelines were made in March 1974.
 20. Views expressed by L.I.J. Gilmore, E.A.L.S., No.1, 1975, at.p. 25.
 21. Trade Union Act, No.9 of 1967, Cap. 233 Laws of Kenya.
 22. Ministry of Labour Annual Report for 1966.
Weekly Review (14 April, 1966), p.13. 1966 was a year of ideological split within the ruling party KANU which resulted in the formation of the left-leaning KPU led by Odinga (Ibid. p.10). Dennis Akumu is reputed to have been detained because he indicated an intention to leave KANU for KPU and because he abandoned KFL to found the Kenya African Workers' Congress, affiliated with the All-Africa Federation of Trade Unions, sponsored originally by Kwame Nkrumah.
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C O N C L U S I O N

In our study we proceeded on the hypothesis that the impact of trade union legislations have been such as to render collective bargaining in pre-independence and post-independence Kenya non-existent. In the alternative, we argued, if the institution of collective bargaining existed in pre-independence era, or exists in Kenya by 1974, then it was in form rather than substance.

With a view to proving our hypothesis we conceived of collective bargaining in two perspectives - orthodox and liberal. In the former context we conceived of it as a process whereby employers and trade unions establish employment standards through the free play of bargaining strengths, with ultimate recourse to strikes, barring the intervention of third parties, or the law. On the other hand, in the **liberal** context we conceived of collective bargaining as allowing for departures from the orthodox view in the interest of the dynamics of our political system. But we hastened to add that there ought to be an irreducible minima below which departures cannot depart, except at the risk of stultify^{ng} the concept. To us, we argued, this irreducible minima constitutes the core of collective bargaining. In any such list

of the irreducible minima we included, one, the right to strike, two, a strong workers' organisation and three a limitation of state intervention to the task of setting minimums e.g. in the case of wages and not maximums.

We then superimposed the above thesis on the various trade union legislations. In the colonial era, as chapter 3 reveals, neither the orthodox conception of collective bargaining nor the liberal existed. The orthodox did not exist because the state intervened as a third party at times openly intimidating the trade unions and their officials. Strikes were banned in all essential services and almost all major industries we brought under the industrial services pool. Further, compulsory arbitration was introduced in essential services. In effect the free play of bargaining strengths was ousted by legislation. In this regard the 1950 essential services arbitration ordinance is held culpable. The liberal did not exist either, because the irreducible minima was taken away by legislations. There were no strong workers organisation. In this respect the registration requirement as demanded by the 1937, 1943, 1949 and 1952 Trade Union ordinances are held culpable. The wide discretionary powers vested with the registrar to cancel or register trade unions in this era was an

executive control of the emergence of strong unions. In the circumstances existing unions were docile and this was inimical to effective collective bargaining. The strike weapon was also ousted by legislation in almost all major industries. Without strike weapon there can be no equilibrium in the industrial relations and the unions are rendered weak. This was the true position in the colonial era. The government of the day did not use the law to only setting minimums in the cases of wages but extended it to suppress even union officials at times ending in imprisonment or deportation.

In the independence era, neither the orthodox conception nor the liberal conception of collective bargaining exists. The orthodox does not exist because the state intervenes as a third party at times culminating in the detention of union officials considered to be 'subversive' in the contemplation of the executive. Sympathetic strikes were outlawed by the 1965 Trade Disputes Act, while other strikes remained more of a remote possibility. In 1974, the Presidential decree outlawed strikes altogether. Compulsory arbitration was introduced in the schedule of Essential Services. In effect there is no free play of bargaining strength as there is limited voluntary dispute

settlement machinery. The workers organisation is also weak. A case in point is the Central Organisation of Trade Unions (COTU). The Governing Council of COTU is not only composed of the highest ranking officers of the organisation but also a representative of the Kenya Government in the person of the Permanent Secretary, Ministry of Labour or his representative acting in an advisory capacity. The top executives of COTU are appointed by the President of the Republic of Kenya from a panel of not more than three names submitted by the Governing council for each post after selection by secret ballot. The President may revoke all or any of the appointments of the Secretary-General, the Deputy Secretary-General and the Assistant Secretary-General. The foregoing apart, given the history and structure of COTU as well as the degree of control exercised over some of its primary functions, the federation cannot be regarded as autonomous. In the words of Gilmore L.J.

"The problem is compounded by the fact that the Government not only represents the interests of the people of Kenya, with the public service constituting nearly one-half of all registered employees in Kenya. It may appear contradictory to the philosophy of trade unions that the nations largest employer has a seat in the national labour federation's council chambers and has the right, among others, to select and remove that body's leadership".

With the foregoing summation we rest assured that our hypothesis has been proved.