FREEDOM OF CONTRACT IN
EMPLOYMENT CONTRACTS

A Dissertation Submitted in Partial
fulfilment of the Requirements for
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# TABLE OF CONTENTS

**TITLE**

**ACKNOWLEDGEMENTS**

**TABLE OF STATUTES**

**TABLE OF CASES**

**INTRODUCTION**

Chapter I: Freedom Of Contract in Employment Contracts

1. Meaning of freedom of contract
2. Development Of the doctrine and its Background

Chapter II: The Contract Of Employment In The Colonial Economy

1. Establishment Of Colonial Rule and Economy
2. Legislative Interference In the labour issue
3. Recruitment of labour

Chapter III: Post-Independence Reform

A. 1. The Employment Act
2. Regulation Of Wages and Conditions of Employment Act
3. Workmen's Compensation Act
4. Factories Act
5. Trade Disputes Act

B. **INEQUALITY**

C. **COLLECTIVE BARGAINING**

Chapter IV: Conclusion: Problems and Prospects

**BIBLIOGRAPHY**

---

<table>
<thead>
<tr>
<th>TITLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>(i)</td>
</tr>
<tr>
<td>TABLE OF STATUTES</td>
<td>(ii)</td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td>(iii)</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>Chapter I: Freedom Of Contract in Employment Contracts</td>
<td>4</td>
</tr>
<tr>
<td>1. Meaning of freedom of contract</td>
<td>4</td>
</tr>
<tr>
<td>2. Development Of the doctrine and its Background</td>
<td>6</td>
</tr>
<tr>
<td>Chapter II: The Contract Of Employment In The Colonial Economy</td>
<td>14</td>
</tr>
<tr>
<td>1. Establishment Of Colonial Rule and Economy</td>
<td>15</td>
</tr>
<tr>
<td>2. Legislative Interference In the labour issue</td>
<td>19</td>
</tr>
<tr>
<td>3. Recruitment of labour</td>
<td>28</td>
</tr>
<tr>
<td>Chapter III: Post-Independence Reform</td>
<td>36</td>
</tr>
<tr>
<td>A. 1. The Employment Act</td>
<td>37</td>
</tr>
<tr>
<td>2. Regulation Of Wages and Conditions of Employment Act</td>
<td>45</td>
</tr>
<tr>
<td>3. Workmen's Compensation Act</td>
<td>49</td>
</tr>
<tr>
<td>4. Factories Act</td>
<td>50</td>
</tr>
<tr>
<td>5. Trade Disputes Act</td>
<td>51</td>
</tr>
<tr>
<td>B. <strong>INEQUALITY</strong></td>
<td>54</td>
</tr>
<tr>
<td>C. <strong>COLLECTIVE BARGAINING</strong></td>
<td>62</td>
</tr>
<tr>
<td>Chapter IV: Conclusion: Problems and Prospects</td>
<td>69</td>
</tr>
<tr>
<td><strong>BIBLIOGRAPHY</strong></td>
<td>77</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>No.</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.</td>
<td>Master and Servants Amendment Ordinance, No. 7 1919.</td>
</tr>
<tr>
<td>9.</td>
<td>Master and Servants Ordinance No. 4 of 1910.</td>
</tr>
<tr>
<td>10.</td>
<td>Native Registration Amendment Ordinance No. 30 of 1920.</td>
</tr>
<tr>
<td>11.</td>
<td>Native Authority Ordinance, No. 22 of 1912.</td>
</tr>
<tr>
<td>12.</td>
<td>1897 Order-in-Council, 1897.</td>
</tr>
<tr>
<td>14.</td>
<td>Regulation of Wages And Conditions of Employment Act Cap. 229 Laws of</td>
</tr>
<tr>
<td></td>
<td>Kenya.</td>
</tr>
<tr>
<td></td>
<td>Table of Cases</td>
</tr>
<tr>
<td>---</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>1</td>
<td>Almagamated Union of Kenya Metal Workers and D.T. Dobie (Kenya) Ltd.; Industrial Court, Cause No. 10 of 1977.</td>
</tr>
<tr>
<td>2</td>
<td>Kenya Union of Commercial Food and Allied Workers and Kenya Commercial Bank Ltd.; Industrial Court, Cause No. 69 of 1976 (1).</td>
</tr>
<tr>
<td>3</td>
<td>Kenya Union of Commercial Food and Allied Workers and Kenya Co-operative Creameries Ltd.; Industrial Court, Cause No. 20 of 1977.</td>
</tr>
<tr>
<td>4</td>
<td>Kenya Union of Commercial Food and Allied Workers and Kenya Co-operative Creameries Ltd.; Industrial Court, Cause No. 18 of 1976.</td>
</tr>
<tr>
<td>5</td>
<td>Printing and Numerical Registering Co. v. Simpson (1878) L. R. 19 Eq.</td>
</tr>
</tbody>
</table>
INTRODUCTION

Freedom of contract has been said to be one of the necessary elements in the formation of contracts, and yet its place in the actual formation of a contract has been most controversial. Freedom of contract is a common law doctrine which developed in Britain in the laissez-faire period, the age of individualism. The common law has attempted to uphold the doctrine by leaving alone to determine the terms of the contract and only interfering where there is coercion fraud, misrepresentation or mistake. This practice is in accordance with the idea of individualism which dictates that men should be left alone to enter into a contract voluntarily and on terms freely bargained for. However, many people all over the world have claimed that the doctrine does not exist today; that it is a sham. It is this assertion that this paper seeks to prove or disprove with regard to Kenya. Though the discussion deals with freedom of contract in general I have concentrated on the doctrine with reference to employment contracts.
I have started by looking at the meaning of the doctrine and the way it operated in the laissez-faire period. I have gone on to look at the effect of legislations and judicial activity on the doctrine, both in its conceptual and practical sense. Other factors which affected the doctrine such as, the virtual eclipse of the doctrine of laissez-faire, development of commerce, the rise of standard form contracts and inequality are also discussed.

Chapter Two examines the way the doctrine of freedom of contract operated in colonial Kenya. Many Kenyans are to be heard saying, with jubilation, how independence rescued them from slavery. This has prompted me to examine the conditions of employment that existed during the colonial era; for if they were slave conditions then there could not have been any freedom of contract. Then, I have looked at the oppressive nature of colonial legislation, its effect on the bargaining power of both the employer and the employee. The methods of recruiting labour has also been discussed to see whether or not the employee entered into the contract freely as the doctrine requires.
In Chapter Three, I have looked at the post-independence reforms and the way they affect the doctrine. Some reforms are in the form of legislations which seek to control the relationship between employers and employees, for example, those which state the minimum working conditions that should exist, the minimum wages that the employee should get and the way disputes should be solved. I have then discussed those factors existing in present-day Kenya which detract from the doctrine of freedom of contract, for instance, inequality and unemployment.

Finally prospects of the doctrine are examined taking into consideration the present and future Kenyan circumstances. I have also attempted to make some suggestions which I do not claim to be satisfying answers to the problem.
CHAPTER ONE

FREEDOM OF CONTRACT IN EMPLOYMENT CONTRACTS.

1. MEANING OF FREEDOM OF CONTRACT

Freedom of contract has been and still is regarded as one of the most important elements in a contract. The doctrine is a very difficult one to define because its meaning has not been constant; has been changing according to the development of the law of contracts. In general, however, the doctrine refers to the magnification of the power of the individual in the area of contracts; meaning that a man is free to enter into any contract with a person of his choice on terms and conditions agreed on by both parties. A definition by Knight should suffice for the time being. He says that freedom of contract is but an application of the great idea,

1 - MaCneil, Ian R., "Cases And Materials On Contracts; Exchange Transactions and Relationships".
"that all relations between men ought ideally to rest on mutual free consent and not on coercion, either on the part of the society, as politically organised in the state. The function and the only ideally right function of the state according to this ethic, is to use coercion negatively to prevent the use of coercion by individuals or groups"².

The doctrine in issue was part of England's Common Law later imported to different countries, including Kenya. A look at its background will therefore mean examining the historical development and operation of the theory in its country of origin.

2. DEVELOPMENT OF THE DOCTRINE AND ITS BACKGROUND

English law of contract began to emerge in the Seventeenth Century under the impetus of business development. But it was in the eighteenth and nineteenth centuries that most of the general principles of contract were developed and elaborated. This development was influenced by various factors.

Firstly, continental jurisprudence through the writings of such jurists as Pothier and Von Savigny expressed the idea that contract depended on, "a concurrence of intention in two parties, one of whom promises something to the other who on his part accepts such a promise."\(^3\) Hence, the tendency in the continental jurisprudence to rest contractual obligations on their consensual nature.

The theory of natural law added force to this idea of the consensual nature of contracts by laying emphasis on the individualistic characteristics of transactions. Natural law theorists supported the idea of individualism by putting forward the theory that an individual serving his own interests was also serving the interests of the community.

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3 - Treatise On Obligations, Part 1, Article 1 by Pothier, 1806.
To the judges of the day therefore, natural law meant that man had an inalienable right to make contracts for himself.

Thirdly, the doctrine of laissez faire was at its height during this period. It was the era of commerce, industry and free enterprise. Individualism, liberty and enterprise were valued as the insignia of a civilised society. To the nineteenth century judges the philosophy of laissez faire meant that law should interfere with people's freedom to contract as little as possible. To them the function of the civil law was negative in that men were to be left alone to conduct their lives and make contracts unhampered neither by governmental nor by judicial interferences.4

Thus freedom of contract and sanctity of contract became the foundations on which the whole law of contract was built. This trend was taken up by the courts as is apparent in such cases as Printing And Numerical Registering Co. v. Sampson.5

Here judge George Russel said;

4 - Atiyah, "Introduction To The Law Of Contract"
   2nd Edition, 1971, Pg. 3
5 - (1875) L. R. 19 Eq. At pp. 462.
"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice".

Sir Henry Maine summarised the above phenomena by saying that the movement of progressive societies was "From status to Contract". This simply meant that the society was growing out of a situation where obligations and functions were determined by a man's status into the one in which all obligations were created by free contract.

There were two main classical ideas connected with freedom of contract. The first was that contracts were based on mutual agreement between the parties. The other emphasised that the creation of a contract is the result of free choice unhampered by external controls such as governmental or legislative interference. A glance at these two classical theories shows that they were purely theoretical; and a question arises: To what extent did these abstract ideas tarry with what was then the practice?

6 Sir Henry Maine, "Ancient Law".
7 Atiyah, Supra, Pg. 4.
The test adopted by the courts in determining the "intention of the parties" was objective, which means that the question was not whether the parties had in their innermost mind agreed to contract but whether their language and conduct would lead a reasonable man to assume that there was an agreement. There were cases where the parties expressed their intention and the courts gave full effect, but there were times, however, when the parties expressed no intention as in the case of a contract that has been rendered incapable of performance by an unforeseen happening. The courts here invoked the doctrine of frustration which was based on the idea of "implied agreement". Thus the court succeeded in imputing to the parties an intention they never had in mind. This shows that freedom of contract in the first sense was limited in its real life application.

Freedom of contract in its second sense, that is, freedom of choice had three aspects. It meant in the eighteenth century that nobody was bound to enter into a contract at all if he did not wish to do so. It also meant that in a competitive society one had choice of the person he wished to contract with. These two ideas were to a large extent maintained in practice. The third aspect of freedom of choice was that a person could make any contract, on any terms.
Freedom of contract in this sense was restricted on grounds of public policy, for example, in cases of a contract entered into between a competent adult and an infant, a mentally deranged person or a drunkard.

These few examples indicate that there was judicial interference with the doctrine of freedom of contract in its abstract conception. This interference was necessary, according to the courts, to curb injustice. But injustice is an inevitable consequence of freedom of contract. So in fact what the courts were doing was to undermine the doctrine.

Great alteration of the above original concepts was yet to come. It happened in the second half of the nineteenth century and in the twentieth century. Two factors have undermined the classical doctrine of freedom of contract.

The first is the development of commerce which resulted in mass production and distribution. This led to the emergence of a complex set of rules governing contractual relationships in the various fields of contracts for example, agency, sale of goods, hire purchase and insurance. There was a movement towards standardization of these rules, especially of the rights duties and abilities enjoyed or imposed on the parties to the contract. Thus there arose an increasingly great use of standard form
contracts in all contracts dealing with the same transaction. These contracts which are to be found in all walks of life have detailed terms which do not depend on the parties' agreement. The contract is flung at the intending contracting party either to accept in toto or to go without. Thus while one may choose whom to contract with he is not free to change the terms of the contract to suit him. But even this freedom in the sense that competition provides a variety of choice as far as contracting parties are concerned is on the wane. This is because there has been a tendency towards larger and larger industrial and commercial organisations which culminate in monopolies or near monopolies, thus reducing the number of competitors. In any case it is very easy for one to refuse to enter into a contract with one company but finally discover that the terms presented by the other company are basically identical with the ones he rejected.

The other factor is connected with the virtual eclipse of the doctrine of laissez faire. It has been supplanted by the need of the state to ensure "social security" which suggests "status" rather than "contract". The peoples' attitude towards the court has changed. No longer is the law of

8 - Cheshire and Fifoot.
contract regarded as a negative instrument whose main function is merely to enforce agreements which people have chosen to make; the tendency is now to look on the law as a positive instrument for achieving justice. Hence, the increasing interference by the state through legislation. It passes statutes which prescribe the contents of the contract between parties. This twentieth century trend has been described by present day jurists as a movement from "contract" to "status" which is the complete reverse of Maine's\(^9\) observation. The trend is more apparent in Labour contracts.

The classical theory of freedom of contract had many weaknesses. It took no account of the social-economic pressures which forces one to enter into a contract with previous one would not care to contract with. Atiyah gives the example of a situation where a person is compelled to join a trade union to be able to exercise his trade and earn a livelihood. In many cases freedom of choice becomes an illusion in the face of all these pressures.\(^{10}\)

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9  - "Status And Contract in Labour Law"
   by O: Kahn-Freund.

10 - Atiyah pg. 16.
Another major weakness of the classical concept was that it ignored the fact of inequality in contracting parties. Freedom of contract can exist only if the bargaining power of the parties is equal. The courts in England at that time assumed that except for infants, lunatics etc. every person could fend for himself and had only himself to blame if he entered into a harsh and burdensome contract. In so far as one was free from physical restraint or other direct restraint he was assumed to be in a position of equality.

From observation of society as it exists today one can see that this assumption was wrong. An employee and a large company have greater contracting power than an employee or a small businessman, respectively. Naturally, the stronger party will insert into the contract and accept only those terms which are favourable to him. The bargaining power is determined by the amount of property and influence one has. The law in protecting the unequal distribution of property, therefore, does nothing to prevent freedom of contract from becoming a one-sided privilege.
THE CONTRACT OF EMPLOYMENT IN THE COLONIAL ECONOMY

The main object of this paper is to examine the operation of the doctrine of freedom of contract on employment contracts.

At common law a contract of employment is understood as:

"A voluntary relationship into which the parties may enter on terms laid down by themselves within limitations imposed only by the general law of contract." ¹

The general law of contract applies to these contracts. Thus there must be offer and acceptance so that the transaction is done voluntarily with the parties chosen by the contractors. The rules regarding capacity apply and so do those dealing with consideration. According to the latter rules unless an agreement is in a sealed deed, inorder for a contract to be enforced there must be some consideration advanced by each party. In the usual case the employee's promise to do the work matches the employer's promise to pay wages.

¹ - Mansfield Cooper and Wood, "Outlines Of Industrial Law" 1966 pg. 2.
As can be seen from the above definition the doctrine of freedom of contract applies to a contract of employment just as in any other contract. This means that the employee should be able to choose his employer and vice versa; that the two should decide and agree on the terms of service; in short, that the employment contract should be a result of the agreement by the parties involved.

How has this common law doctrine been applied and how does it operate in Kenya? To answer this question we must first examine the Kenya colonial economy which created a great need for labour. Then we will examine the resulting contracts of service and the legislative interference.

1. ESTABLISHMENT OF COLONIAL RULE AND ECONOMY

The establishment of British rule in Kenya began towards the end of the nineteenth century which was the era of imperialism throughout the world. In Kenya this era started with the granting of trading and administrative concessions by the Sultan of Zanzibar to the British Government.  

2 - The 1887 Provisional Concession Agreement; The 1888 Concession Agreement, The 1895 Administration Agreement.
This led to the formation of the Imperial British East African Company (hereinafter referred to as I.B.E.A. Co.) which, in order to exploit the economic potential of the territory property, established administrative posts and ventured inland.

Before long the I.B.E.A. Co. ran into financial problems due to the expeditions it had to launch on those native tribes who resisted their advance.

For further exploitation of the mainland, the Company had in 1882 to construct a railway from the coast to Uganda. These two activities proved too expensive and the Company gave up its charter. The British Government took over and in 1895 a protectorate was established over Kenya.

Between 1895 and 1920 the colonial government was concerned with the laying down of a system of administration. This was facilitated by such legislations as the 1897 Order-in-Council, the 1902 Crown Lands Ordnance and the 1915 Crown Lands Ordinance.

3 - S.R.D 1575/1897.
4 - Ordinance No. 21 of 1902.
5 - Ordinance No. 12 of 1915.
Since 1897 there was a gradual settlement by Europeans. The above-mentioned legislations and others made settlement easier; for instance a lot of land was alienated under the 1902 Ordinance. The Colonial government's policy urged by such settlers as Delamere was to encourage European settlement and this was done through active settlement campaigns.

The 1915 Crown Lands Ordinance provided for the creation of African reserves. The main reason behind this move was to remove Africans from the fertile highland area so as to make room for the coming of white settlers. It was also meant to be a way of inducing African labourers to European farms. The creation of reserves resulted in landlessness for Africans; some of whom became squatters on European farms. Meanwhile the Colonial government continued to build the railway whose completion attracted more and more settlers. Most of these settled along the railway to make use of the cheap means of transport.

6 - Sections 30, 31.

7 - Sections 54 and 86 empowered the governor to "Reserve ---- any crown land which in his opinion if required for the use or support of the members of the native tribes of the Colony".
As far as the Imperial government was concerned the colony had to be self-sufficient, economically. Its administration was not supposed to tax the British subjects too much. The Colonial government's policy therefore, was to try as much as possible to be economically independent. It established a capitalistic mode of production based on plantation economy and this forced the government to depend on the settlers heavily.

The capitalist mode of production presupposes that there is a small group of men who possess the means of production while the bulk of the population consists of suppliers of labour. In the Kenyan colonial context the settlers possessed the means of production and the Africans were the suppliers of labour. This was a pre-industrial type of agricultural capitalism where the farmers were struggling to accumulate capital. The limiting factor on European Agriculture was that they were unable to use all the land that had been made available to them. This was because few farmers had the financial security to raise loans from which more extensive farming could be carried on. In order to accumulate capital, farm expenses had to be minimised and one way of doing this was to acquire cheap labour.
But Africans were content with their way of life (they carried on a subsistence economy) and were not interested in employment or in each economy. A way had to be found to induce them to go out and work. The Colonial government had used Indian labour on the railway but was not ready to do so anymore. Indian labour involved many complications, for example, expenses of transportation. But most importantly it precipitated a racial problem in that the presence of Asians in Kenya posed a threat to the Europeans who agreed to their importation, only on the condition that they were to be repatriated back to India as soon as the work was over. The Colonial government therefore decided to rely on African labour. Meanwhile there was a campaign by settlers to try and induce the government to force Africans, whether directly or indirectly, to work on their farms. Some urged the reduction of native reserves, others advocated high taxes; either method would force the African to enter into the wage economy in order to be able to pay taxes or to sustain a livelihood.

2. LEGISLATIVE INTERFERENCE IN THE LABOUR ISSUE

The labour issue in Kenya was in its early stages characterised by government or legislative interference.
The doctrine of freedom of contract in colonial Kenya meant that the native was free not to offer or to offer his labour, voluntariness being one of the common law requirements in a contract of employment. The colonialist could not acquiesce to such common law principles because if they did, it meant that they could only get labour at the will of the Africans; what they needed was sufficient stable labour.

Unlike the legislation introduced in Britain which, looking at freedom of contract in its abstract sense, would constitute interference in the name of justice, the colonial legislation interfered in an oppressive manner.

The earliest legislation was concerned with taxation. As early as 1901 the Hut Tax was imposed on the Africans. A man was supposed to pay a tax on each hut in his homestead. The Hut Tax tended to be oppressive to the men with many wives. It forced Africans to go out and work on European farms and at other public works in order to earn money to pay it.

8 - Regulations No. 18 of 1901.
The colonial government repeatedly refuted the claim that taxation was a method employed to obtain labour. It insisted that the object was purely to obtain revenue. But the fact that labour was the real object is indicated by the Governor's report in 1908, that the requirements of the Highlands could be met by local labour but that it was necessary and desirable to institute a poll tax to supplement the Hut Tax; that this would induce young men to work. The Poll Tax⁹ was passed in 1910 and it required all males above the age of 16 to pay tax.

The taxation system was unfair to the Africans in two ways. Firstly, the rate of taxation was too high in comparison with the wages paid.¹⁰ Secondly, the tax collected from Africans constituted ⁴⁄₃ of the country's revenue, but nearly all of it was expended on the plantation estates for instance by way of government loans to farmers and also to maintain a system of agricultural assistants and advisers. The facts give the picture of a person being forced to go out and work for a third party's benefit.

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⁹ Poll Tax 1910, Ordinance No. 2 of 1910.
¹⁰ The rate for both Hut & Poll Tax upto 1915 was 3 Rupees, 5 Rupees upto 1920 and 8 Rupees upto 1922, then 6 Rupees or 12/= — wage 6-10/= p.m.
There could not have been any voluntariness in the contract of Employment that ensued as a result of the imposition of tax on Africans. The coercion involved automatically rules out freedom of contract.

The other important legislation was the Master and Servant Ordinance 1910\(^{11}\) which was followed by minor amendments and in 1938 was re-enacted as the Employment of Natives Ordinance.\(^{12}\)

The ordinance regulated labour recruitment by providing for the issuance of recruiting certificates. It provided for the creation of a contract between a master and a servant specifying their duties and obligations.

The Ordinance was obviously one-sided favouring the employer who was already in a better social and economic position than the employee. Section 55 of the Act listed down the employer's offences as:

(i) Detaining a servant's property
(ii) Withholding his wages
(iii) Non-compliance with the provisions regarding care of servants.

The employee's offences on the other hand were numerous and of two categories. Section 47 consisted

\(^{11}\) Ordinance No. 4 of 1910.
of Class I offences - the minor offences which consisted of:

(i) failure to commence contracted work at the stipulated time.
(ii) absence from work without leave.
(iii) careless or improper performance of work
(iv) refusal to obey the commands of the Master or his agents, or using insulting language.

The penalty for breach of these was a fine equivalent to the servant's one month salary and in default one month's imprisonment. Section 48 listed Class II offences, that is, the major offences as follows:

(i) Failure to protect or preserve by negligence or otherwise, master's property.
(ii) Departure from the Employer's service "with intent not to return thereto".

The penalty was a fine of 150/= which was equivalent to his 6 month's salary or 6 month's imprisonment in default.

The idea of penal sanctions to enforce a contract of employment goes against common law principles. The remedies for breach of a contract of employment at common law are (a) damages, (b) dismissal of the employee. Why were these remedies ignored.
In view of the Colonialists main problem of labour shortage, the remedy of damages would not be enough compensation even if the African was able to pay them all. Dismissal on the other hand was not any punishment to the African who was content with his way of life and did not care much about wage economy. It would also have meant, for the settler one less labourer in those circumstances of acute shortage. The legislator therefore aimed at keeping the employee on the farm and at the same time be able to punish him for his breaches. Thus section 49 stated that a contract of service was not cancelled by the imprisonment of the employee for breach. Instead that period he was in jail was to be added on to the contract period.

Section 45(1)(b) gave the magistrate discretionary power to direct the fulfilment of the contract in case of a breach by an employee e.g through desertion. The magistrate therefore could order an employee to go back to an employer he did not like. This not only flouted the doctrine of freedom of contract but also the equitable rule against the enforcement of personal contracts on the ground that it was akin
to slavery.\textsuperscript{13} It was, therefore, far from the truth what Grogan and Sharp said; that:

"The native is protected against his employer and guaranteed proper treatment by knowing that he has a court of appeal where he can obtain information and air his grievances".\textsuperscript{14}

The African was suspicious and afraid of the court which ordered him to return to a cruel employer and imprisoned him for minor defaults. The courts had come to be regarded as an instrument of the settlers and of the colonial establishment as a whole. In view of this the right to sue an employer in section 40 was of no use. The Ugandan case of R.V. Joseph\textsuperscript{15} makes this clear. Here a magistrate convicted a servant who had gone to lodge a complaint against his master. The servant was found guilty of absenteeism.

\textsuperscript{13} Rigby V. Connol (1886) 14 Ch.D, 482 at pg.487 Jessel M.R.

"The courts have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being common relation of Master and Servant, or whether they are agreements for the purpose of pleasure, or for the purpose of Scientific pursuists, or for the purpose of charity or philanthropy".

\textsuperscript{14} "From Cape To Cairo" by Sharp and Grogan.

\textsuperscript{15} I.U.L.R., 30.
Sections 24 to 32 of the 1910 Master and Servants Ordinance imposed certain obligations on the employer concerning the welfare of the employees. Some of these were: to provide housing, proper medicine and medical attendance in case of serious illnesses. The employer was also to provide the employee with food where the latter worked far away from his home.

The employer was to pay wages when due. One here gets the impression that the employee was not after all so badly off. But the truth is that the provisions were merely enacted but not enforced.

The 1919 Master and Servants Amendment Ordinance\textsuperscript{16} was enacted to curb contraventions of the law and to help the employers solve their labour problems. Under the Ordinance Labour inspectors were appointed. They were men who could drink and converse with the settlers, that is, men with whom amicable solutions could be reached. Apart from that the Inspectorates were inadequately staffed. The administration did not want to antagonise their fellow Whitemen. Thus, instead of instituting criminal proceedings against the defaulting employers, formal notices of compliance were issued. Where proceedings were instituted they were civil rather than criminal. It is therefore clear that the amendment did not improve the status of the labourers in any way.

\textsuperscript{16} Ordinance No. 7 of 1919.
The 1912 Native Authority Ordinance⁷⁷ is one of the Colonial legislations. It laid down the conditions under which the chiefs and Headmen could employ others to carry out their orders. It was amended in 1920 to provide,

"for paid porters for government servants on tour, for government transport department and for paid labour for work on construction and maintenance or railways and roads wherever situated in the Protectorate and for other works of a public nature".

Under this amendment the chiefs could recruit for public works, any man, for a period of sixty days in a year, unless he had been fully occupied in some other wage labour occupation for three out of the twelve previous months. So here was another legislation which was a negation of the doctrine of freedom of contract. Under it a man could be co-opted into a contract of service whether or not he wished to enter into one so long as he had not been occupied in some other such work for three out of the previous twelve months.

The other important legislation was the 1920 Native Registration Amendment Ordinance⁷⁸ which

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⁷⁷ Ordinance No. 22 of 1912.
⁷⁸ Ordinance No. 30 of 1920.
will be discussed while dealing with recruitment of labour.

Thus the institutionalisation of labour helped to put the employer in a better bargaining position than the employee. Even with no legislative aid the employers were better off, considering the economic and social circumstances. Nevertheless, there was legislative interference which undermined further the doctrine of freedom of contract, both in its practical and abstract sense.

3. RECRUITMENT OF LABOUR

Here we will examine the methods of recruiting labour so as to determine to what extent freedom of contract in the sense of freedom of choice was upheld. In the first chapter freedom of choice was analysed to mean (a) freedom to enter into a contract voluntarily, that is, when one wishes to do so, (b) that a person is able to choose his contracting partner.

As already noted in the early colonial years the administration was ready to give the settlers as much assistance as possible in the recruitment of labour.

They used chiefs whose enhanced status in society made them eager to carry out the orders of
the colonial government which had promoted them. They were afraid of displeasing the authorities and therefore losing their position. At the same time other persons who were either Europeans, Asians, or Africans had set themselves up as professional recruiters. They would enter into a contract with the employer then proceed to the reserves where they persuaded men to leave their reserves to go and work. They would offer very attractive terms (which normally turned out to be non-existent) and transport them to the place of work. The recruiters were paid by the employer on per capita basis. They were normally men who were down on their luck and were ready to use any methods without any scruples whatsoever. Thus, there was widespread use of force and other dishonest means to obtain labour.

During the first World War, physical compulsion and excessive coercion was used to recruit men for the carrier corps.

The Imperial government and the Colonial Secretary were against the use of such methods and within a short time issued orders forbidding the administration to recruit labour for the Private Employers. The orders were welcomed by the Africans who hated being compelled to go to work. It was,
on the other hand, opposed by European settlers whose crops would suffer if the orders were strictly complied with.

The settlers' labour problem persisted. An especially acute shortage was experienced in the post war period (1919-1920), leading to the Northey Crisis. Coryndon who was the Governor of Kenya during the post-war period issued a circular which required the colonial administrators to "Encourage" men in the reserves to go out and work on the European farms. The different administrators interpreted the circular differently. For some, it meant use of force while to others it meant "Encouragement" pure and simple. The District Officer of Forthall, Field Jones, for instance, reported;

"Both my officers and myself are consistently and genuinely doing our best to give full effect not only to the letter but also to the spirit of the circular ---- the chiefs and headmen have standing orders to see that no able-bodied men remain loafing in their locations-----"19

Thus, the practice was for an employer to make an order to the District Officer or any other administrative officer, who in turn would order the chief or headman to produce labourers. The chief

19 - Memorandum headed "Labour Position Fort Hall District" by Field Jones. 3.4.1920.
would send out his young men to acquire a certain number of working men. These young men like the professional recruiters had no scruples about the methods they used to obtain labour. If a man refused to go out and work his sheep was seized; another was taken if he continued being obstinate. Sometimes they would capture men who were walking along the road. Reverend Owen talked of an instance when he saw men being brought to settler farms roped around the necks.

When labour shortage was acute, even the woman and children were forced to work on the farms.

"Up to March last the practice was prevalent under government order emanating from the administration headquarters of the Kyambu district. A tribal retainer would be sent to say that so many girls were needed for a plantation, and if the girls were not found the chief was placed under restraint".20

One can imagine the methods such a chief or headman, whose position was at stake, would employ to obtain labour. This and the above brief account shows that the contract of service which ensued between the employer and the African employee was often not the result of voluntariness. Take for

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20 - "Owen", Owen to Rev. Canon Rowling C.M.S. Uganda. 26/8/192 Box "Forced Labour".
instance those seized from the roads and those threatened with loss of their property if they refused to work, they did not wish to enter into a contract at all, so that the question whether they entered into it with a man of their choice does not even arise.

Nevertheless, there was yet a more effective way of obtaining labour which also requires examination. This method was adopted by the Colonial government in 1920 under the Native Registration Amendment Ordinance. The Ordinance made it compulsory for all males over sixteen years of age to carry a Registration Card in a small metal container. The card gave the man's fingerprints, the name and address of his last employer, the date he left work and the rate of wages paid. The registration system provided the employer with a record of the employees, thus exposing the latter to a lot of oppression. Some malicious employers would use red ink to warn the next employer that the jobseeker was not a good man, thus rendering him virtually unemployable. Such practices were prohibited in 1936.

The system led to the harassment of the Africans by the administrative officers. The police had power
to examine a person's Kipande so as to decide whether or not he was a "shirker". An African who did not possess his card was a "Shirker" even if he had only forgotten to carry it with him. If he had one which was not signed off he was a deserter liable to be prosecuted or repatriated or both. Section 6(1) of the Ordinance required an employer to inform the nearest District Commissioner and the Registrar of Natives, of any desertion. The Registrar would in turn instruct the local officer concerned to send back the deserters.

Under the kipande system the employers could enforce the normal 30 days contract created by the 1910 Masters and Servants Ordinance. According to this Ordinance the employer issued a labour ticket which was to be the basis for the contract of service. The contract was fulfilled in 42 days to earn a 30 days' salary. The contract became enforceable under criminal law through the use of the Registration system. An employee who infringed his contract in any way was prosecuted. Such a man had considerable difficulties in bargaining over his wages and was liable to be returned if he attempted to raise his wages by moving on to another employer. Again, it was possible to monopolise the labour of individuals.
The practice adopted by the employers was to sign on a man for six month's work and then spread it out over a year. About two-thirds of the employees would be signed on in this manner and then were sent home on indefinite leave. In this way a number of employees were tied to a particular employer.

The doctrine of freedom of contract was greatly departed from with the use of the registration system. The system itself was a contravention of human rights and a mockery of justice. Lubembe likens it to slavery;

"For no where has man been forced to enter into a contract against his wishes unless it is slavery".

And as we know slavery is connected with status rather than contract which means that in slave conditions freedom of contract cannot be talked of.

The Ordinance gave the employer too much power over the employee. Unless the employee's card was signed off at the end of the contract he could not get work with another employer and was liable to be prosecuted or repatriated as a deserter. Thus there was no freedom left to choose one's contracting partner.
In this chapter I will examine the post-independence changes, that is to say, the policies of the new Government and the trend of labour legislations with a view to discovering their implications in terms of freedom of contract in employment contracts.

In the previous chapter it was noted that the characteristics prevailing in colonial labour relations were among others, racial discrimination, poor working conditions for the Africans who provided the bulk of the labour, use of force in the acquisition of labour and oppressive legislative interference in favour of the employers (who in most cases were Asians and Europeans). At independence the African leaders who had fought fiercely against the poor living and working conditions of their people were determined to alleviate them, to remove discrimination and promote the values of human dignity and equality.¹

Discrimination was prohibited. This meant that persons who held the same jobs were to get the same salary inspite of their colour. The colonial practice

had been to remunerate a European or an Asian employee better than his African counterpart.

Meanwhile the Government was committed to the task of Africanising the posts held by expatriates.

Many legislations which were meant to be for the protection of the employees were passed.

1. **THE EMPLOYMENT ACT**

Foremost among these was the Employment Act, which was enacted in place of the 1910 Master And Servants Act. It envisages new emancipating features in favour of the employee. The first of these features being that it eliminates discrimination as can be seen, for instance, from the definition of the term "Employee" who according to the Act is:

"Any individual employed for wages or salary and includes an apprentice——3"

The Master and Servants Ordinance, on the other hand defined a "Servant" as:

"Any Arab or Native employed for hire, wages or other remuneration——4"

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3 - Section 2, The Master And Servants Ordinance, Vol. 12, 1910.

4 - Section 2, The Employment Act, Cap. 226.
The use of the term "Employee" rather than "Servant" is significant of a new era. The latter term connotes subservience and as we all know, freedom of contract cannot thrive on such a relationship.

The Act contains such details for the protection of the employees' wages as, when it is due, when and where the payment is to be made, mode of payment etc. As to the last issue payment is to be made in cash (in Kenyan Currency) or by cheque, but not in kind. The colonial legislations did not make similar provisions. Apart from Section 55(1), which makes it an offence for an employer to withhold a servant's wages without reasonable cause, no other section refers to the payment of the employees' wages. It would be fair to assume that payment in kind was allowed by law since it was not prohibited. Many employers at that time used to remunerate their workers in kind. It is obvious that a worker who is paid in cash is more powerful than one paid in kind (the latter has yet to realise his pay in cash); it therefore follows that the employer of the latter type of servant has a lot of power over him. This is what the Act was trying to limit. The Act in addition to the above

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5 - Sections 4, 5, 6 of Cap. 226.
states the employees' right to dispose of his earnings in any way he wishes. All these provisions are meant to lessen the great power the employer has over him.

The Act requires the employer to provide his employees with proper housing or house allowance, medical care, water and also food where the contract so provides.

Section 7, deals with such issues as annual leave (where every employee is entitled to one month's leave in twelve months), maternity leave and weekly rest. Neither the 1910, Master and Servants Ordinance nor the 1919, Amending Ordinance provided for such leave; such issues were left to the discretion of the employer who had only his own interests at heart.

But the most significant feature of the employment Act is that it omits these penal sanctions to be found especially in sections 47 and 48 of the 1910 Ordinance for breach of an employment contract by the employee. According to section 47 breach of what the ordinance referred to as Class I offences was penalised by a

6 – Section 4(9).
fine equivalent to the Servants' one month salary or by imprisonment for a period not exceeding one month with or without hard labour. A servant who breached Class II offences which were considered to be more serious had to pay a fine amounting to his 6 month's salary or imprisonment without infliction of a fine according to the discretion of the magistrate. What was listed down in the 1910 Ordinance as misconduct meriting penal sanctions now gives a right of summary dismissal of the servant in the Employment Act.

Section 17 of the Act enumerates these acts of misconduct as follows:

a) If without leave or other lawful cause an employee absents himself from the place proper and appointed for the performance of his work.

b) If during working hours by becoming or being intoxicated an employee renders himself unwilling or incapable properly to perform his work.

c) If an employee wilfully neglects to perform work which it was his duty to have performed or if he carelessly and improperly performs any work which from its nature it was his duty under the contract, to have performed carefully and properly.
d) If an employee uses abusive or insulting language or behaves in a manner insulting, to his employer or to any person placed in authority over him by his employer.

e) If an employee knowingly fails or refuses, to obey any lawful and proper command which it was within the scope of his duty to obey, issued by his employer.

f) If in the lawful exercise of any power of arrest given by or under any written law an employee is arrested for a cognizable offence punishable by imprisonment and is not within four days either released on bail or on bond or otherwise lawfully set at liberty.

g) If an employee commits or on reasonable and sufficient grounds is suspected of having committed any criminal offence against or to the substantial detriment of his employer's property.

Although we have noted that the Act has as its prime aim the protection of the employee the above right of summary dismissal is a great power capable of being used capriciously to the detriment of the employee. According to the Act it seems as if the employer is the person to decide whether or not an act is one amounting to gross misconduct; he does not have to make reference to any count or any other
impartial body before he can dismiss the employee. We need not however fear too much for the employee because the Kenya Industrial Court tries to temper the situation. Below I will consider some of the disputes that have come to the industrial court concerning Section 17.

One of the disputes was between Almagamated Union of Kenya Metal Workers and D.T. Dobie (Kenya) Ltd. Here a mechanic working with D.T. Dobie (Kenya) Ltd. had his services summarily terminated allegedly for stealing some motor car spare parts. He was charged with the theft in a Criminal court and acquitted. Upon this the cläment sought his reinstatement. This was rejected and the case came to the Industrial Court, where the employee was found guilty of gross misconduct and the dismissal was upheld.

The second dispute was between Kenya Union of Commercial Food and Allied Workers and Kenya Commercial Bank Ltd.

Kenya Commercial Bank Ltd. had summarily dismissed Mr. Maina, one of their employees for

7 - Cause No. 10 of 1977, Industrial Court
8 - Cause No. 69 of 1976(1), Industrial Court
performing his duties in a grossly negligent manner. Mr. Maina had clearly been fraudulent. The Industrial Court upheld the dismissal.

In the next two cases the court tried to moderate the power conferred on the employees.

In Kenya Union of Commercial Food and Allied Workers and Kenya Co-operative Creameries Ltd., a driver/salesman was dismissed by the management for causing damage to a lorry through negligent handling. It was held that the dismissal was wrongful as the lorry was not in a fit condition when he took it. He was awarded 3 month's salary and all the other benefits that go with a normal termination.

In the dispute between Kenya Union of Commercial Food and Allied Workers and Kenya Co-operative Creameries Ltd., two employees had been summarily dismissed for disobeying the order of the Factory supervisor to report back at 2 p.m. so as to unload a certain lorry. The Investigator found the two employees guilty of disobeying a lawful order, a serious offence punishable by summary dismissal.

9 - Cause No. 20 of 1977, Industrial Court
10 - Cause No. 18 of 1976, Industrial Court
The Industrial court however held that a summary dismissal under the circumstances was too harsh; that the employees deserved a normal termination of their services.

The above examples show that the Unions of workers and the Industrial court help to balance the power conferred on employers by Section 17.

The Act provides a machinery for the termination of the contract which in some cases entails the giving of notice or alternatively forfeiting one's salary. This is in accordance with freedom of contract both in its conceptual and practical sense, that one enters into a contract voluntarily and gets out of it once he does not wish to continue with it, of course, subject to payment of damages if such termination amounts to a breach of contract. Thus in the case of a breach of contract the rights of the employer are summary dismissal and damages. The Act has therefore, reinstated the Common Law position which had been flouted as regards remedies by such provisions of the 1910 Ordinance as Section 45(1)(b) which empowered the magistrate to direct the fulfilment of the contract which meant that an order of specific performance could be granted in such cases of contracts for personal service.
2. REGULATION OF WAGES AND CONDITIONS OF EMPLOYMENT ACT

Another method which has been used by the state to regulate the terms and conditions of working in favour of the employee is that of regulation of wages. Minimum wage-fixing has been described as:

"Fixing by the state authority or authorities of a minimum rate or rates of remuneration below which no person may be employed as a wage earner."\(^{11}\)

A payment of wages below the specific wage rate or rates results in a criminal offence with penal sanctions.

Kenya being a member of the International Labour Organisation has ratified the recommendations contained in the 1970 Convention\(^{12}\) concerning minimum wage-fixing. The Conventions require each member state to provide an adequate machinery whereby minimum wages can be fixed for workers employed in certain of the trades or parts of trades including manufacture and commerce in which no arrangements exist for the effective regulations of wages by collective agreement

\(^{11}\) Lal Patel, East African Labour Regime, 1972 Pg. 198.

\(^{12}\) The Minimum Wage Fixing Convention, 1970.
or otherwise, and wages are exceptionally low or in Agricultural undertakings and related occupations. The Convention also required both the employer and employee to be actively involved in the operation of the machinery on the basis of complete equality.

To give effect to this Convention Kenya passed the Regulation of Wages And Conditions of Employment Act\(^{13}\) which establishes the minimum wage-fixing machinery and the procedures to be followed in its operation. Section 4 of the Act empowers the Minister to appoint a General Wages Advisory Board and Agricultural Wages Advisory Board. The function of the former is to fix a basic minimum wages and other conditions of employment in respect of employees generally or in any specific area. The latter on the other hand determines minimum wage rates and working conditions of employees in the Agricultural industry either generally or in any specific area. Each Board consists of not more than four independent members, not more than 3 employees and not more than 3 employers.

\(^{13}\) Cap. 229, Laws Of Kenya.
The Minister is not bound by the regulation proposals made by the Boards. He may reject or vary them or refer them back to the Boards. He may reject or vary them or refer them back to the Board. He may of his own motion make a regulation order relating to the basic minimum wages in respect of employees generally or in any specified area of Kenya or in respect of any category of employees either generally or in any area of Kenya.\textsuperscript{14} He may revoke the existing national minimum wages regulation order with or without the advise of the Board.

The enforcement of the statutory minimum remuneration requirements may be secured either by civil proceedings or criminal prosecutions or both. According to section 5 contravention of the statutory minimum remuneration is an offence involving a liability for a fine not exceeding Shs. 400. The labour department maintains a field inspectorate services in all urban centres. The field officers pay visits to workers in their work places and establishments to make investigations among employers and workers concerned with a view

\textsuperscript{14} Section 12 of Cap. 229.
to ascertaining whether or not the statutory minimum rates in force are in fact being paid. The Labour Officers' aim is to secure healthy relations between the employers and their employees. They therefore prefer reconciliation to prosecution. There have been however some prosecutions, recorded in the Labour Department annual reports which proves that the machinery of enforcement is very much alive.

But we must note that the Labour Department inspectorate relates only to the urban centres. What of the rural areas where a sizeable group of the country's workers are to be found? The high rate of illiteracy in the rural areas makes the workers specially vulnerable to exploitation. Unemployment is another problem to contend with where the enforcement of the minimum wages is concerned; some workers would prefer to work for less than the statutory minimum than to remain jobless.

Thus although the minimum wages regulation may be said to have succeeded to a certain extent, the Labour Department needs to strengthen its machinery of enforcement.
3. WORKMEN'S COMPENSATION ACT

Another of the above type of statutes is the Workmen's Compensation Act\textsuperscript{15} which requires the employers to compensate their workmen for any injury or in case death occurs, in the course of employment. It provides for the compensation of the Workmen's dependants in case of fatal accidents. If a workman leaves dependants wholly dependent on his earnings, the amount of compensation payable is a sum equal to 41 month's earning or 29,000/=, whichever is less. If the workman leaves any dependants partly dependent on his earnings the employer will pay as much compensation as will be determined by the court but which must not exceed 29,000/=. Where he leaves no dependants the employer will be liable to pay only the funeral expenses which must not exceed Shs. 500. The Act also provides for compensation in case of permanent partial incapacity.

Section 27 seeks to protect the employees from their employers' bankruptcy by providing that where the latter has insured against bankruptcy, the insurers will have the same rights and remedies and be subject to the same liabilities as if they were the employers. This means that they will be

\textsuperscript{15} Cap. 236, Laws Of Kenya.
liable to pay the workmens' wages or any other compensation.

Liability is also imposed on the employer where the worker contracts any of the scheduled occupational diseases.

The above Act is based on the 1946 Workmen's Compensation Ordinance and there is really very little difference between the two. But there is one improvement worth-noting; this relates to the rates of compensation. While the 1946 Ordinance required the employer to pay 30 months' salary or 12,000/= in case of a fatal accident the Act expects him to pay 41 months' salary or 29,000=/. The maximum amount of burial expenses payable under the Ordinance was Shs. 300; it is Shs. 500 under the Workmen's Compensation Act. The Act therefore provides greater protection.

4. FACTORIES ACT

There is also the Factories Act\(^1\) which lays down the minimum statutory requirements regarding the Factory working conditions. It deals with such issues as health, cleanliness, overcrowding,

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\(^1\) Cap. 514, Laws of Kenya.
ventilation, lighting, washing facilities, first aid, fencing of machinery etc.

5. TRADE DISPUTES ACT

Through the Trade Disputes Act\textsuperscript{17} the law provides a machinery for the settlement of Disputes arising from labour relations. The Act requires all existing or apprehended disputes to be reported to the Labour Minister. The Minister has the following options:

a) May reject the dispute or part of it.

b) May refer the dispute back to the parties for further negotiations.

c) May cause an inquiry into any matter of dispute. He may appoint a conciliator, with the consent of the two parties, or an arbitration Board.

The Act provides for the establishment of an industrial court whose Chairman is to be appointed by the Labour Minister with the consent of the Finance Minister, FKE\textsuperscript{18} and COTU\textsuperscript{19}. Here one can see the attempt to be fair to both the employers and employees.

\textsuperscript{17} Cap. 234, 1972, Laws Of Kenya.

\textsuperscript{18} Federation of Kenyan Employers.

\textsuperscript{19} Central Organisation of Trade Unions.
The above are briefly some of the protections the government purports to accord to the workers. There may be many grounds for attacking them and coming to the conclusion that the employer is after all not so much protected. But the purpose of this paper is not so much to demystify these alleged statutory protections but to examine their implications in terms of freedom of contract.

In the previous chapter it was noted that the slave working conditions left no room for freedom of contract to exist. Now that these conditions have been eliminated what degree of freedom of contract has been restored? The doctrine of freedom of contract in its negative sense requires that the parties should not be bound or restricted in any way in the manner of the formation of the contract and the determination of its contents. In the present Kenyan circumstances there is freedom of contract to a certain extent in the sense that the parties choose their contracting partners and that they enter into the contract voluntarily. But as to its third sense, that the parties are able to determine the contents, there has been an onslaught. The above legislations prescribe the minimum wages that an employer can pay, mode of payment, the minimum working conditions, imposes liability on the employer for any injuries
caused to the employee etc. The legislations lay down such details of employment that very little is left to be individually decided on by the parties. This attack of the doctrine from without has been described as part of the movement from laissez-faire towards collectivism or what some people have described as a movement from "contract" to "status". A good example of this is the legislation that has come up to avoid the evils of standard form contract.

Putting aside this argument based on freedom of contract in its abstract sense which terms any legislative interference, except to enforce the terms of a contract as they are, as an onslaught, we will look at the doctrine in its practical sense. The agreement advanced here is that government intervention was meant to promote the status of the employee which had always been inferior to that of the employer and in so doing bring the two to the same bargaining level. The question that then arises is whether the government has succeeded in doing so.

Assuming that legislation itself promotes the status of the employee there are certain factors which militate against the exercise of freedom of contract. Some of these factors will be considered below.
INEQUALITY

To understand properly the issue of inequality it is necessary to first look at the conditions that existed on the eve of independence. The few settlers in Kenya owned most of the fertile land in the Highlands and had a lot of political influence. Next in line were the Asians who controlled a large part of commerce, for instance, financing business, retail trade etc. the Africans and Arabs were at the bottom ladder of poverty and oppression. During the insurgency period, the colonialists realised that they could not continue as they had done before. But it was necessary to continue and preserve the system they had established even after independence so as to safeguard their interests.

The above led to what Gary Wasserman refers to as the "independence Bargain" which was struck between the nationalists and the colonial government. The Million Acre Scheme, the "Z" plot scheme and others were embarked upon the transfer part of the European Highlands to African owners - these were to be the well-to-do Africans, who it was thought were in a position to maintain Plantation Agriculture.

In this way an African middleclass was created which had vested interests in private rights, being landowners, and was the ideal group to protect the system. It consisted of political (Nationalist) leaders, their followers who were rewarded in land, and a few other educated Africans who had money with which to buy land. This middle class controlled the dominant means of production in the society.

The Asians got involved in commerce to a greater extent and even began to venture into the field of industry.

Thus it has been agreed that there was no structural change at independence; that the African middleclass replaced the White masters. This continuation of colonial structures into independent Kenya means that inequality persisted. This is so inspite of the fact that the constitution embodies the doctrine of equality; for it also provides protection to private property and the only persons with private property to be protected are the beneficiaries of the colonial system.

In 1965 the Kenya Sessional Paper\textsuperscript{21} Summarises

\textsuperscript{21}1965, Kenya Sessional Paper; African Socialism And Its Application To Planning In Kenya.
the Country's objectives as follows:

(i) Political equality
(ii) Social justice
(iii) Freedom from want, disease and exploitation.
(iv) Human dignity including freedom of conscience
(v) Equal opportunities
(vi) High and growing per capital incomes, equitably distributed.

It would be true to say that even at the time of writing, Kenya is a long way from achieving these objectives. This is because some of the government policies like Africanisation have benefited some groups of the population more than others. Again the structure inherited at independence is such that only a few people have access to education and to such productive assets as land, capital and credit which have been described as "the chief vehicles to high incomes and influence in Kenya".

Inequality in Kenya pervades all aspects of life. It is clearly discernible in the regional disparities of government services. Some Provinces and Districts are favoured with more governmental services, for example, a greater number of primary and secondary schools is to be found in some Provinces and Districts than in others. So also is the case with such
facilities as water, electric power, health services and roads. A comparison between some regions of the country, for instance, the Rift Valley or Central Province and the Western Province would make matters clearer.

Disparities are also to be found in governmental services between the urban and rural areas. But most important is the disparity in urban and rural incomes. It must however be noted that in both urban and rural areas there is a high degree of income inequality. Large-scale farmers are economically better than the peasants while in the urban areas the top civil servants are given much higher salaries than the clerks or the office messengers.

A survey of the income structure may help to see what is meant by inequality. In present Kenya the population can be divided into 3 groups. There is the high income group which consists of owners of large and medium-sized agricultural enterprises, big farmers rentiers, holders of high level jobs etc., whose income is over £1,000 per year. Then comes what could be referred to as the middleclass with incomes ranging between £200 to £60 per year. The third category is the low income
group which lives in a state of real poverty. This group consists of unskilled employees in the formal agricultural sector, majority of the small holders and pastoralists in arid and semi-arid zones. But the above figures which have been taken from the 1972 I.L.O. Report are rather too low even for that year. £1,000 per year means that the high class persons' income is Sh. 1,600 per month. Although I have not made any research into this area general knowledge suggests that Sh. 3,000 to Sh. 5,000 and over per month is or better estimate of the high income group's monthly income. For the middle class I would suggest Sh. 1,000 to Sh. 1,800 per month, and for the third group Sh. 200 to Sh. 1,000. Either of these two sets of figures helps to understand the gap existing between the High income and the Low income groups.

The position in 1960 was as follows:

22 - Employment, Income And Equality.

23 - Ibid. Pg. 86.
High Income Group  -  over £1,350 per year
Middle class Group  -  £500 per year
Low Income Group  -  £75 per year.

When we compare these colonial figures with the above post-independence figures we come to the conclusion that while racial inequalities in income wealth distribution have almost diminished over the past decade, the over-all personal distribution of incomes does not seem to have moved any substantial degree in an egalitarian direction.

The possession of a higher education, of a higher income and of the influential positions that go with it ensures that these people will have a preferential access to scarce productive factors but will also be able to transmit these benefits to their children. While on the other hand, poor education will result in a denial of job opportunities. Again, lack of production assets or influential contracts further reduces the chances of earning a reasonable income. This poverty will be passed on to the children of such parents.

Inequality has been termed by the I.L.O. Report as fundamental to the explanation of employment problems in Kenya. But I think the main cause of unemployment is imbalance in the economic progress.
According to Frederick H. Haberson, unemployment is the by-product of growth, a disease of industrialisation and a consequence of the introduction of modern institutions and ideas. Lack of employment is one of the social factors which make nonsense of the doctrine of freedom of contract; and especially so when it is coupled with inequalities.

It has been noted that one of the weaknesses of freedom of contract was the assumption that the parties involved are equal, that is, have equal bargaining power. The strength of a party's bargaining position is governed by one's economic power (that is, mostly those in the high income class consisting of big landowners and owners of big businesses) are better bargainers than the peasants or small-time business men. This is the result of the inequalities existing in Kenya which together with unemployment compound to make the idea of freedom of contract a fiction. Due to the pressure for jobs a person hardly stops to consider the issue whether or not he would like to enter into a contract with the prospective employer.

24 - The Structure of Employment in Kenya, Edited by Ray Roberts; Article by Frederick H. Haberson.
A person who has remained jobless for 2-3 years will take any job that comes along irrespective of whether he likes it or not. Neither will he argue about the terms of the contract. He would rather take the job first then later try to fight for better terms.

The employer on the other hand is in a much better position. With hundreds of applicants he has a wide range of choice as far as contracting partners are concerned. He is also in a better bargaining position with regard to the terms of the contract and may with impunity, even flout the statutory requirements for example, the minimum wages requirement. Infact many workers do not know of the minimum wage provisions inspite of the fact that the I.L.O. Convention and the minimum-wages legislation require that a machinery for making it known to the citizens should be established. In any case knowledge of the statutory protections may not be of much help when there are hundreds of his type looking for jobs.

The fact, therefore, that one party is so much stronger than the other undermines the doctrine of freedom of contract in its practical sense. But it may be argued that in this age of collective bargaining social and economic inequalities do not really place the employee in such a bad contracting position;
since with collective bargaining the two parties are on the same bargaining level. If this were so, is it true of Kenya? In order to answer this question we must look at the historical and present place of collective bargaining in Kenya.

COLLECTIVE BARGAINING

Collective bargaining 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 an employer or association on the other.

The impetus for collective bargaining in Kenya originated from Britain under the Labour party when in 1928 the Colonial Office issued a Labour policy. The Labour Party advocated for the "establishment of safeguards against the exploitation of indigenous people by European capital, the prevention of forced labour, of injurious or inequitable conditions of employment etc."

This was followed up in 1930 by the issue of directions from the Colonial Secretary Lord Passfield, to all the colonial governors asking them establish

- Appendix X of the Report Of the 28th Labour Party Annual, Conference, London 1929,
"the legal framework within which trade Unions could operate". This led to the enacting of the 1937 Trade Unions Ordinance in Kenya.

But the settlers in Kenya were hostile towards such legislations and were unwilling to implement them. In 1941 the Colonial Office prepared a model Trade Unions And Trade Disputes Ordinance and circulated it to all the Colonial Governments.

In 1943 Kenya enacted a Trade Unions and Trade Disputes Ordinance based on the above model. It was restrictive and designed to put down what the settlers regarded as agitators. According to its provisions all trade unions were to be registered and the registrar was given a lot of discretion to register or deregister a trade union so as to deal with bogus trade unions. The colonial administration was not interested in the Labourers and any attempt to organise themselves was dubbed as subversive activities and as politically inspired. The Government therefore intervened to safeguard the interests of the colonialists.

Thus by 1950, Asian and European staff organisation apart, only four trade Unions had been registered in accordance with the requirements of the

26 - Lord Passfield's Confidential Circular, 17th September, 1930.
Trade Unions Ordinance.

The most important early Trade Union was the East African Trade Union Congress which was formed in 1949 with six Unions affiliated to it. The Congress was so powerful that the colonial government, feeling threatened by it, refused to register it on the grounds that its real object was to undermine the industrial peace and progress of the country.

Inspite of this non-recognition the Congress continued its operations but the government intervened and banned it. This type of frustration forced the Trade Unions leaders and other African politicians to go underground and resort to guerilla tactics to defy the tyrannical oppression.

The 1950's was the era of the development of Trade Unions but the declaration of Emergency led to great restrictions. It was at this time that Tom Mboya helped the formation of what became the strongest Trade Union in Kenya. Union membership rose from 1,447 in 1930 to 26,000 in 1952.

The other important movement was the Kenya Federation of Registered Trade Unions which was later named the Kenya Federation of Labour (KFL). The KFL organised a campaign against, inter alia,
discriminatory practices in employment whereby Africans with qualifications and skills equal to those of Europeans were nevertheless denied access to the so-called "European jobs". Trade Unions were beginning to grow strong and they played an important political role by joining the African political leaders to press for total independence.

The conclusion we draw from the above account is that the colonial structure did not favour of trade unionism on the part of Africans, the majority of whom comprised the employees. Collective bargaining was very much restricted and the government intervened in support of the colonialist employers. One important thing to note, however, is that the African Trade Unions took a long time to come up strong. By the time they took shape Employer's associations were already strong and experienced so that even without any government intervention the latter were better off as bargainers.

Trade Unions in Kenya have continued facing problems even after independence. While the political rulers praise them for their role in the

27 - Stated by Sandbrook in "Union Power!"
struggle for independence, they also chide them for failing to recognise the exigencies of the post-colonial era.

One main problem is the conflict between the Trade Union's Private interests and public interests. The leaders of Trade Unions do not know whether their job is the articulation of their workers' private interests or the political authority's views of public interests.

The other problem is political. In a new developing country trade Unionism poses a threat to insecure political leaders as they provide a base for opposition. They also fear the economic setbacks that might result from Labour Action. The government infact regards trade unions' job as the promotion of economic development. Thus political subservience of trade unions to avoid creation of difficulties in the government development planning and to avoid political instability is what the government desires of trade unions. Thus in Kenya the government prevails over trade unions by defining the scope of its economic action and decreeing the structure of trade unionism. It also lays down qualifications for candidates. According to section 30 of the Trade Unions Act, to be eligible as a Union Voter, a person must be employed or resident in Kenya.
In case of a Trade Union, its registered office must be situated in Kenya. The voter's subscription fee must not be over thirteen weeks in arrears. Part VI of the Act lays down the Union's constitution. Again the government supervises Union's elections. Troublesome union leaders may be dealt with under preventive detention law or by ousting them from office.

The other problem concerns the Union's power to strike. Should the Unions adopt such militant tactics or should they follow the procedures for peaceful resolution of disputes? The right to strike is a very powerful tool in the hands of the employees. It serves as a means of forcing concessions out of recalcitrant employers. It also increases Union solidarity and the members commitment.

 Strikes may on the other hand reduce output in one enterprise alone or disrupt the modern sector as a whole. Frequent labour unrest may also frighten away foreign investors.

In 1965 and 1971 the government passed trade disputes legislations whose effect was to make legal strikes nearly impossible. In 1974 strikes were banned by a presidential decree, and away went the only right that could have helped the worker to increase his bargaining power. This fact coupled
with the weakness and subservience of trade Unions in Kenya leaves the worker in a very pathetic situation as far as bargaining is concerned. The employer still had a lot of power over him and the idea of freedom of contract is yet a far away cry.
CONCLUSION: PROBLEMS AND PROSPECTS

In the foregoing chapters, I have discussed freedom of contract on two levels. The first of these is to the effect that law should interfere with men's relations only to enforce the agreement as it is or where the agreement is the result of mistake, fraud, coercion, misrepresentation etc. On its second level we excuse legislative interference whose object is to protect the oppressed party or to raise his economic or social status. This is because by doing so the law promotes equality in the bargaining power of parties to a contract. Here we talk of freedom of contract in the practical sense.

Freedom of contract in the first sense is rare. It is more rare in a society like Kenya which is based on a free enterprise economy. This type of society is necessarily attended by inequalities which manifest themselves in the differences in the parties' bargaining power. The free enterprise
The economy has been described by Adam Smith as having an ugly, unacceptable form; that it needs taming. The taming has come in the form of welfare legislation. In the field of labour law, laws have been enacted to regulate the Employer-Employee relationship. Legislations that encourage collective bargaining have been passed to help raise the workers bargaining position, and if all fails, he has the ultimate power to strike. All this goes to show that the non-interference by law contemplated by freedom of contract in its abstract sense is never the reality. This is certainly the position in Kenya where we have encountered minimum wages and conditions of employment legislation, the Employment Act, the Factories' Act etc.

As regards freedom of contract on the second level, the conclusion reached in Chapter 3 was that it only exists in a very limited sense in Kenya. This is due to the presence of some persistent factors which detract from the doctrine by weakening the employee's bargaining power. Some of these factors already referred to are unemployment, inequality and weakness of Trade Unions. In order to intelligently assess the future of the doctrine in general and especially
in employment contracts we must first consider the prospects of these factors in Kenya.

Unemployment and inequality have been very acute problems starting in the colonial era and continuing into independent era. They have been considered by the 1965 Sessional Paper,¹ the Development Plans of 1970/74 and 1974/78 and by the International Labour Organisation in 1972². But they have not yet been solved.

One of the Government's aim in the Sessional Paper was to diminish inequality, especially that which existed in different Provinces and Districts as regards economic development. But there is a snag here. Is the equality to be achieved by investing in the Provinces that lag behind or in those which have gathered great momentum for economic growth? The government stated policy in the Paper³ is to invest money where it will yield the largest increase in net output. The profits so obtained may be used to develop the other areas which are not so blessed. While the policy sounds

1 - Sessional Paper No. 10 of 1965.
logical, the fact remains that the inhabitants of the region where investment is done will always be better off than those of the other region. Their chances of getting jobs and decent incomes are greater.

One of the I.L.O.'s suggestions was geared at easing the problem of disparity between the Rural and Urban regions for the government to shift its interest to rural development. This would engage those who migrate to towns thus check employment problems both in the Rural and Urban areas. The 1970/74 Development Plan tried to implement this suggestion by intensifying the number of programmes for assisting farmers. The government also started a special Rural Development Programme which has contributed significantly to an improvement in the co-ordination of activities in the rural areas within the Central Government.

Another suggestion by the I.L.O. was directed at bridging the gap between the high income group and the low income group. The initial target as stated is to double the present average income of the lowest group by adopting policies through which the employed can earn an income, and by raising the income of the working poor. The suggested amounts of income are Sh. 120 and Sh. 200 per month and per household for the rural and urban areas, respectively, to be achieved

4 - Employment Income and Equality. Supra. Pg. 109
by 1978. It is obvious how meagre such incomes are at the date of writing. In any case this does not bridge the gap between the low income and the high income groups especially when we remember that the latter enjoy a higher salary increase and that their salaries vary between Sh. 3,000 to 5,000 and over per month. These facts force me to conclude that the chances of inequality ending are remote.

The other problem, unemployment, was seriously discussed in the 1970/74 Development Plan. The government adopted the method of promoting a high rate of economic growth to generate employment opportunities at a significantly higher rate than the annual rate of the working population. This however did not solve the problem which we still find stated in the 1974/78 Development Plan. The Government has engaged in the following short-term programmes to try and ease the problem; land adjudication, irrigation, cash crops and livestock production, Tripartite Agreements, the National Youth Service etc.

The position at present has been well illustrated in a Weekly Review article whose opening words are as follows;

5 - Para. 3.29 - "In the early years of Independence, it was believed rapid economic growth would achieve sufficient employment automatically. This presumption was false".

"Despite the Kenya government's recent efforts to contain unemployment, the problem is far from solved".

A senior officer at the Ministry of Labour Headquarters\(^7\) gave a starting picture of the unemployment crisis. In 1977 there were 6,515 registered jobseekers in the Central and Eastern Provinces. Of this big number only 1,584 got jobs. The officer partly seemed the loopholes in the Employment Act for this, particularly where it orders the employers to notify the Labour Office of any vacancies but does not order them to fill it. But this is not really a major cause of the problem when only 2,121 places were vacant. The assessment of the employment situation is not encouraging, to say the least;

"Throughout the whole 1977, the unemployment situation remained bad and indications were that the situation was likely to continue".

The situation has continued just as predicted. The problem cannot be solved for a long time.

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7 Mr. Shadrack M. Maillu, until recently was the Provincial Labour Officer for Central and Eastern Provinces.
The Trade Unions as the champion of the worker's causes do not have a bright future, either. Whereas in developed countries they are independent bodies whose interest is only in the worker, in Kenya, as in other developing countries, this has not been the case as earlier noted. The Kenya Sessional Paper of 1965 expects Trade Unions to become involved in economic activities such as, co-operatives, housing schemes, training schemes and in workers' productivity and to generally accept their social responsibility. The effect of imposing such roles on trade unions is to weaken them where bargaining is concerned. In Kenya they have accepted their social role and have become politically subservient.

If none of these factors which militate against freedom of contract show signs of disappearing then it means that freedom of contract cannot exist in Kenya, except in that very restricted meaning referred to earlier.

The above discussion has proceeded on the assumption that the Kenya legislations which try to improve the status of the employees are effective.

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8 - C.f, Ch. 3.
9 - Para. 142 (52).
But the truth is that these laws do not protect the employees adequately because, consciously or not, they still have the employer's interests at heart. Again these laws are not effectively enforced. I am here especially concerned with the Regulation Of Wages And Conditions Of Employment Act. How many cooks, housemaids, farmhands etc. know of the minimum wages and conditions legislation. Most of them get Sh. 80-250 per month for doing a lot of work under very poor conditions.

All the above factors make it more difficult for freedom of contract to be exercised in Kenya under the present system.

In order to overcome these problems we need an economic, social and political structure that avoids or minimises those factors which make freedom of contract impossible. I believe that strict adherence to the African socialism policy to be found in Sessional Paper No. 10 of 1965 could provide a good basis for that structure. This of course means that we should do away with all capitalistic ideas and delete the Private Property sanctity section from our constitution. This together with a revolutionary income policy would eliminate inequalities. This suggestion has ignored the argument that the policy in the Sessional Paper No. 10 strengthens capitalism. If this is true policy guidance must be sought elsewhere.
BIBLIOGRAPHY

1. Atiyah "Introduction To The Law Of Contract"


3. Clayton A. and D.C. Savage, "Government and


5. G.C. Cheshire and C.H.S. Fitfoot, "The Law

6. Gary Wasserman, "The Independence Bargain;
   Kenya Europeans And The Land Issue

7. Kessler and Gilmore. "Contracts, Cases And

8. Lal Pates "History And Growth Of Labour
   In East Africa" Nairobi 1969.


10. MaCneil, Ian R. "Cases And Material On
    Contracts; Exchange Transactions And
    Relationships".
    Mineola, N.Y., Foundation Pr., 1971.
11. R.M.A. Van Zwanenberg "Primitive Colonial Accumulation In Kenya, 1919-1939".


