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COMMERCIAL LAW AND DEVELOPMENT IN KENYA

By

Willy Mutunga

An attempt is made here to show how three branches of Commercial Law, that is, Sale of Goods Law, Hire-Purchase Law and Agency Law affect development in Kenya. A complete paper on this sort of discussion would have to include analyses in other law areas and in particular Banking Law and Negotiable Instruments, Company Law, Insurance Law, International Trade and Economic Laws, International Investment Laws, etc. Our attempt in this paper will inevitably include an incidental analysis of the Law of Contract which forms the basis of the three branches of Commercial Law to be analysed. These three branches of Commercial Law are relevant to our discussion on the neo-colonial roles imposed upon Kenya by imperialism. Imperialism has imposed upon Kenya -- as indeed upon any other Third World country -- three roles: Kenya must provide raw materials to monopoly enterprises and foodstuffs to metropolitan populations; Kenya serves as an area of investment of foreign surplus value in the form of finance capital and as a market for foreign manufactured goods. The common denominator of all these roles is the maintenance of the *status quo* in the imperialist system as more fundamentally facilitated by the class alliances between the international bourgeoisies and Kenyan comprador bourgeoisie.

Another task in this paper is to discuss the role of the three branches of Commercial Law in the dialectic of underdevelopment in Kenya. This will involve a jurisprudential perspective of the role of law in the economic development of Kenya. Then follows a theoretical discussion of how the three branches of law facilitate the neo-colonial roles set out above. A brief examination of the effective facilitation of the roles, that is, the effectiveness of the legal rules on the ground, concludes the theoretical section of the paper. This latter point is the result of field research involving Kenya National Trading Corporation, Coffee Board of Kenya, Brooke Bond Liebig Limited and Cetco Limited. Also involved are some car dealers in Nairobi, among them D. T. Dobie (Kenya) Limited, Cooper Motor Corporation Limited, Westlands Motors Limited, and Simba Motors Limited. All the four major finance companies are also involved: Credit Finance Corporation, National Industrial Credit, the Diamond Trust Limited and the National Bank of Kenya. All these institutions are directly relevant to the neo-colonial roles set out above.

It should be pointed out at the outset that no attempt is made to discuss the role of customary sales law on economic

development in Kenya. There are of course relevant issues worthy of discussion in that field; for example, the impact of general sales law on customary sales law with the attendant conflicts of both. Such a conflict has been inevitable when a more advanced mode of production -- British monopoly capitalism -- was imposed upon a less developed one, i.e., Kenya's traditional pre-capitalist economy. What we may call customary sales law is part of the decadent superstructure protecting the old and dying traditional economic base. A dualistic approach here would be misleading. Kenya must be seen in entirety as an underdeveloped capitalist country and our discussion on "law" and "development" renders irrelevant any discussion on customary sales law.¹

An attempt of this calibre tends to provoke loud accusations of "incompetence," "lack of professional knowledge," etc. For this reason, we will welcome any and all documented criticism by economists, political scientists, accountants, etc. It is of vital importance that we explode and reject the bourgeois argument -- which emphasizes our mis-education -- that we should confine ourselves to our specialised disciplines. We must wander across other disciplines in search of joint solutions to our obvious plight. This paper, therefore, calls for collective endeavour in revealing and exposing the decadent hand of imperialism and the plight of exploited societies. And this we believe is done when law is analysed within its historical and socio-economic context.²

LAW AND DEVELOPMENT

What is development? Although this is perhaps a futile question we have to delve into it slightly. Definitions should, however, not mystify the main problem for analytical purposes. It is crucial for our purpose to know what development entails. Definitions of the word can correctly be said to fall under two camps: there are definitions which seek to justify and perpetuate imperialism. Others reject imperialism. Writers consciously or unconsciously take sides on this issue of definition. There are also the mystified ones which attempt the middle way and purport to fall between the two camps. Our position is that there is no middle way. On deeper analysis of these "middle way" definitions the ultimate result is that these writers are in the camp of imperialism. For exploited societies there is not even the question of taking sides. Nobody in exploited societies seems to opt openly and consciously for imperialism. Thus the innumerable brands of "socialisms" characteristic of most of the exploited societies, and undeniably characteristic of usual petty-bourgeois false ideology, are enough to assure revolutionary optimists in these societies that something, if not everything, is wrong with imperialism, and socialism is being seen as the sole saviour to all innumerable ills in these societies.

We will begin with definitions which perhaps consciously or unconsciously seek to justify imperialism. One of these is given by Professor R. B. Siedman:

*By development. . . we mean 'the process whereby the entire economy is monetized and integrated, with a high degree of specialization and exchange together with associated political social and other changes.'*³

In a word, and especially for the exploited societies, capitalist development. A capitalist society is based upon the economic phenomenon of exchange of commodities, buying and selling. This can squarely be read into the definition. The associated political, social and other changes are assumed to follow logically from that economic phenomenon. It can also be argued that socialist development fits in the definition, but since the definition does not cover all the ingredients of the latter development our analysis of the definition is correct.

And the following definition which appears in the ILC publication "Law and Development" confines itself to the exploited societies. The Research Advisory Committee on Law and Development gives this definition of development:

We agreed that 'development' includes efforts by the (Less Developed countries) to secure some of the material, social and cultural conditions that prevail in materially wealthier societies.

*But we do not limit the term to such efforts; we also use it to refer to attempts to enrich and deepen the cultural traditions of the LDCs, spread the unique benefits of these traditions to wider groups within society and to seek a new and original path for the realization of a better life for the people of these countries. Thus 'development' in the broad sense used here means activities through which the LDCs seek to realize their own values and secure the goals they define for themselves.*⁴

This definition justifies neo-colonialism and imperialism. Further and deeper integration into the international capitalist system is envisaged. The narrow definition -- that of achieving some form of developed capitalism -- has been condemned as false and impossible.⁵ The narrow definition also directly seems to assume this by the use of the word "some". The broader definition of course does encompass socialist activities in LDCs. But socialist activities in LDCs have tended to be capitalist and the "attempts to enrich and deepen the cultural traditions of the LDCs..." are unhistorical and undialectic.⁶ We therefore

need to analyse the essence of the activities in the broader definition before we call them development.

Then there are definitions which reject imperialism. They seek to show that imperialism, the highest stage of capitalism, is a stage of development which must give way to a more progressive stage of development, that is, socialist development and ultimately communism. Thus Walter Rodney criticises the superficiality of definitions or explanations given by bourgeois scholars on the phenomenon of development. He rightly points out that the essence of the phenomenon is left out. He argues:

No mention is made of the exploitation of the majority which underlay all development prior to socialism. No mention is made of the social relations of production or classes. No mention is made of the way that the factors and relations of production combine to form a distinctive system or mode of production, varying from one historical epoch to another. No mention is made of imperialism as a logical phase of capitalism.

In contrast, any approach which tries to base itself on socialist and revolutionary principles must certainly introduce into the discussion at the earliest possible point the concepts of class, imperialism, and socialism as well as the role of workers and oppressed peoples... However, one has at least to recognise the full human, historical and social dimensions of development, before it is feasible to consider 'underdevelopment'.⁷

Rodney is interpreting Marx on stages of development of human society which the bourgeoisie have limited to economic development -- analysis of productive forces in isolation of the socio-economic order of society. Marx's analysis of the stages of development is set out in the Preface to A Contribution to a Critique of Political Economy.⁸ And these stages of social development are communalism, slavery, feudalism, capitalism and communism. Socialism has been observed as a transitional stage prior to communism. And of course Marx's analysis was further developed by Lenin. Lenin's Imperialism, the Highest Stage of Capitalism⁹ is compulsory reading in this regard. As far as Kenya is concerned there cannot be positive development until an end is put to any imperialist domination, retrieve our national market under a dictatorship of the proletariat and its vanguard whose state and law will express the interests of the workers and peasants and other patriotic Kenyans.

THEORY OF LAW

The various schools of bourgeois jurisprudence have defined law.¹⁰ David Williams¹¹ has dealt with this issue at some length. His view is that only two schools are relevant to us: the Sociological School of Jurisprudence and the Marxist theory of State and Law. Our view is that the Positivist School of Jurisprudence is worth discussing as well and it is relevant to East Africa because it is the dominant and prevailing school of jurisprudence. That school emphasizes the maintenance of the status quo without much mystification. Hart, in his Concept of Law defines positivism.¹² Once this definition is analysed it becomes clear that this school in one word rejects other schools, the rider "though in no way hostile to," notwithstanding.

The Sociological School of Jurisprudence also emphasizes the maintenance of the status quo and Roscoe Pound's mystification does not disguise that fact.¹³ Pound realizes that his scheme of interest¹⁴ -- individual, public and social -- cannot be secured in entirety: "Put simply, it has been and is to secure as much as possible of the scheme of interests as a whole as may be with least friction and waste."¹⁵ This legal theory also justifies state intervention in the economy. The attendant argument is that the institution of state can and does act for the welfare of all members of society. Thus the state has no class-content. The question "who will bell the cat" is simply irrelevant. The view is thus the capitalist can protect his private property and while enjoying that right he can serve the general welfare of the people. Such state intervention in the economy has only one acceptable explanation: to prop up and perpetuate the irrational imperialist economic system. The laissez-faire policy which decreed the state's non-intervention in the economy was disapproved by crises -- the first world war, the great depression, other inter-war crises, inflation, etc. The capitalist states had to resist the revolutionary potential in their true roles as stated by Engels.¹⁶

On the question of the role of law in development we will confine ourselves to the Marxist theory of State and Law as being the only relevant one to our discussion. As for that theory, law is a "system of juridical standards and prescriptions expressing the will of the ruling class and protected by the coercive power of the state."¹⁷ That definition brings in the class role of law and its close alliance to the institution of the state. While for the bourgeoisie the state is an impartial institution in a society, Engels correctly states that the state is the "collective capitalist. . . a dictatorship of the dominant class and its political arm."¹⁸ We could trace the origin of law to the birth of the state. Both bourgeois state and law are to this theory tools of exploitation in the hands

of the most powerful and economically dominant class. Thus the state and law cannot be divorced from the socio-economic order of a society and its class struggles.

In analysing law and development it is important that we understand two important terms in Marxist political economy. These are: the economic base and the superstructure. The economic base refers to the economic system at a certain state of social development, that is, the sum total of the relations of production. The relations of production refer to the relations established among people in the process of social production of material goods. Relations of production have three crucial aspects: The first and decisive aspect is the form of ownership of means of production. This aspect is the basis of relations of production. It determines the social division of such society and its class composition. The class composition in turn determines the character of all the superstructural features. The superstructure embraces social views on politics, law, philosophy, art, religion, music, etc. and the political and legislative and judicial bodies and systems corresponding to these views.

Dogmatic Marxists interpret Marx to hold that the only way of effecting development is by changing the economic base, and that fiddling with the superstructural features like law, will not effect social change. Their argument is that the economic base plays the principal and decisive role. The superstructure is formed on the economic base and its character is decided by that of the latter. They argue further that the decisive role of the economic base is underlined by Marx's dictum: "with the change of the economic foundation the entire immense superstructure is more or less rapidly transformed."

This view of the dogmatic Marxists must give way to the better view that the superstructure does not merely conform to the economic base passively. It has an immense dialectic interaction with the economic base. An advanced superstructure is established to meet the needs of growth of an advanced economic base. It promotes the formation and consolidation of its base, destroys the old economic base and becomes the progressive force propelling the growth of productive forces. A decadent superstructure protects the old economic base and hampers the growth of the new economic base.

In relating these two terms to the Kenyan situation it should be pointed out that we, the people of Kenya, are an exploited society, dominated and oppressed by imperialism, more particularly and significantly by American, British, German, French, Japanese, as well as other European imperialists. That is our economic base. Our neo-colonial state is an extension of the international states of the bourgeoisie. The ruling

comprador bourgeoisie is an agent of the international bourgeoisie. Our laws express the will of the international bourgeoisie first and foremost, the interests of the comprador bourgeoisie being championed because they primarily serve those of the former. Any interests derived by the Kenyan petty-bourgeoisie under this set of affairs are simply incidental and accidental. Our political and religious institutions correspond to bourgeois views and ideology.

That is our superstructure, of which law, our main concern here, is a fundamental feature.

CLASS SOCIETY¹⁹

Kenya's class analysis has to be done within her historical analysis.²⁰ Such analysis will reveal the origin of classes, the class struggles, the inter-class conflicts and how imperialist domination has been reflected in these struggles and conflicts. It must be noted that a class analysis of any society is not static. Continuous investigations must be made, and as material conditions change positions taken on the analysis must be reviewed. Another rider to any class analysis is the fact that the proper conclusive analysis can be done when classes are locked in a fierce class struggle openly, thus facilitating a clear distinction between enemy and friend, in addition to exposing opportunists. A concrete example of this can be drawn from Mau Mau National War of Liberation. The bombings and other atrocities perpetrated on the Kenyan people made it obvious that British colonialism was the main enemy. Its local supporters were conspicuous, whether in the name of a European settler or an African home-guard. The friends of the people were also conspicuous, whether in the name of an Asian helping in the printing of the Mau Mau revolutionary papers and literature or the workers who sheltered the braves in towns, or the peasants who gave them food or the youth who spied for them and all those who directly fought for freedom. And needless to say, any class analysis has to start with an analysis of production of material goods in a society. The position of these classes in that production involves an analysis of the ownership of the means of production and the distribution of this material wealth of the society among the various classes.

There is no doubt that the colonial state was an extension of the British bourgeois state. The present Kenyan state is an extension of the imperialist states. The content of the state and its role in imperialist domination has to be understood to avoid the usual deviations. Such deviations see the state either as a mediator of class struggles in the society or its apparatuses performing different roles. A popular example is when a comprador in one ministry blocks a venture that benefits a com-

prador in another ministry. On a deeper analysis, however, you will invariably find inter-imperialist conflicts behind these decisions. Imperialism is not homogeneous. Its unity of interest notwithstanding, it suffers from internal contradictions. Classes do not exist at state level.

There is overwhelming evidence of the dominance of finance capital in our society. The comprador layer of the petty-bourgeoisie is unpatriotic and has its base in the dominance of finance capital. This layer, which rules as an agent of imperialism, sees this foreign domination as inevitable, which is not surprising given the intertwined character of this layer's and imperialist interests. The rewards by imperialism are great and the compradors will and must, along with imperialism, fight against the liberation of the Kenyan people.

In answering the question "who is our enemy? Who is our friend?" we must investigate, identify and delineate these elements. It is clear that this investigation is best done on the lines of nationalities (majority, middle and minority) and national minority communities (Europeans, Asians and Arabs.) In fact the national minority communities provide a bigger percentage in the comprador layer. Some analysts seem to lay great emphasis on comprador elements from the African nationalities and completely forget those from the national minority communities mainly on the basis that the former have formal political control. This aspect of investigation and identification of compradors must not be associated with the reformist or adventurist lines which are well known in many societies. These lines advocate "coups" or "if you cannot beat them join them" attitude. Such opportunistic and dangerous lines are no good in wiping out any imperialist domination, because such domination is based on clear relations of production. Thus it is precisely against this imperialist-domination that the struggle must be directed until it is defeated, all the more so as there is evidence that the compradors, as petty-capitalists, are not oppressed by finance capital.

That Kenya is a class society is undeniable. We have petty capitalists invariably called the petty-bourgeoisie or the national bourgeoisie.²¹

To Swainson and Co., imperialism is creating this national bourgeoisie. In India, Vietnam and China the term is used in those concrete ways which, one must admit, has not been the case in our historical socio-economic development. Even in those countries the words "rickety" or "flabby" have been used to characterise the potential of this bourgeoisie. The essence of this is of course that under imperialism this bourgeoisie is knocked down into petty-bourgeois capitalists, its market is seized and its capital invariably operates under the dominanc

of finance capital or becomes part of it. For Kenya's concrete situation the two terms must mean one and the same thing. There are writers (Swainson²², Van Zwanenberg²³, Kaplinsky²⁴, Cowen²⁵, Kinyanjui²⁵, Leys²⁶, Brett²⁷, and Sandbrook²⁸), who take the Trotskyite line that there is an emerging bourgeoisie in Kenya with a national market. They also reject Lenin's analysis of imperialism thus rejecting the presence of compradors in Kenya. Nobody agrees with this line of thinking, and the less said about it the better. The national bourgeoisie of these writers must not be confused with the petty-capitalists under analysis here. The essence of these petty-capitalists as related to the Kenyan capitalist relations of production is that they are oppressed by finance capital. They would like to keep a bigger share of the surplus value extracted in farms etc. where invariably the operative capital is finance capital; they would like a big share in the market dominated by imperialism. Some of the petty-bourgeoisie's oppression may not involve the sharing of surplus value directly. This oppression might constitute cheating on prices, exorbitant rates of interest, etc. Some Kenyan scholars have seen this aspect of our class struggles as a battle between indigenous capital and finance capital.²⁹ Those scholars accept that there is imperialist domination and there are compradors in Kenya. But their analysis of the role of the state is confused and erroneous. For example the state is seen as helping in the accumulation of this indigenous capital. They also seem to forget that their capitalists do not make capital goods; they have neither technology nor market of their own. The essence of the matter is that these "indigenous capitalists," as a distinct strain from, and unlike compradors, are oppressed by finance capital. They have, therefore, nothing to lose but a new Kenya to gain by joining forces with the rank-and-file of the suffering people of Kenya: workers and peasants who are undeniably anti-imperialist-comprador oppression, thus forming an alliance to fight imperialism and its unpatriotic compradors.

FREEDOM AND CLASS BEFORE THE LAW

As we have pointed out above, the Law of Contract forms the basis of Sale of Goods Law and the Law of Hire-Purchase. We have attempted to give the history of Hire-Purchase Law elsewhere.³⁰ As for the history of the Sale of Goods Law the formal account is correctly given by Clive Schmitthoff.³¹ He gives an historical survey of the development of Sale of Goods Law from the medieval times in Britain through the eras of mercantilism, competitive capitalism, monopoly capitalism and multilateral imperialism. He does not attempt to give the political economy of such a development. It is quite clear, however, that the development of that area of law, was crucially affected by the expansion of markets from the personalised markets to anonymous ones. Schmitthoff notes:

The central concept of the Act of 1893 is that of the property in the goods sold, and many problems require an examination of the question whether the property, or, as it is called title, has passed from the seller to the buyer. In the modern view, the test of property has, in this connection, a somewhat abstract and unrealistic flavour.³²

We will allude to the political economy of this development below. The history of contract law is however, important and needs further discussion. The doctrine of freedom of contract³³ is the fundamental basis of all principles of law of contract.³⁴

The obvious point to start is when the bourgeoisie seized political power in Britain. The British history of the Law of Contract is relevant here for the obvious reason that Britain was later to impose this law on Kenya. British capitalism was built on the ruins of British feudalism. The bourgeoisie thereafter demanded "free" labour market, "free" play of economic forces on which capitalism was to be based for a long time. "Free" labour market meant workers who were "free" of feudal fetters, serf dependence and "free" of property (the serf depended on land for his subsistence hence by freeing him from land, he was also freed from his sole means of subsistence) and whom hunger would drive to the factories. To quote Marx:

*The workers were to be free from the old relation of clientship, villeinage or service but also free from all goods and chattels, from every real and objective form of existence, free from all property. Such a mass would be reduced either to the sale of labour power or to beggary, vagabondage or robbery as its only source of income. History records the fact that it first tried beggary, vagabondage and crime, but was herded off this road on the narrow path which led to the labour market by means of gal-
lows, pillory and whip.³⁵*

Finally law permanently declared all persons equal. A worker was, before the law, equal to a capitalist. Thus Seagle in his Quest of Law on p. 266 has written that "there was no god but contract and Sir Henry Maine was its prophet" of the 19th century. The doctrines of "freedom of contract" and "sanctity of contract" were the inevitable counterparts of the free enterprise system. In a society based on private ownership of the means of production and where law has declared all to be equal, in reality this served to strengthen the dominant position of the property-owning class.³⁶ Legal relations are always fundamentally derived from economic relations. They are property rights. The indispensability of contract to the develop-

ment of capitalism is well advanced by F. Kessler:

*With the development of a free enterprise system based on unheard of division of labour, capitalistic society needed a highly elastic legal institution to safeguard the exchange of goods and services on the market. Common lawyers, responding to this social need transformed 'contract' from the clumsy institution that it was in the sixteenth century into a tool of almost unlimited usefulness and stability. Contract became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way.*³⁷

Later in the 19th century, the individual enterpriser was replaced by large scale enterprises and ultimately the multinational corporations. The form of the contract changed but its essence continued. The new form was more detailed and elaborate with more exemption clauses. It was the necessary development of contract owing to the development of large scale enterprises under monopoly capitalism.³⁸

Right from the beginning freedom of contract had a class content.³⁹ Freedom of contract, stripped of its ideological cloak means no more or less than freedom to exploit and be exploited. In a class society where parties will not have equal bargaining power, except where equals are involved, say two capitalist firms,⁴⁰ it is false to talk of freedom of contract. In truth state intervention in contracts by legislation in part recognises that this equality is illusory. Trade union movements underline this basic fact as well. So is the judicial creation of the doctrine of fundamental breach.⁴¹ Physical freedom which the doctrine of freedom of contract emphasizes ignores the relevant consideration -- the economic power of the parties to a contract.

This doctrine of freedom of contract has been imposed on Kenya.⁴² As for the general principles of contract law, whose basis is this principle, the contract Act 1872 of India was imposed on Kenya by Britain via India. This Act was repealed by the Contract Act, Chapter 23 of the Laws of Kenya.⁴³ This latter Act provides that the English Law of Contract is our law.⁴⁴ Our Sale of Goods Act, Chapter 31 of the Laws of Kenya enacts the Sale of Goods Act, 1893 of Britain with very minor, insubstantial modifications. Our Hire-Purchase Law is also fundamentally English law. What our Hire-Purchase Act, 1968 has done is to modify, confirm and supplement English Common Law of Hire-Purchase.⁴⁵

There is no doubt that the varieties of agents Kenya has in her International Trade and Financing cover the three obvious neo-colonial roles imposed upon her by imperialism. We have to

trace the history of this law by analysing the development of that law in Britain before it was imposed on Kenya. And for that we turn briefly to G.H.L. Fridman who states:

So far as contract is concerned, the early part of the eighteenth century was still largely pre-occupied with the notions of express authority and ratification. Any possible injustices that might have occurred could be cured by appeals to equity. It was in the latter part of the eighteenth century and early part of the nineteenth century that the leading ideas of the modern law of agency emerged in more or less present day form. The use of estoppel; the law of undisclosed principles, the wide authority of factors and other similar agents at common law and under Factors Act, 1889 -- to name only a few examples -- all appear at this time in more or less their present form. What happens in the nineteenth century is that these developments are refined, to meet the needs of the commercial community.

These needs are at the basis of this part of the law. The medieval community was not sufficiently open and mercantile in character to require more than a rudimentary notion of agency (just as it needed only an elementary law of contract). The growth in importance of commercial life (especially with the rise of trading companies, the ancestors of modern limited companies) showed that, both in contract and tort, agency was a vital relationship.⁴⁶

In a word, before and under feudalist Britain the law of agency was embryonic. This was so because of the fact that Britain did not have a national market. It could not boast of a national economy. Whatever trade there was, was localised until the merchants, the ancestors of the bourgeoisie, come in the scene. They did trade beyond their local provinces. During the era of competitive capitalism and the establishment of the rule of the British bourgeoisie, Britain had a national market, production was stepped up because of the inventions and innovations. The need for agents is clear once this is viewed against the fundamental importance of capitalist law that the goods are produced for their exchange values and they must reach their ultimate consumers. This enables the capitalist to appropriate surplus value, capitalise it and expand production in continuous production cycles. Under monopoly capitalism and imperialism, the international market, (capital breaks down national boundaries) the mass production and distribution of goods, must necessitate the "refining" of the rules of law of agency. And that is where Kenya comes in. The law of agency was imposed on Kenya by British Imperialism to serve the neo-colonial roles of

which we are all aware. We do not have a national market. Ours is part of the market for modern imperialism.

THE NEO-COLONIAL ECONOMIC FACTOR

The neo-colonial economic factor has already been stated in terms of neo-colonial roles and the maintenance and perpetuation of imperialism. The aspect of investment of metropolitan capital here underlies the other two roles. Metropolitan finance capital is invested in the production of raw materials and foodstuffs.⁴⁷ That finance capital earns better returns here. Metropolitan industrial capital (more correctly finance capital because industrial capital cannot free itself from the former because it is part of the finance capital which is a merger of bank and industrial capital⁴⁸) is invested in the production of manufactured goods which find a ready market here. For the industrial capitalists to realize their surplus value (profits) these goods must reach their ultimate consumer. This process is facilitated by the role of commercial capital which serves industrial capital. Mandel correctly paraphrases Marx on all this; to quote him at length:

When the production of commodities is completed, the industrial capitalist already possesses the surplus value produced by workers. But this surplus-value exists in particular form; it is still crystallised in commodities, just as capital advanced by the industrialist is, too. The capitalist can neither reconstitute this capital nor appropriate the surplus value so long as they retain this form of existence... To realize surplus-value he must sell the commodities produced. But the industrialist does not work for definite customers (except when he carries orders for the "ultimate consumer"); he works for an anonymous market.

Every time that a production cycle is completed, he would thus have to stop work at the factory, sell his commodities in order to recover his outlay, and then resume production. By buying what the industrialist produces, the traders relieve him of the trouble of going himself to look for the consumer. They save him the losses and charges involved in interrupting production until the commodities have reached their destination. They, so to speak, advance him the money capital that allows him to carry on without any interruption.

But the traders who advance to the industrialist the funds they need to reconstitute their capital and realise their surplus value, must in their turn

quickly sell the goods thus bought, so as to begin the operation anew as soon as possible.⁴⁹

The ultimate objective of all this is quick appropriation of an increased surplus value:

Now each production cycle brings in the same amount of surplus value, provided that the capital and the rate of surplus value remain the same. Increasing the number of production cycles accomplished in one year means increasing the total amount of surplus value produced that year. Reducing the circulation time of commodities is thus not only a way of realizing surplus value more quickly, it is also a way of increasing the amount.⁵⁰

And commercial capital shares in the division of the total surplus value an equal footing with industrial capital "because by reducing the circulation time of commodities it helps the industrialists to increase the total amount (of surplus value) and the annual rate of surplus value."⁵¹

Marx's analysis of industrial and commercial capital must be linked with Lenin's analysis of imperialism. It will become obvious in the case of Kenya that finance capital dominates production and distribution of material goods thus acting as both industrial and commercial capital in Marx's analysis.

RULES OF APPLICATION

It would be impossible, given the limited scope of this paper, to examine in depth all the rules applicable, but we examine a specific rule -- nemo dat and its exemptions -- a specific proof of the general thesis of the role of Law.

First and foremost, contract is the fundamental legal rule. We thus have a contract of sale⁵² a hire-purchase agreement⁵³ and principal and agency relationship⁵⁴ fundamentally dominated by the doctrine of freedom of contract. The definitions of "goods" under sub-section (1) Section 2 of both the Sale of Goods Act and the Hire-Purchase Act respectively, encompass materials, foodstuffs and foreign manufactured goods. The sub-section under the Sale of Goods Act defines "goods" to include "all chattels personal other than things attached to or forming part of the land which are agreed to be severed before sale under contract of sale." The sub-section under the Hire-Purchase Act contents itself by providing that "goods" under the Act "have the same meaning as in the Sale of Goods Act."

Protection of private property as a fundamental principle in a society whose economic structure is based on private ownership

ship of means of production is championed in both Acts. This protection is basic in the facilitation of the neo-colonial economic factor. In both fields of law this legal expression is enshrined in the principle of nemo dat quod non habet which literally means "no one can give what one does not have." Sub-section (1) of section 23 of the Sale of Goods Act enacts the nemo dat principle. It provides:

s.23(1)... Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had,...

The Hire-Purchase Act enacts the same principle under sub-section (1) of section 2. This is clear when the definitions of "hire" "owner" and "hire-purchase agreement" are analysed.⁵⁵

On the question of the circulation process of the goods and the reduction of circulation time of commodities, both Acts facilitate that objective. Under capitalism and monopoly capitalism the nemo dat principle came to be a blunt legal fetter in the field of commercial law. While under feudalism it had functioned properly because of the personalised market, under capitalism, and in particular monopoly capitalism with its mass production and mass distribution of commodities, this principle could no longer remain unmitigated. Exceptions to nemo dat must be seen in that light. The unmitigated legal expression of the nemo dat principle, could inhibit merchant or commercial capital serving industrial capital. The Sale of Goods Act has the following exceptions to the nemo dat principle:

1. Where the owner is estopped from denying the seller's authority to sell: S.23(1).
2. Where the sale is by a mercantile agent: S.26(3).
3. Where the goods are sold under any special common law or statutory power of sale or under an order of the court of a competent jurisdiction: S.23(2)(b).
4. Where the apparent owner disposes of the goods as if he were a true owner thereof: S.23(2)(a).
5. Where the seller's title is voidable and at the time of sale has not been avoided: S.24.
6. Where the goods are seized under a writ of execution and are sold to a bona fide purchaser: S.27.

7. Where goods are disposed of under the conditions described in sub-sections (1) (2) of 26.

Under the Hire-Purchase Law, the form of transaction facilitates the circulation process as well. In the so-called triangular transaction whereby the dealer sells the goods to a finance company which then lets them out on hire-purchase to the hirer, the circulation process comes to the end when the dealer gets a hirer who is ready to buy the goods and the finance company accepts to finance such a buyer. The triangular transaction mentioned above has two forms of contracts. There is obviously a contract of sale between the dealer and the finance company. There is a hire-purchase agreement between the finance company and the hirer. Outside the transaction, there must be a contract of sale between the industrial capitalist (the real owner of the goods) and the dealer. That contract champions the interest of the industrial capitalist as regards his production cycles, profits etc.

Of course it can be argued that the hirer is not always the ultimate consumer in cases where the hirer, in a purported contract of sale, sells the hired commodity to a third party. The legal issue here would seem to fall squarely on the legal implications of assignments under hire-purchase law in Kenya.

Sub-section (1) of section 2 defines the hirer as "the person who takes or has taken goods from the owner under a hire purchase agreement, and includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or by operation of law." At common law only benefits or rights can be assigned, but not burdens like the paying of instalments. It is clear from this sub-section that the hirer can assign his liabilities as well. This raises a very important question: Are assignments the only exception to nemo dat under Hire-Purchase law in Kenya? To answer this question we must analyse the authorities on this point.

The obvious case to start with is Belsize Motor Supply Co. v. Cox⁵⁶ which held that the hirer can assign the option to purchase the hired commodity. This decision was approved by the English Court of Appeal in Whitley Ltd. v. Hilt.⁵⁷ To get around these decisions the agreements soon have specific clauses prohibiting assignments of option to purchase. In United Dominion Trust (Commercial), Ltd. v. Parkway Motors Ltd.⁵⁸ the hire-purchase agreement thus provided: "The hirer shall not sell, assign or charge the goods or the benefit of this agreement." The hirer assigned the goods and it was held that this was a breach of the express term of the agreement and the assignees had to return the goods or pay their full value, and could not claim the right to pay merely the unpaid balance of the hire-purchase price. Thus the hirer had not passed a good title to the assignee.

In Wickham Holdings Ltd. v. Brooke House Motors Ltd.⁵⁹ the court did not question the fact that assignment of the option can be prohibited in the agreement but it held that the finance company was entitled to recover as damages in conversion only what it had lost by reason of the wrongful act in selling the car and that that was the amount recoverable as damages. Lord Denning M.R. and Danckherts, L. J. expressed the view that a clause prohibiting the assignment of the option to purchase could not alter the fact that all the owner had lost was the unpaid balance of the hire-purchase price, and that accordingly only that sum should be recoverable. Thus clearly, the hirer passes good title to the third party who can even pay the sum recoverable. The third party is not required to return the goods or pay their value.

The precedent value of these English cases is as laid down in Dodhia v. National and Grindlays Bank Ltd.⁶⁰ and it is quite clear that the decision in Wickham's case would be favourable in Kenya for obvious reasons: A hirer who is hard-up can always avoid terminating the agreement under Section 12 and assign his option to purchase. The question is whether he can assign his burdens. We have argued that under sub-section (1) of section 2 the hirer can assign his burdens so that he passes good title to the assignee. It is easy to see why the owner may want to prohibit assignments. When the agreement falls through and the hirer cannot pay, there is always the possibility that the owner can unjustly be enriched by repossessing the goods and selling them at a price over and above the unpaid balance of hire-purchase price. But where the hirer assigns, he may end up getting the windfall himself. The issues raised on assignments anyway can be clarified. A clause prohibiting the prohibition of the assignment of benefits and burdens can be added in section 7 of the Act. The state of the case law can also be ascertained. As it is now, the Kenyan courts can adopt the decision in United Dominions Trust case and champion the owner's enrichment. This state of law cannot be said to inhibit quick circulation of goods.

Under the provisions of both Acts, the charging of monopoly prices or unfair prices (in the case of raw materials and foodstuffs) is left to the dictates of the doctrine of freedom of contract. Nor are the rates of interest charged by finance companies which provide credit to facilitate the quick circulation of goods interfered with.⁶¹

Under Agency Law, the whole question of title revolves around the Agent's authority.⁶² The law is that the agent, possessed with actual, apparent or usual authority, can in the relevant transaction pass a good title to a third party. If the agent has no authority to enter into the relevant transaction as agent,⁶³ he will be personally liable to the third

party for breach of implied warranty of authority. It should be noted that one of the main duties of the agent is that he must never deny the title of the principal to goods, money or land possessed by the agent on behalf of the principal. This general rule has a half-hearted exception.⁶⁴ This does emphasize, as indeed do the other duties, protection of the principal's private property.

It must be realized that the Agency Law in the present practice of international sales has supplanted the impact of the operation of the nemo dat principle and its exceptions. And it can be said that in Kenya -- where the operation of these rules on the ground confirm this -- buyers pay for the goods before delivery and that operation will be confined to personalised cases. The essence of Agency Law generally is to protect the principal's property in goods during their distribution and the duties of the principal and agent reinforce this position. Profits will only be maximised if the agent performs his duties diligently.

How is this specific legal rule facilitated on the ground? Here we will emphasize the mode of payments.⁶⁵ This is crucial to the facilitation of the quick circulation or distribution provision of the goods.

On the provision of raw materials and foodstuffs let us look into the operations of Brooke Bond Liebig Kenya Limited. This company exports tea to African countries as well as abroad. The mode of payment is invariably by a letter of credit. The main mechanism of the letter of credit process goes through the following stages:

1. The importer completes a bank form which contains full instructions on how the L/C (i.e., letter of credit) should be constructed.
2. Importer's bank transmits the L/C to its correspondent bank in the exporter's country.
3. Correspondent bank notifies exporter and sends him the detailed L/C, containing all the requirements and showing the value of the credit and length of time for which it is valid.
4. Exporter then proceeds with shipment and careful collection of all the required documents ensuring that they conform hundred percent with the L/C.
5. When documents are complete, exporter presents them (usually together with a draft) to correspondent bank, who checks for conformity and then pays according to the forms of credit.

It is important to note that the L/C will provide for the type of export/import contract (for example, C.F. F.O.B. F.O.R. etc.), but the basic contract of the entire transaction is a separate document. Other important contents of L/C are documents required evidencing current shipment (for example, bills of lading, insurance policy), name of ship and details of voyage, particulars of the goods to be shipped etc., of course if the mode of transportation is different then the above contents vary. The bank in the buyer's country will normally transfer documents of title to the buyer and at the same time deduct from the buyer the equivalent of the amount paid against the documents by the bank of the seller's country. It is important to note that payment will have been made before goods arrive. Disposal of goods by mere documents of title therefore becomes important.

Going back to Brooke Bond the company transports its tea to London, paying for the expenses and insurance etc. In London the company has agents who auction the tea weekly in the London market. The company pays the agents' commission. The agents advise the company on the stock available in London and send the money which comes from the auctions the week following the auction. The agents do this by the system of bank transfers. The company uses its sister companies in the U.S.A. and Canada to sell tea there. The mode of payment is by a letter of credit valid for 60 days.

As for coffee, the Coffee Board of Kenya has weekly auctions in Nairobi and it is paid the week following the auctions. The exporters, CETCO, for example, are also paid by means of a letter of credit valid between 60 and 120 days.

KNTC is worth considering when we look at the distribution of manufactured goods in Kenya. KNTC was launched by the Government in 1965 to Africanise commerce. Our concern here is that KNTC is an importer of foreign goods. KNTC has agents⁶⁷ all over the country. Agents purchase these foreign goods from KNTC either cash or by banker's draft. The mode of payment of imports by KNTC is by a letter of credit the common one being the sight letter of credit. The length of credit varies between 60 and 120 days. The pricing system of KNTC is just like one of any merchant capitalist. Costings are done covering all expenses and of course profit to KNTC is included. KNTC invests its capital on the distribution of goods and this capital is properly finance capital from ICDC which is financed by government and foreign financial institutions. KNTC has many foreign suppliers, principally all from western capitalist countries.

Coming to car-dealers, in the realm of hire-purchase we have car dealers who are importers like D. T. Dobie, Simba Motors, Cooper Motor Corporation, Westland Motors, etc. We also have

sub-dealers who buy from the importers, for example, Joginder Motors. The mode of payment by all car importers is by letter of credit, the duration of credit varying from 60 to 90 days. The dealers sell the cars to finance companies the moment they get purchasers. The agreements between the manufacturer and the dealer are really sale agreements although they can in certain circumstances bring out principal/agent relationship.

As for the finance companies mentioned above, they constitute institutions of finance capital. All the four operate like savings banks but the effect of this local money capital on foreign finance capital is that the former is denationalised. A close look at these companies reveals that they ask for a deposit of 50 percent of the hire-purchase price. The other half has to be paid off in periods varying between ten months and three years.⁶⁹ CFC, NIC and DT have all offered 20 percent of their share capital to the public.

On the question of interest these companies are money lenders,⁷⁰ charging exorbitant interests. CFC, for example, gives 6 percent interest for money entrusted to them on deposit (for deposits of KShs. 100,000/- and over carry an interest rate of 10 percent) but charge 12 percent interest on loans they give. Loxley⁷¹ and Mandel⁷² argue correctly that the rate of interest is charged on the borrowed sum over the period with no allowance being made for the balance reduced monthly over the period. It is only the National Bank of Kenya which makes this allowance when it finances civil servants. A flat rate of say 10 percent per annum, they argue, is effectively equal to almost 12 percent per annum. It can be shown, therefore, that CFC charges 21.6 percent per annum on all loans they give.

It is an undeniable view that the circulation process is in theory and in practice, effectively facilitated. So is the role of providing raw materials and foodstuffs. Production by monopoly enterprises goes uninterrupted so does the supply of raw materials which is necessary for that production. The returns from finance capital imported are also high while such capital facilitates the circulation of goods.

CONCLUSION

There is no doubt that the three branches of commercial finance are effective legal expressions of the neo-colonial roles imposed upon Kenya by imperialism. If we agree that in Kenya we have skipped certain stages of development and we cannot develop to a fully developed capitalism, then these three branches of law play the role of decadent superstructure, protecting an underdeveloped capitalist base which we want to eradicate. The three branches are tools of exploitation, oppression and domination by imperialism.

NOTES

¹ Shem Ong'ondo has written a very good and convincing dissertation on the impact of Sale of Goods Law on Customary Sales Law in Maragoli, Kenya. He notes the persistence of Customary Sales Law, its being phased out by General Sales Law. He gives a thorough analysis of the conflicts involved and their political economy.

² See Mutunga, *Notes on Teaching Commercial Law* (mimeo 1978).

³ R. B. Siedman's Special Sciences Conference paper, p. 2.

⁴ *Law and Development*, ILO, New York (1975), p. 2.

⁵ See Baran, *The Political Economy of Growth*, London (1972), P. Jalee, *The Pillage of the Third World*, New York (1970), W. Rodney, *How Europe Underdeveloped Africa*, Dar-es-Salaam (1972), Tamas Szentes, *The Political Economy of Underdevelopment*, Budapest (1971), D. Wadada Nabudere, *The Political Economy of Imperialism*, Zed Press, 1977, Frank, *Capitalism and Underdevelopment in Latin America*, London (1967). See also the brief class analysis below.

⁶ Works of Okot p'Bitek are famous in this regard. See in particular his "Song of Lawino and Ocol," Nairobi (1972); a stanza from "Song of Lawino," at p. 48, follows:

*Listen Ocol, my old friend
The ways of your ancestors
are good,
Their customs are solid and
not hollow
They are not thin, not easily
breakable.
They cannot be blown away by the winds
Because their roots reach deep into the soil.*

In the opinion of this writer, Okot p'Bitek's works are relevant because they show first and foremost that something is wrong with our societies as they presently are. But his solutions are un-historical and undialectic. See also, L. Senghor, *On African Socialism*, London (1964), p. 9:

We shall retain whatever should be retained of our institutions, our techniques, our values, even our methods. From all this -- African acquisitions and European contributions -- we shall make a dynamic symbiosis to fit Africa and the twentieth century....

This sort of exercise has been condemned as exercises to prepare Africa for fascism. For whatever that argument, these exercises do not advance the cause of African revolution. They either support the status quo unconsciously or they dangerously retrogressive in that they fail to understand the essence of the conflicts of the two modes of production and the effect of those conflicts on African traditional values.

7 Rodney, *How Europe Underdeveloped Africa*, pp. 20-

8 English rendering of the preface by Marx of his *Kritik der politischen Ökonomie*, Erstes Heft, Berlin, 1844. See Karl Marx and Frederick Engels, *Selected Works*, Vol. 1, Progress Publishers, Moscow, 1973, pp. 503-504.

In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite state of development of their material productive forces. The sum total (Gesamtheit) of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure (Überbau) and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual (geistigen) life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness. At a certain stage of their development, the material productive forces of society come in conflict with the existing relations of production, or -- what is but a legal expression for the same thing -- with the property relations within which they have been at work hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an epoch of social revolution. With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed. In considering such transformations a distinction should always be made between the material transformation of the economic conditions of production which can be determined with the precision of natural science and the legal, political, religious, aesthetic or philosophic -- in short, ideological forms in which men become conscious of this conflict and fight out.

⁹ See Lenin, *Selected Works I*, pp. 666-768.

¹⁰ See generally Lloyd, *Introduction to Jurisprudence*, London (1972). For a brilliant and successful attack of these schools, see S. A. Golunskii and M.S. Strogovich "Bourgeois Doctrines as to the Essence of Law; Criticism thereof." Handout, Williams, September 1972, University of Dar (mimeo). See also able work by Sipula Kabanje: "The Bourgeois Theory of Utilitarianism and Its Significance to the Theory of Law," an unpublished LL.M. Dissertation, University of Dar, 1978.

¹¹ D. Williams, "Law and Socialist Rural Development," (1973) 6 *E.A.L. Rev.* 193.

¹² Hart's definition is:

Legal positivism: The expression 'positivism' is used in contemporary Anglo-American literature to designate one or more of the following contentions:

1. *That laws are commands of human beings;*
2. *That there is no necessary connection between law and morals or law as it is and law as it ought to be;*
3. *That the analysis or study of meaning of legal concepts is an important study to be distinguished from, though in no way hostile to, historical inquiries, sociological inquiries and critical appraisal of law in terms of morals, social aims, functions, and so on;*
4. *That a legal system is a closed logical system in which correct decisions can be deduced from predetermined legal rules by logical means alone;*
5. *That moral judgment, cannot be established, as statements of facts can, by rational argument, evidence or proof....*

¹³ At the end of the last and the beginning of the present century, a new way of thinking grew up. Jurists began to think in terms of human wants or desires or expectations rather than human wills. They began to think that what they had to do was not simply to equalize or harmonize wills but, satisfaction of wants....

Three elements contributed to shift the basis of theories as to the end of law from wills to wants, from recon- or harmonizing of wants. The most important part was psycho- psychology which undermined the foundation of the metaphysics will of philosophy of law. Through the movement for unification of social sciences, economics also played an important part especially indirectly through the attempts at economic interpretation of legal history, reinforcing psychology by showing extent to which law had been shaped by the pressure of economic wants. Also the differentiation of society, involved in industrial organisation, was no mean factor, when classes came to exist in which claims to a minimum human existence, under standards of given civilization, became more pressing than to self-assertion. Attention was turned from the nature of law to its purpose, and a functional attitude, a tendency to measure legal rules and doctrines and institutions by the extent to which they furthered or achieved the ends for which law existed, began to replace the older method of judging law by criteria drawn from itself.

R. Pound, *Philosophy of Law*, Yale (1954), p. 42.

¹⁴ R. Pound, *Contemporary Juristic Theory*, (1940), pp. 76.

¹⁵ *Ibid*, p. 76.

¹⁶ Engels, *The Origin of the Family, Private Property and the State*, Moscow (1972), p. 168.

¹⁷ Clemens Duff, ed. *Fundamentals of Marxism-Leninism*, 2nd edition, Moscow (1968), p. 127.

¹⁸ Chkhikvadze, ed. *The Soviet State and Law*, Moscow p. 13. Engels, *The Origin of the Family...*, p. 168.

¹⁹ See Mutunga, on the so-called indigenous bourgeois accumulation of capital and imperialist domination in Kenya. The case of ICDC of Kenya.

²⁰ Kenya's history is being rewritten along patriotic lines. For a good example of this, see Maina: "Mau Mau: The Peak of African Political Organisation in Colonial Kenya," Kenyatta University College, 1977 (mimeo). (A copy of this manuscript is in the hands of *Ufahamu* under preparation for publication in a special issue on the history of Africa, ed. K.M.)

²¹ The use of the two terms is confined to Kenya in this analysis. The word 'bourgeoisie' has been defined by Marx

Engels in their Communist Manifesto as "the class of modern capitalist owners of the means of social production and employers of wage-labour." For third world countries, the use of the words "national bourgeoisie" has been properly analysed by Prabhat Patnaik in Robin Blackburn's *Explosion in a Subcontinent*, Penguin (1975), pp. 52-54, which we quote in full:

India is a specially interesting case, because the bourgeoisie there was more developed and mature compared to many other Third World countries, and there was only a small strictly comprador element (i.e., those involved only in foreign trade or in serving foreign capital in other ways, for example as local agents.) Of course, like other national bourgeoisies, it developed in a colonial environment and therefore shared certain common characteristics, but there was a difference of degree partly reflecting the significant economic development which had taken place in pre-British India. The pre-British structure was extremely complex with a hierarchy of land rights and also, at least to some extent, identifiable class relationships. There was considerable monetization and commodity production, with the consequent tendency towards differentiation among the peasantry and the emergence of trade as a two-way process between country and town. Manufacturing was quite developed -- non-mechanized but catering for an international market. The system, whether or not we choose to characterize it as a feudal one, was in a state of decomposition, and the possibility of a Japan-type development could not have been ruled out. Merchant capital was significant and, though the later bourgeoisie was not the lineal descendant of the earlier one, there was some continuity. Domestic capital persisted in internal trade and a large section of the modern industrial bourgeoisie has a mercantile background.

Colonial rule destroyed this pre-capitalist economy in two phases. First was the so-called 'drain of wealth' which, one can argue, continued throughout the colonial period but which was particularly important in the late eighteenth century. Private loot and the East India Company's treatment of the administration as a profitable business resulted in a shortage of specie, leading to recession in agriculture and dislocation of trade and industry. The second phase, starting after the Napoleonic wars, involved the decline of handicrafts through factory competition. Urban handloom industry was more or less totally destroyed. The destruction spread to

rural weavers as well, but many lingered on -- partly through market imperfections and partly by cutting into subsistence -- only to fall victim to the famines. The exhaustion of land, the increase in rents, and the fall in wages of rural labourers suggest a large population being thrown out of employment, but how long and with what severity this process continued is still a matter for debate.

It is hardly surprising in these conditions that Indian industrial capital did not grow. Being pre-empted from its potential markets, facing a state which followed a policy of 'discriminatory interventionism' in the interests of British capital, and being excluded from the British-dominated old-boy network which controlled much of the banking and external trade, it hardly had a chance.

- 22 In *Rape*, 1977, No. 8 (The Kenyan Bourgeoisie).
- 23 *Journal of Eastern African Research and Development* Vol. 4, No. 2 (1974), p. 61.
- 24 *Readings on Multinationals in Kenya*, OUP, 1978.
- 25 Some Problems of Income Distribution in Kenya, I. paper, 1977, p. 6.
- 26 *Underdevelopment in Kenya*, 1975.
- 27 *Colonialism and Underdevelopment in East Africa*,
- 28 *Proletarians and African Capitalism, The Kenyan C* 1960-1972, 1975.
- 29 Apollo Njonjo and Peter Anyang'-Nyongo. From *Cod Deliberations*, Dakar, Senegal, Workshop on Public Sector Development, December 1978.
- 30 Mutunga. "The Demystification of the Kenyan Law of Purchase," *East African Law Journal*, 1975.
- 31 C. Schmitthoff, *The Sale of Goods*, 2nd ed. London pp. 5-17.
- 32 *Ibid*, pp. 4.

³³ See also Otto Kahn-Freud, *Labour and the Law*, London (1962), p. 16.

As a social fact that which the law calls 'freedom of contract' may, in many spheres of life (not only in labour relation), be no more than the freedom to restrict or to give up one's freedom. Conversely to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally and socially unfree will.

R. B. Siedman, "Contract Law, the Free Market, and State Intervention: A Jurisprudential Perspective:7(4) (1973), *Journal of Economic Issues*, p. 556.

Parties to bargains are seldom of equal bargaining strength. To the extent that they are not, contract, however it may appear to parties, is not a matter of freedom of choice, but of command. Is it significantly different to say to a man: "I will pay you a wage if you will work for me?" rather than, "You will get no wage unless you work for me." Two hundred years ago Lord Chancellor Northington expressed it successfully: "Necessitous men are not, truly speaking, free men."

At law, to treat unequals notionally as equals is in fact to elevate the stronger to a position of domination. In a bargaining situation, the stronger imposes upon the weaker the norms of conduct which he desires. There is no "equality" between African labourers and a giant copper mine or plantation. An African who must raise cash to pay poll tax, or go to jail, has no freedom to decline to work for cash wages.

Andrew Lyall, "Contract, Freedom and Exchange," forthcoming (1975) *E.A.L. Rev.*

³⁴ For the general principles of law of contract, see Cheshire and Fifoot, *The Law of Contract*, 8th ed., London (1972); Macneil, *Contracts in East Africa*, South Hackensack, NJ (1968); R. W. Hodgkin, *Law of Contract in East Africa*, Nairobi (1975).

³⁵ Marx, *Pre-capitalist Economic Formations*, London (1964), p. 98.

36 Mandel, *Marxist Economic Theory*, London (1968),

At the same time money begins to conceal the real economic relationship, formerly transparent, between serfs and lords, between necessary and surplus labour. Landowners and tenants, employers and wage earners meet on the market as free owners of commodities, and the fiction of this 'free exchange' hides the continuation of the old relationship of exploitation under its new forms.

37 F. Kessler, "Contract of Adhesion -- Some Thoughts on Freedom of Contract" 43 (1943), *Columbia Law Review*, p.

38 *Ibid.*, p. 631.

The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable -- the standardised mass contract. A standardised contract, once its contents have been formulated by a business firm, is used in every bargain with the same product or service. The individuality of the parties which so frequently gave colour to the old type of contract has disappeared. The impersonality of the market. It has reached its greatest perfection in different types of contracts used on the various exchanges. Once the usefulness of these contracts was discovered and perfected in transportation, insurance and banking business their use spread in all other fields of large scale enterprise into international as well as national trade, and into labour relations. It is to be noted that uniformity of terms of contracts typically recurring in a business enterprise is an important factor in the exact calculation of risks. Risks which are difficult can be excluded altogether. Unforeseeable contingencies affecting performance, such as strikes, fire, and transportation difficulties can be taken care of. The standard clauses of insurance policies are most striking illustrations of successful attempts on the part of business enterprises to select and control risks assumed under a contract.

39 See for example, Dicey, *Law and Opinion in England 19th Century*, London (1914), p. 57.

p. 97: 40 See Stewart McCaulay, "Non-Contractual Relations in Business in *Sociology of Law*, ed. Aubert, London 1969, p. 194 *et seq.*

41 See Whitford, "The Doctrine of Fundamental Breach in E.A.," *E.A.L. Rev.* 87 (1979).*

42 Now vide. S.3 of the Judicature Act, 1967, (No. 16 of 1967).

A good example of this is the general rule that court will not determine the adequacy of consideration in contracts (although equity will in certain circumstances, see Treitel, *Law of Contract*, pp. 65-66). This rule has been justified on the following grounds:

It is rather that they (courts) should not interfere with bargains freely made.... The Courts are not well equipped to deal with the social and economic questions involved in determining whether a bargain is fair, and it seems that their refusal in general to judge adequacy of consideration is correct. (Trietel, supra, pp. 64-65.)

Again, behind this argument the doctrine of freedom of contract is clearly operative. This general rule facilitates the essence of all contracts in capitalist societies, that they are tools of exploitation. And that is why exploitation of one party to a contract by the other is not a vitiating element in contracts.

43 S.4 of the Act.

44 S.2 of the Act.

45 Mitunga, "The Demystification of the Kenyan Law on Hire-Purchase," *East African Law Journal*, 1975.

46 *The Law of Agency*, London (1971), p. 7, c.f. Marx and Engels, *Manifesto of the Communist Party*:

The need of a constantly expanding market for its products chases the bourgeoisie over the

*Willy seems to have in mind a published article by Whitford in an issue of *E.A.L. Rev.*, in this case No. 87, rather than two different sources as in the original manuscript. (Ed. K.M.)

whole surface of the globe. It must nestle everywhere, settle everywhere, establish connections everywhere. (See also footnote 54*.)

- 47 Nabudere, *The Political Economy of Imperialism*, Ch. XI.
- 48 Ibid.
- 49 Mandel, *Marxist Economic Theory*, p. 185.
- 50 Ibid., p. 187.
- 51 Ibid.
- 52 S. 3 of the Sale of Goods Act.
- 53 S. 2 of the Hire-Purchase Act.
- 54 Friedman, Ch. 5*

*Willy is referring to *The Law of Agency* by Gerald Henry Louis Fridman. In the third edition of this book, published by Butterworth & Co. (Publishers) Ltd., London, 1971, a definition of this law is formulated as follows:

Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. (p.8)

The amorphous nature of the concept of the "Agent's Authority" is designed in such a way as to benefit foreign capital, which, in the specific case of neo-colonialism identifies itself in the person of the "principal." That is the gist of Fridman's elaboration of the problem when he reveals what is involved in the concept. He writes:

The elucidation of the agent's authority is complicated by the fact that, in a sense, there is not one unique, integrated notion of authority, but, instead, there are several varieties of authority. (p.89)

These "several varieties of authority" are variously given as 'actual' or 'real' authority, 'express' authority, 'implied' authority, etc., all of which, as Willy says, are meant to guarantee the foreign capitalist control of his 'investment.' See also footnote 46. (Ed. K.M.)

55 For example, hire-purchase agreement "means an agreement for the bailment of goods under which the property in the goods will or may pass to the bailee...."

The fundamental principle under Hire-Purchase law that property in the goods does not pass until the hirer exercises the option to purchase is clearly enacted, C.F. Helby v. Mathews (1895); H. L. Bandali v. Lombank Tanganyika Ltd. (1963) E.A. 304; Matayo Musoke v. Alibhai Garage (1960) E.A. 31; Mukembo v. Republic (1974) E.A. 100.

56 (1914) 1 K. B. 244.

57 (1918) 2 K. B. 808.

58 (1955) 2 All E. R. 557.

59 (1967) 1 All E. R. 117.

60 (1970) E.A. 195 see A.B. Lyall "Dodhia's Case and the Legal Process" *E.A.L. Rev.*, Vol. 1 (1971), p. 277.

61 For a more detailed discussion on the half-heartedness of the Hire-Purchase Act, 1968, see Mutunga, *Demystification article*. (See footnote 30, Ed. K. M.)

62 Friedman, Ch. 9, c.f. 20 M.L.R. 650, *Cambridge Law Journal*, (1961) 239. (See footnote 54 and the explanation thereof for further clarification, Ed. K. M.)

63 Paguin Ltd. v. Beauclerk (1906) A.C. 148.

64 Friedman, p. 13. (See footnote 54 and the explanation thereof for further clarification, Ed. K. M.)

65 Other yardsticks would be to investigate how quickly the distributors dispose of their goods and the role of bank credit in these payments. Obviously when the distributors cannot honour the sight drafts from their resources a bank loan or overdraft is the only way out.

66 Walker, A.G. *Export Practice and Documentation*, London, pp. 123 and 124.

67 In the field of imports these "agents" are, in law, buyers not agents.

68 Shivji, I.G., quoting P. Jalee in "Capitalism Unlimited, Public Corporations in Partnership with Multinational Corporations," AR, Vol. 3, No. 3 (1973), pp. 359-382.

According to Loxley at p. 162 (Loxley infra) fn. 49. In the N.I.C. Standard Bank owns 2/5 of the capital, 3/5 of the capital is owned by Mercantile Credit Bank of London. The National Grindleys International owns 1/5 of C.F.C. capital while a trading company, R.O. Hamilton, owns the rest. The Aga Khan owns all in D.T. This situation has, of course, been slightly affected by the 20 percent of share capital offered to the public.

69 Loxley, infra, p. 162, table 51.

70 Goode, *Hire-Purchase Law and Practice*, London (1970), p. 51. NIC, DT and CFC interest rates are 10 percent for money loaned towards purchase of new cars, 12 percent for old cars. National Bank of Kenya charges nine percent for both purchases.

71 Loxley, *The Development of the Monetary and Financial System of the East African Currency Area, (1950-1964)*, unpublished Ph.D. thesis, University of Leeds (1966), p. 165.

72 Mandel, *Marxist Economic Theory*, p. 236.