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THE REGULATION OF LABOUR AND THE STATE
IN THE SUDAN

(A Study of the Relationship Between the Stage of
Social and Economic Development and
the Autonomy of Labour Relations Law)

EL SIDDIG ABDELBAGI HUSSEIN

LLB University of Khartoum

LLM University of Warwick

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The School of Law

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The Trade Union Ordinance (Amendment) Act TUO 1960 ; OG.A5 1960.

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The Public Service Act PSA 1973; OG.A.26 1973, LS Vol 6, 397.

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The Apprenticeship and Vocational Training Act AVTA 1974; LS Vol 7, 186.

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The Public Service Regulation PSR 1975; OG.LRO.No 19 1975.

The Industrial Safety Act ISA 1976; OG A3 1976, LS Vol 10, 96.

The Industrial Relations Act IRA 1976; OG A4.1976 LS Vol 10, 119

The Wages and Conditions of Employment Tribunals Act WCETA 1976, LS Vol 10, 148.

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LRO 1975 respectively.

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Notes

- (1) Laws of the Sudan
- (2) Official Gazette
- (3) Order
- (4) Legislative Regulatory Order
- (5) Supplement to Official Gazette
- (6) Act
- (7) Provisional Order

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ABSTRACT

The thesis is a study of labour regulation and the State in the Sudan in the light of a general theoretical conception of labour law and the State. The first Chapter defines the concepts of analysis that are used throughout the study, isolates the "essential" properties of the Capitalist State and Law from the historically concrete forms which they assume in a particular society and distinguishes between processes which influence development of the form of law and others which influence its sociological development. Drawing on the analysis in Chapter I, Chapter II exposes the inter-relationship between the Sudanese social formation, State and Law and the implication of this inter-relationship for both the form and substance of labour relations law. Chapters III, IV and V are specific verifications of the hypothesis regarding the inter-relationship between the State and labour relations law in the Sudan and that regarding the development of the "substance" and "ideology" of law in general.

The thesis considers law as an empirically-founded discipline. But, it distinguishes between various types of empirical facts about law corresponding with respective semi-autonomous social levels at which law asserts its existence. The research method followed describes the empirical facts about law at the particular level and, in order to determine the epistemological significance of these facts, analytically relates them to empirical facts at other levels. Wherever used in the thesis the term "theory" signifies either this methodological procedure of analysing the inter-connection of empirical facts at a certain level and their inter-relation with other facts at other levels, or the substantive generalizations about law which findings at these various levels would allow.

I consider my application of this methodology to the study of labour relations law, the historical dimension this application introduces in socio-economic analysis of this law, the criticism of certain Marxist and other sociological conceptions of law it enables, and the socio-historical relativity of the "substance" and "ideology" of law it reveals as original contributions to the knowledge of labour law. The compilation and evaluation within the framework of the thesis of empirical materials on industrial relations in the Sudan are likewise original contribution to the knowledge of Sudanese "labour law" and labour law in general.

INTRODUCTION

Law is a social phenomenon. To be complete the knowledge of law requires examination of this phenomenon at several levels of abstraction corresponding in turn with several concrete inter-relationships between law and society.

To begin with, the researcher needs to focus on the formalities and techniques of rule-making and legal administration and the rules principles and concepts governing them. At a second level, in order to rationalize these doctrinal aspects, the researcher needs to examine the substantive content of rules and legislation with relation to social practices and relations which law endeavours to regulate. The focus of the latter examination is to show the extent to which formal law (i.e. rules, legislation and the principles underlying their innovation and administration) contradicts, or otherwise compares with or justifies existing divisions, equalities inequalities, "balances" or "equilibriums" of powers of the parties who are bearers of these relations or practices. At a third level the researcher needs to examine the extent to which these practices and relations phenomenalizing these divisions, equalities, "balances" and "equilibriums" of powers are themselves limited by the existing social and political structures within which they are taking place. At a fourth level the researcher needs to know whether and to what extent the latter structures are themselves concretized social manifestations of dominant economic relations of production.

It is only after examination of the respective facts at these various levels has been completed and a critical unification of the findings accomplished may a theory of "essential" law be formulated. The question why the formulation of such a theory is of particular importance in the case of an implicitly comparative socio-legal study (i.e. a study of law in an under-developed social formation in the light of knowledge about law available in a developed society) is explained below.

The above delineation of the province of law means that law is conditioned by underlying economic and social factors prevailing in a particular society. However, if law as a social discipline is socially and economically determined so also will this affect the academic discipline dealing with this law as its field of study. This is a fact of some significance in assessing the relevance, for a study of labour "law" in the Sudan, of the literature on labour law in Britain. Because it is largely dominated by the practical needs of studying existing social industrial and legal practices (e.g. collective bargaining, industrial action and specific legislative and judicial approaches to these and other areas of labour relations) the analysis which this literature offers is not necessarily relevant for another country where these practices, and, structures within which such practices may take place, are either lacking or radically different. Even when they have attempted to draw general theoretical conclusions about law, some analysts (e.g. legal pluralists and sociological jurists) of law in developed societies did not in fact go beyond the second level of abstraction aforementioned. This premature theorization (i.e. a theorization effected before examination of respective facts at other relevant levels of abstraction) produces only empiricist conceptions of law (i.e. conceptions that consider as

"essential" characteristics of law [phenomenal] forms which law happens to assume in a particular society at a particular stage of development). To propagate these conceptions as "theories" of law is to endow them with a universality that they do not possess. To apply these empiricist conceptions of law in a particular society to a study of law in another totally different society is to overlook differences, between law in both societies, which even empirical investigation of law at any one of the four levels aforementioned can reveal.

This thesis argues that it is always a "dominant" "form of economic relations" - (previously mentioned under the fourth level) - which determines the "essential" forms of the State and Law, but that the autonomy of the State and Law are in turn always conditioned by the stage of development of the form of economic relations. However the effect of this development or under-development is reflected directly on society, thence on the State and through the medium of the State on labour relations law. Depending on whether the subject of examination is a developed society or an under-developed social formation, the application of this general hypothesis reveals either an "autochthonous" "evolutional" or "superstructural" "revolutional" course of social and legal developments respectively. In the context of the evolutional course of development which is typical of a developed Capitalist society both the State and Law (if viewed at the present point of time in isolation from their previous historical stages) appear as representative of "balances of powers" and an apparently social consensus among classes and groups in the wider society - (Cf *infra* Chap.II f.98). Hence industrial relations law appears as largely determined by autonomous operation of autonomous institutions of collective bargaining, and, the State appears,

in this and other fields as merely instrumental in giving effect to collective demands and wishes and furthering the interest of the community as a united whole. In the context of the revolutionary course of development which is typical of an under-developed social formation both the State and Law appear as effecting economic regulation of this formation from above. This latter course of development has its origin in colonialism and its imposition of a capitalist form of State and Law on a largely non-capitalist social formation. The sense in which this course of development is "revolutionary" and the manner in which it interacts with the social formation as a whole are explained in the thesis.

The thesis argues that labour legislation in the Sudan is a capitalist form of law different from labour law in developed Capitalist Societies only in the degree of its ideological development or autonomy. Because it is a form of descendent regulation, labour legislation in the Sudan reflects, not the wishes or economic positions of autonomous workers' and employers' organizations but certain political and economic policy objectives formulated and given pre-eminence by the State. The condition of the law regulating a particular area of labour relations (e.g. collective, public individual and private individual labour relations) is always explicable by the stance of the State towards this area. The division of the part of the thesis dealing with labour legislation into three chapters, dealing respectively with collective labour relations, public individual labour relations and private individual labour relations, itself corresponds with a typology of State intervention in the case of each one of these areas. The type and extent of this intervention is in each case determined by the proximity of the area under regulation to the political and economic policy considerations put forward as

influencing State intervention in various areas of social relations.

The Chapters on labour legislation in the Sudan focus mainly on studying the effect which the stance of the State towards each particular area of labour relations has on the ideology of the law regulating this area and that of labour relations law in general. The aspects of the law designated as its ideology are; formalities of rule-making and legal administration and the social effectiveness of the law. The focus of the discussion is to demonstrate the extent to which political determination of the "law" and the particular rule-making and legal administration processes adopted affect both the formal effectiveness (i.e. impartiality and enforceability) and the social effectiveness (i.e. social-wide effectiveness of statutory law deriving from optimality of this law for the spontaneous social operation of the relations it endeavours to regulate) of the law.

CHAPTER I

TOWARDS A GENERAL THEORY OF THE STATE AND LAW

Introduction

The visiting African Law-researcher is faced with the problem of analysing social phenomena in his own country in terms and concepts indigenous to legal education in the host country. The researcher may, in conformity with the dominant research methodology in the host country, underrate this predicament or deny its existence. But implicit in any research approach that does not account for the discrepancy between the social context of "Law" in for instance The Sudan and Britain and the implication of this for Law are the underlying assumptions about the positivism of social phenomena and exportability of social disciplines.

A study of Law in two unequally developed social environments may give as a clue to the "knowledge of the Law" the definition which is given to Law in the developed environment. I believe that such a definition must be subjected to further scrutiny in order to distinguish, within Law, between what is inherent and universal in the Capitalist "form of Law" and what is ideological and peculiar to "the stage of development" of the developed society.

The search for a method of comparative "sociological" investigation led me to exclude as unsuitable for this purpose sociological theories that, limiting themselves within the sociological sphere, make their rules by assembly of social phenomena in order to explain other social phenomena. At a certain level of abstraction these theories become part of the concrete historical reality they are endeavouring to interpret. The problem with such methodology and its findings - (whether a sociological theory of Law or pluralist theory of politics or industrial relations) - is that they remain peculiar to the concrete historical formation in which they evolved - (i.e. developed Capitalist Societies). But they may not possess more than a descriptive value even in such societies.

The difference between the two social environments concerned is also present in the stage of economic development. A method of investigation will be most effective if it integrates the economic and social spheres.

Marxian theory possesses all the ingredients noted above as essential for comparative "social" investigation. It possesses the potential of a "sociological" method that is capable of interpreting concrete historical formations without running the risk of being enveloped in the concrete history it is describing. It also contains the substantive and methodological conception that societies are determined by their underlying economic structures. It thus adopts as its terms of reference categories that are universal and applicable in the interpretation of social formations in their specific stage of economic development and social and economic configuration.

The main object of this chapter is to argue that the "social" and historical substance which the "form of Law" and the "form of the State" assume, affect the ideologies of the social phenomena of Law and the State, and, is at any time reflective of the stage of economic and social development. This is important for understanding the "capitalist" forms of Law and the State in Sudan. The argument in this chapter also shows that the province of ideology in Law is too extensive to be delineated by a uni-disciplinary approach to legal research.

The chapter is divided into three main parts. Part 1 sets out the general philosophical background on which I intend to place my argument in Parts 2 and 3 of this chapter. Part 2 examines the implications of the argument in Part 1 for a number of issues whose discussion is vital for the analysis in the rest of the thesis. Part 3 utilizes the outcome of the discussion in the first two parts for summing up the argument for the historical relativity of the appearances of Law and the State and for advancing a general methodological conception of a "form of Law" and a "substance of Law" that would apply in the analysis of Law in the Sudan.

1. General Methodological Questions

The question whether Marxism is valid for analysis of non-Capitalist social formations depends on whether Marxian theory is a methodological naturalistic conception of "history" (i.e. a science) or whether it is in addition to that substantive materialist conception of "History" (i.e. a materialist theory of the determination and transformation of societies; a philosophy). If the first position is adopted the body of Marxian writings remains "a scientific approach to a

strictly empirical investigation of the historical development of the modern capitalistic mode of production" (Korsch, 1963, p.167) (1). According to this conception the truth of the substantive results achieved by Marx through application of his own method to philosophy and the sciences is endogenous to the stage of development of the capitalistic mode of production at the time of that application (2).

If the second position is adopted some of Marx mature works (e.g. "Capital") become an application to a specific society and science of a general philosophical conception of History. Thus Lenin says of the relation of "Capital" to a general dialectical philosophy; "in Capital Marx applied to a single science, logic, dialectics and the theory of knowledge of materialism which has taken everything valuable in Hegel and developed it further" (3).

I shall argue that Marxian theory is both a philosophy and a science. However my argument is not necessarily a synthesis of the two positions above. It is rather an elaboration of a specific interrelationship between Marxian science and philosophy and of the methodological implications of this interrelationship for both these science and philosophy. There is also no necessary connection between philosophy as used here and the metaphysical. Marxian theory is a science and a philosophy in the sense that depending on the level of generality at which any of the various questions this theory addresses itself to, is analysed, its various propositions are stated either as scientific concepts or philosophical categories (4). Philosophical categories are in this sense different from scientific concepts in the degree of generality (i.e. in the removal from the data of sense "Bhaskar

1979, p.5") of the questions with reference to which they are formulated (5). Thus Marxian theory is "neither . . . refractory to empirical reference in the sense in which philosophical theories are" nor wholly provable by empirical test (Giddens, 1971 X).

1.A Why is Marxian Theory a Science and Philosophy?

Soviet Marxists staunchly believed that "Dialectical Materialism" (6) was "the central" and "most important" of Marxian philosophy (7). Although "Dialectical Materialism" meant different things to Engels, Plekhanov, Lenin and Stalin, the overall theme they adhere to is that Marxian theory was, foremost a philosophy and science of history (8) and more than just a hypothesis or methodology for research.

Other commentators also agree that the conception of Marxian theory solely as a methodological principle is incompatible with Marx's formulation, in the 1859 "Introduction", which "implies the reification of the concepts of economic base and superstructure and the transformation of their logical relation into a causal relationship of dependence and succession, the former being said to condition to determine to overthrow or to change the latter" and also incompatible with Marx's rejection of the suggestion that his theory applied only to the bourgeois economy of the modern world (Jordan 1967, p.299).

Some of the commentators who accept that Marxian theory comprises a philosophy and a science consider the philosophy as a metaphysical or teleological view of history - (Jordan 1967, pp. 307-310, Elster 1985, p.107) - that has no necessary logical connection with

Marxian historical materialism (i.e. science) - (Jordan 1967, pp. 300, 392) or has no such connection with development of the productive forces that Marx sees as obtaining within Capitalism (Elster 1985, p. 272).

The metaphysical or teleological attributions are unacceptable in view of the fact that "destratification of science (9)" and "dehistoricization of reality" constituted the essence of Marx's critique of Idealism in the philosophy of Hegel (Bottomore 1985, p. 256). For their part Marx and Engels believe that their premises were not arbitrary dogmas but could be verified 'in a purely empirical way' (German Ideology Vol I pt. 1A) (10). Yet "whether fused in dialectical materialism or separated in Western Marxism" the dialectic of Marxist theory has remained cast in an essentially idealist mould and its materialism expressed in a fundamentally empiricist form (Bottomore 1985, p. 256).

I believe that a reading of Marxian theory viewing this theory as composed of logically inter-related and interdependent philosophy and science may reveal a holistic and consistent understanding of Marx's works.

1.B What does it mean to say that Marxian Theory is both a Philosophy and Science

1.B.1 The Dialectical Method

In his description of the movement of the productive forces (Marx Capital III 1962, p. 798) Marx makes implicit use of his own version of Hegel dialectical method (11) (Bukharin 1969, pp. 74-75, Bottomore 1985, p. 200). I will explain this further. The productive forces are things (12). To speak of a movement of the productive forces is explicable either as a metaphysical anthropomorphism, or, "metaphorism" (12a). I argue that the development of the productive forces is a "metaphorical" description of the movement engendered by the interaction of the productive forces and the social forces of production. This interaction is "nature-imposed" (13) and materializes into economic and social phenomena. This materialization is effected through a process which although evolutionary is contradictory in the Hegelian sense (14). But whereas the three stages of the Hegelian Triad are in Hegel's Philosophy different temporal stages of a thought process or moments of existence of an essence (Althusser 1969, pp.89-107), each and every stage and the "negative totality" they constitute become in Marx's dialectics "a historical condition . . . i.e. a social condition associated with a particular historical form of society - Marcuse 1963, p.314". The poles of the contradictions are now external to the process of the contradiction itself. The three contradictions now condition the relationship between the natural and its reflection in the human mind. An idea which is a reflection of the natural world in the human mind persists as far as it is compatible with the sensuous consciousness of the natural world. A change in the natural environment triggers a new sensuous consciousness and disturbs the previously held ideas. Finally an idea compatible with the new sensuous consciousness is born (14a). Thus the intellectual advance arising from contradictions in thought is the reflection in the human brain of the dialectical process of motion in the

external world" (Lenin; PhN 1960, p.196, Jordan 1967, p.199). This consciousness is in its turn an integral part of the social process (Hook, 1971 p.71). "The social forces act upon the productive forces effecting their transformation, and the productive forces thus transformed reflect back upon the social forces of production (Plekhanov; DM 1947, pp.242-243") (15).

1.B.2 Marx's "Capital" Presupposes Marxian Philosophy

"Capital" is a theoretical construction, of the historical development of the Capitalist mode of production, undertaken from a philosophical materialist conception of history (16). This means that "the Capitalist system of production relations constitutes a totality . . . an all-inclusive unity which for this very reason must be examined and presented as an interconnected whole" (Bottomore 1985, p.200). This presupposition is essential for, inter alia, understanding the specific classification and "hypostatization" of the economic categories and other related concepts analysed in "Capital" (17). Korsch despite his doubts about a Marxian materialist philosophy of history believed that it is "one of the essential signs of Marx's dialectical materialist method that no distinction exists between the historical and the "theoretico-economic" material in "Capital". . . and that the latter is "precisely a theoretical comprehension of history" (Korsch 1970, p.54). Lukacs likewise argues; "by elaborating the connections between production and distribution, Marx brings the dialectical opposition of the economic and the extra economic into an organic and law-like relationship with the science of economics" (Lukacs 1978, p.64).

I believe that far from being a "hypostatization" or "crude functionalism" (Elster 1985, pp. 3-48; (18) Jordan 1967, pp. 298-299) the movement which Marx metaphorically attributes to economic categories and the contradiction he sometimes predicts as inevitable among some of these categories derive from the sum total movement generated by all forms of class struggle at all the social levels of a mode of production (19).

The disregard of the interpenetration of production, distribution and the social practices produces a conceptually unbridgeable gap between the material base and the superstructures (20). It has also been noticed as responsible for the inadequacies of theories of the State in Britain (Holloway and Picciotto 1978, pp.10, 14). It is not clear whether some of the contributors to the debate the latter two authors introduce are not themselves prey to an empiricist reading of capital that led them into subordinating the living economic and political class struggle to what is in fact a fictitious movement of hypostatized economic categories (21).

1.B.3 Marxian Philosophy is Responsive to Empirical Reference

The interdependence of Marxian philosophy and science also means that a Marxian philosophy of History does not depend for its validation on any extra-historical facts. The connection of the social and political structure with production must be shown empirically and without any mystification or speculation (Marx, German Ideology 1940, pp.13-16) (22). "The theoretical conclusions of the Communists" writes Marx "merely express in general terms actual relations springing from an existing class

struggle, from an historical movement going on under 'our very eyes' (23).

The validation of philosophical materialism in this manner is possible because Marx's implicit use of his own version of Hegel's dialectical method allows the deduction that Marxian philosophy and science are empirically-based and therefore verifiable by reference to the substance of the "Historical process" and to substances of specifically determined historical processes respectively. The relevance of Marxian Dialectics in explaining the mechanism of material determination is discussed later (infra Part 2.B.2.b). I illustrate here how the philosophical categorization of the process of this determination is dependent on scientific conceptualization of historical, empirically observable, processes.

Marx considers the general movement of the productive forces as a key to understanding the different socio-economic forms of production (Marx Capital III 1962, p.798). The "development" of the productive forces is meant to indicate the ever-continuous cumulative changes which the methods of Labour, its social productivity and incidentally the condition of the "objects of Labour" (23a) have experienced (24), and, are, theoretically, capable of experiencing, across different stages of human history. The socio-economic form which production historically assumes always corresponds to a definite stage of development of the productive forces.

A question which interposes itself here is; what is it that constitutes a "stage" of development of the productive forces? However I am inclined to believe that every phase of reproduction (25) constitutes

a new stage of development of the productive forces. If development of the productive forces means development of the methods of labour and its social productivity - (and the incidental impact of this on natural resources i.e. objects of Labour) - there is no reason why every phase of reproduction, however infinitesimal its impact might be, cannot be a new stage in the development of the productive forces. Marx's emphasis on the process of centralization of the means of production and socialization of Labour - (Marx Capital I Ibid p.715), his identification of different patterns of Labour relations corresponding to definite stages of industrialization (26), and, his analysis of the organic composition of capital and the tendency of the rate of profit to fall (Marx Capital III 1962, pp.227, 152, 143, 242, 210-259) are all attempts at periodizing the process of reproduction on the basis of its effect on the condition of the productive forces or vice versa.

According to this perception piece-meal changes in wages and "modalities of control" (26a) or in the distribution of "roles and products" (26b) that obtain within a mode of production as results of cumulative development of the productive forces, the falling tendency of the rate of profit and class struggle are themselves cumulative steps towards exhaustion of developmental potential of the dominant mode of production (27). "Analytically accentuated conclusions" (27a) of an empirically-based study of these processes within a determinate Capitalist Society may therefore also serve as *prima facie* partial evidence for the validity of philosophical materialism.

Commentators who view Marx's philosophy as teleological and his Capital as an empirical critique of political economy do not see any logical connection between the two (Elster 1985, pp.55-56) and therefore also no such connection between changes that have been taking place within Capitalism since its inception and the thesis of determination by the economic structure (Elster 1985, pp.157, 272)(28).

From a different perspective, Althusser and his followers also deny that stages of development of the productive forces consist in the ever-continuous phases of reproduction and that such development can at all be a cumulative process. Balibar, for instance, conceives a mode of production as periodized in the combination of its elements - (Balibar 1975, p.252). It is the combination specific to the CMP*, of; Labour power, means of production and the non-worker (Ibid p.212), which, in his view, constitutes the stage of development of the productive forces, to which the economic structure underlying the dominance of that mode of production corresponds. The recurrence of development of the productive forces appears, with Balibar, as determinable, not by the frequency of occurrence of reproduction nor by any other time frequency, but, by the "atemporal" frequency of the alteration of that combination. Depriving a "stage", of development of the productive forces, of its temporal content and identifying it with a combination of substance - (Balibar Ibid 226 cf. supra p.) is tantamount to its "structurization" (29).

* Capitalist mode of production.

Althusser accepts Balibar's formulation of the so-called basic concepts of historical materialism (Althusser and Balibar 1975, pp.163-181, 209-225). For his part Althusser also gives a wholly structuralist content to the Marxian concept of historical time (Althusser 1975, pp.91-118). He substitutes his so called structuralist causation - (which is an exclusively "synchronic" explanatory concept; Glucksmann 1974, pp.148-150, 167) - for Marxist explanatory concepts which I believe emphasise both "evolution" and "systematism" (30).

What both Althusserians and the previous Commentators slice off Marxian theory is the core of its materialist dialectic i.e. that through their mutual interaction the productive forces and the social forces of production are at any given time the originator of their own "historical" movement (31). Their view also disregards that determination by the economic structure - (which always naturally corresponds with the stage of development of the productive forces; Marx preface 362-63, Capital III 1962, p.772) - is an ever-continuous dialectic between the material and social substance of any historical process or "the Historical process in general" (31a).

The above view has its roots in the way in which its proponents view the relation between Marx's "Capital" and a general dialectical philosophy (e.g. Elster 1985, pp.37, 157). Having displaced Marx's concrete works from their dialectical philosophical framework some of these proponents could offer only ahistorical, formal, logical explanations for the thesis of the primacy of the productive forces or the relation between the economic structure and the superstructure (32). Thus contradiction between the stage of development of the productive forces

and relations of production becomes for Elster and Cohen (33) an ahistorical - (i.e. because it is not judged by the empirical historical process) - event that may take place - (i.e. in the formal logical sphere), between the productive forces and a counterfactual set of relations (Elster 1985, pp.259-260) or "when stagnation of the productive forces sets in (Cohen 1978, pp. 160-174). Both Elster and Cohen offer an ambiguous view of the concrete historical social and economic development that has been taking place since the inception of Capitalism and of the ability of Marxian Science and Philosophy to explain this development.

Althusser argues for the expulsion of all traces of the Hegelian dialectical method from Marx, allegedly on ground of its incompatibility with the distinct Marxist "problematic" (Althusser 1970, pp.24-69; 1969, pp. 89-255). This argument is integral to Althusser's theory of "anti-humanist" and "anti-historicist" (34) Marxism. "The discontinuity which Althusser introduced" in these respects between theory and practices (35) was too radical and in effect made it "impossible" for him "to reconcile the two" (36). Althusser however chose theory and, considering Marxian theory as the product of a self-subsistent process of knowledge (Althusser 1975, pp.24-69) transferred its application wholly into the philosophical sphere. This however meant the denial of the application of Marxian theory in any specific historical process or indeed the "Historical process in general" (Cf. *infra* f.39). In some of his later works Althusser denounced what he called this "theoreticist" tendency that underlay parts of the earlier works of "Reading Capital" and "For Marx" (Althusser 1976, pp.106, 141). However, because Althusser's earlier concept of the "economic structure" (37) and other so called basic

concepts of historical materialism (Althusser Balibar 1975, pp.163-181, 209-225) have remained unchanged, this subsequent renouncement, and the new emphasis associated with it, on the class struggle are superficial (38). Applying Althusser's recommended "symptomatic reading" - (Althusser 1975, pp.24-69) - to his own works we find that his essay; "Ideology and Ideological State Apparatuses" (Althusser 1977, pp.123-173) is an intuitive account of a class struggle that does not discursively fit into his overall theoretical apparatus. This is because there is simply no conceivable historical province for class struggle in Althusser's problematic as he himself seems to recognize (Althusser 1976, p. 106).

1.B.4 The Distinction between Scientific Concepts and Philosophical Categories

The interdependence of Marxian science and philosophy also means that all Marxian propositions are liable to interpretation at, at least, two broad levels of abstraction - (i.e. (1) as scientific concepts or hypotheses and (2) as philosophical categories). This in turn means that a proposition can be properly critically evaluated only after the level at which it is proposed to be understood and evaluated has been properly identified. This identification is essential for determining the type (e.g. empirical or theoretical), realm (i.e. the field from which such evidence may be gathered be it a determinate historical process or the "Historical process" Cf below f.39) and weight of evidence needed for the validation of the proposition. To illustrate this I will give a concrete example. Taken as a philosophical statement the thesis that the economic structure naturally corresponds to a definite stage in the development of the productive forces and determine the superstructures (Marx Preface

pp.362-63, Capital III 1962, p.772) cannot be categorically validated by empirical facts obtainable from a single concrete historically determined social formation (Marx, Preface, pp. 362-63). This is so for two reasons. The first is that the realm of this categorical statement is the Historical process in general. This is a field of application that has wider spatial and temporal historical dimensions. It includes, as its particular instances the sum total of historically determined social formations on earth, and the history of the evolution of Mankind past and present (39). The second reason is that such a categorical philosophical statement cannot possibly be validated directly by empirical evidence but only by "analytically accentuated findings" (39a) of the historical sciences vis-a-vis such evidence.

It has been suggested in respect of the first reason that "only a world history written from the materialist point of view could provide the theoretical substantiation of historical materialism" (40). With regard to the second reason, it has also been suggested; "the meaning of the philosophical category of "matter" does not . . . apply to any object of science but affirms the objectivity of all scientific knowledge of an object (Althusser 1977, p.51)".

The above discussion does not mean that Marxian philosophical categories are not responsive to empirical reference. It simply means that the validation of these categories can be effected only via the historical sciences. Thus "the validation of these categories remains the responsibility of science and not of philosophy" (Jordan 1967, p.255).

1.B.5 Marxist Theory as a Historical Science

The preceding discussion supports a conclusion that the validity of Marxian philosophy does not wholly depend on the evidence obtainable from a concrete historical social formation and that, in interpreting the latter Marxian propositions can only be proven as hypotheses of science. It follows from this that "materialists who apply philosophical categories to the objects of the sciences as if they were concepts of them are involved in a case of mistaken identity" (Althusser 1977, p.51) (41).

As a science Marxian theory hypothesizes that the real basis of social life consists of definite productive forces and definite social relations established by men interacting in the production of their means of subsistence. This means that the study of institutionalized behaviour must deal with "determinate individuals" with men as they really are and not as they may appear in their own or other people's imagination (Jordan 1967, p. 302). It furthermore claims that all human activity can be described by means of the same naturalistic method which applies equally to the world of nature and to the world of the mind (Ibid 300).

Against "methodological individualism" Marxian science, thus stated, affirms the non-reducibility of society to individuals (42). Like Durkheim Marx uses a "causal criterion" (42a) to establish the reality of social facts on a "collectivist conception of sociology" (42b) (Giddens 1971, pp.66-67; 1977, p.2). In contrast to Durkheim, Marxian method substitutes a "relational criterion" for Durkheim's "criterion of externality" (Durkheim 1938, p.10) as the basis for that reality (42c). It thus avoids Durkheim's mistake of establishing that reality by reification

of society. It is "the relations of people among themselves vis-a-vis the natural objects in respect of which these relations are incurred" (42d) that constitute this basis. The Marxian position is also advanced because, by specifying this essential real object for social science "Marxism provides a potentially theoretically autonomous sociology". The pre-existence of societies also establishes their autonomy as possible objects of scientific investigation (Bhaskar 1979, pp.1-91).

Marxian science shares with certain schools of sociology - (Durkheim 1938, p.43) the conviction that the empirically observable world should constitute the starting point for all theories (German Ideology 1940, pp.13-16, Frühschriften 1953, pp. 347-50)(43). Likewise Durkheim's stratification within the social sphere, of social facts into "articulated structures" and "free currents" (i.e. practices) (Durkheim 1938, pp.10-13, 110) and his assertion of the explanatory primacy of the former (Ibid 110) - (i.e. without denying the latter their *prima facie* relevance) is not qualitatively different from the stratification (i.e. of levels of abstraction) present in Marx's criticism of the classical economists and his concrete historical studies (44). The level of material production which Marxian theory advances as an additional and ultimate referent in sociological explanation does not invalidate and indeed may only be reached via these methods of investigation within the "sociological sphere". "Different levels" (44a) of the "sociological sphere" may, while possessing their own ideological rationality, still be manifestations of the material structure (45).

Marxian science subscribes to a philosophy that views all types of societies as specific socio economic forms of the process of production in general (Marx Capital III 1962, p. 798). The field of investigation of Marxian science is not necessarily confined to the "synchronic" configuration of phenomena and determinate individuals in their relation to contemporaneous social structures (46). It endeavours also to explain the process through which the contemporaneous structures have themselves materialized across time (Bukharin 1969, pp.269 -272).

Thus delineated this field of investigation needs for its interpretation and comprehension an approach that transcends inter-disciplinary barriers. The subjects of investigation include (in addition to determinate individuals) series of social phenomena that vary in their "level of socialization" (46a) and extent of crystalization or fluidity. To provide a more adequate account of the inter-relationship of phenomena at different "levels of socialization" and ultimately of the relationship between the economic structure and the ideological superstructures, disciplines such as economics, psychoanalysis, politics, historical sociology, industrial relations and cultural studies are all needed and the critical unification of their findings is essential for arriving at a clearer view of the socio-economic totality (47).

1.B.6 The Primacy of Philosophy

Many critics argue that Marx provided no schematic evidence to validate his philosophical conception of History (i.e. did not use his methodological interpretational science to substantiate this conception) (48). It is however true that Marx and many of his successors paid less

attention to the question of validating philosophical materialism. Some of the texts that may be cited as interpretations of concrete historical situations, appear not as written to establish the philosophical hypothesis but as themselves based upon the prior acceptance of that hypothesis (49).

The interpretation adopted in this thesis suggests also that Marx instead of explaining, through interpretation of concrete historical situations, the basis for his conviction in a materialist philosophy of History tries to base even his theoretical construction of the development of the Capitalist mode of production upon this so called unsubstantiated conviction. Thus Capital is not intended to and could not categorically validate the philosophical hypothesis (Jordan 1967, p. 313).

The explanation that the Marxian teleological view of "history" is responsible for leading him into neglecting the validation of his philosophical conviction (50) is unacceptable. Marx however constantly referred to the empirical nature of his view of history and knew what kind of evidence would confirm his hypothesis and where he should look for it (Jordan 1967, p.304). Marx even regards such evidence as so overwhelming and easy to come by that he does not think it worthwhile to test his hypothesis by applying it to a particular historical situation (Jordan 1967, p.304). As is perhaps obvious from the discussion in previous parts the fact that Marx provides no evidence to substantiate his philosophical hypothesis does not mean that Marxian science is not capable of producing an interpretation of the world history in support of this hypothesis. Thus it is suggested; "Marxist Theory . . . has only laid the cornerstone of the science which Socialists must further advance in

all directions . . . (Lenin CW4 1960, p.211)".

Marx however does not regard his philosophical conjectures as hypotheses. In "Capital" the materialist evolution of society is described as a process of natural history working with iron necessity towards inevitable results" (Capital I 1983, p.19)(51). Marx's conviction in his hypothesis is so strong that he, not only sees its substantiation as unnecessary, but also relies on it for espousal of a philosophy that would henceforward change the world instead of interpreting it (52). With regard to the relation between science and philosophy this could mean that the truth of the philosophical categories is taken for granted and that indulgence in the proof of scientific formulations of these categories is a gratuitous and redundant exercise (52a). Soviet Marxism even held that the materialist science of history presupposes or is deducible from the materialist philosophy (Jordan 1967, pp.348 - 369).

The question of the relation between the philosophy, science and also possibly practice of Marxism depends entirely on the subjective view and environment of the actor. It is perfectly consistent for any person to become a "Philosophical Materialist" first and depending on the conditions of his environment choose whether to, immediately change, or, interpret it. I believe that interpretation is always a scientific task and, to do justice to Marxist theory itself, must therefore always follow the methods of objective science potentially present within this theory. The propriety of uncritical adherence to Philosophical Materialism is however justified because adherence to any philosophy depends on the "world outlook" of the actor. I have already pointed out that although responsive to empirical reference Marxian propositions require for their

proof as philosophical categories a type and scope of evidence different from that required for proof of scientific concepts. Even if such evidence is provided the partisanship of other people's philosophical beliefs (which cannot possibly be ruled out) may prevent its comprehension (53)

However the subordination of Marxian philosophy of History to Marxian science or the denial of existence of the former hampers a consistent understanding of Marx works. Moreover such an approach may also have serious methodological implications for Marxist Science itself. The failure of both Lukacs and Korsch in presenting an adequate perception of Marxian Science (54) is not unrelated to their view of Marxian theory as the self-knowledge of Capitalist Society (Lukacs 1971, p.229) or the theoretical expression of a revolutionary process that will end up with the total abolition of bourgeois society (Korsch 1970, p.62). The limitation of the scope of Marxian theory to the specifically historically determined Capitalistic mode of production (Korsch 1963, p.167, 1970 p.44) and denial of philosophical categories that are not necessarily reducible to this mode (Korsch 1970, p.44) led to the belief in the identity or coincidence of consciousness and reality (Korsch 1970, p.78). The latter in its turn meant a conception of Marxism that is incapable of distinguishing between science and ideology.

2. Implications for Research

The previous discussion has methodological and substantive implications for research. Section 2.A below examines the methodological implications.

2.A Methodological Implications

The assumptions made in the previous discussion are also implied at all stages of research in the thesis. I explain here only the nature and implication of the main assumptions.

I consider theory and empirical data as complementary but distinguish between various levels of theorization and the different nature of the empirical data needed for substantiation in each case. Accordingly, I consider some Marxist and Third World literature as empirical data for theorization on the State and Law in Sudan. However, these same theories of Law and the State are also supported at a lower level by empirical data that I have compiled in a study of Industrial relations law in the Sudan.

This method reflects two convictions that are themselves derived from the previous discussion. The first is that no matter how comprehensive empirical data at a certain social level on a particular subject is, it can never by itself vindicate a theory of the subject formulated solely on the basis of this empirical data.

Just as a phenomenon is arguably explicable by collection of subjective individual views about it (e.g. through questionnaire) so also is it explicable by other social or economic facts preceding it in point of time or order of hierarchy. Explanation of any phenomenon need, in order to discern and perceive the internal characteristics or rationality of this phenomenon, to trace its interrelationship with these other relevant social and economic facts (54a). It is only after empirical

investigation of the phenomenon has thus been completed and the implications analysed that a theory of the phenomenon can be formulated. This thorough investigation and analysis are important because "essential relations" which theory seek to express are sometimes "ontologically distinctive from . . . out of phase with and perhaps in opposition to the phenomena (or phenomenal forms) they generate - Bottomore 1985, p.407)". I also apply this methodological procedure to show that the non-capitalist phenomenal forms which certain economic social and legal relations assume in Sudan - (and possibly in some other under-developed social formations) - do not necessarily mean that these relations are also functionally non-capitalist (54b).

The second conviction is that the explanation of one set of phenomena by another does not necessarily mean the deprivation of either of them of its internal rationality. Explanation must emphasise both notions of "evolution" and "systematism".

2.B Substantive Implications

2.B.1 Redefinition of Concepts

Drawing on previous analysis, the definition of concepts undertaken under this part presupposes two things. The first is the interpenetration of economic and social layers of a society. The second is the universality of Marxian propositions. The emphasis on the interpenetration of economic and social layers of a society is relevant in discussion of the relation between the material base and the superstructures. The visualization of this relation is important for

concept^{ion} of the autonomy of the State and Law which in turn is essential to my analyses of Law in general and then to Law and the State in Sudan in particular. This interpenetration also posits a conception of a mode of production as a societo-economic form internally composed of interpenetrating levels of materiality and sociality. This conception is relevant, in discussing the implications for Law and the State of the presence, within one and the same social formation of Capitalist and non-capitalist economic relations. It also helps to evaluate the various theories that have been advanced as explanation for this phenomenon.

It is also relevant in visualization of a theory of transition to Capitalism that will help guide the discussion, in the next Chapter, on the Capitalism or non-capitalism of the Sudan.

Likewise the emphasis on the universality of Marxian propositions signifies that the content which concepts such as the "economic structure", "relations of production" and the "productive forces" assume in a definite concrete historical formation must not be confused with the contents of the philosophical categories of materialism. It is wrong from my view for instance to equate the philosophical category of the economic structures and the Capitalist economic structure (55). The latter is only a specific concrete historical form of the former. The main purpose of the discussion is the purification of these concepts from the historical connotations that have been attached to them as their "essential" meaning and the statement of their content at a level of generality that would make them applicable in the anatomy of any social formation including the one which constitutes the main subject of study for this thesis.

The empiricism and "historicism" (55a) of the "economic structure" and other concepts have also led to an empiricism and "historicism" of forms of Law and the State and of certain of their attributes (e.g. autonomy). Hence another justification for the discussion is to demonstrate that because of their empiricist presuppositions certain theories of Law and the State in developed Capitalist Societies cannot be universal theories of Law and the State.

2.B.1.a Relations of Production

For the purposes of the analysis in this thesis I treat "relations of production" and "economic relations" as synonymous. Man's original "relation" to his natural conditions of production is, strictly speaking, not a relation. "He actually does not relate to his conditions of production, but rather has a double existence, both subjectively as he himself, and objectively in these natural non-organic conditions of his existence" (Marx Grundrisse 1969, Penguin, p.491-93). This basic "relation" becomes a production relation or an economic relation when it is mediated through other men. "Economics" says Engels "deals not with things but with relations between persons, and, in the last resort, between classes; these relations are, however, always attached to things and appear as things" - (MESW 1962, p.374). An economic or production relation is, then, a relation between two or more individuals vis-a-vis the means of production or vis-a-vis their relation to the means of production.

"In all forms of society it is a determinate production and its relations which assign every other production and its relations their rank and influence" - Marx; Introduction 1953.27.(56). When we come to apply our definition of an economic relation, formulated with reference to individuals abstracted from their "societal" (57) context, to the anatomy of Capitalist Society for instance we find that the concept "economic relations" comprise within itself numerous hierarchical levels of relations which together articulate the dominance of the Capitalist mode of production in that Society.

To begin with; Capitalist economic relations comprise: (1) relations at the level of distribution of the means of production (i.e. the specific manner in which labour power and the objects and means of Labour are united); and (2) relations at the sub-level of distribution of roles and products (i.e. subsumption of the individuals under determinate relations of production specifying their role in production and their share of the products); and (3) The relations, reflective of this latter subsumption, among the social forces of production at different "levels of socialization" (i.e. from different levels of relations at the plant level between - (and among) - direct producers and the owners of Capital and, gradually, to the level of their relations as collective producers and collective owners, and, to that of their relations as politically organized producers, and politically organized owners of Capital).

Having reduced the process of production to different stages of relations of distribution we may ask; why is it called a process of production - (instead of one of distribution)? Production consists in all these stages of distribution. But because of the ancillary nature of the

distribution of products it is conventional to consider production as articulated in the first act of distribution (i.e. the subsumption of individuals under determinate relations of production). It is an empty abstraction to consider production while ignoring this distribution (58). When defined with reference to its final results - (e.g. as increment of skill or efficiency of the means of Labour) "production" could also mean "development" (Marx Grundrisse, pp. 491-93, 1969 Penguin, quoted in M. Caine and A. Hunt, Marx and Engels on Law)(59).

Returning to the definition of "economic relations", we may note that as a concept "economic or production relations", does not, because of its inclusion of the "sum total of the relations" in a Capitalist Society, help in an anatomy of that society. To be able to undertake that anatomy, I will, first, prepare a breakdown of that concept into its component levels hoping to investigate each, separately, and, give it a specific epithet.

I shall always use the phrase "historical - or historically determined - form of an economic relation" to connote a specific manner in which Labour power and means and objects of labour are united and "the incidental sub-framework of organization of production" which the manner of this unity necessitates. This relation is historical - or historically determined - because it is determined once, at the beginning, and, would last for the lifetime, of a mode of production. It is a relation of form - (as opposed to a "combination" of substance) because it consists in the manner in which Labour power, and, means and objects of Labour - (i.e. means of production) are united but not of these elements in their unity (60).

At the level of the sub-framework of organization of production and distribution, an economic relation becomes a relation between two or more individuals vis-a-vis their relation to the means of production. If we are to look for the substance of this relation the most likely target is the completed subsumption of individuals under the specific historically determined forms of economic relations (61). This subsumption manifests itself into: (a) a determinate organization of the productive forces - (Labour power + means and objects of Labour); and (b) a determinate distribution of roles in production and shares of the products. But, following the distinction already made (61a) between analyses of forms and analyses of substance we may note that (a) and (b) above are not by themselves the "essence" of an economic relation.

The essence of an economic relation is not the determinate roles in production and the determinate shares of the product which the parties, to the relation, accept as forming the basis of their relation. These are only the effects of an economic relation; its phenomenal forms; or, its modes of expression. Nor does the essence of an economic relation consist in the determinate organization of the productive forces - (or in the external force which support that subsumption). This must be the case because these are the sources the economic relation derive from, and, as such, they are external to itself (i.e. cannot, by themselves, be its essence). An economic relation is, in essence, a power relation whose existence or non-existence depends on the "balance" (62) of powers at the disposal of each party to the relation. This is not, of course, to deny that "the powers" of the parties to the relation are, at any given time, an expression of; their share in the means of production, the place they occupy in the production process and

the condition of the productive forces (63).

2.B.1.b The Productive Forces

"The productive forces" mean the material productive forces (64) and as such, include; the objects and means of labour and "Labour power" either in their unity in a particular mode of production - (i.e. as actual means of production) or in separation from each other (i.e. as potential means of production); Marx Capital II 1967, pp.36-37, Capital III 1962, pp. 804-805. As a constituent of the productive forces labour is perceived not as social labour but as Labour power; as a consumable value; an object (65). Defined as the means and object of Labour and labour power the productive forces do not belong to any particular historically determined form of production (66). Transition from one mode of production to another alters not the entities but only the form of unity of these elementary factors of the "productive forces". Moreover in contrast to the cataclysmic course of development of their socio-economic forms the course of development of the productive forces is evolutionary (67).

2.B.1.c The Social Forces

"The social forces of production" correspond to the human agents, their mutual "economic relations" and the social forms which these relations assume at the different "Levels of Socialization".

2.B.1.d Process of Production

"Social process of production in general" is a phrase used by Marx to describe, in the abstract, the production of use-values independent of the socio-historical form of such production (Cf supra f.66). In Marx's words, ". . .The Capitalist process of production is a historically determined form of the social process of production in general. The latter is as much a production process of material conditions of human life as a process taking place under specific historical and economic production relations, producing and reproducing these production relations themselves, and thereby also the bearers of this process, their material conditions of existence and their mutual relations, i.e. their particular socio-economic form (Marx; Capital III 1962, p.798). Because it is indispensable for human existence the process of production, irrespective of its form, must be a continuous process, and must continue to go periodically through the same phases (Marx; Capital I 1983, p.531). "When viewed, therefore, as a connected whole, and as flowing on with incessant renewal, every social process of production is, at the same time, a process of reproduction (Ibid).

Having defined the meanings I attach to "The relations of production", "the productive forces", "The social forces of production" and "the process of production in general" I now turn to discussion of the "Economic Structure".

2.B.1.c The Economic Structure

Althusser - (For Marx, Ibid. III) - defines the economic structure as comprising the forces of production and the relations of production. In another work - (Althusser & Balibar 1975, pp.165-181) - he fragments these two into their component elements, which, are, according to him; Labour power, direct Labourers, masters who are not direct Labourers, objects of production and instruments of production. "By combining or inter-relating these elements we shall reach a definition of the different modes of production" (Ibid 176). Balibar's conception of a mode of production is identical to Althusser's (Althusser and Balibar 1975, pp.209-224). It is these elements in their combination which both Althusser and Balibar conceive as the economic structure. Althusser, often, uses the "economic base", the "(economic) mode of production" and the "combination", interchangeably, to mean one and the same thing; namely the economic structure (Althusser; for Marx 1969, pp.111, 89-116 idem. Reading Capital 1975, pp.174-181).

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The elements Althusser and Balibar enumerate are not pre-given elements. The "non-worker" (Althusser & Balibar 1975, p. 212) or the master who is not "a direct Labourer" (Ibid. 176) are not pre-given elements. The emergence, among the social forces of production, of non-Labourers who are the owners of the conditions of production is itself a product of historical development of the productive forces (Marx Capital III 1962, p.798).

The text on which Althusser relied in reaching the conclusion that

non-Labourers are a pre-given element is from Marx (Capital III 1962, p.772) and reads: ". . . It is always the direct relationship of the owners of the conditions of production to the direct producers - a relation always naturally corresponding to a definite stage in the development of the methods of labour and thereby its social productivity - which reveals the innermost secret, the hidden basis of the entire social structure and with it the political form of the relation of sovereignty and dependence, in short the corresponding specific form of the State". But this text is a statement of a general principle which is as equally true with a classless society as with a class society. The elements which Althusser draw from this text are elements of only one specific species of relationships (i.e. relationships of a class society) among the different species of relationships that are covered by the text. They are by no means elements of a philosophy of historical materialism in general. They are simply elements of a historically determined socio-economic form (e.g. Capitalist Society). This is so because the "direct relationship of the owners of the conditions of production to the direct producers" could be one of "equilibrium" (67a) e.g. because these owners and these producers are one and the same people (e.g. in a primitive commune or in a socialist mode of production).

Marx never suggested that the economic structure comprise the subjects and objects of the production epoch (i.e. material productive forces and social forces of production). In all relevant texts Marx is clearly speaking about relations between people which correspond to a definite stage of development of their material productive forces (67b). In other words, there is always a clear distinction between three elements: the people, their production relations, and, their material

productive forces. But it is "the sum total of the relations of production" which is pinpointed as constituting the economic structure (Marx; Preface, MESW I 1962, pp.362-363. idem Capital I 1983, p.86 idem Capital III 1962, p.772).

In another text Marx, unequivocally, states that: ". . .The aggregate of these relations, in which the agents of this production stand with respect to Nature and to one another, and in which they produce, is precisely society, considered from the standpoint of its economic structure. Capital III 1962, p. 798" (68).

Althusser and Balibar's conception of the economic structure confuses its content as a philosophical category with its content as a conceptualization of a configuration of phenomena in a concrete social formation. As a philosophical category the economic structure comprises the aggregate of "economic relations" mentioned previously as present within a mode of production. When applied as a scientific hypothesis the economic structure connotes a totally different object. An economic relation applied as a scientific hypothesis connotes as its object a concrete living social relation incurred vis-a-vis a concrete real economic activity. Likewise conceived as a scientific hypothesis the economic structure becomes the aggregate of these living social economic relations. The task for Marxist interpretation becomes the exploration of the empirical interrelationship of production relations at enterprise level with higher, organizational legal and political, forms of these relations within a concrete social formation (69).

Althusser's conception of the "economic structure" led him into substituting another version of "historicism" (69a) for the historicist approaches he attacks (Althusser 1975, pp. 119-143)(70). Because there is no conceptual link between Althusser's "economic structure" and superstructures, the study of their interrelationship cannot be an object for a materialist science. Thus Althusser's model offers no province for a Marxian Science (71).

2.B.2 The Relation between the "Economic Structure" and Superstructures

2.B.2.a The Scope of Existence of Superstructures

I have defined an economic relation as a relation between two or more individuals vis-a-vis their relation to the means of production. An "economic relation", as defined above, may, in a societal context, exist at different "levels of socialization" (72). It may in particular exist at the lowest level of socialization, as a relation between direct producers. It may, at a higher level, exist, in specific societies, as a relation between these direct producers on the one hand and other individuals who, though not direct producers, are involved in the production process. At further higher levels an economic relation may exist as a relation of distribution, of "roles" (72a) in production and shares of the products, among the different individuals involved in the production process, in proportion with their property rights in the means of production. Even political relations are social forms which economic relations assume, at top "levels of socialization".

The analysis of this subject has so far been proceeding at a high level of abstraction explaining the state of things a priori (i.e. from a philosophical materialist perspective). The interpretation of concrete historical formations require however an explanation of the empirical inter-relationship of concrete phenomena. The social totality described apriori as composed of economic relations at different "levels of socialization" presents itself in concrete history as definite people with definite relations of production and social and political forms. It is possible to hypothesise that relations of production at enterprise level, collective Capital-Labour relations, political relations, labour and political organizations, the centralized State and Law are all specific forms which economic relations assume at these definite empirical "levels of socialization".

The "level of socialization" of a relation designates the place of the relation in the societal hierarchy (i.e. judging by the extent of Communality which the relation reflects)(73). There is another important distinction to be made, among relations which have become concretized (i.e. structures) and others which are still unmoulded (i.e. practices). Thus there are political structures and political practices, industrial relations structures and industrial relations practices and social structures and social practices (74).

I consider all these structures - (e.g. Labour and political organizations, state and legal insititutions and other social and educational institutions or establishments) - as historically-material structures - (i.e. as opposed to the naturally-material structure which is the productive forces at the definite stage of development) - or

superstructures. Superstructures are accordingly levels of the "naturally-material structure". Each superstructure and the practices taking place within it interact and in their turn react upon, and are influenced by, other superstructures and practices.

From this perspective the relation between the material structure and the superstructures cannot simply be viewed as one between a conceptually distinct economic base and a State and Law. The Social totality should rather be regarded as composed of these hierarchically organized (75) interpenetrating levels of structures and social practices determined in the last instance by the stage of development of the productive forces. The relation between the "economic structure" and the State or Law for instance can be established only via other intervening superstructures and practices.

However for purposes of comparative socio-economic studies that endeavour to discover the "essential characteristics of specific forms of social relations" (75a), the "realist" (75b) transcendence of the historical appearances which these "forms" assume in a particular society is important. All the superstructures fulfill social and economic functions that also incidentally mould and normalize human practices (i.e. reinforce a dominant ideology). A study of these historically specific structures must not focus solely on the objectively-ascertainable or subjectively-ascertainable ideological roles they play. In order to introduce a historical dimension in the study of ideology and incidentally arrive at a non-historicist and non-empiricist conception of the State and Law such a study must focus also on the fact of the historical inception and materialization of these same superstructures.

2.B.2.b Mechanism of Determination via the Economic Structure

I have already defined the "economic structure" and stated that each phase of reproduction is a new phase in the development of the productive forces. I now endeavour to explain the mechanism through which correspondence between the productive forces and the economic structure and determination of the superstructures by the latter is effected. As already mentioned the actual shares of the products or "roles" (75c) in production and the social forms which distribution of "roles" and shares takes at all levels of socialization are merely the phenomenal forms of economic relations "their modes of expression". An economic relation is "essentially" a power relation whose equilibrium or disequilibrium depends on equality or inequality of the parties" relation to the means of production, but, whose existence depends on a balance of power over and above and in spite of that equilibrium or disequilibrium.

The mechanism through which this "natural correspondence" (Marx preface 362-63 Idem Capital III 1962 p.772) - is maintained is one of disturbance and re-establishment on new bases of the "balance of power" inherent in economic relations. The condition of the "economic structure" changes when all or part of its constituent economic relations have experienced a movement of disturbance and re-establishment of balance. The new economic structure - (i.e. the new balance of power at the lowest level of socialization) does in turn assert itself at "higher levels of socialization" (i.e. superstructures and practices). The motor of this movement is always the Class struggle (75d). A scientific - (i.e. as opposed to a philosophical) - recognition that the productive forces

have developed further and that the economic structure and the superstructures must change to conform to the new phase signifies nothing more than "the existence of a stimulus for social action" (76). The reason why this is the case is explained below.

The process of adaptation by society to a new stage of development of its material productive forces proceeds on the basis of contradictions, at "different levels of socialization" (77) between relations of distributions founded by the social forces of an antecedent stage and the relations of distribution necessitated by an imminent stage of development of the productive forces. We can carry this further to say that this contradiction is one between the determination, from above, by the superstructures (e.g. law, form of the State, ideology . . .) and the potential determination, from below by an imminent economic structure in an imminent stage of development of productive forces.

The superstructures of an antecedent stage of development of the productive forces assert their dominance at all levels of socialization in society. Likewise new material conditions in order to provoke any social change have to first exist in men's consciousness - (i.e. have to be strong enough to, overcome the ideological dominance of the existing superstructure, and, provoke the knowledge of their sensuous consciousness by the actors) - and be, thereafter, transformed, at their hands, into social action at higher levels of socialization. Contradiction between economic relations of an antecedent stage and economic relations of an imminent stage of development of the productive forces, in effect, takes place at every level of socialization in society.

Two qualifications need to be made about the mechanism and motor of movement of the material determination discussed above. The first is that they are described here at the level of social production in general - (irrespective of the historical specificity of a social formation within which they are taking place). This in its turn means two things, the first is that the specificity and functions of the ideological (i.e. historical) "forms" which practices materializing as a result of this process take depend in each case on the specificity and stage of development of the historically dominant "form of economic relations". The second thing is that the contradiction described at this level is applicable even to classless societies. However in its application to class societies this contradiction becomes conditioned by internal divisions within such societies. Rather than automatically displacing each other - (as they do in classless societies) - the contradiction between the superstructures of an antecedent stage of development of the productive forces and the potential determination by the economic structure of an imminent stage of development of the productive forces present, in class societies, a relationship in which the superstructures may, as long as the developmental potential of the mode of production remain unexhausted, be "over-determinant" (78).

The second qualification to be made is that in empirically testing the validity of this mechanism and motor of material determination the distinction made earlier between validation of philosophical and scientific propositions must be borne in mind.

2.B.3 Transition

The capitalist process of production is a historically determined form of the social process of production in general (Marx Capital III 798). Although the origination of isolated capitalist economic relations may, under feudal society, have started earlier (79) these capitalist economic relations became a historically determined form of economic relations - (i.e. a capitalist mode of production) - only when the development of the productive forces has reached the pitch of enabling "the beginning of their politico-economic form" (79a). A mode of production, as a societo-economic system, begins only at that stage. Transitional periods present therefore features, not of origination of individual economic relations of a mode of production but of beginning of the politico-economic form of these relations (80).

Such a conception of transition has immense logical appeal because of the following :-

- a) There is the difficulty, prior to this stage of historical beginning, of pinpointing a rupture in which an antecedent mode of production expires and a new mode commences. All antecedent developments leading to this culmination, although they may be claimed as a precondition facilitating that transition, are definitely not stages of development of a new mode of production. This is because these same developments can logically be claimed to be stages in the development of the decaying social system whose existence, however continues as long as its superstructures persist - (Cf Maurice Dobb pp.61-64; Christopher Hill pp.118-121; both in Rodney Hilton 1976).

b) The concept of a mode of production finds a content only from this moment of historical beginning. Without this location of mode of production at the level of historical beginning, the hypostatization by Marx of the capitalist mode of production (or of capitalism and capitalist relations of production as often used as epithet for that concept) would remain a meaningless anthropomorphism. I have already indicated that this hypostatization is only a metaphorical way of describing the movement engendered by the societal forces within a mode of production (81). The debate in recent years on the "ability" of capitalism at "dissolving" antecedent "modes of production" conducted with reference to Third World Countries is example of the confusion and sterility discussion would end at if the concept of a mode of production is to be reductively used to connote individual or non-societal configurations of individual economic relations (82).

A form of economic relations becomes historical - (i.e. acquires societal existence) as a culmination of development of historical substance antecedent to that becoming. "We see then the means of production and of exchange on whose foundation the bourgeoisie built itself up, were generated in feudal society (Marx; Communist Manifesto in MESW I p.39).

The structure which emerges at the beginning of a mode of production, to represent and consolidate the new form of economic relations, is not simply an economic superstructure - (i.e. is not merely a political power of a class resulting solely from organization of bourgeois economic interests previously existing in disparity under the superstructures of the decaying feudal system)(83). It is in addition to

that, the structure destined by the "general movement of the productive forces". It is therefore extra-economic in origin (Marx, Grundrisse 1969 pp.485-9).

It is the politico-economic structure of the new historically determined form of economic relations which construct both the societal form and substance of their sub-system of organization of production and distribution. It would in particular secure, by force if necessary, the labour power, the means and objects of labour, and, determine the roles of different individuals in production and their share of the products, and, undertake all that is necessary for the operation of the form of economic relations as a societal system. We are here encountering a situation in which the politico-economic structure determining both the form and substance of the sub-system of organization of production and distribution. This is a type of determination compatible with the stage of development of the productive forces at the moment of transition, when the social in an antecedent system of production has been ruined and the social of the new order hasn't been born yet (84).

The political authority implanted by this revolution is an embryo that comprises within itself the elements of the new social system. This authority is the State. For the whole period after its establishment by the victorious class (or classes) and until the foundation of its representative mode of production has been completed, this transitional State exists in absolutism, or, "economic-corporate primitivism" - (Gramsci, 1971 p.263).

The transitional State undertakes re-organization of individuals' immediate relations to the means of production, and, their subsumption, under capitalist relations of production. In case of capitalist production relations which had already existed, in isolation, under the doomed feudal system, organization by the transitional State would mean the acquirement, by these relations, of an additional juridical and political existence. For a whole period after the establishment of the State, organization of production could also take the form of using its power in furthering the dominant material interest at the expense of other less dominant material interests in the social formation. In the early history of European Capitalism this was particularly exemplified by the State measures aiming at, the liquidation of feudal property - (in Engels, principle of communism MECW VI pp.345-46) - the hastening of the process of divorcing direct producers from their means of production (Cf Marx, Capital I 1983 pp.672-693) and the forcing down of wages by Acts of Parliament (Cf Marx Capital I 1983 Chapter XXVIII).

^ An authority which imposes a system of distribution of the means of production can a fortiori build its sub-system of organization of production and distribution (i.e. sub-system of distribution of "roles" in production and shares of the products). Unlike that of consolidating the distribution of the means of production, and, because of the perpetuity of the production process, safeguarding the smooth functioning of the sub-system of distribution - (i.e. guaranteeing the appropriation by different agents of production of a share in the products representative of a "balance of power" in the imminent stage of development of the productive forces) becomes a permanent function for the State. The State not only cannot, in the long run, over-impose an external

sub-system of distribution oblivious to the stage of development of the productive forces, but it is the stage of development of the productive forces and of production and distribution which determine the different forms the State has to assume in correspondence with themselves (85).

3. Historical Relativity of the Superstructures

The conception of the State as inherently autonomous or law as "essentially" rational or objective are products of, inter alia, a tendency to treat as "essential" properties of the subject of inquiry - (e.g. Law, The State . . .) historically concrete forms which the particular subject happens to assume at the time of inquiry. This conception confers on empirical findings about historical forms of law and the State in developed Capitalist societies an epistemological status and universality that they do not qualify for. In order to explain why Law and the State can in other societies be different I endeavour to show in this part that the form of Law and the State and their ideological properties are always conditioned by the form and stage of development of material production. This is true whether these forms are studied in different societies or within the same society across different stages of its development. In this part however I will focus on the latter possibility. In order to identify the "essential" "form of the State" I need to investigate the process through which contemporary State institutions have developed across time. The emphasis I place on the development of the State through time does not imply that the study of the contemporary system of the State is unimportant. This is simply the approach most suitable for the purpose of the thesis, namely the identification of the "essential" features of the Capitalist form of Law

and the State and utilization of the conclusions for the discussion of Law and the State in Sudan.

The view that the State is inherently autonomous is also shared by some commentators who are supposedly "anti-historicist" - (Balibar 1975 pp.209-224), Althusser 1975 pp.163-181, 1969 p.113, Poulantzas 1982). The anti-historicism of Althusser and his followers had paradoxically led them all the way back into idealism (Clark 1980 p.40. fs.56, 85). Whereas historicist interpretations misconceive the concrete historical substance which Law and the State assume in developed Capitalist societies for the "essential" forms of the Capitalist State and law; some of Althusser's followers formulate theories, about allegedly the "essential" form of the State, which, although accomplished through formalistic analytical deduction, is a universalization and eternalization of this same historical substance (86).

3.A. The State

I have mentioned elsewhere that the stage of development of the productive forces determines the form of the State. This needs more clarification. To do this let us recall the definition of economic relations, used throughout the text, as power relations whose equilibrium or disequilibrium depends on equality or inequality of the parties' relation to the means of production. Where the parties are unequally related to the means of production (e.g. one owns the means and objects of labour and the other owns only his labour power) their powers are bound to be unequal. This inequality of power will further be reflected in the parties' relations vis-a-vis the process of production (i.e. in the

distribution of "roles" in production and shares of the products). In Capitalist relations of production this further inequality is exemplified by on the one hand the privilege of the owners of capital to manage and appropriate surplus value, and, on the other by the entitlement of the workers to wages in an inherently unequal exchange. But this doesn't explain everything. A party to an unequal economic relation may, in fact, receive less than his share because the other party is, from a position of dominance, capable of intensifying his exploitation. The political and legal control of the exchange between Capital and Labour, may take different ideological forms which depend on the stage of development of the productive forces.

The first of these forms is one in which the acceptance of exchange and the terms and conditions of the exchange are directly imposed and sustained by a repressive regime of the dominant party. In the history of Capitalism in Britain and France the pillars of this form could be found in a host of statutes aiming at; the coercion, through expropriation, of the agricultural population into accepting the exchange of their labour power for whatever share of the products the owners of the conditions of production were ready to offer - (Cf. Marx; Capital I pp.671-685), compulsory extension of the working-day, and, the lowering of wages (87).

A second form of control of the exchange between capital and labour begins when, due to completion of appropriation of the means of production, economic necessity replaces external repression in urging the labourer to sell his labour-power. This is the stage of the so-called "free exchange" between Capital and Labour. Henceforward the

labourers may be left to the natural laws of production i.e. to their own dependence on capital, a "dependence springing from and guaranteed in perpetuity by the conditions of production themselves". The State no longer needs to invoke external power for protection of the system of distribution of the means of production since it is now internalized as a self-evident Law of Nature - Marx Capital I p.689). The terms and conditions of exchange between capital and labour, although still fixed by the owners of capital, reflect an increased awareness of the natural barriers, to capitalist development which the imposition of an unlimited working-day for example might create - Marx; Capital I p.447, 253)(88).

A third form of control of the exchange between capital and labour begins when, due to development of the productive forces and increased "socialization" of the workforce, the social power of the workforce intervenes as a new factor in the determination of the terms and conditions of the exchange (89), especially with the development of trade unions.

The first form of the political and legal control of the exchange between capital and labour is effected by an economic-corporate State whose objective and means, as a lever of the capitalist class in the course of its formation, are reflective of the conditions of the economic structure at a time of transition, and, of primitiveness of the instruments of labour, its low productivity and disorganization of the dominated classes at this and the immediately subsequent stages.

The second form of control corresponds to a stage of development of the productive forces in which technical economic performance had gained relevance as a criterion in the determination of the terms and conditions of the exchange. The State, still the sole determinant of the terms and conditions of the exchange, acquired a new rationality in the interpretation of its authority. For the first time then and there State authority appeared as distinct from the partial interest of the dominant class.

The appearance of the autonomy of State authority becomes tangible when such authority has become exercisable within institutions consisting of the organizations of both the capitalists and the workers. This is what takes place in a developed context of the third form of control of the exchange between capital and labour. Concretized in the institutions within which it has become exercisable State authority becomes a "centralized State", whose primary task is the harmonization of conflicting interests of the parties to the sub-system of distribution (i.e. of "roles" and products) within the dominant socio-economic system of distribution of the means of production (i.e. within Capitalist Society).

To the class which owns the means of production the centralized State symbolizes an organized power which may potentially be wielded for maintenance of a sub-system of distribution favourable to their short term and long term interests - (the two interests being not necessarily always coincidental) - as appropriators of surplus value and privileged

beneficiaries of an established and desirously stable system of distribution of the means of production respectively. The fulfilment by the centralized State of these objectives is guaranteed by the material power of this class (90). As an instrument of this class the centralized State does not invoke its power to directly protect the mother system of distribution of the means of production because it does not need to - (i.e. because civil society or economic relations at the different "levels of socialization", of which the centralized State is a superficial level, do that job) - Cf A. Gramsci, Prison Notebooks 1971 p.263.

For the dominated classes on the other hand the centralized State represents an organized power which may equally be utilized in promoting their own interest within the existing system of ownership of the conditions of production. As an instrument of these classes the centralized State may not effectively change the system of distribution of the means of production, because, of the many economic relations at different "levels of socialization" on which the existence of this system is based, it is only a superficial level.

To recapitulate: (a) relative autonomy of the State means relative autonomy of the centralized State; (b) this autonomy is objectified by the apparent neutrality of the Institutions of the Centralized State - (the judiciary, the legislative organ and the executive organ) resulting from their placement in a relation with each other whereby they, in their interrelation, appear as representative of public consensus (91); (c) autonomy of the centralized State is neither absolute nor static. It only exists as a relation to, that is to say its existence or non-existence depends on, the stage of development of the productive forces and

incidentally the stage of class struggle. We have already seen that the absolutist State and the State in the secondary form of exchange between capital and labour, although forms of the Capitalist State, were strictly speaking not autonomous; (d) not every Capitalist State is a relatively autonomous State.

3.B. Law

In contrast to the different schools of positivism which conceive law as either an arbitrary will of a sovereign or as having no other than a normative existence (92) the Historical and Sociological Schools are distinguished by their attempt at discovering a "scientific" explanation to law. The Historical School (93) sought to understand the history of law as a process which is necessary and therefore "conforming" to law (i.e. "conforming" to the laws by which is determined the historical development of a nation). Because of its preoccupation with the historical form - (in disregard to the substance of the historical process) - the Historical School failed to discover these laws which, according to it, determines the historical development of a nation - (Plekhanov, DM 1947 p.162). Instead it predicated the "consciousness of a people" or the "spirit of a people" - (Savigny Vol.I p.14. Puchta Vol.I p.31 German Editions) as its final terms of reference. From the point of view of its critics this was a recourse to an idealism "less solvent" than the "much more profound idealism of Schelling and Hegel" - (Plekhanov, DM 1947 p.167).

The Sociological School of Jurisprudence likewise conceives law as a social phenomenon and seeks the application of the sociological method - (i.e. observation, experiment comparison and the "historical method" Lloyd, 1985 p.550) in its study. In his *Rules of Sociological Method* Durkheim however rejects the "historical method" from among rules of sociological explanation because its inclusion was in the first place due to Comte particular conception of sociological laws - (which is more like the approaches under f.94) - (Durkheim, 1938 pp.125-126).

In its modern (94) form the Sociological School focussed on expounding the social basis of law and asserting its dependence on social "compulsion" (Ehrlich, 1936). At the basis of Ehrlich's conception of law (95) lies the assumption that social evolution is an autonomous and spontaneous process, and, in the search for truth, empiricised society is the final authority to which appeal may be made (96). Hence in its formulation of a theory of law the sociological approach mistakes the concrete phenomenal form which the "form of law" assumes, for the "form of law". This is an approach that is inherently incapable of distinguishing between the "form of law" and the ideological appearances this form may assume. One commentator has accordingly noticed the absence of ideological analysis in the domain of sociological theory both old and new - (Hunt, 1984 p.12).

Ehrlich's idea of law contrasts on the other extreme with Austin's theory of "Commands". But they have one thing in common namely their empiricism of the subjects of study. Ehrlich substitutes his empiricism of society for Austin's empiricism of the form of law. Both "Society" and the "State" have their roles in the law-making process.

To understand these roles, the idea of society as a concrete given subject has to be transcended. What is needed for this understanding is an anatomy of society or its breakdown into its component elements; its people, their relations and their material conditions of existence.

Pashukanis,(97) starting from presumably Marxist premise, offers his own conception of a general theory of law. He differs from previous jurists by his endeavour to relate law to underlying economic relations. Although following an historical materialist investigation of law (Warrington 1981 p.2) Pashukanis' empiricism or historicism of empirical or historical findings about law lead him into idealizing its essence. This makes discussion of his theory of law relevant for the purposes outlined under Part 3 of this Chapter. Moreover, left uncriticised, Pashukanis' theory of law is a strong Marxist authority that law is "essentially" rational. This contradicts the main theme and a conclusion posited by the weight of empirical evidence in this thesis which are that the form of law is determined by the historically dominant form of economic relations and that the rationality or irrationality of this form is always relative to the socio-economic historical conditions in which it is dominant.

Pashukanis' analysis of objectivity of the legal form is, for the purposes of the discussion in this part of the thesis, important because it is a focussing on the issue to be tackled before any claim as to autonomy or non-autonomy of law may be established. Pashukanis, of course, provides the categories, which from his point of view concretize the legal form. It is essential, therefore, that, before any alternative categories are advanced as grounds for that objectivity, his view be

accounted for.

Pashukanis' emphasis that the assertion of the class content of juridical forms does not by itself explain the objectivity of the legal form is, undoubtedly, rightly placed. But, instead of seeking objectivity of the legal form in the specific stage of the class struggle, he chooses to desert class analysis altogether and opt for the commodity-exchange epiphenomenon. Pashukanis is not seeking to establish an ideological objectivity (i.e. effectiveness) of the legal form, but, rather to empiricise the legal form and give it "essential" objectivity (98). It is important to understand, therefore that Pashukanis' analyses of the form of law and the State are not simply, as they are sometimes mistaken to be (99), analyses of ideological forms but a general theory of law and the State. All this is done on supposedly Marxist basis but, not without some confusion and misinterpretations.

Instead of taking the relations of direct producers to the owners of the conditions (i.e. means and objects of labour) of production as the clue to understanding capitalist society at its different "levels of socialization", Pashukanis undertakes the commodity-exchange epiphenomenon (100) as his basic category. Development of the productive forces does not in Pashukanis model affect the people who would in turn change or conserve production relations, but, affects market relations (p.92 Ibid) which would in turn accumulate law. Commodities (as objectified social relations) are therefore the parties to legal relations and men are in turn subject matter of these relations (Ibid pp.51, 76, 48). Accordingly historical evolution provides both the form and content of legal norms (Ibid p.53) while the State role is reduced to

that of injecting clarity and stability into the legal structures (Ibid p.68).

Pashukanis traces the development of law from an embryonic stage and, through an uninterrupted evolution (101), to a fully developed legal form possessing "differentiation and precision" (Ibid 54). He links this development with the development of commodity-exchange. With the development of the latter, the legal - i.e. rational interpretation of authority - becomes possible (Ibid p.92). As the wealth of capitalist society assumes, in his view, the form of an enormous accumulation of commodities, society presents itself as an endless chain of legal relationships (Ibid p.62). Law is, therefore, a capitalist phenomenon (102) (Ibid p.44) while all antecedent forms in which it existed were its embryo (Ibid p.54).

Starting from a premise in which people are atomized individuals (Ibid p.90) brought together by development of market relations, and, a conception of the State as an authority, antecedent to economic relations (Ibid pp.90-94), constantly moving towards legality by operation of market relations, Pashukanis is unable to explain how come this course of evolution has, in certain circumstances (e.g. the circumstance of Capitalist society), turned into a relation of domination and subordination (103). This is significant because it is a failure to arrive at the landmark that separates a Marxist theory of law from other sociological theories of Law, namely the insertion of law into people's living relations of production. Pashukanis has gone a step further to substitute his empiricism of market relations for Ehrlich's empiricism of society. That is not far enough.

My criticism of Pashukanis theory of law can be formulated at two levels:-

1) If Pashukanis' analysis were intended as an investigation of the development of an ideology of law I would agree with it subject to one reservation. The reservation is that the development of commodity-exchange is not the proper determinant of development of an ideology of law under capitalism. Although it is only when wage-labour is its basis that commodity production and commodity exchange impose themselves upon society as a whole (Marx, Capital I 1983 p.551) it is also true that they are not coterminous with the capitalist mode of production (Marx, Capital I 1983 p.167). Thus commodity exchange is too general a criterion to be of any explanatory use in contemporary comparative legal studies - (e.g. of the Law of Contracts in the Sudan and Britain). Taking commodity exchange as a criterion also misses the inherent quality of capitalist form of economic relations which is one of domination by expropriation of the means of production. This is a serious omission because it obliterates the guiding thread for distinguishing between ideological historical substance which the "form of law" assume and the essential "form of law". It also leads to the illusion that the objectivity of the legal form regulating any area of social relations (e.g. industrial relations) is explicable by development or under-development of commodity-exchange. This is an extreme form of economism that subordinates living human relations to hypostatized economic categories.

2) Because Pashukanis' analysis is meant to substantiate a claim that law is "essentially" rational my disagreement with it is more fundamental. Pashukanis views about the legal order in Medieval Europe

- (Cf. supra f.102) suggest his readiness to confine the concept of law to relations that are rational. This however exposes a methodological error in his approach namely his confusion of analysis of forms and analysis of substance. Law is "essentially" an instrument of domination. The "form of law" and the "substance of law" - (i.e. the historical substance which law assumes or what Pashukanis mistakenly calls the legal form or the form of law) - are: a) always synchronous and b) must always for methodological purposes, be kept distinct in space - i.e. one should not be merged into the other even though they appear as indistinguishable. The "form of law" corresponds to the form of domination and is determined by the historically dominant form of economic relations. The substance of law corresponds to the institutional tangible existence the "form of law" assumes at a definite stage of development of the socio-economic form. The conclusion then is that there has always been law though its form and substance considerably vary across different stages of human history in correspondence with the material conditions of the dominant and the dominated. This also means that there is always within a dominant definite mode of production one form of law whose substance may vary in accordance with the stage of development of such mode. This does not however mean that all branches of law are under capitalism "substantially" uniform. The specificity (i.e. the capitalism feudalism or otherwise) of the "form of law" and that of the substance of law are not necessarily coincidental. The substance or institutional form which a legal relation assume may continue to be non-capitalist in so far as that is compatible with the new social functions of the legal relation under capitalism (103a). What is important is that "forms of legal relations" and substance of such forms that cannot serve these social functions are ultimately replaced (Renner,

1949 pp.52, 75-76).

Having pointed to the empiricism of some sociological and Marxist ideas of law I now elaborate the methodological distinction between the "form of law" and the "substance of law" referred to in the introduction to this Chapter. However it is important to emphasise that the analyses in this section are developed with reference to Labour Law and, their extension to other branches of Law, although theoretically possible, (104) is beyond the scope of the thesis.

3.B.1 Determination of the "Form of Law" by the "Form of Economic Relations"

Not every social relation is law. Only those social relations incurred vis-a-vis a material interest are law or potential law. Moreover law is only metaphorically a social relation. Law is not the social relation itself but only a form of existence which the social relation assumes. Both the form and content of social relations are provided by forces external to law. Moreover, social relations cannot be severed from economic relations. I have already defined economic relations as power relation - (Cf supra Part 2.B.1.a). But this is an abstraction. Social relations - interaction between people - are the immediate forms of expression of economic relations. Law in turn is a form of existence of social relations. In other words law is a form of manifestation of a relation of power inherent in economic relations. The form of law is determined by the form of the economic relation. Development of the form of law depends therefore on development of forms of economic relations. The transformation of Man metabolical

relation to the earth into a relation to the earth as property is mediated through a social interaction of conquest (i.e. of domination and subordination)(105). (Marx; Grundriss 1969 pp.485-493). The historical form which Men's relations among themselves vis-a-vis the means of production assume (i.e. the type of domination, whether domination by dispossession of the means of subsistence or by enslavement or servitude) and the historical substance of these relations - (the ideological appearance which domination has to assume in order to communicate effectively with the dominated, or, in other words, the moral justification which the exercise of a power of domination assume) - are only the modes of expression or the phenomenal forms of a power relation. But, we may also notice that phenomenal forms existing at any given time are but dominant power relations "concretized". As such they solidify the existence of the power relation and are in turn affected by the constant disturbance and re-establishment of the balance of power on whose existence depends the existence of the power relation (Cf. supra Part 2.B.2.b).

3.B.2 Development of the Form of Law

The definition of law as, principally, a form of domination, irrespective of the ideological substance this domination assumes, means that, society, is not, a necessary pre-requisite for the existence of law. Law, as a relation of domination and subordination, may exist between two people living in; (a) geographical isolation, or, (b) social isolation - (whether abstract or real) from other people. Development of isolated social relations into society corresponds to development of the form of law. Development of social relations within society corresponds to the

development of the substance of law.

We may now classify the form of a legal relation with reference to a complexity or simplicity of the social relations which it symbolizes. To that effect a social relation - (and incidentally a legal relation) is simple when it exists between two people or two groups of people vis-a-vis their relations to material conditions of human existence (i.e. objects and means of production) in its social isolation from other similar relations. In such state of existence, the terms and conditions of the relation are set solely by the parties to the relation and the power of domination is confined to the power which one of the parties might possess over the other. If there are other individuals in the same geographical locality the relations which may exist between different groups of these individuals, likewise, exist in their isolatedness, as relations between members of different unrelated social cells (106).

Complex social relations (and incidentally complex legal relations) appear when, due to development of material productive forces, either of the poles of a simple relation increasingly identifies itself with other poles, of other simple relations, corresponding to itself in their specific relation to Man's material conditions of existence (107). In a situation in which none of them is already dominant, conflict between one unified form of social relations and another - (or other) - unified forms may lead to one of them establishing a dominance of their forms of relations over the other - (or others).

When this has been achieved it is tantamount to the historical beginning of a societal form of social relations (i.e. a form of a specific organized dominance that would last for a period of history). A victorious class (i.e. the class represented by the dominant pole of the historically-determined form of social relations) emerges with an organized social power in place of the fragmented powers which each of its members once possessed in isolation. The isolated forms of social relations which once existed between the different groups of this class in their isolation are henceforward transformed into a system of "societal" relations. These developments are significant because they relate to a process through which law came to gain autonomy. The victory of a particular form of social relations without the others may, because of the progressiveness of the victorious form when compared with other forms - (e.g. capitalist relations when compared with feudal relations or the latter when compared with slavery), by itself paves the way for that autonomy. Moreover the assumption by the social organization of the task, previously undertaken by individual members of the organization in their isolation, of protecting the victorious form of social relations lay the basis for a juridical separation between the interests of the constituent members of the organization as individual owners and their interests as a social organization.

3.B.3 Development of the Substance of Law

Whereas development of the form of law is effected by interaction of different forms of social relations, development of the substance of law proceeds on the basis of interaction between the poles of the same, historically determined, form of social relations. Taking

the example of the CMP the form which law assume here is a form of domination whereby one class owns the means and objects of labour and another class owns only its labour power. By investigating the substance of the form of these legal relations we discover that it has varied considerably in correspondence with the stage of development of the productive forces and, incidentally, with the stage of class struggle (108). We may in particular note that these variations have gone hand in hand with the forms of exchange between capital and labour, described earlier (supra Part 3.A).

Before drawing any theoretical conclusions from this concomitance, it is essential however to examine development of the substance of law during the secondary and contemporary forms of exchange between capital and labour and the extent to which it contrasts with the earlier statutes whose primary objective was the consolidation of the forms of capitalist relations - (i.e. through expropriation of agricultural population, prolongation of the working day and the forcing down of wages Cf supra f.87.)

I have already mentioned that the beginning of the second form of exchange between capital and labour (the so-called free exchange) also marked the beginning of an era in which the State was to rely more and more on rational interpretation of its authority (Cf supra f.88 and text above). However, this rationality is nothing else than a metaphorical description of abandonment of certain restrictive laws which had become incompatible with the specific stage of the class struggle (109). With the development of capitalist production the observance of certain minimum conditions of work, essential for the process of reproduction,

became inevitable. This is a phase which, in England, witnessed the dying away of the 14th and 15th Century "fixed-wage" legislation (110). From the beginning of the 18th Century grievances over individual rights whenever brought to the attention of the House of Commons were frequently redressed (S and B Webb 1920 p.55). According to the Webbs: "For fifty years from 1710 the curriers, hatters, woolstaplers, shipwrights, brushmakers, basketmakers, and calico-printers, who furnish prominent instances of 18th Century trade unionism all earned relatively high wages and long maintained a very effectual resistance to the encroachments of their employers (Ibid p.45). However an interpretation that these improvements were exclusively operatives' achievement forced by struggle is difficult to accept in the light of the power with which the State hit back in 1799 when the operatives had shown their readiness to help themselves by unlawful combination instead of laying their greivances in a regular way before His Majesty" (Ibid pp.50, 68-72).

The recognition which the process of production has gradually gained as a factor in determining the terms and conditions of employment was not unrelated to the inception of *laissez-faire* and the influence the latter exerted in institutionalizing a judicial tradition of importing the doctrine of freedom of contract into the employment relationship. To that effect, the Webbs have noticed that "when *The Wealth of Nations*, afterward to be accepted as the English gospel of freedom of contract and natural liberty, was published in 1776 it must have seemed not so much a novel view of industrial economics as the explicit generalization of practical conclusions to which experience had repeatedly driven statesmen of the time (S and B Webb Ibid p.55)". Despite its subsequent seizure as a moral justification for the unholy

objective of depriving the workers of legal protection whilst denying them the benefit of combination the acquirement, by the employment relationship, of contractual status entrenched its position as an emancipatory specific reciprocal relation.

What characterized this phase of exchange between capital and labour was that until 1825 the law-making process continued to be a unitary process imposed on the working population. The interpretation placed on freedom of contract meant that Employers Association and the judiciary remained the influential participants in the law-making process and in its enforcement while the individual worker was to concede to their will and to their patronage of his freedom.

The era of the secondary form of exchange between capital and labour terminated, officially, in 1825 when the "Peel's Act" (6 Geo.IV.C.129) came into effect and established, for the first time, "the right of collective bargaining involving the power to withhold labour from the market by concerted action" (The Webbs Ibid p.108). The period from 1825 when this "limited existence of trade unionism" was allowed (Roy Lewis, 1970) and to 1875 when the scope of that existence was widened, along with developments after 1875 belongs to the new and third phase of exchange between capital and labour.

Institutionalized autonomy of law became a reality after Parliament under pressure by the working masses (The Webbs Ibid pp.113-299) had finally resolved to drop the criminal liability legislation against the trade unions (111). The existence of free trade unions and their participation in the law-making process (whether through collective

bargaining or through a unitary political emphasis) marks a new era in development of the substance of law. The preoccupation, by the trade unions, with collective bargaining and the priority which the latter, as a method of setting terms and conditions of employment, had on legislation added an ideological dimension to the autonomy of law. "As collective organizations become entrenched the nineteenth century doctrine of individualistic laissez-faire gave way eventually to a firm belief in collectivist laissez-faire. Abstentionist legal policy was a central plank of the prevailing voluntarist ethos in industry, which in turn seemed consistent with a pluralist approach to the philosophy of the State (Roy Lewis 1970)(111a).

Conclusion

The movement towards autonomy which the historical development of the "substance of law" has shown is a reflection of social emancipation from a primitive stage of development of the productive forces, at which both form and substance of legal relations were imposed by a power external to economic conditions (Cf supra f.87) to stages when economic conditions of production and distribution began to gradually breed their own countervailing determination of the substance of economic relations.

The preceding discussion upheld and demonstrated a distinction between the "form of law" and the "substance of law". The form of law is determined, directly by the form of the State and, indirectly by the form of economic relations. The "substance of law" consists in the economic and sociological existence the "form of law" assumes and is

therefore external to the latter. Relying on this formulation we can also describe the province of ideology in law.

Ideology is the normalization which the form of law - (or various proliferations of that form) - gain as a consequence of development of the substance of law - (i.e. all social practices that can be field for legal regulation). This is an ideology whose development is, dependent upon factors external to the "form of law", and, more easily detectable across time. As such it is more general and spontaneous than the artefactual or "philosophical" ideology which law as a social and academic discipline possesses (112). However my emphasis on forms of ideologies that prevailed during the reign of definite historical forms of consciousness is justified by the concern for establishing the historical relativity of present day law and its ideology.

The study of synchronic proliferation of ideology - (i.e. its study as a system of beliefs) - is of course also essential for a complete understanding of ideology. Both the spontaneous and artefactual ideologies exist at various social levels of the totality. They together constitute independent levels of ideologies of law. At the highest and most superficial social level, law enhances its acceptability by an outward appearance of impartiality and other distinct techniques and formalities of law making and legal administration (113). At a lower level, social relations that constitute the field for legal regulation appear as deviations from social practices that are apparently equilibrant, spontaneous and rational. At a still lower level these social practices which phenomenalyze this equilibrium spontaneity or rationality themselves take place within moulding socio-economic structures that in

their turn derive their ideological invincibility from the material relations of production.

It follows from the above delineation of the province of ideology that the latter is a "diachronic/synchronic" phenomena. It also follows from discussion of the hierarchical organization and interdependence of several levels of ideologies that analysis of the ideology of law that presents this ideology as exclusively inherent in any one of these levels is too reductionist. Hence analyses that propagate the superficial ideology of formalism as a solo explanation for acceptability of law in the wider society (114) or those which overlook all these higher levels of ideologies and directly explain law by interests associated with the dominant material relations of production are both equally reductionist (115).

The discussion on development of the substance of law also discloses that the centralized state is not exogenous from this process. On the contrary, the effect of development of material and social production on law appears as always mediated through the centralized State. This allows the conclusion that the form of law is determined by the form of the State - (e.g. capitalist, feudalism . . .). But that the relative autonomy of that State and the ideology of law depend for their development on development of forms of consciousness which is in turn dependent upon development of the substance of politics and law - (i.e. social practices associated with definite stages of development of material production).

The development of the form and substance of law described is also product of autocentric evolutionary development of a now developed capitalist society. How does it relate to an under-developed social formation? The difference is between a situation of historical beginning and materialization of the form and substance of law and one of imposition of a form of law from without. This has much to do with the underlying distinction between capitalism which has had a historical transition and an imposed capitalism. The difference between poles of the latter situation is that the imposed forms of economic and social relations depend for their existence and continuity on descendent superstructural controls while an historically due transition is an evolutionally due - (though cataclysmically effected) re-organization of superstructures of the same society in accordance with a corresponding new stage of development of its material productive forces. The extent to which this is a significant distinction in analyses of the form of law and the State in Sudan is shown in the next Chapter.

CHAPTER II

SOCIETY THE STATE AND LAW IN UNDER-DEVELOPED SOCIAL FORMATIONS

Introduction

The analyses in Chapter I emphasised the dependence of the form and substance of The State and Law on underlying economic relations in the respective social formation. The present Chapter is divided into three main parts. Part one explores the specificity of economic relations prevalent in the Sudan against a theoretical background derived from Chapter I. It is developed and seen here as applicable to analyses of other under-developed social formations. The main concern is to show how a definite distribution and concentration of specific forms of economic relations affect distribution of social and political power.

Part II argues that the form and class composition of the State in the Sudan are conditioned by (a) imposition of a State apparatus from without (i.e. through colonization) and (b) a configuration of social and political power conditioned in its turn by the distribution and concentration of forms of economic relations discussed in Part I. The class movement described as taking place within the social formation as a whole reproduces both the form and class composition of the State and the configuration of power whilst also widening discrepancies in distribution of social and political power and, consequently, of the benefits of progress.

Part III shows the significance of the form and class composition of the State and that of the heterogeneity of the social forms present in the social formation as a whole, for a study of labour relations law. Utilizing the conclusions drawn I then outline the objective and plan that will guide the discussion in the rest of the thesis.

1. The Paradox of the Dual Society

Long after the Independence of many African States and to date, a gap continues to exist between economic relations in those centres which had the first interaction with capitalism, and those in the rest of the social formation. It was the theorists of the Dualist thesis who first visualized a distinction in the economies of under-developed countries between a relatively developed and advanced "capitalist" sector and a traditional archaic "subsistence" sector in which the majority of the people dwell (Lewis 1954). However, instead of conceiving this duality as an effect of an imposed integration, the theorists of dualism understood it as an effect of incomplete integration, in the national and world markets. From this wrong basis they prescribed a development strategy which would address itself to extending modernization to the "subsistence" sector by increased integration of that sector in both markets (A G Frank 1969.255).

The assumptions of the dualist model were challenged by many economists (Bauer 1956, Laclau 1971, Frank 1969, Kursany 1983) who argued that by maintaining this artificial separation between capitalist and non-capitalist sectors "Dualism" underestimates the degree of commercialization which is possible in the rural

areas (1).

Nevertheless the urban/rural dichotomy of under-developed social formations continues to puzzle researchers of all interests. What the critics of Dualist thesis have unanimously and convincingly dismissed was the alleged absence of reciprocal economic inter-action between the capitalist and the so-called subsistence sector. The question whether different sectors of the economy of an under-developed social formation are capitalist and whether "Capitalism" may coexist with pre-capitalist economic relations remains controversial.

However, knowledge of the dominant relations of production in an under-developed social formation, and the specificity which the class structure peculiar to this formation may confer on these relations, is essential, to my analysis of the state, labour, and labour law and the extent to which they compare with their Western counterparts. I adopt as a hypothesis a view that the search for a dominant form of relations in an under-developed social formation should be conducted at the economic, political and other social levels in such formation. Using this methodology, my further premise is, that, there is no clear-cut demarcation between capitalist and non-capitalist "economic relations" and that the same "economic relations" may be capitalist at a certain level but non-capitalist at another or other levels. Applying this formula to the rural-urban dichotomy I would further hypothesize that when defined by their functions, economic enterprises in rural zones are capitalist, but when defined by their forms of social organisation

they are not. Their existence as functionaries of the politically dominant capitalist mode of production (CMP) means that non-fully-capitalist economic relations are in effect subordinate to the CMP.

1.A Economic Relations in Rural Communities

Economic interaction between the capitalist and the non-fully-capitalist sectors of the economy takes different forms. One such form is that in which the "non-capitalist"(2) sector pays the dues of its subordination - (i.e. taxes)- to the "capitalist society", presumably to receive it back in form of services. Another more important form this interaction takes is that of commercial exchange. Commerce has a profound effect on the integrity of the "non-capitalist" social formation. This is because it operates to distort the function of "pre-capitalist economic relations" (2a) and undermine their ability to reproduce and expand their forms of organisation (2b). In Sudan this process started on a large scale in the post 1820 era following the destruction of the peasants' communities' organisations by the Turko-Egyptian Invasion.

Irrespective of the mechanism that the process of dissolution might take, it always results in the transformation of the peasants' community from an organisation for the production of use-values to one for the production of exchange values. To explain this I need to return to the example from the Sudan. The gradual displacement of traditional schemes of irrigation on the Nile by

mechanical schemes - (a process which first evolved through the operation of collateral economic and human forces but was later (1900-1956) hastened through State-sponsored introduction of commercial plantation) - means that the peasant - (i.e. the small-holding farmer C.f Macfarlane, 1978.9-10) - has had to allocate part of his resources (previously forming part of his subsistence) for the production of values to be exchanged for fuel. The expansion in the production of exchange-values - an expansion dictated by a mechanism of price always operating to extract more profit for the Capitalist sector (3) - coupled with the peasant inability to expand the cultivated area (4) means that an ever-increasing number of peasants households' members have had to look for external resources for their subsistence (5) (e.g. seeking employment in the "Capitalist Society").

All over Sudan this process has been exacerbated by two factors namely:-

1. Active intervention by the political authority in the introduction of cash-crops in some regions (e.g. cotton plantation in the Gezera Scheme 1925, the Nuba Mountains scheme in South Western Sudan, and N Eastern Sudan)(6); and
2. Encouragement, by the State, of the large-scale production and commercialization of subsistence commodities (e g Sorghum and Wheat in Kassala Gedaref and the Gezera Schemes).

For the peasant communities, production of subsistence commodities on a large-scale in "the Capitalist Sector" (6a), was a further encroachment on the autonomy of these communities. It means that the peasant can then buy his subsistence-commodities at a lower cost than he will incur for producing them. In effect the peasant-communities have been transferred into small-commodity producers and their subjection to the market has been completed. The peasant found himself in a situation where he has had to choose between (1) working on the field and scarcely producing his subsistence lot, either directly or indirectly by producing values and exchanging them for subsistence commodities from the market or, (2) deserting his field and looking for employment in the Capitalist Sector. This is a new type of proletarianization effected without dispossessing the direct producer of his means of production.

The transformation of these peasant communities into capitalist formations requires more than just their dissolution. It further requires that the profits accruing from prevalence of exchange-values be invested in capitalist enterprises within the village community. But the fact that the appropriators of profit belong to the capitalist sector of the economy which is more advantageous to invest in, militates against such a possibility. In effect village-communities, while exporting their surplus population to the Capitalist sector, stagnate in their secondary form as communities of petty producers. Since these producers own and possess their means of production and use their own personal labour in production these communities present economic relations which

are hardly describable as Capitalist. However, there are writers who argue that these communities are nevertheless Capitalist. The reason for this, from the point of view of some under-development theorists, is that, because the periphery as a whole is a base stratum in a hierarchical World Capitalist System (Wallerstein 1974), extraction of surplus value, a paramount objective of both national and international trade, is Capitalist in objective even when it is effected through pre-capitalist forms of exploitation (Frank 1967, 1978).

Another view holds that, despite their pre-capitalist forms of exploitation these communities may be capitalist because it is not the form of exploitation (e.g. slavery serfdom free labour, etc.) but the "laws of motion" peculiar to each mode of production, and the contemporaneity with a definite epoch of production that would enable us to determine whether the given relations of production are capitalist, feudalist or otherwise (Banaji 1977).

What these views overlook is the fact that capitalism is both a social and an economic existence. Existence of a capitalist socio-economic form in a geographically defined social formation is impossible without the antecedent existence in that formation of an aggregate of individual capitalist economic relations enough to enable the beginning of at least their politico-economic form (7). Moreover the beginning of that capitalist politico-economic form does not necessarily directly transform all other non-capitalist economic relations into capitalist ones. Individual non-capitalist economic relations may at this - (i.e. The Individual) - level survive

that beginning (8). What the dominant capitalist politico-economic form does - (or to put it more precisely, what class struggle within the dominant capitalist politico-economic form does) - is that it obstructs the agents of these non-capitalist economic relations from asserting their relations at higher economic and political "levels of socialization" (9).

Far from being transformed, non-capitalist economic relations, albeit their bearers may become exchange-values' producers, are thus condemned to stagnate in their "pre-capitalist" forms of organisation. While the agents of these non-capitalist economic relations exchange on unequal terms (11) with the capitalist sector, the forms of economic and political organisation, and incidentally the forms and practices of economic and political class struggles which these (their) relations would allow may not enable these agents to exert any considerable pressure on the dominant capitalist state - (or the capitalist politico-economic organization). They in effect end up weaker than any of the classes of the "Capitalist Society". The latter classes possess at least the forms of organization (i.e. Capitalist labour organizations e.g. trade unions) that are likely to influence the centralized state (11a).

A conclusion that the rural communities are Capitalist because they are subjected to Capitalist exploitation is presumptuous and involves ignoring their taxonomically non-capitalist forms of organization. Although subjected to Capitalist exploitation these communities are also, from my perspective,

politically weaker. If the urban nuclei and the rural zones are equally capitalist the disparity between the notably meagre political - (and consequently economic and cultural)(12) role of rural communities, despite their numerical supremacy (13), and the disproportionately greater political role of the urban nuclei in an under-developed social formation remain inexplicable (14).

Explaining inequalities while holding to a view that the under-developed social formation is a capitalist social formation would necessitate an examination of the internal class structure of this alleged capitalist social formation disclosing the characteristic features which cause it to produce inequalities of the type prevalent in the Third World and why these inequalities assume a geographical polarization between town and country. It is my view that a class structure which produces inequalities of the enormity and polarization of those prevalent in the Third World cannot be a homogeneous class structure (15). Under-development theorists (16), while stressing these inequalities, do not however even attempt to provide such an examination. They rather offer an externally-orientated explanation which largely remains oblivious to the specific internal structure of each particular social formation.

Proceeding from a different perspective, Banaji is also ready to argue that the "economic relations" prevalent in rural communities of the Third World are capitalist economic relations even though they are masked in various forms of exploitation (Banaji 1977, 1983). I accept Banaji's view to the extent that

economic relations prevalent in rural communities are only functionally capitalist (16a). This goes in line with my belief that there is no inherently ideologically distinguishable "forms of capitalist economic relations" and that the social and ideological appearance which the societal form of these relations assume differ across time within the same society and from one society to another subject to the stage of development of the material productive forces and class struggle (16b). My analysis differs from Banaji's in two respects. First, in its emphasis on the distinction in the levels of definition between the capitalism of urban economic relations and the "Capitalism" of the rural ones. Second in its explanation of the "Capitalism" of rural communities as an effect of their subordination by a politically dominant capitalist mode of production. The explanations which Banaji offers in both respects are not convincing.

Despite the array of criticism he launches (Banaji 1977. 6-11) against Dobb (Dobb 1946) there is nothing convincing in Banaji's analysis to sustain the claim that capitalism unqualifiedly defined does exist in non-capitalist forms of exploitation. The quotations he marshalls from classical Marxist texts do not amount to more than connoting that surplus value could be produced through non-capitalist forms of exploitation. However this may mean, not that "Capitalism" exists in and because of these non-capitalist forms of exploitation, but, that it exists geographically external to and independent of these forms while creating them through distant trade or political domination. Without limiting his analysis to any concrete societies Banaji argues that the CMP is in existence in

the definite totality of its historical "Laws of motion" (Banaji 1977.10) i.e. as an epoch of production. The implication of this, is, that all relations of production existing in an epoch of capitalism are capitalist relations of production even though they assume non-capitalist forms of exploitation at the enterprise - (or individual) - level. But if a mode of production consists in a definite totality of the historical laws of motion which Banaji enumerates (Banaji 1977.10) from where are these laws of motion to be derived to prove the existence of that mode if not from the relations of production at the enterprise level; the same relations which Banaji dismisses as irrelevant? (17)

1.B Capitalism of the Urban Nuclei

The urban nuclei of the Third World present aggregates of economic relations which are capitalistic in character. Individual economic relations (i.e. economic relations at the lowest level of socialization) in these nuclei are vastly relations of wage labour. The different levels of socialization of these nuclei, made up of relations among agents in the different divisions of production, present a homogeneous class structure, i.e. a class structure composed of the divergent and contradictory interests of different agents of identical, all formally capitalist, economic relations. Together with the bureaucratic apparatus (itself a centralized existence of and as such a level of existence of the homogeneous class structure) relations of production at different levels of socialization in the nuclei constitute an organization of capitalist production; a "capitalist micro-society" within the under-developed

social formation.

However strong the grounds for classification of these urban centres as capitalist might be, a conclusion to that effect is bound to meet some objections. But the theoretical grounds on which the different objections are based are themselves open to question. Taking capitalism as a mode of production whose fundamental economic relationship is constituted by the free labourer's sale of his labour-power, Laclau (Laclau 1971.25) is ready to argue that because the capital in circulation in Latin America was accumulated internally by the absorption of economic surplus produced through Labour relationships very different from those of free labour the dominant relations of production in that continent remain pre-capitalist in character (Laclau 1971.30).

Laclau's conception of a mode of production as an economic mode of production (i.e. as definite economic relations in their isolation) is an erroneous abstraction and has, in effect, prevented him from accounting for economic and social conditions prevailing over vast areas of Latin America which he unrealistically categorized as pre-capitalist or feudalist - C.f Infra f63 and text above.

To prove that capitalist economic relations are dominant in a particular social formation it is not essential to prove that individual economic relations (i.e. economic relations at the lowest levels of socialization, e.g. at enterprise level) existing in that particular social formation are unanimously capitalist economic

relations. It is enough that there are sufficient capitalist economic relations to enable the autochthonous beginning of a politico-economic form. There is, in the specific example of under-developed social formation, a further point which is worth remembering, namely, that, due to conquest from without (i.e. colonization) the politico-economic form of capitalist economic relations began even before the existence of an aggregate of autochthonous capitalist economic relations sufficient to enable an autochthonous beginning. Just as the dominance of the politico-economic form of capitalist economic relations may not affect the pre-capitalist forms of organization of individual non-capitalist economic relations so may not the presence of individual non-capitalist economic relations in a social formation mean that the dominant politico-economic form is not capitalist (18).

Doubts are cast from other different perspectives (19) on the capitalism of the Third World and on the description, of the urban nuclei in the countries in that part of the world as capitalist politico economic forms. These perspectives focus either on the privileged position which the industrial worker holds vis-a-vis the urban sub-proletariat and the peasantry to reach the conclusion that a working class doesn't exist (20), or, on the type of the enterprises and industries that constitute the economic base of private ownership to reach the conclusion that the owners of these enterprises and industries are not bourgeoisie (21).

As to the first view, if it is emphasizing the pecuniary aspect of the phenomenon and from this perspective expressing sympathy with the less privileged classes its value remains merely sentimental. If, however, it is intended to forecast the political orientation of the working class and the effect of that on the State, its credibility is questionable. It is true that the working class in under-developed formations might be in a privileged position in relation to other classes in the non-capitalist social formation. But it is always the definite economic relations of individuals, to the means of production, and, among themselves which determine their class position. From the experience of the Sudan, it is this class position, so determined, which determines the political orientation of the workers.

Another related view is that which denies the utility of class analysis because of the limited number of the population who can be classified as members of classes. This view has as its foundation a tendency of fusing the developed capitalist sector (whose agents admittedly constitute a minority) into the non-capitalist sector (whose agents are a majority) and quantitatively measuring capitalist relations of production in relation to non-capitalist relations in the national formation. It therefore ignores the existence of relations of production, which are qualitatively capitalist, in the capitalist formation (i.e. the developed sector) and the political domination of the non-capitalist formation by that sector.

The limited economic and industrial base of a bourgeoisie and a working class in the "Capitalist Society" of an under-developed country does not change their class character, nor diminish the importance of class analysis in the study of social phenomena in these formations. This is so for two reasons. The first is that political existence and effectiveness of a class (e.g. the workers) is tested, not by a universal criterion, but, in relation to the existence and effectiveness of other classes (i.e. the bourgeoisie) in the same social formation (23). The second reason is that despite their superficiality (24) (i.e. under-development of their underlying economic structure) class organizations in such a society represent social powers whose interaction is worthy of consideration because of the impact it has on integrity of the social formation as a whole and the limitation it imposes on the success of voluntarist development planning.

The second view is one which emphasises the tertiary and consumerist nature of prevalent industry to deny the existence of capitalism and a "capitalist" class. It is held by protagonists of "under-development" theory (Amin 1976, Frank 1972). From their perspective they end up describing capitalism in the Third World as "peripheral capitalism" "dependent capitalism" or a "colonial mode of production" (25). To some of them this is not simply a transitional capitalism but a qualitatively different form of capitalism (26).

The protagonists of "under-development" theory do not deny the existence of classes, but their analyses lead to the conclusion that, because of the dependent nature of the economic structures in under-developed countries, external influence is determinant and these classes are ineffective in the formulation of economic and political policies (27). What are the characteristics of this alleged special brand of capitalism?

The problems which under-development theorists address themselves to are not pure economic problems. Rather under-development theorists endeavour in many cases to offer external economic explanations to what are in fact predominantly internal politico-economic phenomena i.e. inequalities. Amin for example poses that, "under-development is manifested not in level of production per head but in certain characteristic structural features which dictate an uneven distribution of income and prevent the transmission of the benefits of economic progress from the poles of development to the economy as a whole" (28). Like his Dependency School colleagues Amin perceives economic dependence as the basis for these structures of inequality (Amin 1976.202). The types of industrialization and capitalist enterprise in the Third World are conceived of as part of these structures, because they always fit into a model that perpetuates inequality (Amin 1976.200, 215-233). Theorists of "under-development" emphasise that these inequalities are irremediable because they are the mode of reproducing the conditions of externally-orientated development (Amin 1976.352). This is, they conclude, peripheral capitalism which would ultimately perpetuate stagnation and

under-development.

My own reservation towards this interpretation is that, capitalism seems to be defined here with reference to a social well-being which it should, supposedly, bring about (29). This is namely, equal division of the benefit of economic progress among different regions of the same country and evenness in the distribution of income (30). The expectation that it is in the nature of capitalism to bring about this well-being is an illusion. It is my view that it would help avoiding further confusions if the laws and characteristics of the CMP are to be derived by inference from a theoretical model of that mode and not from the concrete capitalism of Western Europe. European capitalism is a capitalist mode of production in its historical specificity. The emergence of capitalism in a pre-capitalist class structure peculiar to Europe has led to industrialization and the guaranteeing of a relatively decent minimum standard of living. These would not be necessary accompaniments of capitalism everywhere else. For this reason the phrases "peripheral capitalism" or "dependent capitalism" are misleading. It is simply capitalism (i.e. the capitalist mode of production) taking root in a class structure different from that in which European capitalism has flourished.(31)

1.C The Social Formation as a Politically United Whole

Having outlined the "non-capitalism" and capitalism of rural communities and urban centres respectively I now turn to examine the ways in which these two different sets of economic relations

are interrelated and the implication of this for categorization - (i.e. as capitalist or otherwise) - of the social formation as a whole. Before outlining my position on this issue I need to explain why the existing theories of these interrelationship and categorization are inadequate.

There is a group of scholars who characterize the relation between these capitalist and non-capitalist economic relations as one of articulation of modes of production (32). Their analysis commences from a conception, of a mode of production that reduces it to production relations at the lowest level of socialization - (i.e. as consisting in individual economic relations at the individual social level) - and, of the social formation as comprising a combination of modes of production equally reductively defined. What is epitomized as "non-capitalist economic relations" in this thesis is construed by this group of writers as pre-capitalist "mode or modes of production". Likewise investigation of the dominance or non-dominance of the CMP is in the majority of cases made only at the individual level of individual capitalist economic relations.

By confining itself to individual economic relations and failing to conceive as part of a definition of "a mode or production" higher levels of socialization (e.g. levels of collective-economic and political social relations) at which individual economic relations may or may not assert their presence, this approach presumptuously promotes "non-capitalist" economic relations into pre-capitalist mode(s) of production and underrates the dominance of the CMP.

This approach also pre-empts any theoretical conception of a social formation. If the social formation consists of an aggregate of reductively conceived modes of production, a descriptive account of a chaotic social phenomena and their chaotic existential interaction would be the only way for establishing a unity of the social formation. This is a methodology which, although acceptable from certain other perspective (33), is inappropriate for analysts - like members of this group (34) - who approach their subject of study from a materialist conception of history. Content with the empirical configuration of phenomena makes espousal of a "mode of production" and other concepts of Historical Materialism practically useless. It also disregards a tenet of the latter theory namely, its emphasis on the discovery of the essence of things as a means for knowing them (i.e. essentialism)(35).

The difficulty the "theory of articulation" poses for establishing a unity of the social formation has led some of its supporters to suggest the adoption of an "extended" concept of a mode of production and to conceive of articulation as occurring either between extended modes of production or between a dominant extended mode and "restricted" subordinate modes within the social formation (Wolpe 1980.36-38). An extended conception of a mode of production is defined as a conception that allows the mechanisms and processes through which individual isolated economic relations are brought into relation with one another and the relations and forces of production are reproduced to be perceived as conditions of existence of a mode of production. Examples of such mechanism and processes are "circulation",

"distribution" and the "State" (Ibid.36). The functioning of these mechanisms and processes has been referred to as the laws of motion (Ibid.36).

It is only because this so-called extended conception of a mode of production is still a reductionist conception of a mode of production (36) that the existence of more than one mode of production within a social formation is conceived as possible. The so-called laws of motion of a mode of production, as defined by Wolpe (1980,.36) or Banaji (1977.10) while they may be laws of motion are not forces of motion that originate movement of the mode of production (37).

I have mentioned earlier that a mode of production is a societal concept that comprises within itself inter alia economic ideological and political social levels. Each one of these, hierarchically organized strata represents a societal level of existence of individual economic relations of that particular mode of production. Within this conception "society" is an embodiment of a mode of production, or an organization of a specific type of production (38). This is a conceptual definition of a type of society. A concrete social formation (i.e. any congregation of people living in a definite political domain within geographically defined boundaries) may not necessarily be an embodiment of a mode of production.

Movement within a developed capitalist society is effected, in an ascendant evolutionary fashion, through class struggle at those, above-mentioned, and other social levels within that society (39). However, there are reasons which make movement within a post-colonial social formation possibly different.

African social formations - (as we know them now by their political boundaries) - presented before the advent of colonialism characteristics typical of those of an Asiatic or village economy (Amin, 1976.51). In all cases the conquest of these formations was immediately followed by establishment of a relatively powerful central administration over the colony and later by an unprecedentedly expanded exploration and extraction of mineral and natural wealth. In addition to interrupting the autocentric development of these formations colonialism has sown the seeds of a state and capitalist economic relations that were subsequently to influence economic and social development in these formations.

In contrast to the preceding approach I believe that the concrete form which social and political power assume (e.g. the centralized state form) within an under-developed social formation should itself be considered as a level and condition of existence of a mode of production. If the diagnosis of this concrete form establish that it is capitalist both in form and substance then it is the capitalist mode of production which is politically dominant in the social formation as a whole (40). This latter conclusion is sanctioned by the empirical fact that this concrete form (i.e. the centralized state) dominates the entire social formation. However

my analysis goes beyond this empirical facade to further establishing the interrelation of this dominance with an underlying economic and class structure.

I have already distinguished between the capitalist and "non-capitalist" economic relations prevailing in urban and rural zones respectively of an under-developed social formation. I also emphasised the point that this difference, resides in the different forms of organization prevalent in each zone, and, is, therefore, one of degree - (i.e. judging by their economic function all economic relations in the social formation are capitalist but judging, at a higher level, by their forms of organization only those prevalent in urban nuclei are fully capitalist). The relation between capitalist and "non-capitalist" economic relations is not therefore one of articulation of modes of production. It is rather one of political (or organizational) domination and subordination. Non-capitalist economic relations and their agents are political subordinates of capitalist economic relations and their agents.

The political dominance of capitalist economic relations and their agents (or in other words dominance of the capitalist politico-economic form) may not correspond to a numerical supremacy of individual capitalist economic relations in the social formation as a whole. It stands even though these relations are a minority as against a "conglomeration" (41) of individual non-capitalist economic relations in the social formation as a whole. This ability of capitalist economic relations to subordinate, through their politico-economic form, pre-capitalist economic

relations despite the possible numerical supremacy of the latter is due to the latter's relative historical primitiveness (i.e. their relative primitive social cohesiveness). The "emergence" of capitalist economic relations and dominance of their politico-economic form in a situation of historical socio-economic primitiveness, a situation which cannot by itself historically give birth to capitalism, is explicable only in the light of colonization and imposition of capitalism and a form of a State from without.

Given the imposition of capitalist economic relations and their centralized form of a State from without the reason for political subordination of non-capitalist economic relations becomes obvious. It is that these relations and their agents lack the forms of organization essential for enabling them to communicate effectively (42) through institutions of a "capitalist society" (43) - (i.e. institutions which are in essence crystalized social [economic, political and ideological] forms which individual capitalist economic relations assume at higher levels of socialization). Individual capitalist economic relations on the other hand possess their own substance and forms of organization that enable their agents to further organize at higher levels of socialization into trade unions, employers and workers federations and labour or bourgeois parties and participate in managing the State.

This peculiar position of dominance and subordination gives rise to a main issue whose discussion and that of its impact on a methodology for labour law constitutes the balance of the Chapter. The issue relates to the impact which dominance of a capitalist

politico-economic form has on the relations of classes of the "capitalist society" among themselves and on the integrity of the social formation as a whole. The ensuing discussion endeavours first to show the extent to which the State structure is capitalist and then move to discussing the above issue at various stages of development of the State structure and in relation to autonomy or non-autonomy of the State.

2. The State

2.A Bureaucratic Genesis of the "State"

Colonialism and its immediate consequence (44) were tantamount to appropriation of all feasible agricultural land and mineral resources and the subsumption of the respective colonized population under definite relations of production. A bureaucratic apparatus is in this respect a centralized form of organization essential for the completion of this subsumption. Under colonialism the "bureaucratic apparatus" and the heights of "the bureaucracy" (45) possess no more than a functional status. They have an intermediary role of enabling the functioning of a system, of production and distribution, whose specificity is determined by a power external to them (i.e. the metropolitan State).

The post-colonial social formation inherited a bureaucratic apparatus (i.e. a centralized State apparatus) composed mainly of an army, an administration (i.e. the executive and the judiciary) and in the second grade of a constitutional system (i.e. an organic

law or creatures of that organic law, such as political parties, a Parliament or legislative body and trade unions) to govern the interrelationship of the different institutions of the bureaucratic apparatus. The decolonization of these apparatuses which began immediately after Independence at the initiative of an educated elite, which had joined State administration by the time of Independence, initiated the making of the bureaucracy (as a social category) (El Tayeb 1967).

The acquisition by the post-colonial State of enterprises and plants previously owned by the metropolitan State meant that the heights of the bureaucracy in the post-colonial State were to assume, in addition to the functional role they inherited from their predecessors (i.e. colonial administrators and governors), a principal function of appropriating, supposedly on behalf of the social formation, and designing a system of production and distribution for utilization of, the means of production. A dominant class of owners of the means of production was absent. The classes of the "non-capitalist" periphery were unable to undertake supervision of bureaucratic performance (46). Consequently the heights of the bureaucracy became a politically independent and dominant power (47) by virtue of the managerial status they occupy in relation to lower-ranking employees in the bureaucratic apparatus.

The managerial status of the heights of the bureaucracy remained a source of independent power only so long as proper (48) classes (i.e. social categories defined by their relation to the economic structure e.g. working class, capitalist class) in the

"capitalist society" were not strong enough to participate in political decision-making - see infra f.51 and the text above. Having said this we can now move to outline a theoretical model that explains the process through which the heights of the bureaucracy have lost their exclusiveness and independence.

2.A.1 Emergence of Class Power within the "Capitalist Society"

The heights of the bureaucracy presumably on behalf of the politically-united social formation undertake the twin role of exploiting and of organizing-cum-supervising the labour process. Organization and supervision in this broad sense include the tasks of governance part of which is the task of reinvesting the surplus - of the national revenue (i.e. after deduction of expenditures) according to priorities determined by the heights of the bureaucracy themselves. By fulfilling these economic functions the heights of the bureaucracy indirectly increase the material and social productive forces and expand "capitalist relations of production" in the social formation (49).

More and more agents are subsequently added to the "capitalist society", and, further concentration and centralization of existing relations is effected. To a great extent the emergence of social classes in the "capitalist society" is conditioned by the emphasis the heights of the bureaucracy place on the role of private enterprise and development planning in general or by the form which economic exploitation assumed under colonialism. Emerging classes (whether workers or bourgeoisie) militate to

undermine the heights of the bureaucracy political power by acquiring an ever-increasing share of power within the "capitalist society". The workers begin to question the manner in which the labour process is organized and demand a bigger share in setting the terms and conditions of the agency the heights of the bureaucracy are assuming allegedly on behalf of the social formation. As the contribution of the bourgeoisie to the budget of the centralized state increases, through taxation, they demand a better climate for investment to sustain that contribution or to increase it. In short after accomplishing their role of pioneering the Centralized State in under-developed social formations the status of the heights of the bureaucracy as an independent political power is lost. Henceforward the heights of the bureaucracy, although they may continue to rule, and, although may remain autonomous in their bureaucratic capacity, they may never be a neutral political power - (i.e. will always rule in alliance with one or more of the classes in the social formation).

During the prominence of the bureaucracy as an independent power it rules in a power bloc comprising all agents of the CMP in the National formation. At this early stage the overriding interest of keeping the integrity of the Capitalist State overshadows the potential contradictions among the interests of the forces within the power bloc. Keeping the integrity of the Capitalist State is an overriding interest even to workers because all agents of the CMP are at such stage a privileged minority in the national formation. Many factors compound to create this privilege including;

1. Extraction of revenue (e.g. through taxation) from the non-capitalist social formation exempts the CMP from bearing the long-term costs of the reproduction of the labour force and therefore enable the CMP to support relatively higher standards of living for the workers (Meillassoux 1972).
2. Employment provides a secure income over and above the supporting income most of the workers at this stage have outside the Capitalist Society (Hussein, 1983.32).
3. At the social level, employment relationship provides a definite reciprocal and emancipative relationship as opposed to the forms of exploitation (slavery, serfdom or patriarchy in case of family labour) which existed before Colonization or Independence.

The emergence of capitalist classes (e.g. workers and bourgeoisie) in under-developed formations can therefore be theoretically located in the aftermath of a crisis-situation in which the functioning of an ever-expanding Capitalist State becomes impossible without further sacrifice of economic interests by the forces in the power bloc. It is at this conjuncture that, the neutrality of the heights of bureaucracy as an independent political power falters, and, the conflicts within the bloc polarize along economic interests between heights of the bureaucracy and employers in a private sector on the one hand and employees in the lowest strata of the State bureaucracy and apparatus and employees in the private sector on the other. The end of the supervision of the production process as a source of power for the heights of the

bureaucracy does not mean the exclusion of the bureaucracy, or the heights of the bureaucracy, altogether from politics. There is still another role for the bureaucracy to play by reason of its class affiliation.

2.B Class Affiliation of the Bureaucracy and the Present Configuration of Power in the Social Formation

Members of State administration - i.e. the bureaucracy - are recruited from different social backgrounds. However for the purpose of deciding the class affiliation of members of the bureaucracy the latter may be regarded as distinguished into certain distinct strata, with different recruitment criteria. In this respect we can distinguish between the heights and the subordinate strata of the bureaucracy.

It is peculiar to under-developed African formations that there existed no capitalist classes prior to the establishment of colonial rule (50). For this reason, class affiliation of the bureaucracy in the post-colony, for us, matters only after the conjuncture, described before, in which management of the production process ceased to be a source of power for the bureaucracy. This is a stage, in the experience of many African states, characterized by the emergence of politics of alliances and counter-alliances between the heights of the bureaucratic apparatus and the social classes in the social formation (51).

The polarization of conflict along underlying economic relations manifested itself first within the bureaucratic apparatus between public sector manual workers (i.e. the lowest stratum of the bureaucratic apparatus) and the heights of the bureaucracy - in their political capacity - when the independence of the latter, in that capacity, had begun to falter. White collar employees on the subordinate strata of the bureaucracy and employees of the private sector joined forces only later. The delay in case of the latter is concomitant with the chronology of development of a private Capitalist class. In case of the former it may possibly be due to the neutralizing influence which the hierarchical internal organization of the bureaucracy may exercise on this category of employees.

The demands put forward by the workers were, in the case of Sudan, largely political demands nourished by a workers organization's belief in their right, as representatives of individuals constituting the majority of the population of the "capitalist society", to participate in the management of the means of production (i.e. affecting both their distribution and utilization (Hussein 1983.68).

There are on the other hand many factors which mould orientation of the heights of the bureaucracy towards becoming a permanent ally of a bourgeois class in the course of formation, including;

1. The bureaucracy as a political centralized form of Capitalist division of Labour and Capitalist relations of production (52) (i.e. of domination and subordination) imposed on a predominantly precapitalist social formation, prescribes a course of development that may naturally lead to emergence of private capitalist classes.
2. The fact that the heights of the bureaucracy were, at the inception of the centralized State, holders of unfettered political and economic powers enabled many of them to accumulate for themselves - (whether through; pursuance of elitist policies, high salaries corruption or through these means combined) - part of the national wealth and thereby form the first fraction of an indigenous bourgeoisie in the social formation (Sandbrook 1975, Shivji 1976, Seidman 1978).
3. The fact that the heights of the bureaucracy are without exception brought up in bourgeois educational institutions (Mazrui 1978 esp.Chap.16) leads many of them to believe sincerely in the cause of bourgeois version of economics and politics.
4. The bureaucracy as a system of internal hierarchical organization presents an institution of control which, although with incumbents recruited from different social background in the social formation, pays allegiance only to its heights even in their political capacity.

2.B.1 The Centralized State as a Dominant Allied Force

Dominance of the politico-economic form of capitalist economic relations in a social formation that is predominantly non-capitalist means that only agents of the capitalist society may form effective or effectively participate in dominant class organizations. This in effect means that the majority of the population (83% in 1973 in Sudan; Ilo Sudan 1976) dwell in a non-capitalist periphery from which they, although obliged to pay taxation as its citizens, are inherently incapable of reciprocating any political influence on the centralized State. The economic relations of the "capitalist society" are historically over-developed (53) in relation to those of the non-capitalist periphery. The centralized State because it is a condensed existence, and, as such, a level of existence, of the "capitalist society" is in effect over-developed (54) in relation to the non-capitalist classes. Moreover the centralized State is also dominant in relation to classes of the "capitalist society". The centralized State represents the biggest single employer of wage-labour and the biggest shareholder in the economy. The dominance of the political form of Capitalist economic relations is largely a reflection of the capitalism of this omnipresent state-sector of the economy. The omnipresence of this sector and the hierarchical organization of production within it endow the "heights" of this organization (i.e. the heights of the bureaucracy)(55) with an overriding political-cum-managerial influence.

In the light of inability of the majority of people, in the social formation, to exercise any effective political pressure on the State bureaucracy, struggle for political domination remains

confined within the "capitalist society" between the heights of the bureaucracy and their allies - a small Capitalist class largely compradorian and dependent in its existence on State sponsorship [C.f in relation to Sudan; Mahmoud 1983, Kursany 1983] - on the one hand, and the lowest strata of the bureaucratic apparatus (public sector employees) and the private sector employees on the other hand.

This polarization presents a relationship in which the heights of the State apparatus and their ally (i.e. a Capitalist class) are dominant. As long as the pre-colonial bureaucratic institutions continue to exist and as long as classes in the social formation remain content with expressing their political struggle through these institutions, the dominance of this - heights of the bureaucracy/a Capitalist class - alliance is bound to persist no matter how variable the political forms it might assume (56).

It is the class conflict among classes of the "capitalist society" and the resultant behaviourism of the centralized State which overridingly influence social economic and political changes within the social formation as a whole. However the extent to which this proposition is compatible or incompatible with a "theory" of plurality of social forms will be examined later in the Chapter (57). The extent to which it could explain contemporary social and economic phenomena, in an under-developed social formation, as observed and compiled, most notably, by "under-development" theory proponents (58), is shown below.

Whether or not, the social conditions, and, characteristics - (in Amin 1976.200-290), which "under-development" theorists enumerate as incompatible with development, and typical of the economies of Third World countries, are reasons for under-development is not clear. It is arguable that these characteristics and conditions are symptoms of under-development and that the latter's cause is still to be sought elsewhere, outside the under-developed social formation or at a different (social or political) level inside that formation. Those "under-development" theorists who conceive of dependence (itself enumerated among the anti-development characteristics - in Amin - Ibid) as the cause behind under-development and the other anti-development characteristics as consequences of that dependence are in effect propounding a vicious circle which explains nothing (59).

Amin tries to break away from that circle by placing the two factors he construes as direct reasons for dependence (i.e. unequal international specialization and unequal exchange) on foundations deeply rooted in history, but his reasoning is not convincing. Taking into account the long period since Capitalism has conquered the social formations Amin is focusing on (e.g. Black Africa, the Arab World and Egypt, Amin 1976.27-58) and the profound economic political and social changes which these countries must have undergone, Amin's historical analysis may explain the reason behind the existence of dependence in the first place, but does not account for the alleged contemporary dependence in which under-developed countries are supposedly destined to stay. This is a weakness in Amin's analysis further exacerbated by his omission

of demonstrating any dialectical - (i.e. causal) interrelation between the "history" and the "present" in these formations.

Many under-development theory critics might agree that Capitalist orientated economic development has, in the context of many Third World countries, so far led to unevenness in distribution social injustice and even mass famines, but disagree that the theoretical inferences of the theory's proponents adequately account for these phenomena (60).

It is my view that under-development is produced by an unequal distribution of political power among different classes in the social formation. This inequality is determined by a class structure that owes its initial existence to imposition of a Capitalist bureaucratic form of a State from without at a primitive stage of social development in the under-developed social formation. The major disagreement with the theses of "under-development" is that the perpetuity and reproduction of this class structure is, from my point of view, being effected by, interaction of social forces within the social formation (61), and the instrumentalization of the centralized State by these forces in that interaction.

Inequality of distribution of political power is manifest at two previously identified levels namely, (1) that of the relation between the "capitalist society" and the non-capitalist periphery whereat classes of the former possess among themselves a disproportionately greater share of political power and, (2) that of the relation among

classes of the "capitalist society" whereat bourgeois interest (even though not a bourgeoisie)(62) are dominant. This unequal distribution of political power in its turn entails a further unequal distribution of the benefits of technological advancement. Dominance of bourgeois interest affects the choice of techniques - (resulting in preference of Capital-intensive techniques because of their profitability) - and types of industrialization. In the latter case it results in preference of production of consumption goods and tertiary industry over production of capital goods - (i.e. because it is profitable and more practicable for an individual nascent entrepreneur to follow a process that climbs from the least to the most expensive enterprise). Relentless pursuit of profitability - (a concomitant of dominance of bourgeois interest) - would in short entail all the "negative" economic consequences compiled by propounders of under-development theory.

Furthermore, the economic struggle of the dominated classes in the capitalist society (i.e. the wage-demands and the consumption needs of the urban population) on the one hand and their relatively immense political power (i.e. in comparison with that of non-capitalist classes) to influence political decision-making on the other, hamper the adoption of a long-term strategy (i.e. a strategy for autocentric accumulation Amin 1976.210). The adoption of such a strategy while detrimental to the immediate consumption and profit needs of the urban classes, is essential for extending the benefit of progress to the population of the non-capitalist periphery. This class conflict and adjustment within the "capitalist society" engenders a movement of the CMP (63) that

confines Capitalist economic reproduction within the politico-social boundaries of the CMP - i.e. within the "capitalist society". This confinement is also the reason why non-capitalist economic relations, whilst having lost their taxonomical economic function through commerce, still preserved their forms of organization. The bearers of these non-capitalist relations are thus subjected to a double exploitation (64).

The negative economic consequences which the pursuit of profitability entails are likely to place severe strain on the surplus for reinvestment and state balance of payment (Muller, et al 1979). Experience has shown that when this had happened the burden of domestic savings was increasingly placed on the non-profit-earning classes (Hussein 1983.253). In implementing the laws and measures imposing this burden the centralized State exhibited immense and effective - (at least in the short-term) - powers of coercion against all non-profit earning classes including the urban workforce - (Hussein 1983.208-209, 235). This in turn exemplifies the dominance of bourgeois interest and the potential of descendent control at the disposal of the State.

Finally there is evidence to suggest that this dominant descendent political and economic change is in its turn followed by a disproportionately wider internalization of Capitalist patterns of consumption and Western standards of morality, even among rural population, and, at the expense of cultural authenticity (Harrison 1981, Mason 1970, Tunstall 1977). This in turn minimises the credibility of an even empirical plurality of social forms (65).

2.C Why Can't the State be Relatively Autonomous?

2.C.1 Inadequacy of Existing Theories

Most significant among the theories (66) of the State in under-developed social formations is the thesis of the over-developed post-colonial State expounded by Alavi (Alavi 1972). Alavi's analysis is in favour of a power of the "bureaucratic/military oligarchy" derivative from its relation to a bureaucratized structure which, because it was set by a power superior to the colony i.e. the Metropolitan State, was over-developed in relation to the structures in the colony at the time of its setting, continues to be over-developed in the post-colonial era. Alavi's analysis does not articulate the nature (i.e. whether historical or structural) and specificity (whether it is in relation to the pre-capitalist classes or in relation to the classes within the "Capitalist Society" or in relation to them all, or whether it is absolute) of this over-development. Yet his contribution, in so far as it reinforces a thesis of dominance of the centralized State apparatus in under-developed social formations, is valuable and relevant. It is only because Alavi is ready to argue that an "over-developed" State is of necessity an autonomous State that his thesis abounds in contradiction. He enumerates certain characteristics (67) which, from his point of view, are pointers to that autonomy. But we may notice that, these characteristics, while they may support a thesis of "over-development" do not in any way prove that this "over-developed" State is autonomous. Alavi sees otherwise because he conceives that in order to lose its autonomy the State

apparatus has to be exclusively dominated by a single class (Alavi Ibid pp.71-72). This is a misconception. The State apparatus may be too over-developed to be dominated by a single class, but, nevertheless partial because the heights of that apparatus voluntarily ally themselves with particular classes to the exclusion of others. Or, is Alavi suggesting that the State apparatus (i.e. as a bureaucratised structure) is too over-developed to be manipulated even by its heights? (68)

Alavi's thesis does not provide any explanation as to how the military/bureaucratic oligarchy could act on behalf of three propertied classes to preserve a social order in which their interest is embedded (Alavi Ibid p.62) and at the same time remain relatively autonomous (i.e. in relation to classes other than these three propertied classes). In reaching the conclusion that the post-colonial State is relatively autonomous Alavi has contented himself with examining the relation of the State apparatus to the dominant classes while overlooking the relation of the State apparatus and these dominant classes to the struggle of other classes in the social formation namely, the dominated classes the overwhelming majority of the people (i.e. the workers, the peasants and the sub-proletariat). In effect, Alavi's conception of the State appears peculiar and confused. He formulates a theory of a State in isolation, not only from the dominated classes but also from the dominant classes i.e. a State which is only a bureaucratic-military oligarchy (69) in its bureaucratic capacity.

The class structure and the class constellation which Alavi describes are not necessarily supportive of a conclusion that the post-colonial State is relatively autonomous. It is more plausible and logical alternatively to argue that the three propertied classes described in Alavi's model do in fact constitute an alliance whose members' interests, although not identical as among themselves, are identical in their opposition to that of the majority of the people - i.e. the workers and the peasants - in the social formation (70). That, the military/bureaucratic oligarchy, because it "acts on behalf of the three propertied classes to maintain the social order in which their interest is embedded - Alavi Ibid p.62", far from being an independent power is, in effect, an active member of the alliance. If this is accepted we arrive at the conclusion that, because it supports the interest of an opulent few at the expense of the majority of the people the military/bureaucratic oligarchy can never be an independent political power (71).

2.C.2 Theoretical Objections to a Theory of Relative Autonomy

To a great extent the thesis of the relative autonomy of the State in under-developed social formations, as represented by the previous writers, is, in effect, a product of extending, sometimes by inaccurate analogy (72), predetermined views about the State in developed Capitalist Societies, to its counterpart in post-colonial societies. It is my view that for any claim, as to relative autonomy of the State in post-colonial societies, to be sustained, analysis of the social formations peculiar to these societies is indispensable.

Ownership and appropriation of the means of production are historically unsettled in an under-developed social formation. The centralized State in these formations not only symbolizes a regulation, from above, of a sub-system of distribution (of roles and products) but also represents the only guardian of the system of distribution of the means of production. Absence of a historically dominant structure of ownership and appropriation of the means of production is due to the absence of a historically determined form of economic relations. Because there is no "historically determined" (73) form of economic relations, development of the substance of capitalist economic relations which in historically determined capitalism provides the different levels of socialization - (across time and space) - that constitute a civil society - (on top of which the centralized state, in a historically determined capitalist society, is the highest and most superficial level) has not begun in the under-developed social formation. The centralized State, in this formation, in effect, assumes functions which, in a developed Capitalist Society, are carried out by civil society and the centralized State.

The dominance of the politico economic form of capitalist economic relations I have been describing at different parts of this Chapter, is dominance of the heights, of a sub-system of distribution, on whose - i.e. the politico economic form's, — presence depends not only the existence of this sub-system of distribution but also that of a system of distribution of the means of production. In effect, class struggle presents a starkly different picture in an under-developed social formation. It is not

a struggle of historically dominant and dominated classes within the establishment of a historically dominant class. It is rather a struggle of politically created classes (74) each to establish its own State i.e. to initiate its historical beginning.

Because it was not established by any of the national classes in the social formation the State apparatus is presumably autonomous and may be used by any of these classes towards establishing its own State. But we have seen that the hierarchical internal organization of the State bureaucratic apparatus makes its identification with a capitalist path of development more probable. From this I drew the conclusion that as far as the State apparatus retains its characteristic features, as a system of division of labour, a coalition of the heights of the State apparatus and a capitalist class is likely to be the underlying dominant power in the social formation. It is now important to add a qualification that this is not a historical dominance (dominance resting on an underlying dominant capitalist economic structure in the social formation). The dominance of this alliance may at any time be undermined by a full-scale revolution i.e. a revolution which aims, not only at reforming the State apparatus and its constituent institutions, but, at reorganizing them on new class bases in order to accommodate classes of the non-capitalist periphery. The only guarantee that such a revolution may not take place is the might of the State apparatus - i.e. restrictiveness of State control from above.

Paramountcy of descendent control does not mean that individual political regimes do not endeavour, for their own stable survival, to strike a balance between conflicting politically-pressing interests. Generalizing from this phenomenon some writers maintain that the "State" is a mechanism of articulation between modes of production. The State from this perspective "has to secure some integration between the modes so that the precapitalist modes can function in support of the Capitalist mode. Yet the State also has to intervene to protect the precapitalist modes from some solvent effects of the interaction with the Capitalist mode - (Lamb, 1975 p.132), Fitzpatrick, 1983 p.169, 1980 p.247-255).

However, if it is accepted that the "State" is, not an entity exogenous from the so-called modes of production but a centralized form of the politically dominant mode of production (i.e. the CMP) and that "State" behaviour is not reducible to that of the persons in charge of the political regime but is, beyond that, determined by a class movement within the dominant mode of production and the social formation as a whole, then this argument is weakened. It also follows that, volitional reconciliatory measures even when adopted are likely to be short-lived (75). This is because on the one hand their effectiveness depends on their suitability for the momentous state of ever-changing economic conditions and on the other, consequential ever-changing balances of interests and powers may hamper their updating to respond to these changes.

I may now sum up the theoretical objections to a theory of relative autonomy of the state in under-developed social formations in the following way:

1 - Autonomy of the State is a relation to - i.e. its existence or non-existence depends on - the stage of class struggle. A social formation in which class struggle has not reached the stage of establishing a historical dominance of a class is a historically under-developed social formation (i.e. a society in the course of formation), and, as such may not necessarily present features of cohesion and coexistence.

2 - In a situation in which none of them is "historically dominant" the coexistence of classes can only be guaranteed, from above, through superstructural - (political, legal and administrative) control by representatives of one of these classes or different representatives of the different classes.

3 - Where political control is undertaken by representatives of a class whose members constitute a tiny minority in the social formation, repression or alternatively "ideologically-procured voluntariness" (76) are likely to be the characteristic features of that control.

4 - That, because of its dependence on inter alia the voluntary relinquishment, by the most broadly-based and as a matter of fact the best organized (Hussein 1983 p.260/66) of all classes - (i.e. the working class) of struggle, for realization of rights, of ownership

and appropriation of the means of production, that it is in a position to win, voluntary co-existence of a capitalist class and a working class in a social formation in which, although the former is politically dominant, neither of them is historically dominant, is ultimately most unlikely. Although the Capitalist minority may endeavour to legitimate its rule (e.g. through appeals to modernization) its success to that effect is limited by under-development of the wider ideological State apparatus (77). Hence there is always present in these formations a relative class repression that distinguishes them from developed Capitalist Societies.

5 - Despite the apparent neutrality of its bureaucratized structure the State in under-developed social formations cannot in effect be autonomous.

A - While superstructural legal, administrative, bureaucratic and public controls might prescribe minimum standards of performance that purport to secure impartiality of the State apparatus, they are inherently incapable of transcending the limitations imposed by the class structure I describe (78).

B - Although public support is sought after, and political control is effected in the name of national economic development, and although the economic activities of the government may be reflective of its commitment to these objectives. It is not simply the proclaimed objectives of development planning and its execution, but, the actual social implications of that planning and

of its execution for the different classes in the social formation and the reaction of these classes, that would determine whether the State is autonomous or not. The State apparatus may be partial irrespective of the judgment and convictions of the people in charge of the government. The partiality of the State I have endeavoured to explain is not a partiality that is effected by a class conspiracy but one that is destined by a class movement.

3. Why a Methodology for "Labour Law"

The class structure of an under-developed social formation, outlined in previous pages, raises two questions that need to be answered because they implicate my argument for a dominant form of law and a historical relativity of the substance and ideology of the law.

- (1) From the angle of heterogeneity (79) of its social forms an under-developed class structure raises the question as to whether the various social fields expected to be found in such a situation can be accounted for adequately by a totalizing explanation (Fitzpatrick 1983). I explain how my argument for a dominant form of law accounts for this supposed plurality of social forms.
- (2) From the perspective of historical under-development and the descendent political control necessary for its integrity an under-developed social formation offers a space too restrictive for the existence of the social institutions of collective bargaining and raises the question as to whether the concepts of legal pluralism are at all applicable in such a formation. I apply my earlier argument regarding the historical relativity of the superstructures (1) to criticize certain theories which seek to universalize these pluralist concepts (2) to outline an alternative methodology for the study of labour law in The Sudan.

3.A What Does Plurality of "Social Forms" Signify?

Fitzpatrick analysis is not simply a case-study of under-developed social formations (80). Rather it outlines a pluralist model that is seen as equally capable of accommodating comparable legal plurality in the first world (Fitzpatrick, 1983 and 1983b). The radical pluralism" he advocates differs from liberal pluralism in that, his, is a counter-monist pluralist view of history, whilst the latter, in its legal version is a positivist sociological philosophy of Law (81).

Radical pluralism as a general theoretical model, because it does not accept that totalizing Marxist explanation can adequately explain social fields, rests on a historical materialism that accommodate a plurality of social fields (Fitzpatrick; 1983b p.6). However the elements or element of historical materialism that constitute the totalizing Marxist explanation that cannot supposedly account for social fields are not clear from the analysis. If however it is meant that the economic structure (i.e. the aggregate of economic relations at the lowest level of socialization in a social formation) - cannot account for the different series of social phenomena in that formation this may be a cause for disagreement (82).

It is doubtful whether there could be a theory of a historical materialism that could accommodate a theoretical plurality of social fields. Although Althusser concept of "over-determination" could be held as giving rise to a possibility of multicausal

explanations (Glucksmann 1974 p.155). Taken with his conception of "historical time" - (Althusser 1970 p.96-110) they make it extremely difficult to situate Althusser analysis of the social totality within a diachronic/synchronic context (83). The extent to which Althusser's concept of "over-determination" and his general conception of Marxism expressed in the earlier works of "For Marx" and "Reading Capital" are reconcilable with Althusser's own subsequent writings is also not clear - e.g. C.f (Althusser, 1976 pp.47-54, 104-105). This weakens the authority of his works and its support for Fitzpatrick's view. If Fitzpatrick is suggesting the possibility of a phenomenal heterogeneity of social forms I would certainly agree with him. The main theme of my argument is always, that, this possibility does not mean that phenomenal heterogeneous social forms are not monocausally explicable by, analytical accentuation of the empirical findings about these forms - (i.e. by analyses at higher levels of abstraction) (83a).

Coming to the particular case of under-developed social formations, an admission that these formations provide examples of a duality of Capitalist and non-Capitalist economic relations does not support an argument for a pluralist approach to the study of social phenomena in these formations. This is so because the specificity of the economic structure - i.e. the question whether it is Capitalist or otherwise - comes at a different level of analysis. The Capitalist mode of production - (or any other mode of production) - is not the economic structure. It is only a definite socio-economic form which the whole or part of the economic structure in a social formation might, at a definite stage of

development of that formation, assume. It follows from this that although there may be a heterogeneity of Capitalist and various types of non-Capitalist social relations (and incidentally of ideologies of Law) their presence does not support a "theory" of plurality of "social forms" because these relations are ultimately explicable with reference to one - (though not necessarily specifically homogeneous) - economic structure.

However there are stronger grounds for hypothesising a phenomenal heterogeneity of social forms at the level of specificity of the economic structure. I have in this respect already mentioned that economic and - incidentally - social relations (84) are divisible into Capitalist and non-Capitalist social relations.

I now need to determine the implication of this empirical or phenomenal heterogeneity for a theory of a dominant "form of Law" - which I prefer to one of plurality of legal forms. I shall use the terminology, already defined, of the "form of Law" - (i.e. the form of domination), the "substance of Law" - (i.e. economic and social relations forming the subject matter of legal relations) and the "ideology of Law" - (i.e. the normalization which different forms of the "form of Law" acquire as a consequence of development of social and economic relations).

Within a politically subjugated social formation the ascertainment of the dominant "form of Law" cannot simply be established, by assemblage of phenomenal individual social relations - (constituting the substance of Law) prevalent among members of

a primitive tribe or inhabitants of a remote village in that formation. Yet the so-called theories of plurality of modes of production (i.e. articulation theory) and social forms are based on such an assemblage (85). There are two reasons why evidence compiled and conceived in this way cannot support a theory of articulation of modes of production and incidentally of plurality of social forms (86). The first reason is that empiricism of phenomenal forms of social relations, pre-empts further investigation of the function of their underlying economic activity, and, in consequence, overlooks the possibility of their being precapitalist veils of functionally Capitalist economic activities. The second reason is that by treating the forum (e.g. village - tribe - commune) where these forms of social relations prevail in complete isolation from the domain of the State a theory of plurality extremely exaggerates, at its own peril, the politico-social potential of these relations.

With regard to the first reason, I have already mentioned that although economic relations existing within the domain of a Capitalist politico-economic form may assume different social forms of organization, they are all functionally Capitalist (87). Acquisition of the Capitalist forms of organization is an emancipation - as much as stagnation in the precapitalist form is despite the conversion of underlying economic function, a subordination - explicable only in the light of class struggle. My definition of the "form of Law" emphasises derivation of the latter from the "form of an economic relation" (88), and its instrumentalization by the transitional State (another antecedent -

i.e. to Law - creature of that "form of economic relations") in the consolidation of the pre-historic societal form of that "forms of economic relations" (89). Hence I am inclined to believe that within a politically unified social formation the "form of Law" is determined by the form of the dominant State (90).

From this perspective the phenomenal heterogeneity of social forms does not mean a plurality of "form(s) of Law". This is so because this heterogeneity is relevant, not for determination of plurality or monism of the "form of Law", but for analyses of the ideology or ideologies of the "form of Law". There is, to recapitulate, a dominant Capitalist "form of Law" which assumes, different forms of social relations - (i.e. substance) or, in effect, ideological appearances. There is no reason why the Capitalist "form of Law" should not, depending on the stage of development of the productive forces and that of class struggle, assume various forms of Capitalist and "non-Capitalist" ideological appearances. I have already pointed in this respect to the errors of theories of the inherently autonomous (91) or inherently ideologically distinguishable Capitalist "form of Law" and the State. I preferred alternatively to conceive of the autonomy of the State and Law (i.e. development of an ideology of the "form of Law" and the State) as depending for its development on the development and materialization of social relations, social classes and class power (which in turn depend on the stage of development of material production)(92). For example in an under-developed social formation where the CMP is politically though not historically dominant it is not surprising to encounter a "form of Law" -

e.g. labour relations legislation - which, although indisputably Capitalist, possesses a primitive social ideology that makes it hardly distinguishable from State's other administrative and political actions.

Coming to the second reason, because they do not exist in complete isolation from each other, I do not believe that a separation between, a "state legal order" (Fitzpatrick 1983 p.159) or "official law" (Bryde 1976 pp.110, 113) and a "non-Capitalist legal orders" is possible. The under-developed social formation is a politically unified whole that contains within itself relations that, because of lowness of their level of socialization (i.e. as relations affecting two or more individuals in their relative isolation from the larger society) may be decided upon by the parties to the relations themselves and others that are, because of highness of their level of socialization, determined by the dominant form of the State (93). From my perspective then the existence of definite social relations within a unified social formation must be established both horizontally, by identifying a geographical locality in which they prevail, and vertically by varifying the higher social levels, of a conceptually hierarchically composed social formation, at which these relations are able to assert their existence - C.f supra fs. 44A, 75 & 77 in Chapter I.

Having identified the development of an ideology of the form of Law as determined by the stage of development of the particular society I now add that the determination by the latter of the former is always effected through the intermediacy of the

State. It is always the extent of State intervention in economic and social relations which is, the direct determinant of the ideology of the "form of Law" and, indicative of State autonomy. But, because the extent of State intervention is, within an autocentrally developing society, itself always prescribed by the index of development of social forces within that society, the stage of development of society is seen as the ultimate determinant. However, this may not hold true for a social formation in which the centralized State although Capitalist is, because of its colonial bureaucratic genesis and parasitism on other, non-Capitalist, classes, more than just a superstructure of Capitalist relations of production in that formation. In this latter case, which corresponds to that of the Sudan, State intervention, still the direct determinant of an ideology of the "form of Law", is not subject to any irrevocable limitations. Before outlining a methodology of research that treat Labour relations Law as it is in reality, I need to explain first that the absence of free institutions of collective bargaining in the Sudan is, not an aberration that can be remedied by prescription and introduction of a "pluralist ethics", but, the condition of existence of a "form of Labour Law" that should be treated independently in its own right.

3.B Pluralism as a Positivist Sociological Philosophy

The conception of Labour Law as constituted in the interrelation of Labour Legislation and the institutions of collective bargaining, marked its beginning as an independent legal discipline (Clark 1983, p.84, Wedderburn 1983 p.31).

That conception was first clear in the works of pioneers (Sinzheimer 1907, 1908, 1916, 1927 Lotmar 1900, 1902, 1908). Some of them were influenced in turn by the teachings of sociological jurisprudence and Marxism (Kahn-Freund 1981 pp.96-7). Ehrlich's idea of real Law - (or Living Law), Ihering's conception of Law as social engineering (Kahn-Freund Ibid p.96) and Gierke's organic theory of society (Gierke 1950, Hallis 1930 p.140-65) all feature in Sinzheimer's view of organizations as spontaneous law-creating bodies and in his emphasis on empirical legal research.

Sinzheimer's recognition of organizations as law-creating bodies, his conviction that this autonomous norm-creating process is one of the fundamental characteristics of Labour Law and the concept of dependence he perceives as inherent in the employment relationship (Kahn-Freund 1981, p.78) are the fundamental themes that were introduced, via Kahn-Freund, into the British tradition of Labour Law (Wedderburn 1983 pp.29-33)(94). However, Kahn-Freund emphasised the inequality inherent in the employment relationship (Kahn-Freund 1972 pp.5-8) and insisted that the plurality suggested by his model of collective laissez faire is descriptive not an ideology (95) (Kahn-Freund 1977, p.15 N.30). As a description modelled on the phenomenology of conflict and reconciliation in a developed Capitalist Society "collective laissez faire" is perhaps self-consistent. To this extent it may provide the answer as to what legal framework for Labour may or may not, in the light of an observed balance of power in a particular society, be effective in that society at the stage of its development at the time the observation is made.

There are however few, among the believers in "collective laissez faire" who concede that it is descriptive. "The rest insert the collective laissez faire perspective into the wider doctrine of pluralism" (96) (Clegg 1975 p.310) and take it upon themselves to assert that "men and women are under a moral obligation to behave according to the pluralist model . . . and that it is right to allow pressure groups wide scope, and - at least within developed societies - to introduce the essential features of pluralism where they do not exist and to protect them where they are in danger (Clegg Ibid p.310)".

Having accepted pluralism as a description of the phenomenology of conflict and reconciliation within a Capitalist Society, Clegg's point urges me to identify a certain conception of this phenomenology which is unacceptable. Once it is promoted to the rank of an ideology, (or ethics) "pluralism" in effect (1) overlooks the underlying equilibrium of power within a Capitalist Society (2) isolates phenomenal consensus from the structure of dominance (i.e. the socio-economic system of distribution of the means of production which is Capitalist Society) and the stage of the class struggle in which it is inserted and (3) eternalizes "pluralist behaviour" while presumptuously attributing to it a moral persuasiveness. I am not arguing against the morality or immorality of a pluralist ideology C.f infra f.99. My criticism is rather that because it is based on phenomenology of inter alia conflict and reconciliation pluralism thus conceived is an "unscientific" ideology (i.e. based on grounds that are not self-existent) and a yearning that may never be earned - C.f infra

text above f.99. It is more consistent to let one's beliefs be goaded by one's reason. Yet signs of a discrepancy between the two are inevitably evident in some pluralist writings (97).

The findings of the pluralist theory had been based on, at least, one plainly accurate observation about European Capitalist Societies, namely that they permit and even encourage a multitude of groups and associations to organize openly and freely and to compete with each other for the advancement of such purposes as their members may wish (Miliband 1983 p.131). One such finding is the idea of "equilibrium of power" or "balance of power" which is central to pluralist thinking (98).

If we observe the political and social scene in an under-developed social formation the picture we may assemble will sharply contrast with that from a developed Capitalist Society. The military and unipartist dictatorships we may encounter as common phenomena, are however only the *prima facie* evidence against the suitability of a "pluralist model" for industrial relations in these formations. The substantial cause that makes a political and an economic pluralist perspective inapplicable, the cause that may frustrate - at least in the case of the Sudan Cf supra f.51 - an alternative liberal multipartist or unipartist political model - (and incidentally minimises the chances for a pluralist model for industrial relations) - when either is introduced, is the class structure, and, the class movement within that structure, outlined before. This however raises the question as to whether the so-called pluralist model, being a perspective based on assemblage

of observed facts about a definite society at a definite stage of its development, can have anymore than a descriptive validity even in the context of that society (99). I argue that, this so-called pluralist model is in effect only a phenomenal form which an ever-unidirectionally changing balance of power, in a developed Capitalist Society, assumes at a given point of time in the history of that Society. The ostensible concertation which groups-interaction might show at this stage does not owe its existence to a pluralist model or pluralist ethics which can be abstracted and introduced anywhere and at any time to produce a similar concertation. On the contrary the "pluralist model" is only an assemblage of observed facts about that concertation. As such it does not possess a rationality of its own, or, a regulating capacity and certainly not an existence independent from the definite stage of economic political and ideological class struggle of which it is but an indexation.

The conclusion suggested by previous analysis is that collective bargaining and the social pluralism it implies is a historical substance and an ideology that the relations of wage-labour in effect assume in developed Capitalist Societies. This historical substance and ideology, while essential for the appearance of Labour Law as a relatively autonomous institution and an independent legal discipline, are conditions, extrinsic to "the form of Law", and, peculiar to developed Capitalist Societies. Labour Law in under-developed social formations, because it lacks an equally developed historical substance, possesses a little more than a formal existence (i.e. exists only, as "formal Law", in

statutes) and is virtually merged into other legal disciplines such as Administrative and Constitutional Law, the Law of Contracts, and, Criminal Law. It is of course possible, depending on the type of political regime, that a limited or even a liberal form of freedom of association may exist in any under-developed country. But it is always the Law, and not the economic and social forces in a "Society", which may safeguard that existence in an under-developed social formation. Existence of freedom of association and the right to organize is not, in effect, an inevitable existence. It may at any time be terminated by the force of Law that brought it in the first place.

It may also be true that trade unions in under-developed social formations possess immense political powers which if left to materialize (i.e. if allowed free channels of expression) will safeguard that existence. But political power is not by itself necessarily sufficient to support a social existence of Labour Law. Political power may support that existence when it is, not simply a product of organization and a juridico-political framework granted from above, but, also, an irrevocable index of a historical evolution. In absence of a definite historical substance that concretizes a definite course of historical socio-economic evolution and therefore prescribe the province of the political, the political itself assumes a dominant and an original role in the under-developed social formation. The political which, irrespective of the various internal alliances that are possible, consists of the organized social power of the different strata of the bureaucratic apparatus and the classes to which they are affiliated

in the social formation in effect, not only symbolizes the unity and coherence of the under-developed social formation, but also determines the course of material development in that formation. Depending on the specific form of the State (i.e. on the class composition of the specific alliance in control of the government) the political may determine whether that should be a Capitalist or Socialist course of development. It has been emphasised in previous analysis that there is at present one form of the political which has been dominant namely, that constituted in the alliance between the heights of the bureaucracy and a Capitalist class.

3.C The Methodology

Since the existing bureaucratic structure and the class structure it has created have been in existence since independence, with a difference in the extent of ossification of course, they provide the only concrete context of study. Within this class structure there are many possible forms of alliances and in effect specific forms of regimes - (e.g. right-wing military dictatorships 1958, 1971-1985, left-wing military dictatorship 1969-1971 and Parliamentary regimes 1956-1958, 1964-1969).

Rather than basing a study of industrial relations on a transient framework derived from the economic and social policies of a definite form of regime, I prefer rather to conceive of the class structure I describe and the dominance of the political associated with it as the underlying base-structure that as it is and through its determination of the multiplicity and durability of these different regimes has determined the main features of labour law in the Sudan.

Administrative solutions for labour disputes, expropriation by the State of the machinery for settlement of individual grievances, the administration of labour legislation by tribunals and the status of these tribunals as strata in the bureaucratic hierarchy are characteristics, of labour relations and labour "law", that have survived political changes in the Sudan. The particular changes introduced by different regimes, depending on the type of regime, feature only as extreme or moderate versions of this basic structure.

The survival of the politico-economic form of Capitalist economic relations - (as a specific form which the political, in under-developed social formations, assumes) is made possible by a certain ever-present degree of descendent political control. The description of this survival or dominance as "politico-economic", as opposed to a socio economic, is meant to emphasize that it is only the State structure which symbolizes that dominance (100). The State bureaucratized structure is simultaneously the biggest-sized Capitalist economic structure in the social formation. The overwhelming majority of members of the working class is constituted by workers and employees of the State. Private employers and their employees exist only in the shadow of the State and its employees. There is no indigenous Capitalist class outside the State which can manipulate a regime in charge of the State - although the latter may voluntarily associate itself with such a class. The regime in control of the State confronts workers and employees of the State in a double capacity; as their

political master and their employer. This confrontation takes place at the different strata of the bureaucratic apparatus between workers and employees in that strata and executives whose actions are carried within the regime's directives (101).

There is a degree of administrative and bureaucratic control which is necessary for the cohesion of the State in its capacity as a corporate employer. This is particularly manifest, in the case of public employment Laws, in a tendency to concentrate settlement of individual grievances and adjudication over these grievances in hands within the administrative bureaucratic hierarchy to the exclusion of other jurisdictions.

There is a different type of control necessitated by the State's economic and supposed political functions. To that effect the Law is in itself a descendent form of control distinguishable, if at all, from other actions of the State by the formality of the process through which it is made.

The State as a corporate Capitalist is actively involved in the process of production. To that effect the regime in control of the State formulates strategies for economic change. Law and in particular Labour Law is an essential element of any such strategy. The State often provides a reasonable floor of rights for the individual employee within the limits sanctioned by the prerogative of bureaucratic control in the case of the State employees. At the same time the State endeavours to restrain the collective power of Labour from frustrating the outlined strategy. Legal

control for inducement of economic change affects employees of both private and public sectors. It is also a control that has in particular affected the area of collective Labour Law merging it completely into administrative Law and excluding the Judiciary from participating in its development.

Although the degree of control varied with the emphasis each particular regime placed on economic change the fact of control itself has remained unchanged. In effect Labour relations in Sudan are, and have always been, regulated and lived in the manner the State, and not the trade unions, want them to be.

The balance of the thesis is devoted to examination of the different levels at which political, political-economic and bureaucratic controls assert their existence and the effect of these controls on an ideology of Labour relations "Law" in Sudan. For purposes of determining the effect of State intervention on an ideology of the Law of various areas of industrial relations we need to know whether various forms of control in different areas of industrial relations reflect varying degrees of intervention. Before that I would need to show these same various forms of control which intervention assume in different areas of industrial relations.

For purposes of enabling a systematic examination of these issues I assume - (an assumption which I hope will be vindicated by discussion of forms of control in the next three Chapters) - that it is the "level of socialization" (102) of industrial relations at a particular area (i.e. the seriousness of the threat which these

relations pose to political stability and State's effective performance of economic and bureaucratic functions respectively) - which determines, the degree of State intervention, and, hence, the ideology of Law, in that particular area. I, accordingly, classify Labour relations according to their levels of socialization into (a) collective Labour relations; (b) public individual Labour relations; and (c) private individual Labour relations. As clear in few places in the next Chapter (103) (a) sometimes appears distinguishable into private and public collective Labour relations. However, because of its derivation from the distinction between underlying individual employment Laws in each sector I do not consider this further distinction, of (a), as worth separate treatment.

Among the areas designated, "a" reflects a degree of State intervention higher than that reflected by "b", while "c" reflects the least. Likewise the ideological content of law is in each case determined by that degree of State intervention. Drawing of conclusions regarding ideological content of various Labour relations Laws or the relation between State intervention and ideology would at this stage be premature. It is important however (for purpose of delineating the area of discussion) to reiterate (104) at this stage that there are various levels of ideologies of Law. The discussion under part 3:B of this Chapter has purported to identify as reason for the inapplicability of a "pluralist model of industrial relations" - which is a most developed form of ideology of a Labour Law (105) - the absence of socially developed institutions of industrial relations in the Sudan. That is in effect, a negation of an ideology of "Labour Law" at a certain

social level. A question which poses itself is whether there is any more ideology of Law to be verified? The affirmative answer to this question derives from the above-mentioned remark that there are various levels of ideologies of Law. The exploration of an ideology of the Law will in the next three Chapters be conducted at the levels of "non-institutionalized" social relations and formalism of Law-making and legal-administration.

For the purposes of clarification I outline here the objective and plan that will guide the discussion in the rest of the thesis.

The discussion will follow an interpretational approach and explain the existing state of the law as it is. The materials processed in the course of discussion are meant to demonstrate the sources, provisions, fields of application and administration of the Law. The aim of the discussion is examination of these various areas of the Law with reference to objectivity and effectiveness of Law-making and legal-administration. Theoretical conclusions regarding the condition of the Law endeavour always to show that the Law is in each case the way it is because of a relation which the area under legal regulation bears to the structures of the State and the economy outlined in this Chapter. These theoretical conclusions are however always made on the basis of the empirical data presented in each Chapter.

It is not my intention to examine the success or failure of the State in achieving definite social and economic objectives through the use of Law. Since the causes of this success or failure are always primarily extra-legal (i.e. social or economic). An

examination of this nature may not be adequately effected by a thesis whose main focus is "Labour Law". Moreover I endeavour always to avoid, as a means for establishing the supposed relationship between Law and the State, the explanation of legal details in a particular area of industrial relations by economic and political details in this or other areas. I do this for three reasons. The first is that, as previously indicated (106), the type of empirical data valid for substantiating a specific theory of a State is different from the type of data valid for substantiating a theory of the development or under-development of the ideology of law regulating a particular area of social relations within that State. The second is that a theory of the State, while capable of explaining the direction in which Law regulating a particular area of social relations is developing, may not necessarily account for the internal characteristics which this Law, although developing in that direction, possesses, and that these characteristics are in their turn explicable by other secondary factors (107). Finally an approach of this type may also shift the focus of the thesis to areas which are external to industrial relations.

I will always present the empirical legal materials available in a particular area of industrial relations as evidence or effect of State intervention or abstention vis-a-vis that area and then analyse the ideology of the Law regulating this area in the light of this evidence and effect.

Since the discussion aims inter alia at demonstration of the jurisprudence of Law-making and legal-administration. It will under all Chapters include, in addition to doctrinal analysis of legal

rules and their application, examination of the social and economic context within which the Law-creating institutions (i.e. governments, trade unions, the courts, and administrative tribunals and authorities) have, at various stages of the economic and political development of the Sudan been functioning. This will inevitably involve discussion of past Laws and conditions.

The discussion will focus on each specific area of collective or individual Labour relations and discuss the Laws applicable to it. Although the discussion of the Laws regulating a specific area may incidentally proceed in a chronological order my efforts are concentrated more on the coherence of the topical structure i.e. the structural interrelationship of the chain of economic social and political changes that gave birth to different Laws.

The extent to which collective Labour relations can be claimed to be the most pertinent to political stability and economic performance and therefore also the most heavily regulated is shown next. Implicit in the discussion are two points. The first is that because it is not moulded by underlying historical socio economic structures interaction among socially non-developed organizations - (e.g. be they trade unions, governments or others) - takes place wholly at the level of free unmoulded currents of social and political activity and is therefore relatively devoid of a social ideology. The second point is that, given the "disequilibrium of power" within the "capitalist society" and that the State wider - (i.e. social) - ideological apparatus is too under-developed to create and maintain an "ideological balance of power" (108) an everpresent

degree of a partial political control hindering the development of even a politically fabricated ideology, is inevitable. Both of these points militate against the possession, by collective Labour relations Law of an ideology, whether socially-institutionalized or superstructurally-fabricated.

CHAPTER III

COLLECTIVE LABOUR RELATIONS AND THE LAWIntroduction

In contrast to the evolutionism that characterizes social change in some developed Capitalist Societies (I), social change in Sudan is largely a revolutionary process (II). Focussing on the period under examination in this thesis - (mainly the period 1948 - 1984) - social change in that country has largely been effected from above through interaction of a Capitalist economic and political structure of a State, and a largely non-Capitalist social formation (III).

Rather than being tempered by conditions of direct production or considerations of spontaneous optimum economic performance, the Centralized State undertakes the political regulation of the economy and society from above. It sets beforehand a system of distribution, of roles in production and shares of the products, within which production is to take place. This system comprises strategies for matters ranging from income distribution to political participation and division of power among the executive judicial and legislative organs.

In practice this means a hegemony of strictly political power enabling it occasionally to change in form (Military . . . Parliamentary . . .), to assume both legislative and executive powers and functions, and, to delimit the freedom of the judiciary and the trade unions (IV).

The reason why control, takes a certain orientation, - affecting in particular certain social groups and institutions namely, workers and trade unions, and varies in degree from one area of industrial relations to the other is best explained by recourse to earlier discussion of the State and class structure and the politically relevant factors affecting State intervention in industrial relations in Sudan (V). Three of the factors mentioned there are particularly relevant in this respect. The first is that control of the State apparatus depends on the outcome of struggle among classes of the "Capitalist Society" - whose agents constitute less than 20% of the population in Sudan. The second is that the State apparatus has been since independence controlled by "heights" of the bureaucracy in alliance with a nascent Capitalist class. A further deduction from this latter point is that even within the "Capitalist Society" control of the State apparatus rests in the hands of a minority - i.e. the majority being employees in the lowest strata of State bureaucracy, employees in the private Sector and other less privileged urban classes. The third point is that the State apparatus and State-owned enterprises are employers of the vast majority of the workforce.

These factors together explain why existence of permanent forms of control in industrial relations is both essential and possible. The fact that workers constitute the majority of agents within the "Capitalist Society" and relatively the most powerful social class in the social formation (VI) makes the ever presence of descendent forms of control a pre-requisite for protection of the economic and political lead of the classes presently in charge of the State apparatus. Workers consciousness with this, their own, potential social power has in case of

the Sudan nourished trade union movement ambition for political leadership and, in consequence, aggravated the need on the part of the ruling alliance for even more descendent control.

Likewise the position of the State as employer of the vast majority of the workforce - whilst itself a result of inter alia the hypertrophy of the Services Sector and under-development of other Industrial Sectors - necessitates and enables (at different levels) central determination and administration of the terms and conditions of employment. Moreover the non-Capitalism of the largest part of the social formation, a concomitant of its technical backwardness, and the need for its modernization (i.e. a need imposed by a superior need for social and political integration within national boundaries) provide the justification, and, sometimes material support (VII), for descendent control. Bearing in mind its position as employer, the State relates to its employees also as political subjects and, propagating this need for modernization, determines their rights and duties as employees within overriding and overall determination of their rights and responsibilities as political or national subjects. In practice this policy has always meant the sacrifice of individual and sectional employment rights for allegedly national objectives.

Influenced by these political and economic conditions Labour relations Law in the Sudan has from its inception been interventionist. In what follows I shall discuss forms and objectives of intervention, as manifest in various areas of collective Labour relations, under two main headings namely, (1) - Curtailment of trade Unionism as a political force and (2) "Nationalization" of Trade Union economic and industrial

functions.

1. Curtailment of Trade Unionism as a Political Force

As early as 1921 a Labour Board was set up by order of the then Governor General of the Sudan with the purpose, inter alia, of advising on all questions of Labour in the Country. There was until 1946 no pressures from a workers movement to influence the Board's deliberations. But, in 1946 the Board, conscious of the strain that the economic position in the aftermath of the World War II (Fawzi 1957) might place on industrial relations in general and on government relation with its workforce in particular and influenced from abroad by a British Labour Government (Beling 1961, p 51) recommended "the setting up by all large-scale employers (whether Government or private) in the Sudan of Work Committees wherever practicable in the interest of both the workers and the industry (1)". The declared objective of these Committees was "to form the bases on which Trade Unions could subsequently be set up on sound prepared lines (2)". Although Work Committees proved little success (3) the task of setting sound lines for the future development of trade unions was relentlessly pursued even after the latter were legalized (TUO 1949) (3a). However "soundness" from the Colonial administration perspective meant non-interference with political administration of the country, non-affiliation to political parties or organizations, non-pursuance of political objectives, and, commitment to peaceful settlement of industrial disputes (4).

The position of the government as employer of the majority of the workforce and regulator of the economy and that of the State as a micro-Capitalist Society, politically dominated over by a minority within that Society, renders difficult the attempt to demarcate the sphere of the State from that of Society (i.e. the micro-Capitalist Society is indeed a politico economic rather than a societo-economic organization (5)). This position blurs the line between political and non-political activity. To that effect, because they may in the context of an under-developed social formation entail the practical though not necessarily calculated effect of overthrowing a constitutional authority, general strikes launched for purely economic gains are usually construed as potentially political (6).

Government determination to implement its criteria of soundness and the wider political implication of trade union economic action in the context of the Sudan made the imposition of certain restrictions on the freedom of association inevitable. Rather than granting unconditional freedom of association to the workers and subsequently endeavouring to dissuade them from politics the very existence of trade unions was allowed only within a legal framework that was designed to make them politically manageable. With only one exception all trade unions came into existence only after this legal framework had been standardized for them (7). Despite its restrictiveness in certain aspects, the standardized legal framework introduced in 1949 failed to restrain the trade Unions from forming a national federation that led them, only a few years later, into the heart of the political arena. The Colonial administration was over-optimistic in thinking that the curtailment of trade unions' political influence was possible through increased emphasis on orientation of their

members to the approach and practices of industrial unionism (8) and without further restriction of the right to organize in general and to strike in particular.

Successive nationalist governments, military and parliamentary alike, did not however hesitate to impose these additional restrictions. This made the Colonial Collective Labour Relations Law as, in certain respects, relatively the most liberal in the history of the country. This also meant that, despite the political upheavals the Country has undergone within the last 30 years, Collective Labour Relations Law was to possess certain common characteristics that have survived across time. Under this part of the Chapter attention is focussed on three politically motivated forms of controls that in their turn reflect negatively on workers ability to organize and to bargain collectively. These forms are: (a) compulsory registration; (b) restriction of the "right" to federate; and (c) restriction of strike action. Before moving to discuss the first of these forms it is important however to mention a few words about the terminology of "rights" adopted in the Chapter.

To talk about strike action, freedom of affiliation and freedom of organization as matters of "rights" and to approach the study of industrial relations in the Sudan from a conceptual perspective of "rights" "freedoms" and other similar notions may lead to formulation of an idealist and speculative legal framework that pays little respect to historical socio-economic conditions in that country. The construction of a right to strike, a right to organize and other "trade union rights" as pillars of a "system of industrial relations" that is capable of universal application is a positivism and systematization of social phenomena

characteristic of a liberal pluralist "ideology". These concepts of rights are borrowed from the discipline of Labour Law in a developed Capitalist Society and I have previously expressed my reservation about their application to Sudan (9). Any such application involves the abstraction of these concepts from the substantial existence they possess in their place of origin, and, must in turn be adapted to the condition of the socio-economic relations they are intended to conceptualize in this new position.

Also worth examining in this context is the ILO endeavour to maintain international Labour standards based on respect for freedom of association and protection of the right to organize (ILO Conventions No 87 1948, No 98 1949 and No 84 1947). All forms of Legal restriction on freedom of association and the right to organize (e.g. restriction of recruitment of members at the primary trade union level, restriction of the right to federate, restriction at all trade union levels and monopoly through trade union registration) are at variance with Article 2 of the Convention No 87. Yet such restrictions are imposed in an increasing number of countries all over the under-developed world (Erstling 1977, pp 19-35). This manifest failure of ILO standards in this group of countries is some evidence that these standards are themselves bearers of pluralistic assumptions that underlay their European progenitors (9a). Ratification of ILO Conventions does not of course guarantee that articles of the Conventions will automatically be abided by. However it is at least a formal undertaking by the ratifying State to observe these standards. Sudan has proved reluctant to commit itself even to such a formal undertaking. By January 1985 out of a total of

159 ILO Conventions Sudan has signed only 12. The most recent of the 12 was the ILO Convention No 122 of 1964 (9b).

To recapitulate, the frequent usage in the text of a phraseology of rights - (e.g. right to strike, right to federate, right to organize . . .) - should not lead to a preconception that there is a socially-existing right to strike which legislation does not recognize, or in case the social absence of this right is conceded, to the misconception that the preaching of these abstract notions of rights is by itself enough to establish an effective trade union right or rights. However it is important to point out that to assert the social absence of a right to strike and the inability of jurisprudential doctrines to establish one, is wholly distinct from the subjective and speculative question as to whether legislation should or should not provide for a "right" to strike. A central tenet of the former approach is that the answer to the latter and other similar questions, depends not on the wishful thinking of a possibly class-opinionated individual, but is ultimately objectively imposed by the underlying economic and social power-fabric of the particular society (10).

1.A Compulsory Registration

Compulsory registration in Sudan is an institutionalized form of control (infra Part 1.A.2) of which the procedure of actual registration is only a phase. Compulsory registration is a restriction on the freedom to organize because it makes the trade union existence conditional upon a passage through an administrative process whose purpose is to ensure that the trade union organizational and constitutional structure fits

TABLE A (Appendix to f.9b)

Numbers of ILO Conventions

Ratified by the Sudan until 1 January 1985

Serial Number	Number of Convention	Year of Convention	Subject Matter
1	2	1919	Unemployment
2	19	1925	Equality of Treatment (Accident Compensation)
3	26	1928	Minimum Wage Fixing Machinery
4	29	1930	Forced Labour
5	81	1947	Labour Inspection
6	95	1949	Protection of Wages
7	98	1949	Right to Organize and Collective Bargaining
8	100	1951	Equal Remuneration
9	105	1957	Abolition of Forced Labour
10	111	1958	Discrimination (Employment and Occupation)
11	117	1962	Social Policy (Basic Aims and Standards)
12	122	1964	Employment Policy

Compiled from ILO Chart of Ratification of
International Labour Conventions 1 January 1985.

TABLE B (Appendix to f.9B)

Some of the ILO Conventions Not Ratified by the Sudan
until 1 January 1985

Serial Number	Convention Number	Year of Convention	Subject Matter
1	11	1921	Right of Association (Agriculture)
2	20	1925	Nightwork (Bakeries)
3	30	1930	Hours of Work (Commerce and Offices)
4	47	1935	Forty Hour Week
5	63	1938	Statistics of Wages and Hours of Work
6	64	1939	Contract of Employment
7	84	1947	Right of Association
8	87	1948	Freedom of Association and Protection of the Right to Organize
9	94	1949	Labour Clauses (Public Contracts)
10	103	1952	Maternity Protection (Revised)
11	118	1962	Equality of Treatment (Social Security)
12	129	1969	Labour Inspection (Agriculture)
13	130	1969	Medical Care and Sickness Benefits
14	131	1970	Minimum Wage Fixing
15	132	1970	Holiday with Pay (Revised)
16	135	1971	Workers Representatives
17	144	1976	Tripartite Consultation (International Labour Standards)
18	151	1978	Labour Relations (Public Service)
19	154	1981	Collective Bargaining
20	158	1982	Termination of Employment

Compiled from ILO Chart of Ratification of
International Labour Conventions 1 January 1985

within a predetermined juridico-political framework (11). Compulsory registration and the office of a registrar of trade unions are means of political control because they take the initiative of action from the trade unions and consolidate it into the hands of administrative authorities. Rather than relying solely on a legal policy that seeks to counteract trade union economic and political influence through subsequent exposure of their funds and members to legal sanctions, this policy in vogue in the Sudan enables the adoption of extra pre-emptive measures against the trade union - (e.g. ordering reference of a dispute to arbitration, freezing a trade union fund or ordering dissolution or suspension of a trade union, in order to prevent the carrying out of a declared strike). This enables the government always to possess the initiative of action whilst the trade unions are, in the best of conditions, left with the option of seeking judicial or administrative remedies or in the majority of cases with no option but to surrender.

The first trade union ordinance that came into effect on 15 March 1949 - the Trade Union Ordinance 1949 (TUO 1949) - allocated 20 out of its 35 sections to matters relating to appointment, responsibilities and powers of a registrar of trade unions. The registrar of trade unions, is, under, the TUO 1949 S.7, and, all the trade union laws that came into effect subsequent to this date, a government official appointed by the highest political authority be it a Governor General under the TUO 1949 S.7, a President of a Supreme Military Command TUO 1960 S.7 or a President of a Republic - TUO 1966 S.7 and the EAT 1977 S.25(1).

Certified registration has always been a condition precedent to a trade union right to perform its functions. Under all Laws that came into effect before 1971 every trade union was required to apply for registration within two months of the date of its formation - SS.8(1) TUO's 1949, 1960, 1966. SS.8(2) of these three trade union ordinances made it an offence punishable with fine for every trade union and every officer and member of such trade union which failed to register within the time limit specified under SS.8(1). Likewise all 3 ordinances prohibited trade unions and their members from "performing any act in furtherance of the purposes for which they have been formed unless and until such Trade Unions have been registered in accordance with the provisions of the Law" - SS.17.

Although the 1971 and 1977 Employees Trade Union Acts (ETUA 1971, ETUA 1977) did not specifically invoke criminal punishment for failure to register. They provide criminal punishment for general violations of their provisions that may equally apply in case of failure to register. Both Acts retained the requirement of registration as a condition for trade union right to exist and perform its functions. Registration retained this legal effect under both Acts not so much for the criminal punishment attached as for their careful draft which made trade unionism a status attainable only upon receipt of a certificate of registration. Under previous laws trade unions could be formed first and then apply within a specified period for legal recognition. Employees under the ETUA 1971, 1977 could call a general election for the formation of a trade union only 2 months after an application by a provisional Committee of such employees to register as a trade Union has been accepted by the Registrar (ETUA 1971, SS.25-27; ETUA 1977,

SS.26-28). This change enabled the Registrar to regulate and supervise trade union elections - (Cf infra fs. 16, 25, 180 and the text above). This regulation and supervision were in their turn important for achievement of the regime's objective of integrating the trade union movement into the State administrative and political apparatuses.

1.A.1 Procedures and Conditions of Registration

Applications for registration may be made by a number of the Trade Union members subscribing their names to its rules or constitution and otherwise complying with the provisions of the Law (12). Application to register shall be sent to the registrar together with two or more copies of the basic constitution or rules of the trade union. Under the TUO 1949 and its 1960 and 1966 Amendments the registrar could refuse to register a trade union for inter alia any of the following:

(1) If, upon expiration of 3 months from the date of publication, in the Gazette and the press of a notice of the application to register, proper objection to the application had been raised before the Registrar SS.9(4)/10(a) (13).

(2) If the Registrar was not satisfied that the provisions of the Trade Union Ordinance or any regulation made thereunder or the provisions of the rules or basic constitution of the trade union had been complied with SS.10(b)/(d) (14).

(3) All or any of the trade union objectives were unlawful SS.11(c).

(4) Any other trade union already registered was sufficiently representative of the interest in respect of which the application to register was made S.11(d) (15).

In addition the Registrar could at any time invoke as further conditions for registration any new grounds which he was required, by a regulation made by the Commissioner of Labour, to include as such - SS.32 (16). The Registrar could inspect the rule-books or the basic constitution of the Trade Unions and take any other action in order to ensure compliance with the Law - (SS.19-20 of the TUO, SS.11/17 of the ETUA 1971, 1977).

Persons aggrieved by the Registrar's refusal to register a trade union have always had a right of appeal to a Civil Court (17). However, a trade union which had been notified by the Registrar's refusal to register it should, unless reference was made to the High Court, or, if reference was made but rejected by the High Court, be dissolved within 3 months of such notification or rejection - (SS.15 TUO's 1949, 1960, 1966).

As mentioned earlier registration is an institutionalized control of which lodging and certification of lodging - (i.e. actual or formal "registration") are only a phase. The political nature of registration is used as description of this institutionalized registration with its different phases of "registration" deregistration and supervision of trade union performance. Furthermore "political" is used in this context not as a description of specific situations in which intervention of government authorities was politically motivated. It is rather a description of a type of legislative and administrative framework that allows administrative and political authorities to intervene in the direction of the trade union movement. Although there is no express provision which confers on these authorities general discretionary powers of intervention

(e.g. on grounds of Public or State interest). The wide discretion of these Authorities derive from their possession of both legislative and quasi judicial functions (Cf. supra f.16 and infra fs. 25, 180 and the text above). Furthermore, the fact that legislation gives a right of appeal to the Civil Courts is for the reason shown later - (infra f.47 and the text above) - not necessarily an effective guarantee of trade union and workers rights.

There are few cases from the pre 1969 era in which registration of a trade union was refused on political grounds. Both the 1956-1958 and 1964-1969 Parliamentary Governments however, while stressing registration as a condition for conferment of trade union immunities - (Cf. infra part 1.C.2.b) - told the Sudan Workers Trade Union Federation (SWTUF) to reconsider its basis of organization in order to qualify for registration; a condition which the latter could not possibly meet (18).

The paucity of reported decisions is explicable by two factors. The first is that for the reasons mentioned later - (Cf. infra, the text above fs. 60-60B) - parliamentary governments could not enforce the Law as against the trade unions. Thus the SWTUF, though not registered managed to exist in the period 1956-1958, 1964-1966, and, in consideration for undertaking to co-operate with the government was eventually registered in 1966 without meeting the conditions set for registration (18a). The other reason is that there was no room for registration in the period 1958-1960 because trade unions had been totally outlawed. Although a limited trade union existence was allowed in the period 1960-1964 the formation, registration and activity of trade unions remained supervised directly by the Ministry of Interior and

Labour. The latter did not hesitate however to dissolve trade unions and imprison trade union officials (18b).

1.A.2 Cancellation of Registration

The authority of the Registrar over the trade unions does not end upon the issuing of a Certificate of Registration. Even after registration has been duly effected the trade union's conduct of its internal affairs and performance of its functions remain constantly under supervision of the Registrar. The Registrar must be informed to date of, any alteration of rules or Constitution, every new membership and annual returns and expenditure. Failure to comply with this requirement could render the trade union liable to inter alia dissolution.

Sudanese trade union laws have always empowered the Registrar to cancel the registration of or dissolve any trade union which inter alia voluntarily violates the provisions of a trade union law in force. However the extent of intervention this rule allowed varied in connection with two contingencies. The first is the extent to which areas of industrial relations under a particular political regime was subjected to legal regulation. The second contingency is the strategy which the political regime adopts towards trade unions' performance of their economic functions.

Beginning with the first factor it is noted that although the Commissioner of Labour under Colonial administration was empowered to make regulations for the purpose of generally giving effect to the objects of the Trade Union Ordinance - (S.32 TUO 1949) no such regulations.

which would have otherwise added to the corpus of Law administered by the Registrar, were in fact made. In effect the Registrar's powers of cancellation remained exerciseable only in instances of violations arising under the two main collective Labour Relations Laws namely, the TUO 1949 and the Regulation of Trade Disputes Ordinance 1949 (RTDO 1949) (19). The position of the Law did not change much after Independence until 1971.

Three main factors coincided to make the 1970s and the first half of the 1980s a golden era for legislative intervention in industrial relations. They were as follows:

- 1 - The massive political changes that had taken place on the eve and at the beginning of the 1970s decade necessitated this as part of an overall governmental intervention in all spheres of political and social life in order to maintain the new alignment of power (20).
- 2 - A movement to deradicalize the trade union movement through patronage of its leadership and the placement of its organizations under close supervision and direction of administrative and political authorities.
- 3 - Increased emphasis on economic development and on the role of the State in its direction.

This does not mean that before 1971 the registration function was less politically directed. The above factors however account for new policies (Cf. *infra* the text above fs 61/63) which the 1971-1985 Regime adopted and therefore succeeded in that direction. This distinguished its Labour policy from that of the Parliamentary governments - which relied mainly on superficial legal control (Cf. *infra* text above fs. 60-60A) and also that of the 1958-1964 Military Dictatorship - (which

relied mainly on non-institutionalized repression). As will be shown later - (infra text above f.62) - this also meant that the 1971-1985 era was to be a period during which the Registrar of trade unions and other administrative authorities were to assume hegemonic roles in the administration of trade union laws.

As regards the second factor mentioned above it can be noted that trade union laws of the military governments are characterized by an inclination to place under closer administrative supervision trade unions performance of their economic functions. Because the move to restrict trade unions from acting in fulfilment of these functions began immediately after Independence and has continued consistently it is not so much the degree of restriction as the strategy invoked for putting that restriction into effect which distinguishes trade union law under the Military Governments. To that effect the latter extended the Registrar powers of cancellation and dissolution to cover instances in which the trade union has acted in violation of the statutory procedure prescribed for settlement of industrial disputes (21). Parliamentary Governments although preserved the Registrar's powers of cancellation and dissolution in the instance of political strikes, and adopted compulsory arbitration procedures, opted in the latter instance to make violations punishable, not by dissolution of the trade union or cancellation of its registration, but, with fine against the trade union, and fine and imprisonment against members (22). Tightening of administrative control over trade disputes under the Military Governments was inseparable characteristic of their overall elitist economic planning and political decision-making. Although Parliamentary Governments may have equally been conscious of the importance, at least for their own stability, of economic planning and

performance, the wider and heterogeneous popular base on which decision-making depended in their case made such undertaking impossible.

1.A.2.a Exercise of Discretion for Political Ends

Under all trade union laws the Registrar exercises both the power of determining whether or not there is a cause for dissolution or cancellation and that of passing and enforcing the sentence of dissolution or cancellation. Because it is often the case that situations which call for exercise of these powers by the Registrar are also ones that have wider political implications, determination of the issues surrounding a dispute and the imposition of a punishment may as shown below depend more on the weight of political rather legal policy considerations. In spite of the technical or legal language adopted the Registrar's decision is in such situation an incidental ingredient in a package of political reaction dealt by the political authority. Following a threat to strike by the Sudan Railway Workers Trade Union (SRWTU) in June 1961 for instance, a decision to dissolve the trade union was posed as a counter-threat and subsequently carried out, not by the Registrar, but, by the Minister of Labour. Likewise a Registrar decision dissolving the Accountants and Cashiers Trade Union in 1979 was later described by the Court of Appeal as "devoid of judicial reasoning oblivious to established judicial practices and meant hastily to pre-empt a strike action by the Trade Union" (24).

The Registrar's decisions in less politically sensitive disputes are also influenced by the general labour policy of the State. It is important however to mention that this category of disputes is less

politically sensitive not because it does not disclose the interference of political and administrative authorities into trade union affairs but because that interference takes place within an already established and institutionalized juridico-political framework and raises therefore technical and legal rather than crude political controversies. To explain this I will take as specific example some of the labour policies the defunct 1969-1985 political regime had imposed in Sudan.

The overt interference which that regime attempted, necessitated enactment of an enormous corpus of Law aiming inter alia at the setting of predetermined bases of organization and organizational structures for the trade unions (Cf *infra* Part 1.B). The Employees Trade Unions Acts (ETUA 1971, 1977) the 1972 Trade Union Basis of Organization and Organizational Structure Regulations, and the several Trade Union Elections Regulations (25) enacted by the regime incorporated all aspects of organization and gave the Registrar full power to ensure compliance with these statutory provisions. The Registrar could intervene in disputes between a trade union or federation and their constituent bodies and affiliates or between a trade union or federation on the one hand and an employer (including the State) or employers on the other. In all cases the Registrar possessed the power of ordering and enforcing, sometimes against the wish of the majority of members of a trade union or Federation or even against such members' unanimous will, dissolution of trade unions (26), cancellation of their elections (27) and suspension of the activities of their central committees (28).

The political nature of the Registrar's involvement in this category of disputes is blurred because they are disputes that relate, not to the ever-recurring and externally influenced trade unions' performance of their economic functions, but, rather to the rather relatively stable and predetermined organizational framework of the trade union concerned. Hence, although the Registrar's decisions are formally appealable to the Civil Courts (Cf *infra* Part 1.A.3). In all the cases that were appealed, the Courts could discuss and judge the Registrar's decisions not with reference to a general principle of "Labour Law" but on the basis of their technical accordance with the statutory powers conferred on the Registrar. The width of statutory powers conferred on the Registrar on the one hand and the reluctance of the Courts to challenge the jurisprudential pre-suppositions of these powers on the other left the Courts with a minimal role to play. In consequence the jurisdiction of the Registrar as a tribunal was widened considerably during the 1970's and early 1980's.

The widening of the Registrar's jurisdiction incidentally illuminated many inherent weaknesses in its position as a tribunal. Some of the Registrar's decisions during the 1971-1985 era illustrate the need for a judicial tradition to guide its decision-making and for guarantees to safeguard its independence. Some of these decisions, although made upon similar merits, are reconcilable only in their conformity with the State Labour policy. I will examine only few examples. First, there is a contradiction between the outcome of litigations in cases involving trade unions breaking away from federations and the legal view the Registrar adopts in cases of sectional or subsectional trade unions breaking away from their mother trade unions.

While a trade union breaking away from a Federation is condemned to dissolution, a sectional trade union is, according to the Registrar's view, entitled to break away from its mother trade union and the latter may in such circumstance lose its capacity to act for the profession or trade for which it was initially constituted. However, this vacillation of individualist and collectivist liberal attitudes (29), coincidentally conforms with a State policy that controls the trade union movement, through the strengthening of federations' authority over the members of their affiliate trade unions and the weakening of the organizational integrity of individual trade unions - (Hussein (1983), 160-161, 188).

Although its position as a tribunal presupposes impartiality there are examples in which this was obviously lacking. In all examples cited (below fs 30-31) this was occasioned by pressure exerted by the Government either in its capacity as employer (30) or political authority. In two of the cases cited interference by the Government caused the Registrar to give two contradictory decisions on the issue of constitutional powers of a trade union general assembly. The decision was in each case in favour of the party which the Government wanted to remain in charge of the trade union (31).

The cases discussed above may not constitute a large proportion of the Registrar's work. However my argument that the objectives of registration are political depends less on the weight of evidence these cases provide than on the orientation of trade union law which confers legislative judicial and administrative jurisdictions on the Registrar. Even if the Registrar is immune from all the shortcomings associated with the performance of Labour tribunals in Sudan (Cf. *infra* Part 4.A in

Chapter 5) it will still be instrumental in achieving the objectives of this trade union law which are either political or economic objectives formulated by the political authority. Furthermore the cases discussed are not simply of a descriptive significance. They reflect rather an abuse of authority that is inevitably likely to be associated with the performance of tribunals of this type administering Labour Legislation of the type in Sudan. This is evidenced by examples of similar abuses in other underdeveloped countries with comparable labour legislation (Erstling 1977 pp. 61-67).

1.A.3 Judicial Review of the Registrar's Decisions

I have mentioned earlier that every Statute affecting registration gave a right of appeal against the Registrar's decisions (32). The Colonial and Parliamentary Governments' trade union laws made the decision of the Court to which the Registrar's decision was immediately appealable final and conclusive (33). The Trade Union Ordinance (Amendment) Act passed by General Abboud's Military Dictatorship in 1960 followed suit in preserving the right of appeal against the Registrar's decisions. But by providing that the documents of the Registrar should be considered as "official documents" the Amendment made the information essential for enabling the Court to evaluate the Registrar's decision virtually inaccessible (34). Until 1974 the ETUA 1971 gave unrestricted right of appeal to the High Court against the Registrar's decisions, and, reasserted the finality and conclusiveness of the former's decision (35). Following the transfer of the jurisdiction of reviewing administrative decisions from the High Court and its conferment on Province Courts in 1974, decisions of the Registrar

became automatically appealable to the Province Court. The proviso as to finality of the appellate Court decision applied also inadvertently to decisions of the Province Court even though the latter was a third grade strata in the judicial hierarchy (36). This was an inadvertent procedural irregularity that was to be rectified a year later by the Supreme Court (37).

The ETUA 1977 preserved the right of appeal against the Registrar's decisions provided that the appeal is made to the Court of Appeal within 30 days from the date of the decision (38). However the ETUA 1977 regards the Registrar's decisions, relating to application of its provisions, the provisions of regulations issued under it and the provisions of the basic Constitutions of Labour Organizations, as decisions made by a Province Court SS.25(3). The conferment of this status on the Registrar does not directly restrict the right of appeal against its decisions to the Court of Appeal and thence to the Supreme Court. But, one effect is to make the decisions of the Registrar immediately executable as a Court decision, although that is not necessarily always the case in practice (38a). The conferment was explicitly intended to produce this effect (39). In practice however this judicial status has worked more against the trade unions than in their favour.

Coupled with the Registrar's powers of dissolution this judicial status means that members of a trade union ordered to be dissolved may automatically find themselves guilty of Contempt of Court or of belonging to an unlawful organization in case they fail to promptly comply with the Registrar's decision. The absence on the other hand of similar sanctions which the Registrar may take against an employer or person found guilty of violating a trade union right has meant that grievances of the trade unions and their members although remediable only at the Registrar's hands go largely unredressed (Hussein 1983, pp 196-200). This suggests that despite its depiction as a Province Court and in spite of its recognition as such by the Supreme Court (40) the Registrar of Trade Unions, judging by its mode of appointment and remuneration and its jurisdiction and powers in practice, lacks both the independence and judicial powers of a Civil Court.

Although appointed and remunerated as an ordinary senior civil servant (41), the Registrar exercises wide judicial and legislative jurisdictions. Its jurisdiction, over disputes arising under, or relating to application of the ETUA 1977 and the regulations issued under it, is exclusive of preliminary jurisdiction of ordinary civil Courts, and, amounts in case of regulations, to an adjudication of disputes arising under rules made by the Registrar itself or by the Ministry of Public Service of which the Registrar was until 1981 a subordinate (42).

The Registrar is also a body that cannot in practice enforce its decisions in a definite category of cases falling within its exclusive jurisdiction (43). Even if the Registrar finds for a trade union or a trade union member in a complaint brought by either of them it cannot

thereafter enforce its decision against an obstinate employer except through an application for execution made to an ordinary Court (44). In some cases the Registrar does not even bother to make such an application. Instead it left the trade union to seek enforcement of the decision in vain (45). Even when the Registrar was obliged, by the severity of the violations involved, to institute proceedings on behalf of dismissed trade union officials his efforts failed to reinstate them or even to bring the offending employer to justice (46).

If the question of whether the role the Civil Courts play in Sudan is capable of restraining political and administrative authorities from interfering with the privacy of industrial relations is to be answered partly on the basis of what has so far been said then that answer is bound to be negative. Since administrative authorities have always been given substantive statutory powers of control, the scope of judicial supervision has remained very limited. This is a problem so common as to deserve the attention of the ILO. The Committee of Experts on the Application of Conventions and Recommendations has in this respect pointed out : "when Legislation makes it possible . . . for the authorities . . . to directly or indirectly exercise substantial control . . . the existence of a procedure of appeal to the Courts does not appear to be a sufficient guarantee; in effect this does not alter the nature of the powers conferred on the authorities responsible for effecting registration, and the judges hearing such an appeal . . . would (ordinarily) only be able to ensure that the legislation had been correctly applied" (46a).

However, the Supreme Court in Sudan has always possessed the de jure power of declaring as unconstitutional legislation and by-laws that infringe basic Constitutional rights. The scope of judicial supervision need not therefore necessarily have been limited. In reality this limitation exists but only because of restrictions, on this de jure power, self-imposed by the Supreme Court (46b). The reluctance of the Supreme Court to challenge the constitutional or jurisprudential presuppositions of laws conferring unfettered powers on administrative authorities is occasioned not necessarily by a common interest that unites it with the political leadership - (although this cannot always be ruled out) - but by a pragmatic realization that the Courts cannot force the political authority into accepting anything against its wish (47).

Compared with the position under earlier Statutes the functions which the Registrar is now performing are enormous. The present legislation has in consequence entrenched the position of the Registrar as an industrial tribunal - (although not by securing the impartiality and enforceability of its decisions) - through the addition of the role of administering protective provisions provided for trade unions and their members by the ETUA 1977 and the IRA 1976. But to the extent that this new function, confiscate the trade unions initiative of protecting their own interest through means they deem appropriate, and, oust the preliminary jurisdiction of the Courts over Collective Labour disputes its advantages are, from the trade unions' perspective, doubtful. Hence I conclude that these new functions do not substantially change the role of the Registrar from that of an institution whose primary objective is and has always been the facilitation of political control (47a).

1.B Restriction of the Right to Federate

One of the pillars on which freedom of association stands is the workers' right to establish and join federations and confederations and the right of such federations or confederations to affiliate with international workers organizations (48). Legislation which restricts this right or makes the acquisition of legal personality by organizations subject to conditions of such a character as to restrict this or the freedom of association in general has since 1948 been universally declared unacceptable (49).

From a different perspective however federations and confederations are broadly-based forms of workers organizations that may not rest content with wage-increase bargaining and other industrial functions. The likelihood of political involvement of federations and confederations is even greater in countries where, due to the rudimentary stage of industrialization, the government is employer of the majority of a work force of a non socialist economy (49a).

By examining the history of the development of trade union federations within Sudan, this section seeks to explain the relation between, on the one hand, the social stature and political influence of federal trade union organizations and on the other the legal status that has been conceded to freedom of association in general and to these organizations in particular. The theme of the argument is that, judging by this development, there are resilient political considerations that have made the right to federate always subject to legal restriction. Although the division of the argument followed assumes that forms of restrictions

are affected by political and economic policies of forms of regime (e.g. colonial, military, parliamentary . . .). Yet when viewed within the historical context of the Sudan, forms of restrictions effected by the successive regimes are stages of development of the law corresponding with respective political and social changes. However although the forms of control may vary in connection with the above factors, the fact of control and its effect on the law are sufficiently consistent to support the conclusions summarized at the end of the section.

1.B.1 The Formative Stage

With fears of trade union political involvement in mind the first draft of the 1949 Trade Union Ordinance placed certain restrictions on freedom of association (50). However following workers' protest some of these restrictions were removed only few months after their first introduction. The ambivalence with which the Colonial administration met the assembly of a workers' congress in August 1949 and the reconstitution of that congress a year later into a Sudan Workers Trade Unions Federation (SWTUF), was possibly due to the reluctance of the administration to influence the course of major political events in a country that it was preparing to leave in only a few years time (51). But the "truculent behaviour and militant mood" which the SWTUF exhibited immediately after its formation and throughout the 5 years that preceded Independence proved too much a disruption even for the day-to-day running of the colony (52).

The Colonial administration withheld *de jure* recognition of the Federation and refused to extend the immunities provided for individual trade unions and their members to the Federation and its officials. Since the latter were elected representatives deputed by individual trade unions and the Federation was in this capacity a constitutional assembly of federating unions the withholding of immunities meant that participation by individual trade unions in an action concerted by the Federation could invalidate the protection and immunities otherwise available for a trade union and its members taking individual action (53).

Despite its democratic facade the first nationalist government was less tolerant of the political involvement of the trade unions than its colonial predecessor. In March 1956, only two months after the declaration of Independence the ministerial cabinet of the then Parliamentary regime issued a statement expressing its dissatisfaction with the then existing organizational structure of trade unions and their Federation. The Cabinet recommended the enactment of legislation to provide for the formation of federations of trade unions along industry or establishment bases and the confinement of the rights of association only to federations thus established (54). The legislation proposed by the Cabinet came into effect four months later in July 1956.

However despite the enactment of the legislation and the efforts exerted in its implementation - including *inter alia* establishment of government-sponsored federations (55) - the Government failed to eliminate the influence of the Federation. That failure was possibly a reflection of the limitation of the extent to which a supposedly "liberal pluralist" Government could go in suppressing the freedom of association

before plunging the whole system into crisis. It was the internal contradictions within the system exacerbated by Government repressive labour policy and the reactions of the trade unions which led to a sweeping decline in the popularity of Abdulla Khalil Government and brought the opposition parties to the verge of coalition. To prevent a parliamentary take-over by the opposition parties the ruling party Prime Minister secretly contacted the army and invited the Generals to take over instead - (Beshir 1978, p.207).

Restriction of the freedom of federation initiated by Abdulla Khalil Government was maintained by all nationalist governments that came into power after 1958. Moreover learning from the experience of the Colonial and Abdulla Khalil's Governments subsequent governments realized the futility of attempting to restrict one aspect of organization whilst leaving the other aspects intact. Hence the move subsequent to 1958 of restricting the right to strike and the right to organize at individual unions level as a supplement to the restriction of the right to federate.

Because it is a strategy that has been maintained by all political regimes and therefore central to a perception of a Sudanese Labour Law in general restriction of the right to strike is discussed separately. It suffices to mention here that because strikes in the Sudan were up to 1969 often general strikes staged in a political fashion or with political objectives, restriction of the right to strike was intended to, inter alia make members and leaderships of individual trade unions taking part in a general strike personally responsible for their action and thereby make the prevention of general strikes staged by the Federation more

effective.

1.B.2 Common Characteristics of Restriction Under Military Rule

The further restriction of the right to organize which the maintenance of anti-federation policy necessitated in the post 1958 era has taken two different forms. The first form is one in which the political authority makes the right to organize a privilege only for a special category of employees (56). The second form is revealed where all employees are treated equally with regard to their right to organize but the basis of organization, and organization itself are respectively predetermined by and require prior approval of the political authority. It may of course be the case that the use of the first of these forms of control may involve elements of predetermination and requirement of prior authorization. But they feature there, not as an autonomous approach, but, as means for implementation of that form. Both forms however amount to restrictions of the freedom of employees to establish and join trade unions of their own choice. For this reason they are likely to be opposed, not only by politically orientated trade union leaderships, but, also, by the rank and file. From the experience of the Sudan both forms could operate effectively only as sub-systems of a wider framework of political totalitarianism.

Through employment of these forms of control the Military regimes of 1958-1964 and 1969-1985 succeeded in maintaining relatively tight control over the trade unions for relatively long periods of time. The success in maintaining these forms of control was made possible by antecedent political measures that banned trade unionism for periods of

time that were sufficient to enable the military régime to undertake organization of trade unions on new bases and under new leaderships (57). This is explained below.

From the first days of the Military Coup of November 1958 and for 16 months after that date for instance all trade unions and labour organizations were banned and almost all (41/45) the SWTUF officials were put on trial and jailed (Beshir 1978, pp. 211-12) (57a). The trade union laws that came into effect at the end of the 16 months ban upheld the restriction on the formation of a trade unions federation or federations. SS. 27(3) of the TUO 1960 prohibited any worker from joining any trade union other than that formed by the workers of the establishment in which he is engaged. Likewise any trade union whose members are engaged by one employer was prohibited from uniting federating or otherwise affiliating with any other trade union - Ibid SS.27(4) (58).

These provisions were highly effective in practice. No trade union did actually survive in the period between imposition of the ban in November 1958 and its lifting on 9 February 1960. Likewise trade union federations were resurrected only in August 1963 when the Military Regime felt it was by then secure enough to allow a limited form of federal organization (Taha 1970, p.116).

The present collective Labour Law in the Sudan rests, equally, upon a foundation of coercion that was laid down immediately after July 1971. Following the defeat, in that month, of a Communist putsch, in which the complicity of the trade unions was "most likely possible" (AL

Ahram 13 August 1971) - President Numeri's Regime dissolved all federations and trade unions in the country and announced that the trade union movement would "henceforward be sponsored consolidated guided and controlled by the State - (ARR August 1971, p. 417). The task of putting that announcement into effect was not an easy one. It required for its accomplishment a period of 12 months during which trade unions were practically non-existent. Measures taken by the Regime during this period included purges of all known Communist trade union activists and opponents of the Regime, (Ibid). Some of those dismissed from their jobs in the public and private sectors were further tried and executed or imprisoned (Hussein Ibid 142-145, 155) (58a) for their alleged part in the abortive coup d'etat. It was only after the completion of these expedient measures and the resultant exhaustion of the trade union movement that long-term measures, in the form of a legislative and an administrative framework, were introduced to complete incorporation of the trade unions into the State system.

1.B.3 Restriction Under The Parliamentary Rule

The fact that they did not go to the extent of restricting employees freedom to establish and join individual trade unions of their choice does not however mean that Parliamentary Governments did not otherwise maintain some restrictions on the formation of trade unions federations. The 1966 Parliamentary Government Trade Union Ordinance (TUO 1966) contained many such restrictions. SS.30A(2) of the Ordinance made the legality of trade unions federations conditional upon registration. Moreover no federation was eligible for registration unless the "associating trade unions relate to the same industry or are

composed of employees of the same employer 'SS.30 A.3.a. Ibid. However the harshness of this provision lay in that it was directed against a trade union movement which had by tradition rallied itself behind the leadership of a single federation (the SWTUF). Since the SWTUF could meet neither of the requirements under SS.30.A.(3)a it was deemed automatically outlawed.

But even federations formed in accordance with the provisions of the law remained vulnerable to criminal and civil liabilities arising because of pursuance of a trade dispute. While a trade union taking lawful industrial action was immune against such liabilities the same trade union was not immune in case the action was taken in arrangement with fellow associates of a federation or confederation - TUO 1966 SS.30 D(2). Nevertheless the Government managed to sponsor the establishment along its legislation of three federations, a Public Sector Trade Unions Federation (later the Government Salaried Employees Trade Unions Federation) a Private Sector Trade Union Federation and a Teachers Trade Unions Federation - (Taha, 1970 p.132 et seq.).

The seige on the trade unions federal organization directed by the TUO 1966 was reinforced by further restrictions on the right to strike imposed by the RTDA 1966 S.27.(59). The government was determined to take all necessary measures for making both laws fully operative in practice. Following the opposition of the SWTUF and its affiliates and other trade unions to its labour policies the government followed a policy of either dismissing or transferring to areas outside the capital and the main cities all trade union official and activists involved in organizing the opposition. However, when some trade unions loyal to the SWTUF

declared their intention of launching a general strike protesting against the government policies the latter did not hesitate to use the full weight of the new legislation in response - (Taha, 1970 p.132 et seq, Hussein 1983, pp.92-99). Moreover the Parliamentary Government showed no reluctance in using the Police Force in order to disperse strikers or in allowing Ministers to take the law in their hands and immediately dismiss strikers (60).

As hinted earlier there is a limit on the extent to which anti-democratic measures of the type described may be pursued by a parliamentary government in Sudan without plunging the supposed "system" of parliamentary democracy into crisis. The fact that unlike its military predecessor the 1966 Parliamentary Government had not taken any legislative measures towards restricting employees right to form or join trade unions, or towards the organization of individual trade unions along predetermined bases meant that its task of restricting the trade unions freedom of federation was more difficult and its measures for the performance of that task were inherently superficial. There was nothing the Government could have done, apart perhaps from employing contingent and repressive measures, to prevent otherwise strongly organized trade unions from taking industrial action or forming federations in defiance of the Law (Cf. supra f.18.A and the text above). The escalation of conflict between the Government and the trade unions (Hussein 1983 p.146.f(1)) and the resort by the former to coercive measures were principal factors in the political and constitutional crisis that engulfed the Government and led to the downfall of the "Parliamentary System" only three years after the introduction of the 1966 TUO and RTDA - (Hussein 1983 p.92-99)(60a).

Coercive measures cannot be effectively taken by a parliamentary regime in Sudan because from the political experience of that country parliamentary regimes are able to assume power only in the aftermath of the downfall of a military dictatorship brought about largely by the trade union movement (60b). The social power-potential of the trade unions manifests itself under democratic rule to such an extent that parliamentary governments stay in power only as long as the trade unions are willing to co-operate or at least ready and able to communicate their opposition through democratic channels. Failure of the parliamentary system to allow for the representation of modern political elements of which the trade unions are the most broadly-based and the best organized has worked to radicalize trade union opposition (Hussein 1983. p.6,9)(60c) and hasten the downfall of parliamentary governments thus creating a vicious circle of alternating parliamentary and military rules.

1.B.4 Contemporary Determinants of the Present Structure

• In addition to the requirements of prior authorization, and compliance with a predetermined basis of organization, which the present legislative and administrative framework for Labour shares with its counterpart under General Abboud's Military Regime, the present framework also possesses one principal distinguishing characteristic. Rather than directly restricting freedom of federation as a means for effecting political subordination of the trade unions, as was done under previous regimes, the present framework aims to minimize the political influence of the trade union movement through attempted incorporation of the trade union leadership into the State system. Instead of banning federations or denying them the immunities provided for individual trade

unions the Regime has chosen to allow the fédérations to function securely whilst ensuring that their leadership is resting in hands that are unlikely to lead the trade union movement into confrontation with the declared economic and political policies.

Identification of the reasons behind this change of policy may contribute to a better understanding of the present structure, its institutions and the conditions in which they had functioned to produce their intended results during the last 14 years. The most important reason (61) is that following the downfall of the "Parliamentary System" in 1969 and the assumption of power by a left-wing military dictatorship supported by the working and professional urban classes, a degree of co-operation between the trade unions and the regime became essential for preservation of the new alignment of power. Although the subsequent 1971 political change resulted in the purges of communists and communist-sympathizers from within the allied forces, it did not change the class structure of the alignment. But it undoubtedly facilitated the path for a right-wing dictatorship that emerged from within the alliance which in turn sponsored and promoted a moderate and docile trade union leadership. The role which the legislative and administrative framework for Labour played in furthering these objectives and the extent to which the policy of integration worked in practice are explained below.

The main pillars of the present framework were installed in 1971 and include the following :

- a) - An office of a Registrar of Trade Unions with the tasks of, conducting and supervising trade unions elections, thereafter, supervising trade unions performance of their economic functions, and, administering trade union laws and regulations.
- b) - A Corpus of newly enacted laws and regulations that, specify and also give the Registrar the power of making further specification of bases of organization, and, the particular sectors industries or professions in which trade unions and federations could be formed, and, confer on the Registrar the power of determining the numbers, types and internal organizational structures of such trade unions and federations and the description of persons eligible for their membership (62).
- c) - A Department of Labour with the responsibility of inter alia settling employers - trade unions disputes, if necessary, through compulsory negotiation mediation or arbitration (63).

From its inception the legislative and administrative framework for Labour possessed certain internal characteristics and operated in political surroundings that helped the Regime to pursue its policy of integrating the trade unions leadership with a degree of success. Beginning with the political factors, the repression of communists and trade union and political activists within the Labour movement that followed the July 1971 putsch and continued sporadically throughout the 1970s and early 1980s consolidated the position of a new breed of union leadership sympathetic with the Regime. The wider political totalitarianism which characterized the Regime's reign enabled the political police to monitor the conduct of trade unions elections and trade unions day-to-day running of their internal affairs (64) and, to bar the nomination or election of, or to arrest and detain endlessly without

judicial warrant or trial, any person whom they considered a threat to State security (65).

Turning to the internal characteristics of the framework there are two main such characteristics. The first is that Trade Unions' organizational structure is designed and interpreted in such a manner as simultaneously to weaken the central authority of individual trade unions over their members and strengthen that of Federations over the executives of the individual trade unions (66). The second is that the administrative system of dispute resolution provided by the Law, although measured to give effect only to individual and collective demands that are sustainable by the wider economic and political system, has worked to prevent an accumulation of unremedied grievances that may have otherwise hastened the cracking of the legal and administrative framework.

The extent to which General Numeiri's Regime succeeded in integrating the trade union leadership into the political establishment is perhaps evidenced by development in recent years when some federations became exponents of the Regime's labour policy praising the method of administrative containment of industrial disputes and on few occasions directing the Registrar of trade unions to dissolve some of their affiliate trade unions because the latter had failed to abide by the ban on strikes (67).

But there is a difference between incorporation of a trade union movement based on a provision of trade unions members with an interest in the economic and political establishment and an integration of a trade

unions leadership into the political system brought about by a catalogue of manipulative and corrupting practices (Hussein 1983 p.227)(67a). The latter, which is typical of the Sudanese experience under General Numeiri's Regime, is a latent control that depends not always on bringing the power of the State and Law to bear externally on the trade unions but on gaining a footing within the trade union movement and using it to effect control from within. From the Regime's perspective this method also had a propaganda value in that the Regime, while it was doing in clandestine all that was necessary for consolidating its grip on the movement, retained a deceptive legislative facade.

The preceding analysis posits a conclusion that, in spite of the apparent benevolent stance the present legislation has adopted vis-a-vis the formation of federations and the enjoyment, for the first time, by these federations of immunities and privileges previously confined for individual trade unions, the right to form federations and confederations of trade unions is still in reality restricted. The only difference is that the restriction is now, not on the right of a federation to exist or be protected, but, on the ability of such federation or federations to become truly representative of the interests and wishes of their rank and file. Trade union discontent with the federations' leadership began as early as 1980 (68) and culminated in the formation, by rebellious individual trade unions, of a united front of trade unions and associations which later, in April 1985, organized and carried out the general strike that brought General Numeri's Regime to an end (69).

The front has now reconstituted itself into a Trade Union Congress calling for the liquidation of the leadership of the federations inherited from the deposed regime.

Summary

The conclusion to be drawn from this part of the chapter is that there are overriding political considerations which necessitated imposition of certain restrictions on freedom of organization. This happened at the expense of development of appropriate institutions of industrial relations. In a country where the terms and conditions of employment of the majority of the workforce are determined centrally by the government and where employing government units, departments or plants have no autonomous status to deal with employees' trade unions demands, federations and other central organizations become the ideal bodies which could practically negotiate with employers. The centricity of planning affects also all employees in the private sector as far as terms and conditions of employment are concerned and a large section of these employees in respect of all terms and conditions of their employment (70).

It is important however to emphasise that the qualification of political considerations as overriding is not a value-judgment but a conclusion arrived at in the belief that these considerations have within the last 30 years empirically proved their superiority. The emphasis on political phenomena should not also however be taken as meaning that the configuration of these phenomena is not in turn conditioned by structures (e.g. economic and social . . .) beneath the political layer.

I believe that the "economic" the "political" and the "legal" are three hierarchical levels or layers among other numerous intervening levels of socialization (71) that together constitute the social totality (i.e. the given society or social formation). From the practical experience of the Sudan I am also inclined to believe that the impact which the "economic" may have on the "legal" (e.g. labour relations law) is always mediated through - inter alia - the "political". The under-development of capitalist socio-economic structures (i.e. capitalist classes and their organizations whether political parties or trade unions) while a reflection of the vastly "non-capitalist" social formation does in turn allow force and coercion (which are always at the disposal of an over-developed and potentially autonomous State) to play major roles in shaping society from above.

In the field of industrial relations this means that the State could decree trade unions out of, or allow them only a limited, existence. In both cases rules of "Labour Relations Law" enacted by such State may prove a far cry from rules of Labour Law created and administered through mutual interaction of inevitably socially existing organizations of workers and employers in a developed capitalist society. In contrast to the latter, labour organizations in the Sudan are themselves creatures and subjects of the law. This has been demonstrated by the discussion of the forms of restriction of the right to organize in general and to federate in particular. This condition of existence of labour organizations affect also the status of the individual employment relationship. The latter is extensively regulated in such a manner as to make the existence of labour organizations either redundant or ineffective. The respect which law pays to the autonomy of labour

organizations and that of the individual employment (72) relationship also reflects on the objectivity of the legal form (i.e. the extent of development of an ideology of law). From this perspective the rules of the Sudanese labour relations law so far discussed possess little more than the formal existence and are solely judged by their accordance or inaccordance with declared technical requirements of rule-making and legal administration.

1.C. Restriction of the Right to Strike

In Sudan, strikes were, up to the enactment of the TUO and RTDO in 1949, unequivocally prohibited. Section 143 of the 1925 (73) Penal Code made it a criminal offence for any public servant who "wrongfully abandons his duties in pre-arranged agreement with two or more other public servants if . . . the effect of such abandonment is to interfere with the performance of a public service to an extent that will cause injury or damage or grave inconvenience to the community" (74). However apart from the general sections of the Code dealing with criminal conspiracy (S.94), public nuisance and obstruction (S.216) and requirement of notice in case of employees engaged in work connected with public health or safety or with services of public utility (S.228) there was no specific restriction on employees in private employment to strike. But far from being product of a State policy absence of specific restrictions on employees in the private sector was rather due to that the number and power of employees in that sector of the day were too limited to come within contemplation of the legislature (75).

In practice criminal punishment was invoked 'every time workers went on strike (76). This line of policy continued up to the beginning of 1948 when the colonial administration, for the first time, decided - partly it was understood on the advice of the British Government (Fawzi 1957 p.74) - not to press criminal charges against the members and leadership of the Railway Workers Affairs Association - now the SRWTU) - who had gone on a two-day national strike between the 26-28 January 1948. The same policy was followed regarding a three week general strike declared and carried out by the WAA only two months after the date its first strike ended (77).

This change of policy on the part of the colonial administration was accompanied by efforts towards introducing a legal framework within which a form of trade unions could function. An expert from the British Ministry of Labour and National Service of the day (Fawzi 1957 p.79) was seconded to Sudan for this purpose. By April 1948 a corpus of labour legislation had been drafted most of which became law by early 1949.

1.C.1 Trade Union "Immunities" and the Right to Strike.

The RTDO and the TUO 1949 provided a bulwark of "immunities" that paved the way for the de facto and de jure existence of trade unions (78). The choice of both Ordinances to give a legal status to trade unions by way of immunity from the general law - (although strictly speaking there was no such anti union common law apart from a few sections in the 1925 penal code which anyway remained effective even after introduction of the 1949 Labour Ordinances) - is explicable

only in the light of the fact that the relevant sections of both Ordinances were verbatim re-enactment of some of the sections under the British, Trade Union Act 1906 and Conspiracy and Protection of Property Act 1875. Both British Acts give the trade union a legal status by way of "immunity" from the judge-made doctrines (Wedderburn, 1971 p.314).

The protection provided under the RTDO 1949 included immunity from liability for simple, criminal and civil conspiracy Ibid SS.4(1)-(2) (79), immunity from actions for inducing breach of contract or interfering with the trade, business or employment of some other person (Ibid S.6) (80), and immunity from actions of tort SS.3-(1). In all cases, in order to be immune, an act must be done "in contemplation or furtherance of a trade dispute" (81).

It is important to note however that none of these provisions affected a conspiracy that is "not a simple conspiracy" - (i.e. a conspiracy to do an act which, if done by one person would still be punishable as a crime".

The scope of protection afforded is best examined if the relevant sections of the Penal Code and the trade union laws are read together. It becomes clear upon examination however that although they conferred a civil status of existence on the trade unions the trade union laws stopped short of providing for a positive right to strike. This is explained below.

Section 5 of the RTDO 1949 stated that the immunity provided by the RTDO and the TUO 1949 should not be construed as exempting from disciplinary measures or civil or criminal liability any permanent servant of the government who breaks his contract of service in contemplation or furtherance of a trade dispute. One effect of this section is that S.143 of the Penal Code (82), which is an embodiment of a "simple" criminal conspiracy doctrine made specifically for deterrence of strikes by public sector employees remained intact. Although S.143 of the Penal Code speaks about "wrongful" abandonment of duty, wrongfulness is not confined to "criminal" abandonment of duty. Section 17 of the Penal Code defines wrongful as "unlawful", an umbrella description which may cover abandonment of duty in breach of a contract of service. This interpretation is moreover consonant with the wording of S.5 of the RTDO 1949 which uses the phrase "breaks his contract of service". To recapitulate, notwithstanding any immunity provided for under Trade Union and Industrial Relations Law, S.143 of the Penal Code makes pre-arranged abandonment of duty by three or more public servants in breach of their contract of service an offence punishable with imprisonment and/or fine.

Taking into account the absence of any procedural collective agreements that regulate strike action in the public sector in Sudan and the fact that strike action could, at Common Law, in differing circumstances be a breach, or in case notice is given, an anticipatory breach of the contract of service (83), S.143 of the Penal Code could be interpreted as effecting a complete ban on strikes in the public sector.

The confinement of immunity from prosecution or civil action to instances of simple conspiracy meant also that the provisions of the Penal Code regarding the liability of persons involved in certain types of strikes are still applicable. Every employee, engaged in any work connected with the public health or safety or with any service of public utility, who ceases from such work in pre-arranged agreement with 2 or more other such employees without giving his employer 15 days notice of his intention so to do faces criminal punishment (PC, S.228) (84). Likewise strikers may become liable for criminal conviction if their conduct amounts to a public obstruction or nuisance (PC, S.216) intimidation (PC, S.438 and RTDO, 1949 S.7) sedition (PC, S.105) or an offence against the public tranquility (PC, SS.115-120).

The proviso that the action in order to be protected must be taken in contemplation or furtherance of a trade dispute excludes political strikes from protection. In fact SS.27(2) of the TUO 1949 prohibited every trade union which included persons in the public services from federating affiliating or otherwise taking joint action in furtherance of its constitutional objectives with any political organization. The 1966 TUO preserved SS.27(2) and added a new section whereunder federations and confederations of trade unions were prohibited from involving themselves in politics (SS.30 "d" TUO 1966). Strikes which are political, either, because of the political nature of their objectives, or because of the fashion in which they are staged could also fall within the net of sections of the Penal Code dealing with sedition, offences against public tranquility or intimidation.

Throughout the years following enactment of the trade union and labour relations laws and up to Independence the criminal law was rarely invoked against individual trade unions taking genuine industrial action. However as against general strikes organized by the SWTUF the government stance was strict. But even in this case criminal law was invoked only against the SWTUF leadership. One such example of strictness occurred in 1952. Following an abortive attempt by the SWTUF to mobilize a general strike in April of that year no less than 17 members of the Executive Committee of the Federation were charged, with abetting a strike of public employees without 15 days notice under SS.82/228 of the Penal Code, and eleven of them severally sentenced to two years imprisonment (85).

The provisions of the law considered above as effecting a complete ban on strikes in the public sector have not themselves been changed, although new provisions enforcing the ban have been added in subsequent years. The ban has wide implications for labour relations in general because the public sector employees have always constituted more than 50% of the workforce employed in the modern sector of the economy, and the public employees' trade unions are always in the lead of the trade union movement in general (Cf *infra* Chapter V part 1.A).

1.C.2 New Forms of Restrictions in the Post-Colonial Era

The statutory protection provided by the TUO 1949 and the RTDA 1949 was never consolidated or strengthened by subsequent legislation in the post-Independence era. On the contrary the political involvement of the trade unions which became more overt in this era (85a) attracted

more legislative and administrative intervention and less protection. Erosion of the right to strike has, under various nationalist political regimes, been effected through one or more of three definite methods. These methods are discussed below as: (a) increase of punitive provisions; (b) suspension of trade union immunity; and (c) direct restriction of strike action.

1.C.2.a Increase of Punitive Provisions

Increase of punitive provisions - (i.e. whether creating new criminal liabilities or providing extra criminal sanctions) - and their invocation against the trade unions' members are strategies of opposition that have been adopted by all forms of governments in the Sudan (85b). However the rather excessive use and more frequent invocation of criminal provisions by the Military Governments are due to the latter's elitist policies referred to earlier (85c). Both aspects came to surface in extreme forms in the period 1969-1985 because of massive political changes that marked the beginning of this period and also because of constraints which the social and economic consequences of the implementation of development planning placed on the economy towards the end of the period (85d).

Political regimes have consistently preserved S.143 and the other provisions of the 1925 Penal Code discussed earlier. This is in spite of the fact that the Penal Code has in general been subject to various changes since Independence. Some political regimes have moreover reinforced the existing punitive provisions either by adding new sections under the Penal Code or the Trade Union and Industrial Relations Laws,

or by enacting separate state security laws to the same effect. As example of the latter Republican Order No.2 of November 1958 dissolved all trade unions and federations and banned strikes. Violation of the ban on strikes was triable - by a Court Martial - under provisions of the Penal Code dealing with offences against the State and public tranquility (PC, SS.115-127). The November ban on strikes was lifted in February 1960 only to be substituted by restrictive trade union and labour relations laws. The TUO 1960 made all violations of its provisions punishable as criminal offences and provided stiffer sentences for violations (86) which had already been listed as offences under the previous Ordinance. The RTDA 1966 and the TUO 1966 cancelled most of the severe sentences (87) imposed by the 1960 legislation. However the RTDA 1966 preserved both the restriction on strike action and the criminal punishment provided against violation of the restriction (RDA, 1966 SS.27-28).

On the same line, following the military coup of the 25th May 1969, Article 5"d" of the Republican Order No.II issued on the same day (88) made it an offence triable by Court Martial and punishable with death or imprisonment for " . . . any person to go on strike or do any act with intent to cause damage or sabotage to the economic system of the State". The scope of this prohibition was subsequently widened to include "all forms of work-stoppages refusal to work and mass resignation, with or without intention to damage or sabotage the economy or interfere with the performance of any general service . . . if such strikes work-stoppages or resignation would in fact have such results" (89). This ban on strikes remained until November 1970 when trade unions were once more allowed to function under a new

consolidated labour code. However following the suspension of the 1970 Consolidated Labour Code (CLC 1970) in February 1971 and political events that took place in July 1971 (90) a ban on both trade unions and strikes was reinstated on the first of August 1971.

The trade union and industrial relations laws that came into effect after July 1971 contained certain restrictions on strikes (91). Most important was the incorporation into legislation that was to remain in effect until 1985 of the 1969 and 1970 Republican Orders' prohibition of strikes. Sections 17 of the State Security Act 1973 and the State Security Act 1981 (92) - (SSA 1973, 1981) - were verbatim re-enactment of the relevant articles of the Republican Orders No.II and No.IV respectively. Following the enactment of a new Penal Code in 1983 a section 98 "C" of the new code now incorporates a consolidated re-enactment of SS.17 of the SSA 1973, 1981. The new section provides for the death penalty against or imprisonment and confiscation of property of any person who instigates, organizes, participates or encourages participation in an unlawful strike, work-stoppage or mass resignation with the purpose of opposing the legitimate political authority or harming the national economy or obstructing the running of a public service or utility. SS. 98(b) of the PC, 1983 poses the same penalties for "any person who does any act which is intended or is likely to harm the National economy". The Code also widened the scope of sedition so that it may now cover instances of continuation with a strike or other activity after it has been declared unlawful by a government authority (93).

1.C.2.b Suspension of the Trade Union Immunity

This was one of the various anti-union measures which General Abboud's Regime adopted in the period between 1958 and 1964. The trade unions and industrial relations laws that came into effect following the lifting of a 15 months ban on strikes and trade unions in February 1960, contained none of the immunities trade unions had enjoyed under the TUO 1949 and the RTDO 1949. Section 3 of the TUO (Amendment) Act 1960 repealed S.5 (94) of the TUO 1949 thereby making trade unions unlawful as in restraint of trade, and together with their members liable to prosecution for simple conspiracy. Likewise the RTDO 1949 was repealed (95) and none of its provisions relating to immunity from tortious liability (SS.3(1)), immunity from civil and criminal conspiracy (S.4), or immunity from liability for inducing a breach of contract (S.6) was included in its replacement, the TDA 1960. From its part however the TDA provided no alternative form of protection.

1.C.2.c Direct Restriction of Strikes

While inadequate legal protection of the right to strike was, during the colonial era, the only obstacle that hindered the full enjoyment of that right by the trade unions, an additional obstacle was to be encountered in the post-independence era. This was the determination of various nationalist governments to place direct and positive restriction on the strike action. Although political regimes unanimously believed in the need for restriction, the manner in which each one of them sought to implement the policy differed giving rise in the case of some of them to a third method of excluding the right to

strike. Instead of abolishing trade union immunities altogether both the Parliamentary Government of 1964-1969, and its successor General Numeiri's Regime chose to spare these immunities but make them redundant through introduction of compulsory procedures for disputes settlement. The abolition of trade union immunities by General Abboud's Regime did not however prevent that regime from also adopting compulsory procedures for dispute resolution as principal policy.

I argue that operation of a compulsory procedure for dispute resolution of the type that has been in existence since 1960 in Sudan does in practice effect an almost complete prohibition (96) of strikes. The adoption by General Abboud's Regime of the additional measure of abolition of trade union immunities, albeit in theory makes that regime's labour laws the most stringent in the country's legislative history, did not in practice produce any results which were not achievable through the method of compulsory settlement alone.

There are two reasons which make provision of a compulsory dispute settlement procedure by itself effective a restriction. The first reason is that under both the 1966 and 1976/77 laws (97), striking in violation of the procedure makes the trade union and each of its members liable for criminal punishment. Although both laws provide for immunity of trade unions from tortious liability, criminal responsibility and actions for inducing breach of contract (98), the immunity does not cover actions that are unlawful under the Trade Union and Industrial Relations Laws or those punishable as crimes, under the Penal Code, if committed by individuals (99). The second reason is that it is almost impossible under both laws to take strike action without violating either

the statutory dispute settlement procedure or the criminal law (100). So far the only case in which strike action was held to be legal was one where the Commissioner of Labour and the Minister of Public Service had, by failing to refer the dispute to compulsory arbitration within the period specified under the law, themselves acted against the law (101).

In practice however the decision of the Supreme Court in the case cited above brings little relief. This is because the bulk of industrial disputes is dealt with, not by the Civil Courts, but, by the Commissioner of Labour and the Minister responsible for the public service either by themselves or through reference of these disputes to arbitration (102). Moreover the measures which the Minister, the Commissioner and other administrative authorities are empowered to take, in furthering a "settlement" of disputes, often inflict damage that is difficult to repair even if an appeal against the administrative decision is allowed (103).

There is evidence to suggest that strikes have been outlawed by the Commissioner, the Minister and other administrative authorities, even when they were caused by the failure of these authorities to compel employers to engage in negotiation, mediation or arbitration procedures for the settlement of the dispute within the statutory schedule. In one case the Labour Commissioner declared a strike illegal even though the employer and the Commissioner were to blame for the delay in negotiation and reference of the dispute to mediation (104). In a second case a strike was declared illegal and the management was directed to take measures against the strikers even though it was the employer and the Commissioner who were to blame for the delay in the commencement of negotiation (105). In a third case a strike was

declared illegal even though it was a result of management refusal to negotiate, accept reference to arbitration or abide by the compulsory arbitration award (106).

Together with the already existing restrictions on strike action in the public sector these additional forms of restriction in the post-independence era have effected a complete formal abrogation of the right to strike in general. Although some forms of restriction applied only under military rule the direct restriction on strikes has always remained in effect. Furthermore, the lifting of certain forms of restriction by Parliamentary Governments was practically insignificant also because, of the 30 years of Independence since 1956 these Governments reigned for a total of only 8 years - (compared with a total of 22 years of military rule).

1.C.3 Enforcement of the Laws Against Strikes

Every nationalist government stood firmly by the letter of its law on strikes. Whether or not the legal prohibition and government's stance towards its implementation did actually eliminate strikes is a different question that will be dealt with later (107). The discussion in this section is confined to the methods of forceful resistance and reprisals that the State and employers use against workers and trade unions taking strike action which the former regard as unlawful. I consider this subject relevant to the main theme of the Chapter because the extent to which the State and employers are in practice ready to go in counteracting strike action is also relevant in assessing the pre-eminence of political - (i.e. extra-industrial or extra-legal) -

considerations.

Beginning with the State sector it is noted that the Minister responsible for the public service does not usually wait for the Commissioner of Labour or the Registrar of trade unions to declare the strike illegal in order for him - (the Minister) - to take action. Since both the Registrar of trade unions and the Commissioner of Labour were until 1981 subordinate to the Minister responsible for the public service it was the Minister who could direct them to act or approve their action in specific situations. Moreover even when expressing genuine industrial grievances strikes in the public sector are cause for political alarm and intervention of the highest political authority - (be it a President of a republic, a Ministerial Cabinet or Military Council). e.g. In June 1960 a decision by the SRWTU to strike over a wage-increase demand prompted the dissolution of the trade union by order of the Minister of Labour. When the SRWTU nevertheless staged the strike - (El Shiekh 1967, pp.18-20) - the Minister reacted by ordering the arrest of the trade union officials. Three of those arrested were tried and sentenced to imprisonment for "their failure to observe the compulsory dispute resolution procedure". All other members of the trade union executive were dismissed and all workers of the Sudan Railways who participated in the strike faced disciplinary action (Taha 1970 p.113).

The Parliamentary Government that reigned between 1964-1969 was equally determined to ensure compliance with its trade union and industrial relations laws. When the SRWTU threatened to strike in disregard of the statutory settlement procedure the Minister of Transport personally dismissed 43 workers and officials members of the union (108).

Similar measures were adopted, a few months later by the same Minister against the Mechanical Transport Workers Union and 2 years later by the Ministerial Cabinet against the Central Electricity and Water Authority Workers' Trade Union (109).

Similar events continued to dominate the scene of industrial relations in Sudan during the late 1970s and early 1980s. A conciliatory approach to a rail strike in 1979 by the then Vice-President Abul-Gasim M Ibrahim resulted in his sacking from office and necessitated the blockage of the deal by announcement of a wage freeze that was to subsist until 1981 (110). When, in June 1981, the SRWTU again went on strike over wage-increase demands, the President of the Republic condemned the strike as illegal and issued an ultimatum to the workers warning them to return to work immediately or otherwise evacuate government houses with their families. Two days later the Police were given the orders to raid the railway headquarters and to break the strike by force. 86 of the strike leaders were arrested and a few of them including all members of the Central Committee of the SRWTU were prosecuted under the State Security Act (111).

The determination of political authorities to combat strikes was exhibited once more during a strike by the Medical Doctors' Trade Union in March/April 1984. Although the strike was largely over improvement of working conditions demands (8 out of 15 demands related to improvement in the hygiene and general health standards of the service, the rest to payment increase demands) the political authority recommended dissolution of the Union. The Trade Union was accordingly dissolved on 1 April 1984 for its alleged violations of the

State Security Act 1981, the Penal Code 1983, the Industrial Relations Act 1976 and the Public Service Act 1973. On 2 April 1984 the Doctors were given 72 hours warning to return to work. On the same day the security forces were directed by the President to take the necessary measures for identification and detention of those responsible for organizing the strike. A few members of the trade union including all its officials were accordingly arrested and detained without trial (112).

A trade union which goes on strike in violation of the statutory procedures for disputes resolution or in disregard of any order or directive made by the Commissioner of Labour in exercise of his powers under these procedures will also face a penalty of dissolution inflictible by the Registrar of Trade Unions in accordance with his powers under S.31 of the ETUA 1977. In exercise of their powers under the Trade Union and Industrial Relations Laws the Commissioner of Labour referred many disputes to the Registrar and the latter did actually dissolve several trade unions. Trade unions dissolved on ground of alleged failure of compliance with the provisions of the law included the Accountants and Cashiers Trade Union, the Medical Doctors' Trade Union, the Sudan Railway Workers' Union, and the Customs and Excise Officers' Trade Union (113). On one occasion following a strike by the Teachers' Trade Union in the aftermath of employer's repeated failure to fulfill his obligation under a subsisting collective agreement the strike was declared unlawful and the Trade Union dissolved and its property seized (114). Because the dispute occurred in the Southern Region these measures were taken not by the Registrar but by a provincial governor in that Region (115).

In addition to a freeze of the trade union fund which would automatically ensue upon dissolution, such dissolution will also make all strikers severally and jointly liable as accomplices or participants in an unlawful association and in the waging of an action that is not immune by the Trade Union and Industrial Relations Laws. These are offences serious enough to warrant arrest trial and sentencing under the section of the Penal Code dealing with Sedition (S.105) and breach of Public Tranquility - (SS.115-120).

Turning to the position in the private sector it is noted that the measures which employers can personally take against strikers are confined to a) dismissal or disciplining of individual employees; and (b) prosecution of all or any of the trade union members or of employees on strike under the punitive provision of the IRA 1976 S.31 (116). The Commissioner of Labour may also report to the Registrar, any private sector trade union which fails to comply with the provisions of the IRA 1976 regarding compulsory settlement of disputes procedure, and the Registrar may, if he thinks fit, order dissolution of such trade union. Partly because of the relative inability of private employers to influence the Registrar's decision there has so far been no incident of dissolution of a trade union in this sector.

Leaving dismissal and discipline aside for the moment, once a strike is declared illegal by the Commissioner, or the employer decides that the strike is illegal the latter may immediately prosecute all or any of the workers or trade union members on strike. Following a two day strike by the Company's workers' trade union on 16 and 17 August 1980 the management of Hilton (Sudan) brought criminal proceedings, under

SS.29/31 of the IRA 1976, against and, suspended from duty, 11 of its workers, 8 of whom were members of the trade union executive. Although their innocence was confirmed a year later by the Supreme Court all eleven workers were never reinstated (117).

In some cases however following the lodging of information regarding the strike to the Police or the State Security Department - (these were two different bodies then) - the strike organizers were arrested and detained without trial (118). Many trade unionists detained in this fashion spent more than a year in jail and in two cases the detention continued for more than five years (119). In another case the Company's workers went on strike because of the former's decision to postpone the payment of salaries. The Management reacted by announcing the closure of the plant and the lay-off of the entire workforce apparently in violation of the IRA 1976 S.29. Nevertheless the Company's call for intervention of the Police and the security forces was responded to immediately with the forces arriving on the (120) scene and driving the workers out of the Company's premises. Although the Labour Office blamed the employer for causing the trouble the latter was adamant that the strike was illegal and that he was not bound to pay any wages for any of the strike days.

The countermeasures most commonly adopted by private employers are dismissals and the lock out of employees on strike. The employer may with or without the permission of the Commissioner of Labour and irrespective of whether the strike is, from the Commissioner's perspective, legal or illegal dismiss all or any of his employees on strike. If the strike is unlawful - e.g. because it violates

the statutory provisions regarding compulsory settlement of disputes or any order made under these provisions - the employer may apply to the Commissioner for dismissal of all or any of the employees on strike on the ground of wilful disobedience or deliberate omission to carry their obligations under the contract of employment (121). In one case the Commissioner approved the dismissal, under SS.10(5)a of the 1973 Employer and Employed Persons Ordinance (EEPO 1973), of eight employees including the President, Secretary and Treasurer of the trade union even though the dismissals had been made by the employer without prior consultation with the Commissioner and before the industrial action - subsequently taken by their union in protest against the employer's behaviour - which the Commissioner invoked as ground for his approval of the dismissals (122).

Although since 1969 individual employment law requires the prior approval of the Commissioner before an employee is dismissed on any of the grounds aforementioned, and, in spite of the weight of judicial authorities (123) in favour of a view that failure to do so will, irrespective of the grounds contended render dismissal unlawful, there is more evidence to suggest that the Commissioner does not in practice adhere to the letter of the law - at least in cases where the latent reason for dismissal is a strike which he deems unlawful. Following a slow-down by the workers of the Sudan Textile Factory in 1974 for instance the management reacted by immediately dismissing 800 workers. However the Commissioner of Labour condemned the dismissals, but, instead of declaring all of them unlawful, as against the requirement of prior reference of the dispute to the Commission, ratified the employer's decision to dismiss in 212 out of the 800 original cases (124). In another

case the employer's immediate dismissal of four workers did not even attract a comment from the Commissioner nor prevent him from approving dismissal by the same employer of a fifth worker for his participation in the same industrial action that led to the arbitrary dismissal of his colleagues (125). The Metal Sheet Co. Case - (Ibid f.122) - also shows the Commissioner's readiness to declare a strike illegal even when it is sparked by employers' violation of the law (126).

If the Commissioner decides that the strike is not unlawful there is still little which can be done to stop an employer from dismissing all or any of his employees on strike under the sections of individual employment law aforementioned - (supra f.121). Although the Commissioner does in practice exert considerable efforts in counteracting employers' reprisals in cases where the dispute is caused by their intransigence to negotiate over genuine and obvious grievances, its success to that effect is ultimately limited by the Labour Laws in force. This subject is discussed under the next section (127).

Turning to lock-outs it is noted that employers are prohibited by law from adopting this or any similar measure at or between any of the stages of the compulsory disputes settlement procedure that has been in effect since 1960 (128). Despite the prohibition however there has been many instances of lockouts in none of which the Commissioner took the course of action prescribed by the law (129). One reason for this may be that, while they may effectively be applied against some trade union members and officials, the long imprisonment sentences provided by the law against violations of its rules governing compulsory settlement of disputes are practically inapplicable as against an employer whose

presence on the premises or plant is in any way essential for the resumption of work. Another reason is that because strikes are scarcely ever lawful a lockout by an employer is always treated as consequential upon a series of strikes or other actions for whose initiation the trade unions and their members are, in any case, held responsible (130).

Finally, the theme of the discussion in this section has been that legislative restriction on strike action, not only exists on paper but is also fully implemented in practice. I am not claiming that legislative restrictions and their implementation have eliminated strikes. What is certain however is that the legislative policy in Sudan has so far remained impervious to the possible practical limitations and negative consequences - (for industrial relations, the economy and the law itself) - of invoking the criminal law or dissolving trade unions as means for maintaining industrial peace (130a).

The restriction of collective action also means that the position of the inherently weaker party - (i.e. the worker) - is made even worse. This is especially true because the prohibition of industrial action, although in form equally applicable to lockouts and strikes, is not in practice as equally effective against employers as against the trade unions and their members (130b). As explained in the next section the law also does not provide any effective protection for trade union members and officials. It is ultimately the individual employee in its capacity as a trade union member or official which bears the effect of this combination of restriction and lack of adequate individual protection.

1.C.4 Weaknesses of the Individual Legal Basis of the "Right" to Strike

The discussion has centred under the previous section on the de jure and de facto positions of strikes that are considered as unlawful by the Commissioner of Labour. The discussion under this section examines the positions of individual employees and trade unions taking part in a strike or industrial action that is deemed as not unlawful by the Commissioner. My investigation of relevant issues is specifically guided by the question of vulnerability or invulnerability of such employees, to dismissal and other forms of discipline taken under the individual employment relations laws, and in case a vulnerability is proven, whether such vulnerability undermines or is otherwise offset by the immunities provided under the trade union and industrial relations laws.

The discussion under the preceding sub-sections of this Part 1.C. suggests that all strikes are, under the trade union and industrial relations laws and Penal Codes, formally unlawful. However the decision of the Commissioner of Labour regarding the lawfulness or unlawfulness of a strike always depends inter alia on the Commissioner's subjective interpretation and application of the laws governing strikes. The strikes implicated under the present subsection were ones which the Commissioner applying its own discretion and subjective understanding of the law considered as "lawful" - (even though as a matter of law this could not be true). My intention is not to evaluate the Commissioner's judicial performance. It is rather to demonstrate that even if the Commissioner judging by his own understanding of the trade union and industrial relations laws decides that the strike is "lawful" he is powerless to stop an employer from taking retaliatory measures against

employees taking part in this so-called "lawful" strike.

The materials to be considered in the course of the discussion comprise, provisions scattered under several labour laws the most important of which is the individual employment relations law in both the private and the public sectors, and decisions of administrative authorities and the civil courts in specific cases. Before moving to examine these issues and materials it would be helpful to explain two things namely (a) the reason for including a discussion of this nature - (i.e. touching overwhelmingly on individual employment relations law) - in this particular chapter, and (b) the relevance of the discussion to the main theme of the thesis.

Employers' powers of dismissal are in general regulated by individual employment law. Individual employment law is in turn administered by, the Commissioner of Labour and the ordinary civil courts, in case of the private sector, and the Public Service Appeals Board (131) in case of the public sector. The dismissals discussed under this section were all carried out for allegedly anti-union objectives. Cases of this type are, exempted from the jurisdiction of the above-mentioned bodies, and, adjudicated upon exclusively by the Registrar of trade unions. Hence their discussion under a chapter dealing primarily with collective labour relations law.

I have indicated at the beginning of the Chapter (132) that judicial recognition of a right to strike is most effective when or where strikes have become socially inevitable. The limited right to strike that was awarded to the trade unions by the 1949 legislation was of a different

type. Far from being an indexation of a stage of autonomous evolution of trade unions that limited right possessed little more than the juridical existence. It was therefore easy for some nationalist governments to revoke that right and suppress trade unions for relatively long periods of time. The discussion under this section suggests that to a large extent, the terms and conditions of the individual employment relationship equally owe their existence to regulation from above. To that effect determination and administration of the terms and conditions of the employment relationship in the public sector are reflective of external - (State) - control sometimes at the expense of the interests of the direct employer or of both the employer and the employee (133). Although the terms and conditions of employment in the private sector are less susceptible to government control. A contrast between the provisions of the law governing dismissal and the provisions governing other areas of the private individual employment relationship on the one hand and those governing trade union immunity on the other reveals that labour relations law in general is adversely affected by this superstructural (or external) course of development. This is evident from the following:

1. Collective labour relations law did not until 1971 provide any protection against dismissal for trade union activity. This illustrates that because protective legislation has developed mainly at the initiative of the State - (partly under the actual or potential pressure-power of a politically-orientated trade union movement) - it applies to areas which the trade unions are anxious and the State is wishing to protect. Dismissal for trade union activity is an area of labour relations that has so far remained virtually unprotected.

2. Although the trade union law has since 1971 prohibited the dismissal of trade union officials and members for trade union activity. The position of the law is still that this immunity does not override the provisions of the individual employment law that give the employer the power to dismiss in the circumstances to be discussed under this section. The ineffectiveness of this trade union immunity is due to the superficiality or externality of the protection it provides. It shows that even when trade union law has provided for immunities it has done so as a response to trade union political opposition. This political or superstructural orientation of the law disregards the legal obstacles (at the level of the individual contract of employment) and the weak de facto position of the individual employee (itself being a result of the de facto limited industrial power of individual trade unions) which make the operation of this immunity virtually impossible. The fact that not even the trade unions have successfully called upon the legislature to match protection at these three - (i.e. the collective legal, the individual legal, and the de facto) - levels itself reveals the disproportionately greater importance which the politically-orientated Sudanese trade unions have attached to collective labour relations rights (134).

None of the trade union or industrial relations Acts that existed prior to 1971 contained any restrictions on dismissal of individual members or officials of trade unions for trade union activity. On the contrary industrial relations law has always emphasised that public servants who break their contract of service in contemplation or furtherance of a trade dispute are not exempt from disciplinary measures - (including dismissal) - and civil or criminal liabilities (135). Likewise individual employment law in the public sector has since 1973 given the State the right to dismiss any employee on grounds of "public interest" or

"service interest" (136). These sections give the government new powers to inter alia dismiss employees involved in preparation for a strike or work stoppage though not in breach of their contract of service.

The position of employees in the private sector is a little better in the respect that, except for the 6 years reign of General Abboud's Regime between 1958-1964 in which all forms of trade union activities remained potentially criminal, they have from the inception of Trade Union and Industrial Relations Laws been protected against criminal and civil liabilities by the immunities provided under these laws. As far as protection of individual members or officials against dismissal for trade union activity is concerned however the position of employees in this sector was not any better than that of their colleagues in the public sector until 1973. The absence prior to 1971 of specific protection for individual members or officials from anti-union discrimination practices coupled with certain loopholes in individual employment law made strikers an easy prey for dismissal. Until 1969 an employer could summarily dismiss any of his employees who inter alia omitted to carry out his obligations under the contract of employment - (EEPO, 1949 SS.10(2)d). Likewise the employer could dismiss any of his employees for any reason whatsoever subject only to a statutory requirement of notice - (EEPO, 1949 SS.10(1)). Since 1969 an amendment has been introduced to the 1949 EEPO whereby legality of dismissal under SS.10(2) is now made subject to obtainment of prior approval of the Commissioner of Labour (137). However the 1969 amendment left SS.10(1) of the EEPO 1949 untouched.

It was not until 1973 that a second amendment of the EEPO 1949 was passed specifying for the first time only definite instances in which employers may terminate the contract of employment with notice (138). The 1973 amendment came after widespread resentment among trade unions following the suspension of the 1970 CLC and the restoration of the 1949 EEPO as amended in 1969. In the three years that elapsed between the suspension of the 1970 CLC and the passing of the 1973 amendment, SS.10(1) of the EEPO 1949 was used frequently by employers to rid of trade union activists. The 1973 amendment was in this respect an improvement that came at a time where it was most badly needed (139).

Another legislative change introduced in 1971 has been the provision of statutory protection for trade union officials against dismissal or transfer "for reasons of trade union activity" (140) and the protection of trade unions and their members from interference - (through enticement or otherwise) - by employers.

To sum up the hypotheses of the argument : (1) Notwithstanding the legislative changes introduced since 1971 individual employment law has always allowed dismissal for wilful disobedience or omission to carry out contractual obligations; (2) Because every strike is by definition a wilful omission to carry contractual obligations employees taking such action can be dismissed under this rule. The rule applies irrespective of whether the strike is, from the Commissioner's point of view lawful or unlawful; (3) The position of the individual employee is vulnerable also because of the way in which certain sections of the law, regarding "arbitrary dismissal" and reduction of the workforce on economic or

technological grounds are being used or administered; (4) Although the trade union law formally prohibits dismissal for trade union activity. The protection which this law provides is undermined by the above more basic provisions of individual employment law. These hypotheses are examined under three main sub-headings namely : (a) the state of the law; (b) problems of interpretations; and (c) problems arising from administration of the law.

1.C.4.a The State of the Law

There is still one section of the law of individual employment relations which enables the employer, subject only to approval of the Commissioner of Labour, to dismiss any of his employees who fail to carry out his obligations under the contract of employment - S.37'd' of the IERA 1981. The Commissioner's approval of a dismissal under SS.37'd' is not difficult to obtain. This is so because, as will be made clearer under the next section, there is no solid legal ground on which the Commissioner may reject an application for dismissal under this section even if he is satisfied that the employee's failure to carry out his obligations is a result of his participation in a lawful strike. In one case the Commissioner approved the dismissal under this section of six workers three of whom were trade union officials even though the latent reason for the dismissal, as the Commissioner should have known, was trade union activism (141).

The 1973 amendment of the 1949 EEPO has also introduced a new rule under SS.10(12) (now incorporated under S.40 of the IERA 1981) whereunder an employer is entitled to reduce, subject only to the

approval of the Commissioner, any number constituting less than 50% of his workforce (142) for technical or economic reasons. There is reason to believe that this rule is also used by employers in order to get rid of trade union activists. The reason is that there is no legislative restriction and in the vast majority of cases no trade union control on employers' freedom to choose both the number and persons of those to be made redundant (143). In the three applications of the rule affecting trade union members and officials (143a) the employers' application for making redundant specific named persons were approved by the Commissioner. This was despite the fact that some of those made redundant were trade union officials and the others were trade union activists, that the timing of the applications and the circumstances in which they were made suggest anti-union motives on the part of employers or, as in one case, at least cast doubt on the claim that genuine economic and technical reasons were to blame. In the first of the applications examined the Labour Office approved the dismissal of 8 employees even though the application was made in the mid of an industrial dispute, between the applicant employer and his employees' trade union, over the employer's interference with the trade union internal affairs through bribery of part of its members and the dismissal of others (144). In the second application the dismissal of the employee, a trade union executive was approved by the labour office also in the mid of an industrial dispute over conditions of work described in a separate report by the same labour office as "extremely poor" (145). In the third case following protest by the labour office against the employer's dismissal of a member of the trade union executive under SS.10(2)d of the EEPO 1969 the employer withdrew the dismissal notice under that section and instead applied to the Commissioner of Labour

complaining about the economic situation in the factory and demanding the permission to dismiss the same employee under SS.10(12) of the EEPO 1973. The Labour Office allowed the dismissal (146).

The biggest loophole in the law against dismissals and one which has a particularly damaging effect on trade union freedom of action is that the sanctions provided against unlawful dismissals of all types are inadequate and inexpensive (146a) a price which many employers may readily pay in order to rid their workforce of trade union activists. In spite of all the amendments discussed in previous pages the present position of the law is still that an employer may dismiss any of his employees for any reason whatsoever and without prior consultations with anybody if he is ready to pay the dismissed employee the compensation provided for by Statute (147). Until 1981 the compensation payable to an employee upon this so called "arbitrary dismissal" was a sum equalling three times the amount of his salary at the time of dismissal (148). Although the Law provides for, long imprisonment sentences, and, fine in case the restrictions regarding dismissals are contravened these punitive provisions are deemed applicable only in case the employer refuses to both reinstate or compensate the dismissed employee (149).

Of all legal grounds used for dismissal of trade union officials and members reported in 14 firms studied by the author "arbitrary dismissal" - (i.e. dismissal without any ground) - was the ground used in the

majority of firms and the one responsible for the largest number of dismissals - c.f. table (1). In some cases arbitrary dismissal was resorted to by employers following refusal of the Labour Office to allow dismissal under other sections of the Law (150). With only one exception all instances of arbitrary dismissals were opposed, albeit in vain, by the Commissioner and, in three cases, complaints against employers were filed with the Registrar of Trade Unions (151).

Although the compensation payable to an arbitrarily dismissed employee has, since June 1981, been increased to a sum equalling six times the employee's monthly payment at the time of dismissal (152), this has not by itself stopped the continued dismissals of trade union members and officials. Some of the arbitrary dismissals shown on Table I took place after June 1981.

1.C.4.b Problems of Interpretation

Having pointed to their vulnerability to dismissal under individual employment law this section examines the position of trade union officials and members as shown under the latter law in its interrelationship with the protection, provided by S.21 of the ETUA 1977 (153), of trade union officials against "any penalty whatsoever imposed because of their trade union activities". Practice of the Labour Department has established that trade union officials who organize an unlawful strike cannot benefit from S.21 of the ETUA 1977 and escape responsibility for "failing to carry out their obligations under the Contract of Employment" (154).

TABLE I
Appendix to fs. 141-151 and the text above
Unremedied Cases of Dismissals for Trade Union Activity in Individual Firms
Distributed Among Legal Grounds for Dismissal Under the EEPO 1973 and the IERA 1981

Year of Dismissal	1981	1980 - 1983	1983	1983	1979	1973, 1979	1982	1980	1976	1974	1983	1983
Firm	Kusu Auto-Bakery	Bata (Sudan)	Marples Ridgway	Rubi Transport	Salwa Botique	Metal Sheets Industries Limited	Hilton (Sudan)	Coldair Engineering	National Footwear	Sudan Textile Factory	Gemaira Spinning and Weaving Factory	Medical Products Limited
No. of Dismissals under SS.10(12) S.40 1981			1		1				8			
No. of Dismissals under SS.10(5)d SS.37d 1981	5					3		3	2		41	
No. of Dismissals under SS.10(2)d SS.39(6)1981		100		3	1	9	11		14	212		3
Total	5	100	1	3	2	12	11	3	24	212	41	3
Comment	AAD	AAD AOF	AAD	AAD	AAD	AAD	AOF	AAD	AAD	AAD	AOF	AOF

SS.10(2)d = Arbitrary dismissal i.e. with compensation irrespective of reasons
SS.10(5)d = Negligent or wilful omission to carry contractual obligations
SS.10(12) = Reduction of the workforce for economic or technical reasons
AOF = Authorities opposed dismissals but failed to reinstate
AOR = Authorities opposed and forced reinstatement
AAD = Authorities approved dismissal(s)

Source : Compiled by the author from Khartoum North Labour Office statistics

However there is nothing in the individual employment law which prevents an employer from dismissing under this rule -i.e. for failure to carry out obligations under the contract of employment - any trade union official organizing or taking part in a strike which the Commissioner may regard as "Lawful". Moreover, even if the Commissioner convinces an employer that the strike is "Lawful" and that the latter cannot accordingly dismiss a trade union official or member under the rule aforementioned, the employer may, if he wish, still dismiss the employee under his powers of "arbitrary dismissal" (155). This inability of the law to protect trade union officials and members from dismissal or to reinstate them in case they have already been dismissed applies even if these officials and members are dismissed for trade union activity not involving strike or other industrial action.

This contrast between on the one hand SS.21 of the ETUA 1971/1977 and on the other the sections of individual employment law dealing with arbitrary dismissal and dismissal for failure to carry out the obligations under the contract of employment has led some trade unionists to complain of a contradiction between the two (156). In a recent dispute however the Trade Unions Federation -(The SWTUF) - on behalf of the contending trade union argued that the provision of S.21 of the ETUA 1977 should be interpreted as prevailing over those of the individual employment law. In that case (157) following the Supreme Court confirmation of the lower Courts' decisions challenging the alleged unlawfulness of the (157a) strike and acquitting the defendants of all offences charged the employer in complete disregard of directives made accordingly by the Registrar of trade unions (158) and the Commissioner (159) of Labour refused to end the suspension of the 11 trade unionists

concerned and eventually dismissed them giving each the six-months-wages compensation payable upon arbitrary dismissal.

The SWTUF supported the defendants' demand for reinstatement and claimed that they were dismissed because of lawful trade union activity. The defendants applied to the Attorney General demanding enforcement of the Registrar's - (which is a subordinate of the Attorney General's Chambers) - directive concerning their reinstatement. The Attorney General advised the applicants that their dismissals were in accordance with the provisions of SS.39(3), (6) of the IERA 1981 and that there was nothing it could do to prevent or invalidate an employer's action taken under either of these subsections (160). Upon reception of its copy of the Attorney General letter the SWTUF wrote back to him demanding his comment on the SWTUF's own view that the provision of S.21 of the ETUA 1977 restricts employers' powers of arbitrary dismissal provided for by the individual employment law (161).

In a language that suggests his unsuspecting readiness to accept as the true reason for the dismissal the label that the employer attaches to it the Attorney General replied that the reason for the dismissal was "as stated by the employer in the papers before me" not trade union activity. The Attorney General added that individual employment law "provides only pecuniary guarantees against dismissal and that reinstatement is neither desirable nor possible under present Laws" (162). Despite its relevance for determination of the issue under consideration the SWTUF statement of opinion, about the relation between S.21 of ETUA 1977 and the sections of individual employment law regarding breach of Contract and arbitrary dismissal, went largely uncommented upon.

I believe that, as the law of individual and collective labour relations stand at the moment, S.21 of the ETUA 1977 does not restrict the powers of dismissals which employers possess under individual employment law. One reason for this is that S.21 of the ETUA 1977 creates, not an independent and extra-contractual obligation on the employer not to dismiss a trade union official, but, only an obligation not to dismiss such official when his employment as an ordinary employee is not otherwise determinable under the individual employment law. Attempts at establishing a supremacy of S.21 of the ETUA 1977 on basis of general principles of interpretation of statutes are also futile because the IERA 1981 is the latest law and is therefore the one which should prevail (163).

In support of an interpretation that would allow the restriction of employers' powers of arbitrary and other dismissals by S.21 of the ETUA 1977 could also alternatively be argued that the criminal sanctions provided under that Act - (S.33) - make its commands autonomous public law obligations whose violations are punishable as crimes. However such an argument is technically unsound. There are few courts which will incriminate a person for an act which he is fully empowered to take under another, and a more recent, law in force. Moreover, the opinion of the Registrar of trade unions regarding the legality or illegality of dismissal is, because of the role he is empowered to play in the administration of trade union law, also relevant for enabling a conviction under S.21 of the ETUA 1977. It is illuminating to add that the Registrar of Trade Unions has decided in a recent case that he could not judge as unlawful the dismissal by an employer of three members of a preparatory committee of a trade union because, in his view, the

dismissals were made under the employer's powers of arbitrary dismissal (164).

The questions of adequacy of protection and interpretation so far identified under this and the preceding sections are not relevant in case of public sector trade unions. There is not even any common ground for comparison of the legal positions of employees of the private and the public sectors with regard to these questions. The preceding discussion suggests that the difficulties of the workers in the private sector stem from a reluctance of various governments to impose any substantial legislative and administrative restrictions on the wider freedom which the contract of employment gives to employers and because of which employees are left without adequate protection. The weakness of the position of public sector employees is in contrast due to an inclination on the part of the government to erode even the contractual bases of their employment increasingly converting it into a unilateral relationship determinable at the initiative of the government.

Knowledge of the legal position of public sector employees involved in any form of industrial action does not require examination of a legislative protection provided or performance of bodies vested with administration of such legislation as in the case of private sector employees. The search for such knowledge begins and ends with provisions of public service laws which give the government unreviewable (165) powers of dismissal on "public interest" and "service interest" grounds (166). Both grounds are widely used in practice and were actually responsible for the dismissal of 105 trade union officials and 820 trade union members in the period between December 1980 and March

1984 alone (167).

Likewise there is no obscurity in the relation between S.21 of the ETUA 1977 and the provisions of public service laws that give the government absolute powers of dismissal. In contrast with its silence in case of private sector employees the law of collective labour relations quite unequivocally asserts the liability of public service employees for disciplinary measures including dismissal (168).

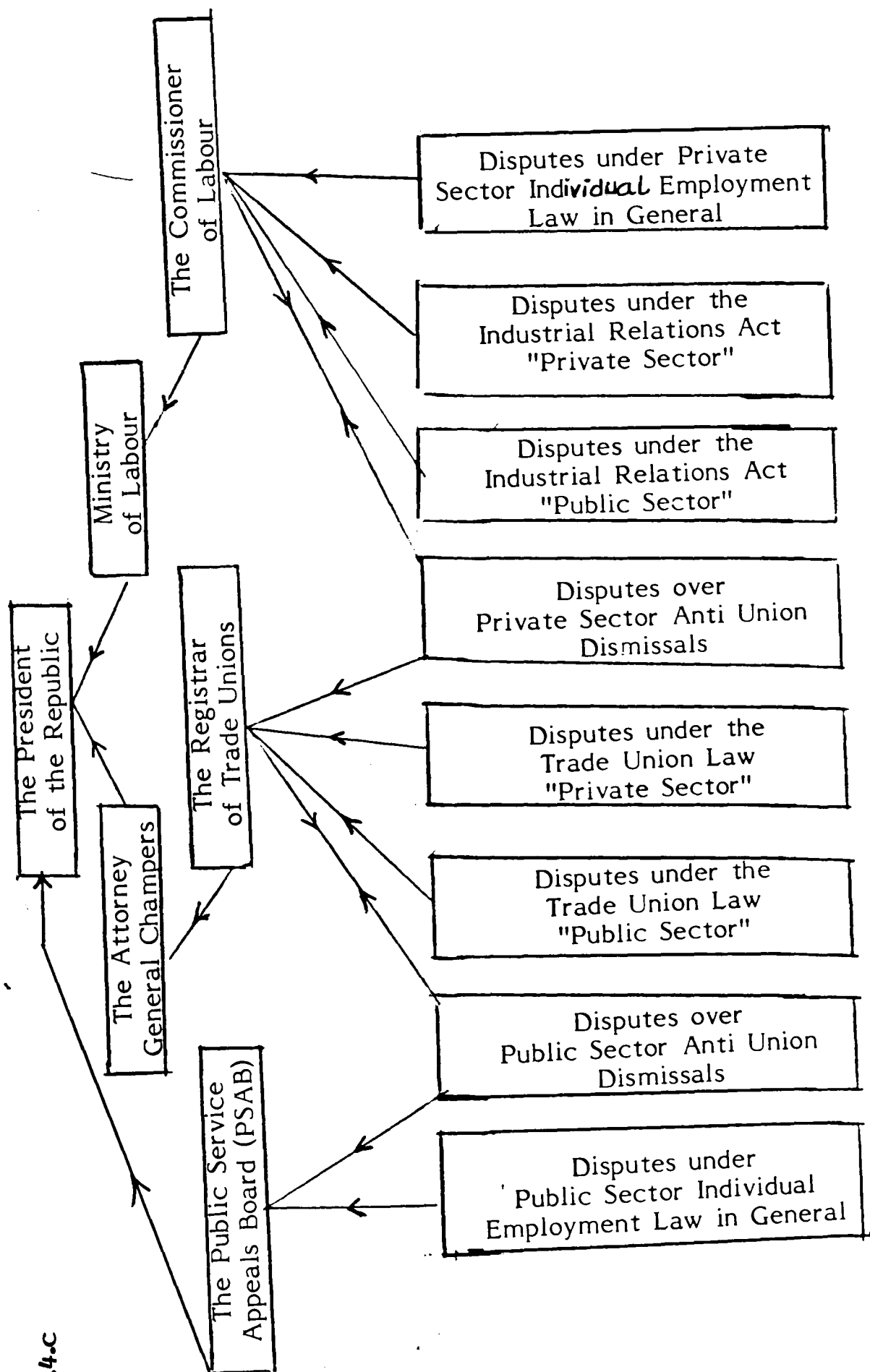
The different treatment, of public and private sector employees, before the law is a phenomenon more conspicuous in the area of individual employment relations. At both the individual and collective levels of industrial relations tighter control is placed on public employees. But control over the same employees, whether public or private, also grows tighter as one climbs, from the strata of individual employment relations, up the hierarchy of collective labour relations (169).

1.C.4.c Problems Associated with Administration of the Law (169a)

I have already mentioned that the law against dismissals is administered by the Commissioner of Labour and ordinary Civil Courts in case of the private sector and by employing government units and the Public Service Appeals Board (PSAB) (170) in case of the public sector. Cases of dismissal for trade union activity in particular from both sectors, are dealt with by the Registrar of trade unions. As mentioned earlier dismissal of trade union officials or members from public employment are formally made under the powers of dismissals for "public

DIAGRAM I

Appendix to Part I.C.4.c



The Administrative Hierarchy for the Process of Labour Disputes in Sudan

interest" and "service interest". The PSAB does not in practice review cases of dismissals arising under these grounds (171). From his side the Registrar of trade unions is also known to have referred trade unionists, who were dismissed because of their trade union activity but whose dismissals were formally labelled as in the public interest, to complain to the PSAB. The reason for the reference was, according to the Registrar, that the dismissals were made under sections of the public service laws which it is not his jurisdiction to administer (172). In effect complaints by trade union officials or members dismissed from public service go unheeded.

The Registrar does receive and adjudicate on complaints of anti-union discrimination by employees of the private sector. A complaint may be, either referred to the Registrar by the Commissioner of Labour, or, brought directly to the former by the aggrieved member or official of the trade union concerned. Even if a dismissed official or member of a trade union succeeds in negotiating the obstacles presented by various loopholes in the law against dismissals and convinces the Registrar to decide in his favour he will encounter other new obstacles associated with a system of administrative justice which while exclusive of the jurisdiction of the Courts is virtually incapable of enforcing its own decisions in this type of complaint (173). The cases examined earlier, under discussion of the general powers of the Registrar, exemplify not only the ineffectiveness of the Registrar's intervention - as far as enforcement of these decisions is concerned - but also that this intervention estopps the claimants from seeking the more effective intervention of the Civil Courts (174).

Conclusion

The main focus of the preceding part, I was on legislative and administrative forms of intervention in the determination and administration of collective labour relations. Attention was also drawn to a tendency of the law to discriminate between private and public sector employees in this respect. These two focuses, explaining the extent of control and examining its effect on the specific relationships under consideration, are meant to illuminate a reciprocal relationship between the autonomy or non autonomy of the relationships regulated and the development or under-development of the ideological content of statutory regulation. The more autonomous the employment relationship - (whether collective or individual) - the more developed the ideology of the law "regulating" this relationship. Regulation in this latter sense is nothing more than a proclamation of a socially existing relationship. I argue that industrial relations in the Sudan are regulated from without and the ideology of "Labour Law" is therefore under-developed - (i.e. "Labour Law" is indistinguishable from administrative and political regulation) - because of a Class and a State structure which make descendent political control both necessary and possible.

Against the possibility of descendent political control could be advanced the argument that strikes do in fact occur from time to time and military dictatorships are sometimes overthrown notwithstanding all legal and political restrictions. The extent to which a thesis of descendent political control is reconcilable with analyses, in the previous chapters, assigning a determinant role for "the economic structure" (174a) might not also be immediately clear. Because of its relevance

for similar questions the next section might pose, the comment on these points will be made in conclusion of the Chapter. The next section explains how forms of control discussed in the preceding section are tactically supported by a control of trade union economic and industrial functions. The section provides further explanation of forms of control and examination of their effect on given industrial relations. The two sections are hoped to provide the bases for, isolating the factors determining the degree of State intervention in various areas of labour relations, and assessing the impact of this intervention on the ideology of the law in each particular area.

2. Monopolization of Trade Union Economic and Industrial Functions

I begin this section by an explanation of the mode in which control of trade union economic and industrial functions fits into a thesis of dominance of political - (i.e. human superstructural . . . (175))-control. All preceding sections dealt with forms of control that, judging by their functions, are directly political. What distinguishes forms of control in the area under discussion is that they fulfill certain economic functions and through this fulfillment act as stabilizers of the direct and relatively contingent political forms of control.

I consider the forms of control under discussion also to be political forms (albeit indirect) not because they are instrumental in achieving definite political and economic gains (although they could be), but, largely because they show little respect for the autonomy of the relations they are intended to control. To that effect they reflect a conscious regulation of the economy, a role which the centralized State

in an under-developed social formation usually undertakes.

Regulation of the economy is undertaken by the State, in Sudan, in fulfillment of its role as a lever of capitalist accumulation (175a). Successful performance of this role is for every political regime the condition for existence and continuity. Parliamentary governments were overthrown after relatively short reigns partly because they had failed (176) to work out definite State-pioneered capitalist development programmes in fulfillment of this inherent (177) role. Military governments stayed for relatively long periods because they had adopted definite development programmes and exerted considerable pressure for their implementation. They were in their turn overthrown because they failed to adapt their initial descendent control of production and distribution to social and economic needs subsequently generated by implementation of this capitalist development planning. These unfulfilled needs were responsible for that overthrowing because they reflected badly on economic performance (Cf. supra reference cited under f.(130a) and the text above) and exacerbated discontent. This incidentally provokes the hypothesis, to be dealt with later, that descendent political control while effective in initiation of a definite social structure may gradually lose its initiative (or autonomy) to emerging economic determinism within that structure (178).

The centralized state (be it under military or parliamentary controls) is itself employer of the biggest percentage of the workforce and has always undertaken regulation of the employment relationship as part of its overall regulation of the economy. This primacy of State regulation is manifest at two levels. At the first level it is manifest in

a comprehensiveness of legislation in all matters affecting determination of the terms and conditions of employment in both the private and the public sectors. At the second level it is manifest in extensive jurisdiction and powers of administrative authorities enabling them to undertake administration of both disputes over statutory rights and those over new demands (so-called disputes over interest).

Control at both levels reflects negatively on the autonomy and effectivity of collective negotiation. It in particular implies limitation of the area of the employment relationship that can be regulated through collective negotiation. It also implies considerable legislative control over the collective negotiation procedure so that administrative authorities could intervene in its direction. I shall examine this legislative and administrative intrusion in its relation to (A) the scope of collective negotiation and (B) procedure of collective negotiation.

2.A The Scope of Collective Negotiation

As mentioned earlier the extent of state control varies in accordance with, the individuality or collectivity of the labour relations under consideration, and the identity of employing sector (whether public or private) (179). Although all collective the Labour relations under discussion vary in the degree of their subjection to state control in accordance with their location in the private or the public sector. Hence my preference to discuss each separately.

2.A.1 Public Sector Employees

There is hardly an area of employment in the public sector which is not extensively regulated by statute. As will be shown in Chapter 4, the position of individual employees in the public sector is such that the government has always remained the sole determinant and administrator of the terms and conditions of their employment. To be more specific I shall examine the effect of this on two separate types of disputes namely : (a) disputes arising from or relating to application of public service laws and regulations embodying the terms and conditions of public employment; and (b) disputes arising from or relating to demands for terms and conditions of service better or other than those provided for by legislation.

2.A.1.a Disputes over "Rights"

A dispute of this nature may arise because a trade union or an employing government unit has actually or allegedly acted against the law. Bearing in mind that it is a conventional duty of Civil Courts, in certain countries, to settle controversies of this type, it might not be immediately clear why a dispute over applicability of the law should lead to an industrial conflict. This peculiar situation exists in Sudan because the law penetrates deep into the heart of industrial relations thus blurring any demarcation between its own and the territory of the negotiating parties. A second and most important explanation is that employing governmental units themselves assume a considerable role both in the determination and administration of the law and their decisions in both capacities are appealable to higher administrative authorities whose

jurisdiction is exclusive of that of the Civil Courts.

It also follows from the above situation that the procedure - (whether legal or extra-legal) - applicable in case of a violation of the law varies depending on whether the party to blame is a trade union or a government unit. Whereas a trade union taking strike action in defiance of a law or order governing the terms and conditions of employment of its members is liable to criminal prosecution, civil suit and dissolution, the government and its units may act "against" the existing law with impunity. This is so because the government action is, from its own perspective, itself a law which should be obeyed as amending the existing law. But government actions possess force of the law also because of powers conferred, by Labour and other legislation, on the President of the Republic, the Minister responsible for the Public Service, the Registrar of Trade Unions and the Commission of Labour to make amendments, regulations, or orders having such power (180).

To illustrate the points aforementioned I will give the following example. S.126 of the Public Service Regulation 1975 (PSR 1975) provides for the entitlement of certain employees to a housing allowance. Following a surge in the number of employees qualifying for the allowance and a complaint by the Treasury a Presidential Order was issued in 1979 (No. 338) banning all public sector units from approving any further demands, by any class of employees, for housing or other allowances. The ban was imposed at a time when a few trade unions had already managed to obtain the housing allowance for their members and some were still fighting for its realization. Two of the trade unions which had been negotiating with employers for realization of inter alia

the housing allowance when the ban was imposed were then told to drop their demands for the housing allowance. The trade unions (181) contended that they were simply demanding implementation of a statutory right that had, moreover, already been implemented in favour of employees of the same rank as their members. The employers were adamant that the housing allowance demand was against the express provision of an order which the President of the Republic was empowered to make under the Public Service Laws and was therefore not negotiable. Both disputes were referred to arbitration under S.11 of the IRA 1976. In both cases the arbitration tribunal recommended the payment of the housing allowance to members of the trade unions. The Tribunal's decision in the Bank's Employees Case, was not complied with, and together with other similar cases led the Ministry of Public Service into preparing a memorandum recommending the authorization of the Ministry to veto any arbitration award that inter alia contradict a law regulation or order in effect (182). Acting on the basis of this recommendation - (even before its proclamation as law) - the Minister of Public Service decided on 23rd July 1980 (183) that his Ministry could not abide by the decision of the arbitration tribunal, in the CEWA's Case ordering either provision of accommodation for or payment of housing allowances to members of the trade union.

Consequential upon the ability of government and its units to act above the Law is also the fact that the majority of disputes arising from or in relation to application of public service laws and regulations are caused by actual or alleged failure of government units to act in accordance with the law. The dispute between a trade union and a government unit may arise because of, a violation that affects only the

rights of an individual employee who is a member of the trade union, or, one that affects the rights of all employees members of the trade union. Example of the first case is the arbitrary dismissal or disciplining of an employee. Example of the second case is the situation where the employing government unit fails to secure for its own employees rights of employment that are provided for by the public service laws.

The view upheld by the government is that redress of individual grievances must be sought by the injured employee himself through the channels available under the law. under no circumstance would the government or any of its units negotiate with a trade union over dismissal, disciplining, reinstatement, or compensation of an employee member of the trade union. This was a practice that had been established by the governments that reigned in the pre 1973 era (184). It is also a principle that has been proclaimed by the public service laws and regulations, and the practice of the authorities vested with their administration since 1973 (185). In the words of the Commissioner of Labour (which is one of several bodies vested with the administration of public service law) "It is imperative that trade unions should not concern themselves with the handling of individual grievances. Disregard of this rule may mean illegality of any form of industrial action taken by the trade union for that purpose" (186). To recapitulate, measures taken against individual employees and the remedies that might be available in the circumstance are, from government perspective, not subjects for collective negotiation. There are two reasons inherent in the legal structure which support this government stance. The first is that government units possess discretionary powers of dismissal which not even the Courts - let alone

the trade unions - are allowed to interfere with. The second reason is that even when the measures taken are reviewable the employee's search for a remedy consists of an action to specified administrative authority - (be it the PSAB, the Commissioner of Labour or the Registrar of Trade Union) - whose jurisdiction under the public service laws is exclusive, of that of the Civil Courts, and, also of voluntary settlement procedures and trade union representation (187).

Disputes that centre around failure of government units to secure for their employees rights that are provided for under the public service laws and regulations constitute the vast majority of disputes that go through the state managed tripartite negotiation procedure (187a). The higher percentage (187b) of this type of dispute is partly due to the financial inability of certain government and public sector units to meet annual or occasional central planning decisions affecting the terms and conditions of public employees (188) in general. But the failure of units to implement terms and conditions of employment recognized by public service laws and regulations which have been in effect since 1975 has also remained a substantial subject matter of the negotiation procedure (189) - until at least early 1984 when fieldwork for this thesis was being completed.

Rather than being excluded from the scope of collective negotiations, disputes over, rights affecting each and every member of the trade union constitute then the lawful subject matter of, and in practice, the main raw material for collective negotiations in the public sector. From its part the government see nothing wrong with this arrangement. A memorandum prepared by the Ministry of Public

Service in 1979 emphasised the importance of keeping the limitation of collective negotiations in the public sector to disputes arising from or relating to application of public service laws and regulations in effect. The memorandum demanded the amendment of S.4 of the IRA 1976 in order to make clearer the limitation of "trade disputes" to disputes of the type the memorandum is contemplating. However the Ministry was demanding more than just the exclusion of "disputes over interest". Demands made by a trade union to a public sector unit for implementation of terms and conditions of service which, although provided for by the public service laws and regulations, are not yet implemented by this unit are for purposes of the Ministry's memorandum demands for new conditions of service which should also be excluded (190).

2.A.1.b Disputes over "Interests"

There are two reasons which make inclusion of this type of dispute into the scope of collective negotiations extremely difficult. The first reason is that, even when it relates to payment-increase demands a dispute of this nature comes into conflict with an established principle of central governmental determination of wages and salaries of all public employees. The second reason is that where they involve demands for new or better conditions of work other than payment, disputes of this nature come into conflict with a detailed and comprehensive statutory statement of the terms and conditions of public employment. Notwithstanding this, except for the six years military rule of General Abboud between 1958 - 1964 (191), trade unions have never been expressly prohibited from making peaceful demands for new

conditions of service. Moreover the Commissioner of Labour does not usually reject an application, by a union demanding assistance in commencing negotiation with an employer, or mediation, simply because it involves demands for new conditions of service.

However judging by the scope of manoeuvre available to the parties to collective negotiation in this type of disputes possess, it may be said that disputes over interests are impossible to resolve through negotiation. Where any trade dispute involves questions of wages or hours of work or other terms or conditions of service that are "regulated by law regulations or precedents" the negotiating government body or the arbitration tribunal are requested not to make awards that contradict these "laws, regulations or precedents" (192). The extent to which this restriction affects autonomy of collective negotiation should be evaluated in the light of the fact that there is seldom an area of individual employment in the public sector which is not regulated by statute. It is important however to add that this restriction does not in practice stop "Heads" of government units and the Commissioner of Labour from engaging in negotiation with trade unions and even making concessions and compromises they are not authorized to implement in order to avoid imminent industrial action. The practical effect of the restriction comes to surface when trade unions press for implementation of agreements arrived at in this fashion.

Judged by their practical effect, disputes over interests fall outside the scope of collective negotiation. As shown below they ultimately end up unresolved. Although the Head of a government unit is free to accept, either directly or through mediation of the

Commissioner of Labour, demands over interest, put forward by a trade union, the central government does not abandon its policy of central planning in order to honour obligations which a Head of a unit or the Commissioner may have pledged. From their part the Commissioner of Labour and the Head of a unit are helpless without this governmental endorsement of their actions. Thus in one case the Customs and Excise Officers' Trade Union managed to conclude an agreement over all its demands with the Head of the Customs Department. Three months later when implementation of the first part of the agreement became due the Head of the Department insisted that his initial acceptance of the Union demands ought to have been understood as conditional upon the approval of both the Ministers of Finance and Public Service and that until such approval had been obtained he could not commit himself to implementing any part of the agreement referred to (193).

Government units break their agreements with impunity irrespective of whether such agreements are arrived at through direct bilateral negotiation or through mediation of the Commissioner in accordance with the tripartite negotiation procedure set by the IRA 1976 (194). Likewise, although arbitration awards are on paper final and conclusive, arbitration awards that uphold trade union demands for new conditions of service are likely to be disregarded by the Government on grounds of *ultra vires* (cf. Supra f. 192 and the text above) (195).

The key to implementation of any agreement affecting existing conditions of service lies with the Public Service Affairs Chamber and the Ministry of Finance. However pressing the need for improvement of service conditions might be, such improvement is impossible to undertake

unless these two authorities have agreed to bear the financial burden involved. Alarmed by the repercussion on the Civil Service of too many unfulfillable promises which Heads of units make with their employees trade unions and the impact which responding to arbitration awards affecting conditions of service of any employees of one unit might have on employees in other public sector units the Director of the PSAC, writing in the memorandum referred to earlier, - *supra* f. 183 - recommended *inter alia* the following :

- (a) - "The exclusion from the scope of 'collective negotiations' of all demands for new or better conditions of service" - (Ibid P.2).
- (b) - "A trade union or federation desirous of realizing new or improved conditions of service for its members shall apply to the employing government unit showing reasons, substantiated by statistics and field studies, for the demands. The employing unit shall then study the application and make its recommendation to the Central Government. Federations and trade unions shall not at any stage participate in or influence the process of consultation over demands thus submitted" - Ibid P.5.
- (c) - "Until such major changes have been introduced the PSAC shall be represented at all present stages of collective negotiations" - Ibid P.4.

Although the Director's recommendation did not formally become law, it influenced certain structural and legal changes that took place subsequent to April 1980. In 1981 the Minister of Finance and National Economy became *ex-officio* the Minister responsible for the Public

Service. This consolidated the administration of public service and the disposition of its financial burden in one and the same hands thus ending the lack of co-ordination previously thrive between the two Ministries. It was this lack of co-ordination which had enabled public sector employees to engage themselves in a lengthy, expensive and state-managed system of negotiation for resolution of disputes which, given the destined financial deadlock, are unsolvable. Moreover a Bill prospectively abolishing the IRA 1976 and introducing a 1982 Regulation of Collective Labour Relations Act was being prepared. S.12 of the Bill provided for the right of a representative of the Ministry of Finance to attend all stages of collective negotiation. Likewise S.25 gave the President of the Republic the right to veto any arbitration award if the implementation of such award may, in his view, have serious impact on the national wage-policy or balance of payment.

The Bill was, from the start, opposed by the ex-Minister for the public service (i.e. in his new capacity as State Minister (196) for the public service) and the Director of the PSAC because of its prospective lifting of the ban, imposed by the IRA 1981 (Amendment) Act, on strikes, and, failure to give effect to the Director's recommendations previously stated (197). The Bill, was eventually rejected by the President of the Republic, and never put before the then People's Assembly. From its part however the PSAC memorandum continued, until April 1985, to be the main source of guidance in the conduct of collective negotiations in the Public Sector.

2.A.2 The Private Sector

There are numerous areas of the individual employment relationship, in the private sector, that are regulated by statute. However when compared with its counterpart for the public sector individual employment legislation for the private sector is different both in the extent of comprehensiveness and in respect of the underlying legislative policy. An area, where this relative lack of comprehensiveness is manifest, and, which is largely left to agreement of employers and employees in the private sector is that of discipline at work (197a). More important is the underlying legislative policy which in the private sector aims at setting a floor of rights whilst leaving the door open for realization of terms and conditions of employment better than those provided by statute (198). Nevertheless, because of restriction of the right to strike, common to all employees, it is doubtful whether private sector trade unions do in practice gain any advantage from this ambivalence - (Hussein 1983, pp. 212 - 215).

However, for purposes of examination of the scope of collective negotiation, the position in the private sector requires a treatment that ignores a distinction between disputes over "rights" and disputes over "interests". The fact that there is no such distinction in practice, while the reason for this plan of writing, is itself due to the underlying policy of private employment legislation mentioned above. The discussion proceeds instead on the basis of a different typology of disputes namely (a) disputes over collective demands whether of rights or interests, and (b) disputes over individual right of a member or members of the trade union.

2.A.2.a Disputes over Collective Demands

A trade union demanding a wage increase above the statutory minimum wage or conditions of work other or better than those recognized under employment legislation can negotiate, directly with the employer, or through mediation of the Commissioner of Labour for realization of these demands. Failure to implement the statutory terms and conditions of employment provided for the private sector amounts on the part of employer to a criminal offence (199). Hence they do not, unlike the position in the public sector, need intervention of a trade union for their enforcement. This has enabled some private sector trade unions to invest their time in negotiating agreements, covering issues or details not provided for by legislation, and, in case of some big firms, providing for formation of joint management-union, production councils, industrial safety committees and disciplinary boards (200).

In contrast to its position in case of disputes over statutory rights the Commissioner has not so far established a sufficiently consistent practice in case of disputes over rights accruing under a collective agreement. The Commissioner's position on this issue oscillates between belief in the bindingness of the collective agreement and refusal to see a need for negotiation on the one hand and disregard of the agreement and attempt of mediating for a settlement at any price on the other. The Commissioner often adopts the former position where the trade union is the party to blame, and the latter where it is the employer which is to blame, for the violation of the agreement (201). However there is no consistent logical theme which underlies this approach. One possibly practical explanation for it is that the trade union's act constituting the

breach often takes the form of an industrial action (which is of course unlawful per se). Hence the castigation of the trade union's act by the Commissioner reflects not his stance towards the bindingness of the agreement but his concern for the form which the action causing the breach has taken.

The Commissioner's stance towards disputes over rights accruing under collective agreements applies even in case the agreement is in fact an arbitration award (202).

2.A.2.b Disputes over Individual Grievances

The official view is that, resolution of disputes over individual grievances should be sought by the aggrieved individual through application to the Commissioner of Labour or the Civil Courts. This rule is strictly adhered to in practice at least by the Commissioner. According to one Labour Officer, "if a dispute over an individual grievance is brought to the office by representatives of a trade union on behalf of its aggrieved member(s) the office will immediately dismiss the complaint directing to hear from the immediate parties to the dispute personally" (203).

The same rule applies afortiori where the trade union decides to settle the individual grievance with the employer and without recourse to the Commissioner. Following a slow down by the Coldair Engineering Plant Workers' Trade Union in an effort to press for reinstatement of three of their colleagues dismissed by the Management in November 1982 the latter reported the incident to the Commissioner. The Union was

immediately warned that its action was in contravention of the rule that disputes of this nature should be referred to the Commissioner. Acceding to the warning the trade union agreed to call off the strike immediately (204). In another case (205) the initial decision of the aggrieved employees to leave the issue of their reinstatement entirely to their trade union did not dissuade the Commissioner from applying the above rule. The Commissioner even refused to recognize that the continuous contention, by the trade union, of the dismissals from the first day and for three consecutive months could operate to stop the period of limitation running, as against the aggrieved employees right of action (206), from the first day of the dismissals -(instead of from the time the trade union had failed and the employees decided to personally fight for reinstatement) (207).

To conclude this discussion of collective negotiation in the private sector I need to only elaborate on a point previously mentioned. To assert that different types of disputes are not formally excluded from the scope of collective negotiation does not mean that the issues contested are always settled or effectively processed within the procedure. Although private sector employment law does not prevent demands for terms and conditions of employment better than those guaranteed by its provisions and in spite of the negotiability of such demands there are other legal and extra-legal constraints that obstruct realization of such terms and conditions. Bearing in mind the restrictions on strike and freedom of association in general, it is only in relatively big and stable firms where both trade unions and managements are desirous of voluntarily regulating their relationship that prevail terms and conditions of employment better than those provided by the law.

Here also if we are to determine the scope of collective negotiation not by the types of disputes that are formally processable but by the types and numbers of those that are actually processed and effectively settled under the system, we will find that the position of private sector's employees is hardly better than that of their colleagues in the public sector. There is evidence (Cf below) which supports this finding. The evidence includes (a) the poor quality and contents of the collective agreements that trade unions could conclude with employers; and (b) the difficulties encountered in bringing employers to the negotiating table; and (c) the impotence of the trade unions and other institutions of collective negotiations in securing compliance with collective agreements in force (208) - (cf. Table 2).

Of the 23 Collective Agreements between trade unions and private employers studied by the author all but three dealt exclusively with issues of working hours and timing, overtime work and pay, rate of payment, transportation, holidays and leaves, medical treatment, promotions, facilities at the place of work and discipline (208a). The three exceptions included in addition provisions for joint management-union councils (supra f.200 and text above). Even within the issues covered the following are obvious shortcomings :

- (a) None of the agreements provides any procedural or substantive control over redundancy and dismissal.
- (b) With only two exceptions, none of the agreements provides for a procedure to be followed in case of violation.

TABLE 2

(Appendix to f.208 and text above)

Share of Responsibility in Industrial Disputes Expressed in %

Causes for Dispute	Refusal to Negotiate		Breach of an Existing Agreement		Discipline Excluding Dismissal	Dismissal	Others	Total
	By Emp- loyers	By Trade Union	By Emp- loyers	By Trade Union				
Number of Disputes Reported	14	-	27	-	8	8	6	63
%	100	0	100	0	12.7	12.7	9.5	100%
	22.2		42.9					

Figures for the Khartoum North District covering the period May 1977 - October 1982

Compiled by the author from Khartoum North Labour Office Monthly Reports
of Collective Disputes for the Area. File No. KNLO-37-IR-3.

- (c) With the exception of two, none of the agreements gives the trade union a right to participate or be consulted in matters of discipline at work.
- (d) With one exception the agreements provide for employers' exclusive right of handling individual grievances.
- (e) Rating of the terms and conditions of employment covered by all agreements is not generally higher to that of those guaranteed by the law - cf. table below.

TABLE 3
Rating of the Contents of Agreements with the Minimum Legal

Rating	In Some Respects Better	Equal in Some Respects	Worse (209)
Number of Agreements	4	16	3

2.B The Procedure of Collective Negotiations

Tripartite collective negotiation procedure in the Sudan owes its existence to General Abboud's military regime that reigned between 1958 - 1964. Immediately after it had taken over that regime outlawed all labour organizations and forms of trade union activity. These were - judging by their objective - political measures that had been provoked largely by the political experience of the regime's predecessor in power (Beshir 1978 pp. 206 - 212). Following its initiation of a ten year economic-development-plan the regime enacted new legislation in 1960

amid propaganda featuring the role the trade union should play in realization of the envisaged development. In addition to other restrictions previously discussed (210) the 1960 Trade Disputes Act (1960 TDA) abolished the 1949 Trade Disputes Legislation (211) and introduced a compulsory procedure of collective negotiations that was to remain, to date, the standard legal framework for industrial relations in the Sudan. The 1960 TDA was repealed by the 1966 RTDA, and the latter was in turn repealed by the IRA 1976 which is still in effect. Despite these legislative changes however the tripartite negotiation procedure has remained basically the same under all Acts.

The negotiations procedure consists of a definite number of stages and has as its apex ad hoc arbitration tribunals. From the first stage to the last, and, irrespective of whether it is a public sector or private sector dispute that is being negotiated the State is always directly or indirectly involved in the process. In addition to its tripartitism the collective negotiations procedure is also compulsory at all stages. Collective agreements are in effect arbitration awards, minutes of tripartite negotiations or sets of resolutions arrived at through these negotiations.

Where a trade dispute occurs the parties to the dispute shall, within a period not exceeding two weeks, enter into direct negotiation with the purpose of settling the dispute - SS.11(1)IRA 1976 (212). Negotiations shall continue for a period of at most two weeks - (extendable upon agreement of the parties to another two weeks) - from the date of its commencement. The Commissioner of Labour may, as an observer attend negotiations and, subject to approval of the parties

participate in them. If an agreement is reached it must be made in writing drawn in three copies and signed by the parties. Such an agreement shall come into effect from the date the Commissioner has approved it.

Failure to, start negotiation within the specified period, comply with the formalities of the process of negotiation or abide by an agreement during the period of its currency is an offence punishable with imprisonment and fine (213). In practice however the Commissioner does not need to bring prosecutions against trade unions under this rule. One reason for this is that he can often prevent a breach of the law by interfering in advance. Another reason is that even when such prevention is not possible it is easier for the Commissioner to take the faster and more effective course of administrative sanctions against the trade union - (e.g. dissolution, suspension . . .) (214). Although there is no administrative measure that could be taken against employers and in spite of the fact that employers are responsible for the majority of violations under the law the Commissioner has not so far brought any prosecution against any such employer (215).

If the parties to the dispute have failed to reach an agreement under SS.11(1)(IRA 1976) each of them "may" apply to the Commissioner demanding his intervention. In case no such application is made by either party the Commissioner reserves the right of ordering submission of the dispute before himself. Once an application for intervention of the Commissioner is made by either party, or the Commissioner has summoned the parties to present their dispute before him his intervention shall be binding (IRA 1976, S.12). The Commissioner shall within a

period not exceeding three weeks from the date of his intervention endeavour to settle the dispute amicably. Any agreement reached at this second stage of negotiation shall likewise be produced in three written and signed copies one of which to be retained by the Commissioner. Every agreement shall provide for a duration of its currency which must not exceed, three years, or five years in case the agreement is dealing with rates of payment and working hours. The agreement shall remain binding on the parties during the period of its currency (216).

The third stage of negotiations involves arbitration. If the Commissioner has failed to settle a dispute within the period specified under IRA 1976, S.14, the dispute may with or without the consent of the parties be referred to an ad hoc arbitration tribunal. Arbitration tribunals are usually constituted by order of the Minister responsible for the Public Service -(irrespective of whether the dispute is in the public or the private sector). The disputing employer and the trade union may, subject to approval of the Minister respectively nominate one employer and one trade unionist who are not parties to the dispute to sit on the arbitration tribunal. The tribunal must include in addition a judge as Chairman, and a representative of the Department of Labour and an expert in industrial relations as members (217). The parties to the dispute may attend the hearing either personally or through their representatives. The arbitration tribunal must decide the dispute and make an award within a period not exceeding four weeks from the date of reference of the dispute to arbitration. The arbitration award shall be final and conclusive (218).

This procedure of "negotiation, mediation and arbitration" (219) operates as an official alternative for strikes and all other forms of industrial action. From the moment a dispute arises and up to the time it has been resolved trade unions and employers are under the obligation of negotiating a settlement without recourse to any form of industrial action whatsoever. Once it has developed into a strike, slow-down, a mass resignation or a lock-out, the dispute comes into conflict with the Law of Strikes and it is then left to the Commissioner and other administrative authorities to determine the course of action to be taken in the circumstances.

Although legislation does not define "dispute" or specify the time and circumstance in which a "dispute" is deemed to have arisen, the Commissioner does in practice take the view that a dispute begins, and the negotiations procedure becomes therefore applicable, once demands by either party to an industrial dispute are made to the other (220). This was also the view held by the Court of Appeal two years later in the Trial of El Fatih Muhyeddin and Others (221). The Court had there to decide whether a dispute had started from the moment the trade union carried out strike action or a few months earlier when the contested demands were put to the employer for the first time. The Court opted for the latter view justifying its decision by the argument that "a dispute arises from the moment demands are made and irrespective of whether the demands submitted are contested or accepted without contention by the other party" (222).

The obligation to negotiate peacefully persists irrespective of whether the dispute is over "rights" or over "interests". A trade union which succeeds in obtaining a favourable settlement to the dispute at the stage of negotiation, mediation or arbitration but fails to realize any benefit because of employer's refusal to abide by the agreement or the award, will have to once again go through all or some of these same stages of collective negotiations in order to compel the employer to fulfill his obligations (223).

The law prohibits, employees from staging or taking part in any total or partial work stoppage, and, employers from totally or partially closing down the place of work by reason of a trade dispute in the following cases (224):

- (1) Before entering into negotiation.
- (2) Immediately after any party applies for mediation of the Commissioner or the latter decides to intervene on its own volition.
- (3) During the mediation proceedings.
- (4) Immediately after the decision is made to refer a dispute to arbitration.
- (5) During the arbitration proceedings.

The Law makes it an offence punishable with imprisonment and fine for any person to violate any of these provisions. There is also the additional penalty of dissolution in case the culprit is a trade union.

I have mentioned earlier that all types of industrial disputes must pass through the statutory collective negotiations procedure. Disputes over "interests" are however particularly difficult effectively to settle within this procedure. Many trade unions especially those of public sector employees are forced to follow the settlement procedure though knowing in advance the futile outcome. The procedure is a lengthy bureaucratic tunnel with a wide entrance that sucks in all disputes. Few of the disputes drawn into the tunnel are processed through its bottlenecks while the rest remain stranded at any one or another of the stages of the procedure. Since a dispute may remain unsettled even after it has been formally processed (e.g. because the government as employer is not willing to abide by the settlement) some of the few disputes processed may find their way back into the entrance. Part of the annual case-load of the Department of Labour is in fact made up of familiar industrial disputes that have remained unsettled - (either because of failure to reach an agreement or to implement one) - and kept coming to the Department in monthly or annual succession for relatively long periods of time (224a).

The formal coverage of all types of disputes by the statutory negotiations procedure on the one hand and the inability of the latter effectively to process these disputes on the other makes operation of the procedure conducive to containment and control rather than resolution of industrial disputes.

TABLE 4

Appendix to text above f.224"a"
Unsolved Repetitive Industrial Disputes

Employer	Years of Statistics	Total of Disputes Reported	No. of Disputes Contesting the Same Demand(s)	Demands Contested	Stages of Settlement and Measures Tried
KSW Co. Ltd	1973-29.4.1982	14	12	Pay arrears Pay increase	Mediation, negotiation
STF Ltd	1973-30.12.1982	9	6	Pay increase	Negotiation, mediation
Bata (Sudan)	13.3.1979-14.12.1983	4	4	Application of a law more beneficial to Union	Negotiation, mediation Arbitration, rearbitration
National Footwear Limited	19.9.1974 - March 1977	5	5	Reinstatement	Mediation - criminal prosecution
Hilton (Sudan)	February 1980 - March 1984	4	4	Reinstatement	Negotiation, mediation, & civil & criminal proced.
Metal Sheet Industries Ltd	16.9.1973 - October 1979	2	2	Pay increase and reinstatement	Mediation
Cotton Textile Industries Ltd	7.4.1977 - December 1979	2	2	Pay arrears	Mediation
Customs & Excise Department	September 1979 - 15.7.1982	5	4	Pay increase	Negotiation, mediation
Water & Electricity Authority	1979 - 17.12.1981	2	2	Promotion & accommodation or allowance for it	Negotiation, mediation, arbitration
State Banks	1978-May 1979	2	2	Improving conditions of service generally	Negotiation, mediation, arbitration
Ministry of Health	1979 - April 1984	3	3	Improving conditions of service	Mediation, arbitration & dissolution of the Union

Where the number of disputes dealing with the same issue(s)
equals the total of disputes reported the disputes were over one single issue
or package of demands, but kept erupting for the number of times and in the period shown,
because of failure effectively to settle the issue(s) contested.

Compiled by the author from monthly statistics
of the Khartoum North District Labour Office February 1984

Some of the structural weaknesses that make the system of collective negotiations incapable, at least in case of the public sector employees, of providing solutions for industrial disputes were pointed to by some members of an Industrial Relations Law Commission set up in 1981. "Even if the Commissioner of Labour can resolve a dispute between a Head of a government unit and its employees' trade union, implementation of such resolution will ultimately depend", argue the critics, "on several other resolutions including those of, the Ministry of which that unit is a subordinate, the Minister responsible for the public service and the Minister of Finance. The ranking of all Ministers in the bureaucratic hierarchy is always higher to that of the Commissioner of Labour (224b)." Indeed, the Minister responsible for the public service ex officio heads the Department of Labour in so far as administration of collective Labour Relations Law is concerned. Investment of the Department of Labour time and effort in working out conciliations and resolutions that are, because of their wider implication, likely to be ignored or overruled by Ministers is however a waste of public funds. The critics also add that the vesting of the authority of referring disputes to arbitration in the same hands as these that on behalf of the State employ all public servants (i.e. the Minister responsible for the public service) and endeavour to keep the expenditure of running the service within targeted limits tarnishes the procedure image and undermines employees' confidence in its impartiality (225).

Although members of the Commission unanimously agreed on the inadequacy of the internal structure of the existing procedure and on the importance of limiting themselves to reforming internal malfunctions within the boundaries of the system of tripartite negotiations there was a

difference of opinion on the appropriate prescription to be recommended. Some members advised that the administration and resolution of industrial disputes should be vested with a National Commission which should include representatives of "the trade union movement", the employers and the National Legislative Authority. Disputes should, according to this view, be referred to arbitration only by resolution of the National Legislative Authority (225a). Another group dismissed the above view as unrealistic arguing that shortcomings of the existing procedure could be avoided if disputes over "interests" were to be excluded from within the scope of collective negotiation. This was the same group, which as mentioned earlier (226), refused to support the recommendation for lifting the ban on strikes, and, whose reservations regarding considerable parts of the Commission Report persuaded the President of the Republic to shelve it.

Conclusion

The preceding discussion has identified forms of descendent control affecting both the morphology and functioning of labour organizations. The overall descendent control of industrial relations has been observed as sub-divided into two closely interrelated direct and indirect controls. The political, administrative and other circumstances that condition control vary in type and strength from one area of collective labour relations to another. Hence control itself and its effect on the autonomy of the area regulated also vary accordingly. To explain all this it was inevitable that the discussion examined in detail different areas and the manner in which a type of control of any one of them affects the others.

The issues I intend to discuss in this conclusion could be classified as referring to (a) viability of a case for descendent control in the light of some empirical facts which seem to challenge effectivity of such control; (b) the implication of a thesis of descendent control on a theory of determinism by the economic structure implied by the previous Chapters; (c) the methodology most suitable for the study of this control and its effects on various social disciplines and; (d) its effect on "Labour Law".

Notwithstanding the extreme length to which some governments had gone in counteracting them strikes were never eliminated under any political regime (227). For purposes of determining the implication on descendent control I shall distinguish between industrial strikes that take place during the reign of a particular political regime and general strikes that are launched as a final onslaught on a political regime. Beginning with the first I believe that their occurrence is insignificant, for the viability of descendent control, because it never practically reached the stage of threatening the overall authority of the law or forcing or persuading the political regime to change its labour policy. Moreover the fact that all political regimes stood stubbornly by their laws even when strikes provoked by, and in spite of, these laws placed serious strain on production - (e.g. Cf Hussein 1983 pp.236-239) - itself discloses the contempt which political-decision-making holds for considerations of optimum economic performance.

Moving to the second type of strikes although the fact that trade unions were always directly or indirectly involved in successfully wielding final onslaughts on political regimes provokes a "hypothesis" that

descendent control is ineffective in the long run, it does not however affect the finding that this control persisted under the reigns of individual political regimes, sometimes for relatively long periods of time. There is moreover a further verification which will falsify the above-quoted hypothesis. It consists in that, forms of control discussed in this Chapter have survived all the political upheavals the country has experienced. This in turn suggests that there is a degree of descendent control which is effective even in the long run - i.e. because of its determination by underlying Class and State structures which have so far remained unchanged (except in the degree of ossification of course). This takes us to the second major issue in this conclusion.

I do not believe that descendent (political legal and social) control is asymmetrical to determination by the "economic structure". The condition of the "economic structure" in Sudan enables the class in charge of the State apparatus and its ally to play a dominant role in the direction of social and economic change in that country. The phenomenon of descendent control is in itself, therefore explicable in relation to - and in this sense determined by - the specific condition of the "economic structure". But as mentioned elsewhere (228) the "economic structure" is not static and economic determinism is an ever continuous dialectic between the material and social forces of production. How does material determinism assert itself in a context in which distribution of shares of the products and "roles" in production appear as momentarily determined by voluntarist human or subjects interaction?

To a great extent the success of economic development planning - (which, by its nature, includes elements of descendent wage and income distribution) depends inter alia on the flexibility of planning in adapting with social and economic changes brought about by partial implementation of such planning or by external world surroundings. The experience of the Sudan has shown that failure to account for social and economic needs generated by these factors does hamper further development and contribute to the undermining of political and legal authorities which obstruct this adaptation - (Hussein 1983 pp.224-239). From this I draw the conclusion that when control, although descendent, is responsive to economic and social needs, generated by economic change, the dynamics of material determinism and that of human intervention become coincidental. "Control" would in such situation cease to be "control" and become adaptation. This would be a typical example of a "mechanical" socio-economic evolutionism (229).

A study of development planning and its implementation and labour relations law under President Numeiri's regime in Sudan has shown that this process of adaptation although essential for the continuity of that regime, could not be sustained in view of certain interest considerations that underlay political-decision-making - (Hussein 1983 pp.224-253). The experience of that regime - (and indeed also that of the 1958-1964 regime) - suggests two things, namely (a) that descendent control by a particular regime persists stubbornly throughout the latter's reign (230); and (b) that adaptation is effected not mechanically in the fashion earlier described but by a political eruption of previously suppressed social needs which overthrow political authority as a first step towards that adaptation.

However such political eruptions took place without basically affecting the State and class structures described in Chapter 2. This meant that there are forms of control which have survived all political changes. It could also mean that, in order to contribute to a more profound knowledge of the State and Law in Sudan, scientific research should always endeavour to examine this structural Class foundation of Law and the State.

It has been suggested that analysis which explains State intervention in terms of furtherance of the interest of certain dominant classes or the bureaucracy are "instrumentalist" (Abdin et al 1983 p.72). Adopting a different perspective some Sudanese economists endeavour to evaluate industrial relations law in Sudan on the basis of its compatibility or incompatibility with supposed social and economic development objectives (231). The narrow definition which some of these economists give to "development" (232), and their assumption that law can unproblematically be used as an instrument of social and economic change are themselves open to criticism. But there is a much more fundamental methodological challenge to this type of analysis.

The problem with these Sudanese economists' analysis is that it adopts, as its terms of reference (i.e. for evaluation of the law), either a speculative and value-judged view of what the role of the State and Law should be, or, alternatively, the pronouncements which a particular regime makes about the objective of its economic and social policies (232a). What is overlooked in both cases is the concrete real distribution of economic and political powers, within the Sudanese social formation, that has remained virtually unchanged in spite of the changes

in political regimes. The examination of this distribution is important because it enables the researcher to reveal by empirical evidence obtainable from concrete reality the roles which the State and Law have, since their inception, been playing. This will also enable the researcher to examine whether these empirically-grounded and economically and socially structuralized "roles" do impose certain constraints on the voluntarist development planning of individual political regimes. Far from being "instrumentalist" class analyses - (i.e. analyses that focus on the underlying distribution of economic and social power within a society) focus on the real structural foundation of phenomena and therefore avoid both the idealism of speculation and the superficiality of analysis based on the pronouncements or voluntarist planning of a particular political regime.

Having defended empirical and philosophical credibilities of descendent control and outlined the methodology most suitable for its examination I now turn to examination of its effect on the ideology of labour relations law. I have indicated at the end of Chapter II that labour relations law in Sudan is devoid of an economically-institutionalized or structuralized social ideology. Nevertheless it may have been possible for labour relations law to gain some ideological substance at the more superficial and themselves distinct levels of rule-making and legal-administration. This would have been the case had the governments at one level originated and maintained a system of collective negotiations capable of determining and administering the rules governing terms and conditions of employment and/or at the other entrusted the administration of present Labour Relations Law with the judiciary.

In respect of rule-making we have seen that collective labour relations legislation, the industrial practices of public employers and the comprehensiveness and express provisions of public sector individual employment law all militate against the operation of such a system. Although collective labour relations legislation equally applies to the private sector. Industrial relations in the latter are distinguished by, the practices of some private employers, the absence of exclusionary legislative provisions - (i.e. provisions which exclude certain issues from the scope of collective negotiation) - and the legislative policy of setting minimum standards whilst leaving the door open for further improvement.

With regard to the second level (i.e. that of legal administration) we have also seen that collective labour relations legislation is wholly administered by administrative bodies. Although the Civil Courts are not excluded from reviewing the decisions of these bodies. The fact that administrative authorities always have the initiative to exercise substantial statutory powers marginalize the practical effect of judicial review. Public Sector individual employment law is also wholly administered by administrative authorities and the preliminary jurisdiction of these authorities is exclusive of the jurisdiction of the Civil Courts. Private sector individual employment law is however administered by the Civil Courts with intervention of administrative authorities available as an optional at the choice of the employee. Notwithstanding, the decisions of these authorities are always appealable to the Civil Courts.

Social practices and rituals that may take place at both levels are important for development of an ideology of law. Participation of employers and employees in the rule-making process may enhance the effectiveness of rules. This is so because people are more likely to obey rules which they have themselves made. Another reason is that, because these are the parties directly involved in the production process they are more aware of everchanging capital and labour market conditions and endeavour to adapt the rules to new needs.

Likewise, the Civil Courts enjoy a relatively high degree of independence (i.e. more than quasi judicial or administrative authorities) from the administrative hierarchy. They also follow techniques, and a discipline of decision-making that ensure relative consistency, predictability certainty and outward appearance of impartiality. A bigger role for the Courts in the administration of labour legislation would have therefore meant a better facilitation of its acceptance or to put it in different words more enhancement of ideological content of legislation.

Because the private sector's labour relations law is relatively free from "commandeering" (233) state-intervention at these two levels, individual employment law in this sector is substantively rich, technically and practically meaningful and appears as a rational self-subsistent discourse. This position of the law sharply contrasts with that of the public sector individual employment law. As shown in the next Chapter the latter appears as a form of unilateral State regulation that concerns itself mainly with the interest of the public service. The manner in which rules are made and administered is not conducive to development

of their ideological content. These rules have no self-rationality to give them a wisdom independent from that of their blatant economic and political thrust.

However the above discussion should not give the impression that private sector individual employment law is perfect. Because of the applicability of collective labour relations and State intervention (commandeering in case of the public sector and protectionist in case of the private sector) to both sectors, individual employment law in general bears certain characteristics that are symptomatic of the "superstructural" or "external" course of development of labour relations law in Sudan. One such characteristic is that the terms and conditions of employment provided by statute for a particular sector are not necessarily representative of the economic conditions of employment in that sector. Thus, findings from Sudan and some other African countries have confirmed that pay-structures in the public sector cannot be accounted for by a market theory of salary determination (Abdin, 1983 p.83). Likewise an ILO investigation has also confirmed that wage-structure in both the public and the private sectors in Sudan is substantially affected by the government which does not operate according to supply and demand criteria - ILO, Sudan 1984 pp.143-145 (234). However the type and extent of State control of the individual employment relationship vary with regard to the public and the private sectors. Although the de jure terms and conditions of employment in each sector are at variance with the counterfactual terms and conditions sustainable by the economic position of employers and the industrial power of the trade unions in that sector. The sense in which the former terms and conditions vary with the latter is different in case of both sectors. Judging by the

size-diversity and financial insecurity of private employers and weakness of individual trade unions, the de jure terms and conditions of employment in the private sector are disproportionately favourable to the employees. Notwithstanding the strength of individual trade unions and the larger size of employing units in the public sector the statutory terms and conditions of public employment are quite modest and even more so if compared with those in the private sector. How and to what extent this situation is maintained by a legislative policy that discriminates between employees on sectoral basis is explained in the next 2 Chapters.

CHAPTER IV

THE STATE-INDIVIDUAL EMPLOYMENT RELATIONSHIP AND THE LAW

1. Introduction

There are two systems of individual employment Laws in the Sudan; one for State employees, and the other for employees of the private sector (1). This Chapter discusses the substance and administration of the Law relating to regulation of two main stages of individual employment in the public sector. The first of these stages is selection for employment and the second is security of employees' rights and their tenure of office. The discussion follows the plan outlined at the end of Chapter II. The Chapter is divided into four main parts namely (1) an introduction; (2) selection for employment; (3) security of rights and tenure of office; and (4) administration of the Law.

The two main stages under examination do of course cover aspects of employment from the moment an application is made for a job to that of termination of the relationship. They also comprise matters and materials that are impossible to cover from all perspectives in one single chapter. The discussion of these matters and materials shall therefore be comprehensive only in so far as is relevant - (i.e. either because it supports, contradicts or is otherwise related) - to the main theme of the Thesis. The separate discussion of the substance and administration of the

Law - made solely for the sake of structural organization of the chapter - does not however mean that the two are not inter-related. The two are so merged in practice that any delimitation of the legal scope of public employment rights and duties in Sudan is bound to be incomplete unless done within this inter-relationship (2).

1.A Origin and Scope of Dual Classification

On the two different stages under examination statutes provide different patterns of protection for the employees in each of the public and private sectors. However the difference between the two patterns is not only formalistic or procedural but also detectable in the degree of effectiveness of the protection provided. Under present legislation the private sector's employees enjoy a relatively more effective measure of administrative protection that is "supplementary to and in turn reinforced by judicial protection (3). Moreover because the control of the private sector employment is relatively relaxed if compared with that of the public sector's (Cf. Supra part 2.A.2 Chapter 3) - employees of the former sector have on a few occasions managed to negotiate and bargain with employers for comprehensive enforcement of statutory protection or for realization of procedural disciplinary arrangements more favourable than those contemplated by Statute (4). Statutory provision for compulsory disciplinary procedure in the public sector has on the other hand hindered development of similar voluntary procedures in this sector.

However the discrepancy between individual employment legislation in the public and the private sector is not symmetrical with the respective strength of the trade unions in each sector. The relatively ineffective statutory machinery provided for settlement of individual employment disputes in the public sector contrasts with the relative strength and numerical supremacy of trade unions in this sector. Nor can the discrepancy be explained by suggestions of a supposed legislative policy that may be said to have aimed at allowing public sector's trade unions to develop their own voluntary protective schemes. Such allegation is pre-empted by the fact that these schemes have no formal status under present Laws (5).

The explanation I put forward is that public employees whilst a first target for political control on economic grounds (6), are also subject to tight bureaucratic control that has so far proved indispensable for the existence of an integral State apparatus in the Sudan. A view similar to this interpretation was expressed by the Ministry of Justice during the reign of a government most sympathetic to the cause of trade unionism. In reply to a request, by the Treasury Minister, as to whether the provisions of the Consolidated Labour Code 1970 (CLC 1970) were applicable to Government employees the Ministry of Justice gave a negative reply. The Ministry's conviction was that; "A government and employee relationship is totally different from that of a private employer and employee relationship. Whereas the latter is a mutual contractual relationship between two juridically equal parties the former is a relation governed by public service Laws.

Regulations and Circulars whose primary objective has always been the maintenance of the interest of public utilities and the tranquility of public administration. The government may at any time unilaterally change the terms and conditions of employment of any of its employees and the employee would not in any case have a right to object to such changes. The public employment relationship is not therefore a contractual but a unilateral statutory relationship whose terms and conditions are set and subject to varification by the government" (7).

It is also the view prevalent in judicial circles that private employment Laws are "public" or "general" Laws (Hassan 1979, pp.17-19) whilst public employment "Laws" are special "Laws" (8). The description of private employment legislation as "public " or "general" Law is based on the mandatory nature of its provision (9) and its invocation of punitive sanctions (Hassan 1979, p.17). The description of public service "Laws" as special "Laws" was coined by the Court of Appeal, in the Ministry of Irrigation 1982 Case, on the conviction that ordinary civil courts have no jurisdiction to entertain claims made under these Laws.

Not all public employees irrespective of grade and skill have always been covered by public service legislation. The Employers and Employed Persons Ordinance 1949 (EEPO 1949) which was enacted primarily for protection of employees in the private sector exempted from its field of application only Civil Servants who held posts in the first or second divisions of the "Sudan Civil Service" (10). The practical effect of the

exemption was that the clerical staff, which constitutes the third division of the Sudan Civil Service and employees in unclassified posts remained under the protection of the (EEPO 1949) until 1970 when this Ordinance was repealed and a Consolidated Labour Code (CLC 1970) (11) covering only employees of the private sector was enacted.

A question which poses itself is, why, if a certain degree of central control is necessary for public employees, were these classes of employees left outside the jurisdiction of the public service Laws that existed prior to 1970 such as the Officials Discipline Ordinance ODO 1927 and the Officials' Affairs Regulations 1938? The two most important reasons for this were:

1 - The floor of rights and the extent of protection against different forms of dismissals which the EEPO 1949 provided for employees covered by its provisions posed until 1969 no impediments on the prerogatives of employers to dismiss (12). For this reason it was not deemed necessary by the government to bring the classes of public employees covered by the EEPO 1949 under employment Laws of its own.

2 - The relaxed control over determination and administration of individual rights of certain classes of public employees was compensated for by an emphasis of the legislative policy on maintaining the segregation between public and private employees in the area of Collective Labour relations. Traces of this policy could be found in Laws such as the Trade Union Ordinance 1949

(TUO 1949), the Trade Union Ordinance 1960, the Trade Disputes Act 1960 and the Trade Union Ordinance 1966 (13).

The CLC 1970 referred to earlier (Supra f.11) was suspended on 9 February 1971 (Hussein 1983, p.123) (14) and following that suspension the EEPO 1949 once again came into effect. This time the EEPO 1949 applied with full effect but as amended in 1969. The 1969 amendment had introduced an obligation on the parties to an employment relationship to refer their disputes to the Commissioner of Labour before any decision to dismiss or resign is taken (15). This was a development that was also to contribute to consolidating a dual system of determination and administration of individual employment rights for both the public and private sectors. The obligation to refer a dispute to the Commissioner of Labour before any decision to dismiss is taken and the subsequent weight of judicial interpretations to the effect that failure to do so will, irrespective of the grounds contended render dismissal prejudicial (16) could have proved also too restrictive on the governmental prerogative stressed by the Ministry of Justice memorandum (17) only few weeks prior to suspension of the 1970 CLC. Hence the enactment since 1973 (18) of Laws (19) that have brought all government employees, irrespective of skill or grade, under their ambit. The autonomy of public employment Laws and that of their administration is now firmly accepted and the Civil Courts may no longer assume jurisdiction over actions brought by public sector employees (20).

The rigid boundary between the Laws regulating public and private employment in the Sudan contrasts with the position in Britain where both Labour Legislation and Common Law employment principles have been applied equally to Crown employees (Wedderburn 1983, p.35) (21). Nevertheless it is also true that the Sudan is not the only country where public and private employees are treated differently. What is rather uncommon about the Sudanese and some other under-developed countries' (22) experiences is the extension of differential treatment to the field of individual employment relations and the introduction of a statutory machinery, for handling individual employment disputes in the public sector, which, excludes both voluntary procedures and the jurisdiction of the Courts, and is integrated in the administrative hierarchy (23). In developed Capitalist Societies where the statutes or the Courts distinguish between "public" and "private" employment Law the practical effect of the policy is minimal either, because the distinction exists only in the area of collective Labour relations, or, because of the marginal role which Law in all cases plays in controlling the employment relationship in these Societies (24). The prohibition of collective offensive economic action by public officials in West Germany, although not in practice eliminating such actions (ELL Supp., 1979, (25) pp.33, 193, Wedderburn 1972, p.365) is also, counterbalanced by a security of the tenure of office (Wedderburn Ibid; ELL Supp. 1979, pp.209-210) and existence of a Labour legal system that does safeguard fair resolution of individual employment disputes (26). Likewise prohibition of strikes by Government employees in the United

States (27) has not prevented the growth, under auspices of the Law, of a system of collective negotiation capable of producing legally-binding agreements on issues ranging from determination of the Terms and Conditions of Employment to dismissal and disciplinary actions in general. Indeed SS.204(2) of "The Taylor Law" (28) imposes an obligation on the public employer "to negotiate collectively with employee organization for determination and administration of grievances arising under the terms and conditions of employment of the public employee - (Smith Edward & Clark 1974, pp.491-492) (29).

1.B Public Employment Defined (30)

Government service in Sudan is usually referred to as the Civil Service. Technically however the Civil Service is graded into three main classes and a number of superscale posts. The three main classes are: (1) the administrative and professional (A & P); (2) the sub-professional and technical (SP & T); and (3) the clerical (C). The superscale posts (known as Groups) are filled by senior officials and their deputies, and the provincial commissioners and their deputies and assistants - (Al-Teraifi 1980). Public employment is in contrast a wider, legislative concept that covers, in addition to employees in scale and superscale posts, public employees in unclassified posts - (i.e. non-pensionable, lower level posts usually filled by manual workers) (31). Under present legislation public employment is defined for all purposes as covering all employees irrespective of grade or skill, in ministries, government departments,

administrations of the Central Government, the Regional Government, Khartoum Province Administration, bodies of the People's Local Government and organizations and public corporations (32). Public employment so defined covers the great majority of the workforce in the modern "organized" sector of the economy in Sudan (33).

Following a decision by the Supreme Court in 1980 the scope of public employment even extends to include persons employed in an enterprise whose capital is owned by two or more governmental departments or units even though the enterprise is a registered private company under the Companies Act 1925. The question before the Court of Appeal in that Case (34) was whether service in Ennielane Bank, being a State enterprise jointly owned by the Bank of Sudan and the Finance Ministry, constituted public service. The Court of Appeal considered that it is the juridical status of the Bank and not the identity of its shareholders which should guide the Court in reaching its decision. Reasserting the independent legal personality a company possesses and presumably its capacity to do all that is authorized by its Memorandum of Association, including the setting of terms and conditions of employment, the Court of Appeal ruled that service in the plaintiff bank is not public service. The decision was reversed on appeal to the Supreme Court, the latter's judgment being based on two grounds. The first ground was that Ennielane Bank is a "unit" within the meaning of the PSA 1973, S.2. The second was that the Court of Appeal did not have the jurisdiction to review a decision by

the Public Service Appeals Board (PSAB) - c.f. *infra* part 4.C.6.

The Supreme Court decision affects the position not only of all employees of the Plaintiff Bank but also that of employees in many other similar public sector "private companies". However due to a lack of co-ordination among the various institutions engaged in the administration of Labour legislation in the country, the decision of the Supreme Court, has not yet had full effect. Indeed the taking by the Attorney General in 1979 of Ennielane Bank Case to the Supreme Court and its defence of the position of the Bank's employees as public employees did not prevent the Attorney General's Chambers from giving a diametrically opposite advice on the same issue in a subsequent case in 1981 (35).

In addition to its potentially wide effect the decision of the Supreme Court in Ennielane Bank Case also exemplifies the orientation of judicial intervention in the development of public employment Law and the extent to which this orientation is guided by an autonomous legal doctrine. This is explained below.

The section on which the Supreme Court in order to reach its decision, relied, reads; ". . . unit means any ministry department or administration in the Central Government, Regional Government, Khartoum Province Administration, People's Local Government Bodies and Public Corporations and Organizations". The Court of Appeal did not deny that the Bank in question is an administration subordinate to the Bank of Sudan and the Finance

Ministry (p.89 Per Zaki A/Rahman CAJ). It considered this as the de facto position of the Bank. In reaching its decision however the Court of Appeal considered the de facto position as irrelevant. What mattered to the Court of Appeal was the intention of the promoters who despite their knowledge of the de facto position of the enterprise decided to promote it into a company. To base a decision on the de facto position would involve going beyond the intention of the parties. The Supreme Court did not address itself to the legal argument advanced by the Court of Appeal nor explain how a Company registered under the CA 1925 may be a unit within the meaning of the PSA 1973 S(2). The Case touched on issues relating to regulation of the relationship among different government departments and ministries and on the prestige of the PSAB. The reluctance of the Supreme Court to follow a line of conceptual legal reasoning in reaching a decision and its invocation of public interest as an alternative guidance in that direction reveals the place which political considerations occupy in the jurisprudence of decision-making, often at the expense of an independent legal rationality. "It may have been just a coincidence that the decision of the Supreme Court came only a few days after the President of the Republic, in total disregard of the Court of Appeal decision on the matter, ordered that the Bank should abide by the PSAB's decision" (36).

THE REGULATION OF LABOUR AND THE STATE
IN THE SUDAN

(A Study of the Relationship Between the Stage of
Social and Economic Development and
the Autonomy of Labour Relations Law)

EL SIDDIG ABDELBAGI HUSSEIN

LLB University of Khartoum

LLM University of Warwick

PhD Thesis

University of Warwick

The School of Law

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2. Selection for Employment

There are many factors which make legal control over selection for employment in general very much more limited than legal control over accrued rights and obligations after the employment relationship has been created (37). However these factors have not prevented the enactment in many European countries, of legislation for combating unfair discrimination. One reason for this is that the sanctity of group-interests which is essential as a moral necessity for this type of legislation (c.f. Davies and Freedland, Ibid.) in a Capitalist Society is widely recognized in historically concrete developed Capitalist Societies. It is this association of anti-discrimination legislation with group-interests and the scant veneration which the latter provoke in under-developed social formations that explain the virtual absence of such legislation in the Sudan.

For many reasons, controlling selection for employment is of greater significance in under-developed social formations. Because the State is the biggest employer, provision of objective control over selection for employment may enhance the impartiality and consequently ideological effectivity of the State apparatus. From another perspective the ethnic heterogeneity, nepotism and economic inequalities prevalent in these social formations constitute the social environment where unfair discrimination practices, are more likely to prosper. Moreover due to the origins (38) and hegemony of the political, the role which legislation, like any other State action, may play in

combating the portion of these practices that is not due to exercise of political power itself, is likely to be more impressive. Having made these preliminary remarks I will now examine the position in Sudan.

2.A A Historical Background

Immediately after the reconquest of the Sudan in 1899, a system of administration, in which the supreme military and civil command vested in one officer termed the Governor General of the Sudan, was adopted for the country (39). For a long time after 1899 appointment and promotion of officials in the Sudan remained, in effect, vested in the Governor General (A-ET 1936, Article 2). In 1938 a regulation stipulating the responsibilities and rights of officials but saying little about selection for employment was enacted (OAR 1938). Even after independence appointment to government posts of all grades was regulated internally within each unit by administrative directives and circulars that were not publishable in the Official Gazette and in effect difficult to trace (40).

There are two reasons that made reform of the public service an important agenda in the programmes of the Government between 1969-1976. One reason was those political upheavals in 1969, 1970, 1971, 1973 which inter alia exposed the extent of politicization of the public service and made it subject for even tighter bureaucratic and political control thereafter. The other reason was expansion of the public sector and centralization of

economic planning following the nationalization and confiscation of all big industries and enterprises in 1969-1970. In 1971 the task of reforming the public service was allocated to a newly-established Ministry of Public Service and Administrative Reform.

Because it was up to that time the least regulated and also possibly because of its significance for political monitoring the area of selection for employment received the greatest attention. The Ministry of Public Service managed with the assistance of a team of British experts to report its recommendations by December 1973 (41). The report recommended inter alia the establishment of new recruitment boards and the widening of jurisdiction of already existing Employment Exchanges (42). By 1976 various pieces of legislation which in their entirety constitute the present public service Law had been enacted. The two main Acts that matter for the discussion in this part are the Public Service Act 1973 and the Manpower Act 1974. The discussion shall however focus on the powers and performance of the institutions which these Acts and their subsidiary regulations provide for.

2.B Recruitment Institutions

2.B.1 Recruitment Boards

The Public Service Act 1973 (PSA 1973) provides for establishing one Central and five regional recruitment boards with the function of - inter alia - selection of would-be officials to fill

vacant posts in the starting and other sectors of scale (A and P) of the Civil Service (PSA 1973, S.33, PSR 1975, S.14(6)). Moreover the Law also provides that selection for public posts shall be made on the basis of free competition in accordance with a merit system (PSA 1973, S.12) that disregards all considerations other than qualification and competence (PSR 1975, S.15).

The Public Service Recruitment Boards provided for under the PSA 1973 were established in 1974 by Presidential Decree No. 1569. Government departments and units wanting to appoint officials in scale (A and P) shall if, falling within the jurisdiction of Recruitment Boards, send a list of adequately described vacant posts to the Boards. The Boards shall, after advertising those vacant posts and interviewing the applicants, prepare a list of possible appointees and send it back to the department or unit concerned. SS.33(4)e of the PSA 1973 provides that in exercising their functions the Boards shall have the power to ensure that their decisions are abided by. However as explained later (43) this power has not been institutionalized and for the time being exists only on paper. This is also the case with S.14 of the Public Service Recruitment Boards' Regulation (PSRBR 1982) which provides that the decisions of the Boards regarding selection are binding on the departments and units concerned.

2.B.1.a Constitution and Power of the Boards

By its Constitution (PSA 1973, S.33(2)) the Central Public Service Recruitment Board (CPSRB) is a government department subordinate to the Minister responsible for the public service and

the President of the Republic. Likewise the Regional Recruitment Boards are constituted by and subordinate to Regional Governors who are in turn subject to control by the Central Government (PSA 1973, S.33A). The Boards are neither tribunals or quasi-judicial commissions nor agencies for enforcement or administration of anti-discrimination Laws because there are no such Laws in the country. The Boards are intended primarily to enhance efficiency of the public service and any protection against discrimination or abuse of authority that may accrue to individuals is incidental. Yet the Boards together with the offices of the Labour Department constitute the only (44) available control on selection for employment. Because it is a State-provided protection it applies only to categories of employees the State is ready to protect and, to the extent allowable by the exigencies of political control. This centralization of recruitment may not by itself necessarily operate to further the cause of fair competition emphasised by the Law (PSA 1973, S.12). In the absence of administrative and financial guarantees to support their autonomy, and a legal source to nourish normative development of their decision-making and thereby institutionalize that autonomy, recruitment centres may easily be used to further not the interest of the Civil Service but that of the political regime in control of the State (45).

There are still several points that have to be mentioned to enable us to assess the degree of protection which recruitment Boards afford to prospective employees. There is first of all the fact that; because the posts Recruitment Boards are empowered

to select for constitute only 20% of the Civil Service posts in the Sudan (Al-Teraifi 1980), the applicants falling within statutory jurisdiction of Recruitment Boards (46) are a minority among applicants for public employment in general. Secondly, even within this minority, the Boards are not empowered to deal with applications for posts in government units, department or public corporations that are exempted by the President of the Republic or the Minister responsible for the Public Service (PSA 1973, SS.33-3(b)). Until 28 July 1976 all public corporations and Banks remained outside the jurisdiction of Recruitment Boards. The same order which then brought these bodies within jurisdiction of the Boards (47) empowers the Minister responsible for the Public service to exclude any of these bodies from that jurisdiction. In exercise of these powers the Minister has issued a list of excepted bodies including State Commercial Banks, Universities and High Education Institutions and public corporations or establishment transacting in joint ventures with the private sector. The Judiciary and the Attorney General's Chambers were later empowered by resolution of the Supreme Judicial Council (No. 2, 28th June 1979) to establish their own "Joint Recruitment Board".

Finally, there is evidence to suggest that the performance of the Boards within the limited scope left for them is still retarded by their powerlessness to enforce their decisions. Consequently, there is no effective remedy for an applicant who, having been selected by a Board is rejected by the employing department or unit in contravention of S.14 of the PSRBR 1982 (48). Equally

there is no effective measure which the Boards may take against a department or unit which in disregard of the Board's authority, advertises vacancies and itself selects applicants. In both Cases the Central Recruitment Board may under the CPSRBR 1982, S.15 submit a report on the case to the Minister responsible for the Public Service. But the Minister is neither required by Law to take action towards enforcement of the Board's directive nor possesses any special powers to order a unit or department outside the Jurisdiction of his ministry to comply with the Board's decision (49).

An example of a Case where an employee selected by the Central Board is rejected by the employing department is the PSCRB -v- the Ministry of Construction and Public Works. The Ministry concerned sent a list of engineers to the Board asking for appointment of four of them for filling vacant posts at the Ministry. The Board rejected the list - (on the ground that it is for the Board to make lists of candidates and selectees) - and selected and sent to the Ministry, for appointment, four engineers from among those on its own waiting lists. The Ministry of Construction appointed only one engineer and rejected the other three. The Board wrote back to the Ministry contending that the latter could, only accept or reject the list in "toto" and not discriminate against any of those listed. The Ministry ignored the Board's letter. Five months later the issue was reported to the Minister of Finance and National Economy under the PSCRBR 1982, S.15. The Ministry insisted on its position and the Minister failed to enforce the Board's decision (51). The names of the

rejected engineers were simply reinserted on the Board's lists of waiting applicants. In this, and other similar Cases the injured party has neither a right of action against the guilty employer nor one for judicial enforcement of the Board's decision (52). All that can be done is to wait for the Board to settle the dispute with the unit or department concerned.

The above and other enforcement problems are perhaps best illustrated by the Board's own report for the period 25 April 1978 - 24 April 1981. The report outlines a number of problems which surround the Board's relations with other State units and departments (Ibid pp.10-17). These problems include inter alia the following:

- 1 - Many units and departments adopt the practice of themselves nominating candidates to fill vacant posts. This, according to the report tends to defeat the ideal of fair competition.
- 2 - Many State corporations establishments and banks within the jurisdiction of the Board appoint graduates without reference to the Board. Because these are often financially independent corporate units the Board is unable to check the appointments they make in oblivion to its supposed power (53).
- 3 - Many units do not appoint applicants selected by the Board. The Board has also noticed that female graduates constitute a majority among those rejected by these units. In all cases female applicants have either been rejected ab initio on ground of their sex or, when the Board has succeeded in securing their appointment have been "constructively dismissed" (54) (e.g.

through immediate transfer to a remote area) on similar grounds.

Table (5) shows that the performance of Regional Selection Boards is equally unimpressive. Secondment which in the table accounts for 50% of all recruitments covers employees whose initial appointments in the Civil Service were either made through the Central Recruitment Board or even before the establishment of recruitment boards of any type (i.e. before 1974). In both cases secondment is not a method of recruitment determined by the Regional Boards. It is therefore inadmissible in evaluating the actual performance of Regional Boards. Excluding secondment, personal selection is the method through which the majority of the remaining respondents - (i.e. those who answered the questionnaire) have been recruited. This happens at the expense of the method of advertisement and fair competition which Recruitment Boards are supposed to consolidate.

Table (5) - Methods of Recruitment Compared

Method Region	Personal Selection	Advertised Job	Others (Secondment)	Do Not Know	Number of Participants
	%	%	%	%	
Kordofan	4.54	9.09	72.73	13.64	28
Darfur	44.82	6.90	37.93	10.35	23
Eastern	45.45	-	50.00	4.55	17
Northern	53.19	6.38	40.43	-	28
Average	37.00	5.00	50.27	7.13	24

Source - Mohamed Osman el Ga'ali : Recruitment policies and decentralization; reflections on empirical findings. Dept. of Business Administration, University of Khartoum, Sudan - unpublished research 1980.

The obvious weakness of the recruitment institutions described under this part is that their performance is totally dependent on administrative discretion. This in its turn is due to the lack of substantive anti-discrimination Law. However read together S.15 of the PSR 1975 and S.12 of the PSA 1973 make competition and selection on fair grounds theoretically a right for all Sudanese and a requirement that all public bodies must observe. But neither the PSR 1975 nor the PSA 1973 specifically provide a right of action for individuals aggrieved as a result of non-observance of this requirement. Were it not for the additional procedural barriers mentioned under f.52 such individuals would have a right of action, against the government body concerned, under the Sudanese Administrative Law - (CPA 1974, SS.309, 312). As explained later these procedural barriers distinguish the application of the Laws on selection for employment in the public sector from that of their counterpart in the private sector (55).

2.B.2 Employment Exchanges

The Manpower Act 1974 (MA 1974) repealed the Employment Exchange Ordinance 1955 (EEO 1955) and bestowed upon the Employment Exchanges new powers that, whilst preserving their previous function as manpower statistics centres under the EEO 1955, made them State agencies responsible for enforcement of employment policies. However like that exerted by Recruitment Boards the Control which the MA 1974 and the Employment Exchanges provide over selection for employment is mainly

procedural.

The Jurisdiction of the Employment Exchanges covers a wider range of employees including those in Scales (SP and T) and (C) and those in Sub-Scale posts. Scale (SP and T) covers the sub-professional and technical classes while Scale "C" covers the clerical class. Classes of the two scales together constitute 60% of those employed in the Civil Service as a whole (Al-Teraifi 1980). Sub-Scale posts are occupied by manual workers who although State employees, were not traditionally treated as part of the Civil Service (56).

Every unemployed person willing and able to work and every worker wishing to change employment may apply for registration, for such purposes, with the employment exchange concerned (MA 1974, S.9). The Act prohibits the employment of any person, falling within jurisdiction of the Employment Exchanges, who is not a holder of a Certificate of Registration under S.9 (MA 1974, S.11). Likewise advertisement, through any means of communication, of vacancies or new posts is prohibited unless the written permission of the competent Employment Exchange has been obtained in advance (MA 1974, S.13(1)a). Most importantly the Act, prohibits direct appointment, and requires employers to apply to the competent Employment Exchange for nomination of a person or persons with the required qualifications. The applicant or applicants appointed by employers must always be from among those nominated by the competent Employment Exchange (MA 1974, SS. 13(1)b).

The Commissioner of the Labour Department may authorize any officials in the Department to carry out inspection inside any plant's premises in order to make sure that the provisions of the Act are complied with (MA 1974, S.25(1)). These officials shall have the power to inspect, examine and investigate documents, records and files and to summon employers to give evidence or explain matters relating to application of the Law. Section 26 of the Act makes it a criminal offence punishable with fine and imprisonment for any person to act in contravention of the Act or any regulations or orders made under it. Likewise although the Act provides no right of action for a person whose application for a job is rejected in contravention of its provisions, such person may, in theory, have a right of action under Administrative Law (CPA 1974, SS.309-312).

These three possible methods of enforcement - (i.e. administrative inspection, criminal prosecution and judicial review of administrative decision) - may suggest that the MA 1974 is fully implementable. However this is not necessarily true.

The provisions of the MPA 1974 apply to the classes of public employees enumerated earlier and to all private sector employees. However when we investigate the methods of enforcement of the Act available to the Labour Department and to the individual employee - (i.e. in case an applicant or applicants nominated by the Employment Exchange are rejected by the employer in contravention of SS. 13(1)b) - in relation to each sector we find that both the Labour Department and the

individual applicant are, in case of public employees, trapped in a net of bureaucratic control that may not allow them to seek judicial enforcement of decisions, or, judicial redress. A government department or unit which acts in contravention of the Act may not be taken to court by the Labour Department, because the cause of action, although a contravention of a Law in force, is, also, a dispute between two government departments which it is for the Attorney General to resolve under the Attorney General Acts 1981, 1983, SS.8. Chances of success of the aggrieved applicant are also minimal. The aggrieved candidate cannot by himself prosecute a government unit under the MA 1974 S.26 because a magistrate or criminal court will not in such a case "take cognizance" except with the antecedent sanction of or upon complaint by the Labour Department (CCP 1974, S.130(1)a).

If the aggrieved candidate decides to initiate a civil suit against unlawful exercise of power by the public employer the civil courts may not assume jurisdiction because the cause of action is related to application of the public service Laws and Regulations, and, therefore, within exclusive jurisdiction of the Public Service Appeals Board (PSAB) (57). If the aggrieved candidate make his petition before the PSAB, the latter may decline to assume jurisdiction because a candidate (i.e. a prospective employee) is not an employee within the PSA 1973, S.30(1) and the PSR 1975, S.25 (58). Furthermore, there is evidence to suggest that the powers of inspection given to the Labour Department under the MA 1974 are seldom exercised

vis-a-vis public employers. None of the Department of Labour 1978-1982 Annual Reports contains a single inspection in the public sector. Although this is partly due to the common problem of staff shortage (59), it is also explicable by assumptions about fairness of public employment practices (60). Finally, as will be shown later (61) the PSAB and the Attorney General's Chambers although playing the above-mentioned roles in administration of public employment Law do not themselves have an independent judicial status and a power to enforce their decisions.

2.B.3 The Political Establishment

Appointment to "high level Leadership" and some "superscale posts" is made by political authority. To determine the identity of holders of such authority that participate in appointment and the number of employees affected I need to define the phrases in parenthesis. Superscale posts include the seven "Groups" posts above Scale (A and P) of the Civil Service in Sudan. "Groups" posts constituted less than 2% of the Civil Service Posts in 1973 (Al Teraifi 1980) and the percentage has not considerably increased since then - (estimated at 3% for 1984) (62). High level leadership posts include posts of under-secretaries or deputy under-secretaries of Ministries and others having equivalent status, chairmen of board of directors of public corporations and organizations, executive directors of public Corporations, directors of department under direct supervision of Ministers, provincial Commissioners and any other posts declared, as high

level leadership posts, by the President of the Republic (PSA 1973, S.2).

"Groups" posts from the first to the fifth are usually filled by scale-to-"Groups" or Group-to-Group promotions. Appointment in Groups posts from the highest seventh to the fifth (inclusive) are made by the Minister responsible for the Civil Service on recommendation of the Minister demanding the appointment PSR 1975, S.27(2). Appointment in high level leadership posts may only be made by order of the highest political authority be it a President of the Republic (PSR 1975, S. 27) or a Council of Ministers - (Officials Affairs' Regulation 1969, S.29). Appointment in high level leadership posts is excepted from all Statutory regulation of selection for employment and subject only to political discretion. Likewise appointment in "7-5 Group posts" is exceptable from such regulation PSR 1975, SS.18(1).

2.B.4 Employers

Even if the Army the Police and other regular forces (63) are excluded there are still public sector units in which selection for appointment is left entirely to discretion of the management or heads of units. These include all public service units that are excepted, from jurisdiction of Recruitment Boards and Employment Exchanges, by order of the Minister responsible for the Public Service, under the PSA 1973, S.33(3)b and the MA 1974, S.13(2) respectively. Bearing in mind the absence of any substantive Law controlling selection for employment, the position of prospective employees in these units is, in theory

weaker, because there is no Law whose alleged breach may support even an application for judicial review of the decisions of this class of public employers. The functions which Recruitment Boards, Employment Exchanges, and the Laws they administer, fulfill, with regard to employees falling within their jurisdiction may possibly reduce the situations in which discrimination would otherwise unabatedly occur. In cases where such discrimination nevertheless occurs the breach of the Law involved may in theory however support an application by the person affected for judicial review of an unlawful exercise of power by the public body concerned. However because of the procedural and bureaucratic restrictions (64) that impede recourse to Judicial enforcement and review the position of different classes of public employees, although legally theoretically different, is practically the same.

The exception of public corporations and establishments transacting in partnership with the private sector from the jurisdiction of Recruitment Boards and Employment Exchanges may in practice mean that a majority of public corporations and establishments are in effect excluded. There are few public corporations which are not transacting business in the manner described and there is none which is not entitled by statute to do exactly that - (the Public Corporations Act 1976, S.5). Given the absence of any form of control on selection for employment on the one hand and the lucrative salaries and wages which public corporations - (compared with other Government departments) - pay on the other, it is not surprising that some of them had under the previous regime in Sudan, turned into financial stronghold of

the President's men, their relatives and supporters (65).

Summary

A general observation about legislation on selection for employment is that it has as its main objective the protection of public service interest. Reflective of this objective is also that legislation which sets detailed substantive and procedural rules is made and administered by administrative authorities. Neither the judiciary nor the trade unions participate in determination and administration of rules in this area. All these factors reflect on objectivity or impartiality of the law (66) and its enforceability (67).

3. Security of Employment Rights and Tenure of Office

Individual employment legislation in the public sector owed its initial existence not to a trade union movement that fought for its realization but to voluntary resolution of the then Governor General of the Sudan to introduce it as part of the overall effort towards establishing a civil administration in the Country after its reconquest in 1899. That introduction was important for defining the rights and privileges (68) of members of the Civil Service who continued, for a long time after 1899, to be mostly British together with a few Egyptians.

Even after the sanctioning of trade unions and Independence, different political regimes viewed the setting of terms and conditions of employment in the public sector as a State prerogative, and, changes in the terms and conditions of public employment always remained an initiative of the State. The continuation of this course of development to date is made possible by political dominance of the State and the absence of any considerable Capitalist economic structure external to the State own structure (which is simultaneously an economic and bureaucratic structure c.f. Supra, Part 2, Chapter 2) which may have supported a social movement to obstruct or change the direction of that course of development.

The area of public employment under examination is one where legislation is the main source of legal control of the employment relationship. Because this legislation is wholly administered by non-judicial bodies, Common Law principles whether substantive or interpretational do not at all compete or interfere with it for regulation of the public employment relationship. This area is also, like all other areas of public employment, one where legislative control either through its comprehensiveness or express provision undermines any social or collective control parallel to itself. There have always been various pieces of legislation which in their entirety provided detailed statements of terms and conditions of the area of public employment under examination.

3.A Employment Rights

Until 1975 various terms and conditions of this area of employment were provided for by three main statutory instruments namely, the Officials Affairs Regulation 1938, the Transfer and Transportation Allowances Regulation 1934 and the Holidays and Leaves Regulation 1934. Up to 1948 when trade unions were, for the first time legalized these instruments remained the exclusive source of legal control of the public employment relationship. But the sanctioning of trade unionism did not end the hegemony of legislative provision. Stipulations were made under the trade unions and the trade disputes ordinances, promulgated in March 1949, with the effect of maintaining exclusiveness of legislation (69).

In 1973 a public service Act stipulating the general principles of public employment was enacted (PSA 1973). The dominance of legislation as a method of control is reiterated in several provisions in the Act (70). In 1975 a public service regulation (PSR 1975), elaborating the general principles stipulated under the PSA 1973 and, consolidating, with certain amendments the terms and conditions of public employment previously contained under the Regulations of 1934 and 1938, came into effect. The PSA 1973 and the PSR 1975 have been in effect since their enactment.

The PSR 1975 contains 166 sections and 38 tables and supplementaries. The Regulation stipulates, defines or specifies, inter alia, the duties of employees (S.13), the date of commencement of service (SS.24-27), working hours (SS.28-32), the mode and rate of remuneration (SS.33-39), the bases and procedures of promotion (SS.40-52), entitlement to and calculation of holidays and leaves (SS.65-95) and allowances, overtimes, bonuses and promotions (SS.96-166). Comprehensiveness, provision of both conceptual definition and quantification of rights and generality of application are characteristic features of the PSR 1975. The various rights and obligations of the employment relationship are drawn in such a detail and particularity (71) as to cover every profession, craft or type of industry in the public sector and in effect leave little or no scope of manoeuvre for individual State units in their negotiation with employees trade unions (72).

Section 4 of the PSR 1975 provides that it applies to all "employees in Ministries, Government Departments and Administrations subordinate to the Central or Local Government". Exemption from the Regulation may only be made by order of the President of the Republic (PSA 1973, S.4(e)).

3.B Security of the Tenure of Office

Substantive and procedural provisions relating to protection of employee's interest in the job and the security of after-service benefits are to be found in the PSA 1973, the Employees

Discipline Act 1976 (EDA 1976), the Public Service Pensions Act 1975 (PSPA 1975) and the Social Security Act 1974 (SSA 1974). A general observation however is that, in contrast to the private sector, individual employment Law in the public sector provides relatively inadequate protection against, and largely no remedies for, dismissal and loss of employment in general.

3.B.A Grounds for Termination of Office

Under the PSA 1973 services of an employee may be terminated for inter alia any of the following:

1 - Retirement or dismissal from Service in the public interest, SS.22'g'.

2 - Abolition of post, SS.22'f'.

3 - Dismissal by a Board of Discipline, SS.22'e'.

3.B.A.1 Retirement or Dismissal in the Public Interest

In addition to SS.22g of the PSA 1973, which applies to all public employees, the PSPA 1975, SS.26(1)b provides that a pensionable official may be retired at any time during his service if the President of the Republic on recommendation of the Minister responsible for the public service has decided to retire him in the interest of the service. Both grounds of public interest (PSA 1973, SS.22g) and interest of the Service (PSPA

1975, SS.26(1)b) were introduced in Amendments to the Acts in 1974 (1974 Act No. 40) and 1981 (PO No 36, 15.12.1981) respectively (73). This does not of course mean that public employees were immune, before these dates, from dismissal on grounds cloaked in public interest or other legal phraseology. Various political regimes exercised that power, as a matter of right or might to dismiss undesirable persons, without feeling the need to institutionalise it by statute. Trade Union officials and political activists have always been the most vulnerable to dismissal on these grounds. On the occasions of dismissals in the period 1958-1984 referred to earlier (74) the direct cause of dismissal was always participation in or launching of a strike which the concerned regime perceived as political.

Since the Civil Courts are not allowed to review claims relating to or arising from application of public service Laws - (see infra Part 4:AB) - determination of whether or not a retirement is in the public or service interest is left to discretion of the President of the Republic, the Minister responsible for the Civil Service and ministers and other officials to whom they may delegate their powers - *Bashir Hamad El Bashir -v- Dept. of Customs and Excise* (75). Experience has shown that retirement in the interest of the political regime is construed by these executives as retirement in the public or service interest even though that was not always necessarily the case. More than 89% of the 925 Public employees reported retired under these provisions in the period between December 1980 - March 1984 were in fact picked upon because of their political beliefs or

trade union activism (76).

In respect of employees in high level leadership posts the PSA 1973, S.24 also provides that they may be dismissed by the President of the Republic, in accordance with the procedure he deems appropriate, if in his opinion a public interest would be achieved thereby.

An employee dismissed or retired on "public interest" or "service interest" grounds may appeal against such measure but only to the authority that recommended or approved his dismissal or retirement (PSPA 1975, S.26(1)b). The Public Service Appeals Board (PSAB) which deals with public employees' complaints (77) does not assume jurisdiction over claims brought by employees dismissed under the PSA 1973, SS.22g, 24 or the PSPA 1975, SS.26(1)b (78).

3.B.A.2 Abolition of Post

Unless a pensionable official, an employee whose service is terminated due to abolition of the post he is holding (PSA 1973, SS.22f) is not entitled to any redundancy, after-service or gratuity payments. If the redundant employee is a pensionable official however he may be compensated by an addition, for the purpose of calculating his pension to his effective service at the rate of one year for each four years of the period between the date of his retirement and the period of his attaining 60 years and by payment of an amount equalling three times the pay he

was drawing per month immediately before his retirement PSPA 1975, SS.26(1)a.

However because there is no concept of unlawful dismissal in public sector employment Law this entitlement of pensionable employees is vulnerable. Whereas private employment law imposes a general obligation on employers not to dismiss and lists only exceptional cases where dismissal will subject to the conditions provided be Lawful (79) public employment Law provides no such obligation. Hence an employee whose post has been abolished may not get this Statutory or any other compensation if his employer, in order to evade the financial burden, chooses to frame as ground for the dismissal a reason other than this real cause - i.e. abolition of post. There is also at least one case (80) where dismissal was labelled as "for abolition of post" even though this was not the accurate description of the situation.

In situations like these the PSAB can, upon receiving a complaint, always give its view regarding the proper application of the public employment legislation and consequently of the legality or illegality of employer's action. The fact remains however that it is not within the statutory powers of the PSAB to order reinstatement or award any remedy. The fate of the dismissed employee is ultimately determined by the willingness or unwillingness of the unit or department concerned to abide by the PSAB's decision (81).

The position of a non-pensionable employee dismissed on grounds of "abolition of post" is even worse. Such an employee is not entitled to an after-service gratuity under the PSPA 1975, S.31 because that Act applies only to Civil Servants holding posts in the first, second or third divisions of the Sudan Civil Service. For the reason shown earlier the employee will not be entitled to a compensation for arbitrary dismissal. The decision of the PSAB awarding the plaintiff in the Sudan Estate Bank's case (Cf. *supra* f.80) compensation for arbitrary dismissal was in this respect not a policy-motivated extension of protection against dismissal to public employees. The text of the judgment shows that the PSAB is not even aware that the Individual Employment Relations Act (IERA 1981, SS.39(6)) - which provides for such compensation - applies only to private sector employees. Had it been aware of this the PSAB could have at least demonstrated its knowledge of the IERA 1981, SS.4(b) which asserts this limitation - (i.e. limitation of the IERA 1981 to Private Sector employees) - and explained its reasons for circumventing it. The PSAB did neither the first or the second nor even explain why it overlooked also the PSA 1973, SS.2-3 and the EDA 1976, S.3 both of which asserting application of their provisions to all public sector employees.

If the employer is a subscriber to the Social Insurance Fund - (as was the case in the Sudan Estates' Bank's Case) - entitlement of the non-pensionable employee to any after-service benefit is governed by the provisions of the SIA 1974. However that Act does not provide any compensation, gratuity or after-service

benefits for loss of employment.

3.B.A.3 Disciplinary Dismissal

Disciplinary dismissal could be for any of the reasons mentioned under the Employees Discipline Act 1976, S.6, which is a verbatim re-enactment of S.6 of the Officials' Discipline Ordinance 1927. The offences provided for in general terms under the EDA 1976, S.6 are elaborated upon by the PSR 1975, S.13 and may also be subject to further elaboration by the internal disciplinary regulation of the department, unit or industry concerned. In contrast to the position in the private sector, public sector disciplinary dismissal is not restricted to only specific violations (82). The choice of the penalty to be inflicted is irrespective of the violation always left to the head of department or the Disciplinary Boards (83). The powers of Disciplinary Boards may derive, from departmental regulations elaborated upon the EDA 1976, departmental regulations made principally by the department or unit concerned (84), or, directly from the manner in which heads of departments and Disciplinary Boards interpret the EDA 1976 and other public employment Acts in specific situations.

The offences provided for by the EDA 1976, S.6 include inter alia neglect or disobedience of orders, regulations and Laws, refusal or failure to perform duties, abandonment of service, acts or omissions incompatible with the proper performance of duties and criminal misconduct. SS.31(1)-(10) of the PSR 1975 provide

an elaborated statement of the duties of public employees and authorize the heads of departments to take any action for ensuring compliance with the orders they make SS.13(6).

It is because of this duality of the jurisdiction of these Disciplinary Boards and employers - (i.e. as both administrators and makers of rules) - that no line of demarcation can easily be drawn between substantive and procedural rules of disciplinary dismissal. Both are ascertainable only through investigation of the performance and practices of these administrative bodies. Hence the discussion in this part will be complete only after that investigation has been effected. This is done in Part 4 of this Chapter.

Summary

I have pointed out that public employment Law provides no general protection against dismissal. The grounds of dismissal I examined together with other grounds mentioned under SS.22(a)-(j) of the PSA 1973 that have not been examined clearly do not support a conclusion that public employment Law is from employees' perspective protectionist in orientation. The subsections that have not been examined cover instances of termination by reasons of "compulsory or voluntary retirement on ground of age", "resignation", "medical unfitness" and "political appointment in the manner specified under S.77 of the PSPA 1975. The discretion given to departments in interpreting and applying the Law and the over-emphasis on interest of the public

service testify to the regulatory nature of public employment Law. Coupled with the exclusive jurisdiction which administrative authorities assume over individual employment disputes in the public sector this discretion reflects also on the objectivity and effectiveness of the Law. These are issues examined in detail in the next section.

For the reasons explained at the end of Chapter II, the discussion in the following sections continues by focusing also on development of legislation across time and explaining this development in terms of political social and economic changes. The same rule mentioned at the end of that Chapter as governing the relation between chronological and topical analyses applies also here.

4. Statutory Machinery for the Settlement of Employment Claims

4.A Heads of Units and Ministers as Tribunals (85)

Public employment Laws specify the terms and conditions of the individual employment relationship and set up the machinery for resolving disputes arising from application, interpretation or non-observance of these Laws. Employees and managements of different State units are required to conduct themselves in accordance with the Law. At plant or unit level the task of ascertaining that employees are carrying out their obligations in accordance with the Law is assigned to "Heads of Units" and Ministers. Non-observance of employment Laws and Regulations

or of management orders, directives and internal Regulations, empowers the management to put on trial and punish the offender in accordance with the provisions of the EDA 1976. The Head of Unit may do this summarily under the EDA 1976 S.10(1) or, if a penalty more severe than those imposable under S.10(1) is sought, he may constitute a Disciplinary Board to try the accused employee EDA 1976, S.11.

However, compared with the powers of summary dismissal which Heads of departments and Governors of provinces possessed under the ODO 1927, S.11(1), powers that are exercisable summarily by Heads of Units under the EDA 1976 are minimal. Heads of Units and Governors of provinces possessed, under the ODO 1927, S.11(1), powers summarily to dismiss employees who are not officials or reduce their pay. Under the EDA 1976 however dismissal may only be imposed by decision of a Disciplinary Board. The position of non-official employees under the ODO 1927 contrasts with that of officials under the same Act. Dismissal of officials under the ODO 1927 even when imposed by a Disciplinary Board is subject to approval by the Central Board of Discipline and by the Governor General respectively. This discrimination between employees who are officials and others who are not was partly due to that officials were overwhelmingly British whilst non-official employees were Sudanese.

Nevertheless, "Heads of Units" in questioning accused employees, in determining whether or not a specific conduct or situation constitute a ground for disciplinary or other actions under existing Laws and Regulations, and in imposing penalties, are in effect, under present Laws exercising quasi-judicial powers over what could be genuine employment disputes to which they are themselves a party. Although these are powers which employers inevitably hold in the area of discipline at work the fact that disciplinary rules are formulated and administered, without participation from the trade unions, and in such a manner as to leave the legal categorization (i.e. its description as offence, serious offence, misconduct . . .) of the act or omission imputed to the employee and the choice of the sanction to be imposed, largely to the discretion of employers, (86) neutralizes the impartiality of the Sudanese procedure even further. Moreover public employment Law and its administration do not offer safeguards that employees unlawfully dismissed whether as a result of improper interpretation or application of the Law or exercise of the powers given to employers will be reinstated or compensated (87).

A recent case (88) however has shown that penalties summarily imposable by the "Head of a Unit" may extend beyond those stipulated under the EDA 1976, S.10(1) to include e.g. dismissal of an employee during the probationary period of his service (89). The case also indicates that decisions summarily taken are often construed as an expression of managerial prerogative which the PSAB is sometimes reluctant to subject to

any external rationality-criterion. In that case the Plaintiff who had been appointed a teaching assistant at the Institute on 21 July 1978 was summarily dismissed by the dean, a year later on 21 July 1979, on grounds of incompetence. The Plaintiff's appeal to the PSAB was rejected because the latter saw no reason for interfering with the dean's decision. The Plaintiff's petition to the Court of Appeal for a judicial review of the dean's and the PSAB's decisions was summarily dismissed because the PSAB's decision is, in the Court of Appeal's view, final. Before the Supreme Court the Plaintiff's Counsel demanded the reversal of both the Court of Appeal's and the PSAB's decisions on the grounds that: (1) the PSAB did not provide any reasoning for its decision of upholding the dean's action; and (2) his client was dismissed summarily by the dean whilst the Law demands the constitution of a Disciplinary Board and non-summary procedures for imposition of such penalty; and (3) non-observance of these procedures had deprived the Plaintiff of the rights to know the charge against him, to be heard and to be given a chance to defend himself. The Supreme Court rejected the appeal on the grounds that the case lay within jurisdiction of the PSAB and the latter's decision was therefore final (90).

4.B Disciplinary Boards as Second Grade Tribunals

Disciplinary Boards are adhoc tribunals constituted by the orders of Heads of Units or Ministers, in accordance with a statutory procedure, to deal with all disciplinary offences and impose any of the penalties provided for by the EDA 1976 (91) or

the Regulations and directives made thereunder. As did the ODO 1927 before it, the EDA 1976 provides for a formal procedure that Disciplinary Boards have to follow whilst performing their functions. The statutory procedure requires that the accused employee be notified in writing with the date of assembly of the Board and given a reasonably sufficient notice of the matter with which he is being charged at least 48 hours prior to the date of such assembly - (EDA, SS.22(3)-(5), ODO 1927, S.27). The Law also provides for the right of the accused employee to be heard, cross-examine all witnesses in support of the charge and be accompanied by an advocate or friend to help him defend himself (EDA 1976, SS.23, 30, ODO 1927, S.28). The Boards are requested to adhere to the charges framed or if they have to alter them, to adjourn the trial if proceeding with trial on the new charges might prejudice the accused. The Boards may take evidence on oath - (EDA 1976i, S.23(3), ODO 1927, S.28(3)) and must keep a record of all proceedings and findings - (EDA 1976, S.24, ODO 1927, S.29).

Disciplinary Boards have jurisdiction over all employees, within a ministry, or, if constituted by a Commissioner of a province, within the administrative boundaries of that province, who hold posts in Scale I, II, III or in the sub-scales of the Public Service in the Sudan. Employees in super-scale posts from Group I to VII have always remained outside jurisdiction of the Disciplinary Boards constitutable by Heads of Units or departments. Under the ODO 1927, S.19 an employee holding a super-scale post may only be tried before the Central Board of Discipline.

Under the EDA 1976, S.14 such an employee may now be tried by a High Disciplinary Board. High Disciplinary Boards are constitutable by, either the order of the Minister responsible for the public service at the request of the Minister within whose ministry the accused employee falls, or, if the accused employee is not holder of a post in groups VII, VI or V; by the order of the latter Minister.

4.B.1 Appeals

An employee may appeal to the Central Board of Discipline - (Now the Public Service Appeals Board under the EDA 1976, S.15) against any decision passed upon him by a Disciplinary Board. For the purposes of this right of Appeal the ODO 1927 did not distinguish between different officials on the basis of their class or grade. But the ODO 1927, S.25 made all decisions of the Central Board itself subject to confirmation by the Governor General. Under this section the Governor General could inter alia confirm the finding and sentence or annul the proceeding with or without ordering a fresh trial.

The EDA 1976 restricts the right of appeal by employees in high level leadership posts. Section 19 of the Act provides that an employee in a high level leadership post aggrieved by any measure taken against him may submit a petition to his minister who shall in turn submit the same to the President of the Republic. It is only upon the direction of the President of the Republic that the petition of such employee may be submitted to

the PSAB for advice (92). Likewise no decision of a High Disciplinary Board in respect of any employee holding a high level leadership post is enforceable unless confirmed by the President of the Republic. Decisions of the PSAB in respect of all other public sector's employees are, under the EDA 1976, SS.15 deemed final.

4.B.2 Judicial Review of Disciplinary Boards' and Heads' of Departments Decisions

The existence under both the ODO 1927 and EDA 1976 of central bodies to which disciplinary measures and decisions taken by Heads of Departments or Disciplinary Boards are appealable, together with other legal procedures - (discussed below) - that are applicable in litigation involving the Government, have confined settlement of individual employment claims within the boundaries of the Statutory machinery, to the exclusion of other jurisdictions. A Civil Court may not assume jurisdiction if an employee aggrieved by decision of a Head of Department or a Disciplinary Board directly applies to it for a remedy. Since the action is in such circumstances one against the Government or a public servant the Court will not assume jurisdiction unless it is satisfied that a period of at least two months has elapsed since notice of the intended claim or of the intended institution of proceedings has been served on the Attorney General - (Civil Justice Ordinance 1929, S.109, CPA 1974, S.33(3)) (93).

The Court may summarily dismiss an application by an aggrieved employee, even after the satisfaction of the condition of notice, because in taking his claim to the Civil Court the Plaintiff has done so before exhausting the means of administrative redress available for him (94) (i.e. has not exercised his right of appeal to the Public Service Appeals Board). One case where this rule was applied is *Mekki Ali el-Azharry -v- Ministry of Health (1976) (95)*. In this case the Plaintiff a surgeon refused to abide by an order of the Ministry transferring him from his present place of work at Khartoum Hospital to Wau Hospital in Southern Sudan. The Ministry reacted by withholding his salary. Against the Ministry's decision the Plaintiff appealed to the Province Court. The Province Court accepted the application and ordered the release of the Plaintiff's salary. On behalf of the Ministry of Health the Attorney General appealed against the Province Court's decision. The Court of Appeal allowed the appeal on the grounds that, assumption of jurisdiction by the Province Court was in contravention of the PSA 1973, S.30, which gives jurisdiction over disputes arising out of the application of the public service Laws to the PSAB, and the CPA 1974, S.312(b) which makes the allowance of applications for judicial review of administrative action conditional upon prior exhaustion by the applicant of the channels of redress available to him - (Cf *Supra* f.68). The decision of the Court of Appeal was unanimously upheld by the Supreme Court.

Five years later both the Supreme Court and the Court of Appeal found a chance to reaffirm the position they have adopted in the Ministry of Health's case. The case was this time *Mudawi Mohamed Ismail -v- Ministry of Education 1982 (96)*. In his thirtieth year of service as a teacher the Plaintiff was dismissed, for absenteeism, by decision of a Disciplinary Board convened in his absence. His claim for recovery of a three year salary and a compensation was allowed by the Province Court. Both the Court of Appeal and the Supreme Court saw that neither they nor the Province Judge had jurisdiction and accordingly directed the Plaintiff to first seek the administrative remedies available for him.

As shown later (4.C.6 - 4.C.6.d) the reluctance of the Courts to interfere with public employment claims applies, whether or not the Plaintiff has exhausted all the channels of administrative redress available to him.

Summary

Disciplinary Boards, Heads of Units and Ministers constitute the lower strata of a quasi-judicial statutory machinery provided for adjudicating on disciplinary matters at departmental, ministerial and appellate levels. This quasi-judicial machinery, whilst assuming exclusive control over disputes relating to application of or arising under the EDA 1976, is virtually integrated into the administrative hierarchy of the State. The extent to which the statutory machinery is integrated into the

State administrative hierarchy may be shown by examining the mode of constitution of the appellate authority of this machinery (i.e. the PSAB), the extent of both its jurisdiction and powers and its relation vis-a-vis other administrative authorities. These are aspects examined in the next section.

Independence of the Statutory machinery from both judicial and collective labour control is detectable at various levels, some of which (e.g. finality of the PSAB's decisions) are discussed also in the next section. I examine here the effect which the operation of the machinery of administration and determination of employment rights and obligations at this level - (i.e. that of Heads of Departments and Disciplinary Boards) - has on the handling of disciplinary matters at work. I do not believe that disciplinary matters in public or private employment in the Sudan do necessarily conform with pre-determined views - (possibly based on experiences of other countries) - about these matters. However for this and also for the difference between public and private employment Law to be grasped this section needs to be recalled whilst reading Part 3.B.3 of Chapter 5.

The comprehensive statutory machinery and statutory control provided at the different stages of a hierarchical system of litigation, and the constitution and composition of the different tribunals of this machinery, by order of and from among State representatives, have worked to exclude trade unions and the Civil Courts from participating in the control of discipline at work. Trade unions and government departments may not

negotiate on the substantive or procedural aspects of discipline at work because it is the Laws and Regulations of the Public Service which should (PSA 1973, S.21) govern this issue (97). There is evidence to suggest that it is the Statutory procedure which does in practice regulate matters of discipline at work in the public sector. Of all public sector disputes that resolved into agreements or arbitration awards in the period between 1973-1981, none had questioned the exclusiveness of legislation and the machinery provided by it in matters relating to discipline at work (98). Likewise Labour disputes that resolved into agreements between Governments and the SWTWF (99) before 1973 did not include issues on discipline at work. The Agreements of March 1950 (100) and January 29, 1968 (101) although extensive on matters of wages, trade union immunities and job evaluation contained nothing on substantive or procedural aspects of discipline at work.

The absence of detailed agreements on matters of discipline may in certain countries not necessarily indicate that discipline is not a focus of industrial conflict - (e.g. because neither side is willing to incorporate its rights and obligations regarding discipline in terms of substantive agreements). However irrespective of whether it involves the proper application of public service Laws and regulations or their misapplication discipline cannot be a focus of industrial conflict in the Sudan also because of the reasons discussed in Chapter 3 (102).

4.C The Public Service Appeals Board (PSAB)

So far the discussion has centred around tribunals with the limited jurisdiction of handling disputes under disciplinary Laws at departmental and ministerial levels. Employment disputes arising under other public individual employment Laws and appeals against disciplinary decisions taken at departmental and ministerial levels now lie to the PSAB. Before examining the present position of the PSAB a brief review of its history, and, incidentally, the history of administration of individual employment Law in the Public Sector in general is, for the reasons mentioned at the end of Chapter 2 and reiterated at the end of Part 3 of this Chapter, relevant.

4.C.1 A Historical Background

As early as 1927 provision was made for the constitution of a Central Board of Discipline (CBD) consisting of the Civil Secretary, the Financial Secretary and the Legal Secretary or their representatives appointed by them; together with such other member or members as the Governor General shall appoint - (ODO 1927, S.17). The CBD possessed original and appellate jurisdiction over claims arising under the ODO 1927. The CBD did not possess jurisdiction to deal with employment claims arising under other public service Laws. One of the few public employment Laws that existed prior to 1927 provided for its own administration. The Sudan Government Pensions Ordinance 1919 provided that a Council of the Civil Secretary, the Legal

Secretary and the Financial Secretary should have the final say on all matters covered by the Ordinance and in case they did not agree the matter should be referred to the Governor General (SGPO 1919, S.4). Neither the Officials Salaries Ordinance 1905 nor the Regulations which came into effect in 1934 and 1938 (103) provided for a machinery for settlement of employment claims arising under their provisions. However under the general provisions of the A-ET 1899 Article 4 the appointment and promotion of officials and presumably the settlement of their claims under the terms and conditions of their service was vested in the Governor General or any person or persons to whom he could delegate his powers. In practice however it was the Civil Secretary who assumed responsibility for the Civil Service and who was in turn most involved in its affairs.

Establishment of a public service commission to be endowed with inter alia the administration of public employment Laws was statutorily provided for in 1953. The inclusion of such provision in the Statutes mentioned below was a result of many factors. These factors were the vast expansion and "Sudanization" of the Civil Service that had begun from as early as 1936 (104), the need for a body to replace the colonial bodies described below and the efforts of the Sudanese officials - (which did not however exceed submission of memorandums) (105). The government and political parties chose an administrative body to handle employment grievances because this was compatible with the form and practices of inherited institutions of a once "autocratic government" (106).

The Self-Government Statute (1953) and the Interim Constitutions of (1953), (1956) and (1964) all provided for establishment of the Commission. A public service commission was urgently needed to fill the vacancy created by the cessation, on the eve of Independence, of the trisecretarial Central Board of Discipline to exercise its appellate jurisdiction under the ODO 1927. That cessation was consequential upon the abolition of the Governor General's office and trisecretarial Council and the assembling of a new political formula that was to govern the post-independence Sudan. Another function which the Commission was intended to perform was that of providing, a preliminary jurisdiction over, and resolution of disputes arising under or relating to application of other individual employment Laws in the Public Sector. This task was before Independence part of the executive responsibilities of the Civil Secretariat (107).

The Commission envisaged by the various Statutes aforementioned was to consist of a president and members to be appointed by order of the President of the Republic (108). The functions of the Commission included, inter alia, the exercise of the jurisdiction previously assumed by the Central Board of Discipline under the ODO 1927, and the review of complaints submitted to the Commission by public sector employees. In reviewing complaints the Commission was to possess powers of ordering the production of documents and information necessary for enabling it to reach a decision and it was to be the duty of government departments and units to abide by such orders. However the

Commission was not to possess powers of making decisions for or against the complainants. The Commission could only make a recommendation, of the course of action to be taken in the particular circumstance, to the minister concerned, or, if the Complaint was one against a minister to the Council of Ministers. If in any case the Council of Ministers had resolved not to accept a recommendation of the Commission the former was to immediately file its resolution and the reasons thereof with the President of the Republic whose decision was final (CS 1958, Article 75). The Commission was to submit an annual report on its performance to the President of the Republic which was in turn required to submit a copy of the same before Parliament (CS 1958, A.77).

Despite urgent need for its services and the recognition of that need by the various statutes cited the Public Service Commission was never constituted (109). The Military Regime of General Abboud which took over at the end of 1958 discarded all interim and recommended Constitutions that contained the provisions on the proposed Commission, and from its part provided no alternative solution. Likewise none of the Party - Governments that reigned between 1964-1969 following the overthrowal of the Military regime stayed long enough, or felt secure, enough (110) to review and determine the fate of the statutory provisions relating to constitution of the Commission.

From the moment of declaration of Independence in 1956 and up to 1969 public employment disciplinary claims, in effect, remained without a formal specialized appellate authority to handle them. Likewise no statutory machinery was provided for the settlement of employment grievances under other Public Service Laws. However bearing in mind the restrictive amendments which the 1956-1969 Military and Parliamentary Governments introduced - (C.f Supra Part 1.C.2, Chapter 3) - to collective labour relations law and the political character which Industrial conflict assumed over the same period (Hussein 1983, 63-107) the positions of the public service and that of the individual employee had, judging by their colonial standards, deteriorated. This was so because these legal restrictions and political confrontation retarded all governmental or voluntary reforms (i.e. the latter being improvement that may accrue across time as result of bilateral or tripartite collective negotiations) at a time when the need for reform had been accentuated by changing economic conditions and expansion of the Civil Service (111).

Individual employment claims that arose under public employment Laws and regulations were dealt with by individual ministers or their representatives. Individual ministers were empowered to exercise, the confirmatory powers previously held by the Central Board of Discipline (112) (ODO 1927, S.16) in dealing with matters falling under this Ordinance, and, powers previously exercisable by the Civil, Financial or Legal Secretaries in matters falling under other public employment Laws. In both

cases the Council of Ministers (113) possessed the confirmatory and over-riding powers previously held by the Governor General. It was also the case that as the legal representative of the State the Attorney General's Chambers often had a say over matters relating to application of public employment Laws by government units. The Chambers played this role, upon, petition by the aggrieved employee, or, notification by the aggrieved employee of his intention to institute proceedings against a government unit or servant or upon prior application for consultation by a ministry or department intending to take a course of action under existing Laws (114).

In November 1970 a Labour Code (CLC 1970) amending and consolidating, all individual employment Laws in the private sector, and, all collective labour relations laws (115) came into effect. Despite the efforts which public sector trade unions had thrown behind the enactment of the CLC 1970 none of the comprehensive chapters of the CLC 1970 relating to determination and administration of the terms and conditions of the individual employment relationship (CLC 1970, SS.55-94) was deemed applicable to public sector employees (116). In effect, administration of individual employment legislation in the public sector remained, until 1973, as it had been during the 1960's.

The preceding description of historical development suggests that an administrative body was always considered as the ideal body for adjudicating on individual employment disputes in the public sector. This however is understandable in view of my

earlier argument that there are features of employment relations Law in Sudan that, owe their existence not to the type of political regime in power but to the class structure and form of the State, and, therefore, have survived all political changes - (supra Part 3 in Chapter 2).

The establishment of the PSAB in 1973 with its present powers and jurisdiction is explicable partly by the durable factors aforementioned and partly by accompanying circumstances mentioned in Part 2.A of this Chapter. The accompanying circumstances explain why reform of the Civil Service and establishment of an authority to deal with public employment grievances were needed. The durable factors account for why the specific administrative form was chosen. The PSAB officially existed upon promulgation of the PSA 1973 (PSA 1973, SS.28(3)b).

4.C.2 Constitution and Jurisdiction of the PSAB

The PSAB consists of a president and members appointed and having their emoluments specified by the President of the Republic. To cope with a huge volume of litigation the PSAB sits in circuits each consisting of three members selected by the president of the PSAB from among its appointed members. The PSAB is a central unit, situate in Khartoum, with no circuits, branches or counterparts in the six regions of the country. Until 1981 the PSAB was one of the institutions of the Public Service Commission which was in turn a subordinate of the Ministry of

Public Service and Administrative Reform. Following the abolition of that Ministry and the subordination of some of its institutions to the Ministry of Finance and National Economy in 1981 the PSAB is now a division of a Public Service Commission which is autonomous from ministerial control and directly accountable to the President of the Republic (117). The president of the Public Service Commission is ex-officio the president of the PSAB.

The PSAB has jurisdiction in respect of appeals submitted by all employees, except those holding high level leadership posts, against any decision relating to appointment promotion or the application of public service Laws and regulations PSA 1973, S.30(1). The PSAB may also advise on complaints by holders of high level leadership posts referred to it by the President of the Republic PSA 1973, S.30(2).

The PSAB may, for the proper execution of its functions, summon any person or persons in order to give evidence before it, take evidence on oath, and, order the production of documents, information, records and files connected with the appeal or complaint (118). A person who unreasonably refuses to abide by a PSAB order to appear in person, or to produce documents, information, records or files, commits an offence punishable with imprisonment and fine PSCR 1982, S.34, PSABR 1973, S.22.

4.C.3 Powers of the PSAB

Existing statutes do not expressly or implicitly provide for remedies which the PSAB may give to an employee aggrieved by a non-observance or misapplication of the Law. This however has not in practice prevented the PSAB from ordering various forms of redress depending on the merits of each particular case. Although the nature of the decisions which the PSAB may make is not made clear, these decisions are by the letter of the Law final and obligatory PSA 1973, S.30(2). Likewise the PSCR 1982, S.34(1) makes it a criminal offence punishable with imprisonment, fine or both for any person to refuse to carry out a PSAB's decision.

The effect which these punitive provisions have on enforceability of the PSAB's decisions should not be exaggerated and judged in the awareness that their culprits are often government ministers or senior officials whose ranks are equal to or higher than those of the president and members of the PSAB and who are always in a position to defend their stance as in the interest of the service - (an allegation which, bearing in mind their intimate knowledge of the ministry or department they are presiding over, it is not always easy to contest).

The PSAB, aware of the difficulties associated with Legal enforcement does not in practice prosecute obstinate government units or departments. Instead it writes to the Presidency of the Republic concerning the facts and its findings in each particular

case and it is entirely for the former to determine what should be done. In some cases plaintiffs who complained against the refusal of government units to abide by the decision of the PSAB were directed either by the latter or by the Presidency of the Republic to complain to the Attorney General (119).

I have already mentioned that dismissals on alleged public interest or service interest grounds are not reviewable by the PSAB (120). The allegation of public or service interest may further be made by a minister or any person to whom he may delegate his authority, subsequent to and as excuse for rejecting a PSAB's decision, even though the original grounds of the dismissal, adjudicated upon by the PSAB contained no reference to public or service interest. In *Beshir Hamad El Beshir -v- the Department of Customs and Excise* (121) for instance, the Plaintiff, a customs officer was tried and dismissed by a Departmental Disciplinary Board on charges of smuggling and disobedience. On appeal to the PSAB the latter found that the evidence adduced was insufficient and the trial proceedings were erroneous. The PSAB accordingly annulled the trial proceedings and directed the retrial of the Plaintiff by a new Disciplinary Board in case the Customs Department still wanted to discipline him. Upon presentation, by the Plaintiff, of the PSAB's decision to the defendant Department the latter gave him a letter signed by the head of the Customs Department conferring to the Plaintiff the decision of the Minister of Finance and National Economy to retire him in the interest of the service under the (PSPA 1975, S.26b). The Plaintiff's subsequent complaint to the PSAB was in vain as the

latter does not assume jurisdiction over claims arising under the section referred to.

4.C.4 The PSAB as a Stratum in the Bureaucratic Hierarchy and the Implications of this Position for Enforceability of its Decisions

The mode of composition of the Public Service Commission, the source of emolument of its president and members and their tenure of office (122) make the Commission - (of which the PSAB is only a Subsidiary) a government ministry that is directly subordinate to the President of the Republic (123). This subordination is demonstrated by the PSAB's inability to enforce its decisions (124). It also reflects on the impartiality of the PSAB's legal opinion (125). Although there are cases in which the PSAB's decisions were not necessarily partial this type of empirical evidence does not, in absence of institutionalized safeguards of autonomy, support a conclusion that the PSAB is autonomous. The autonomy of any institution should from the legal point of view always be tested at both the institutional and the practical empirical levels.

In addition to its subordination to the political hierarchy the PSAB does not possess any legal immunity or privileges that distinguish its status from that of other ministries and government units. Furthermore, members of the PSAB possess no exceptional legal qualifications that distinguish their expertise from that of other ordinary senior civil servants. This means that their decisions have little impression upon, and are open to challenge by

other State units. Moreover every government unit and department has as its own employee a qualified legal adviser that advises the unit or department on legal issues arising in the course of performance of its functions; including issues relating to discipline and employment claims in general. These legal advisers are generally better qualified (126) than the president and members of the PSAB and have stronger influence on the opinion of their employers. As experience has shown these legal advisers although government employees do not necessarily always adhere to "the official legal policy" (126) of the State as represented always by the stance of the Attorney General's Chambers.

Although "the official legal policy" has always maintained the finality and obligatory nature of the PSAB's decisions some government units have, under the guidance of their own legal advisers, and, in pursuance of their own particularistic interests, gone to extreme length in contesting this finality. It is of course always the official legal policy - (i.e. a politicised legality that is not always coincidental with legal or objective legality) which ultimately prevails.

The points mentioned above are illustrated by the facts in *Anwar Ali Hussni -v- Ennielane Bank*. In his application to the PSAB the plaintiff in this case complained that he was unlawfully overlooked by two consecutive promotion decisions in two consecutive years. The PSAB ordered the defendant Bank to produce the secret personnel records of the plaintiff and those of his promoted colleagues for inspection. Upon examination of the

secret reports written about the plaintiff in comparison with those of other employees and the commutation of these reports into an evaluative numerical record for the purpose of determining eligibility for promotion, the PSAB found for the plaintiff and accordingly directed the Bank to rectify his position. The Bank refused to abide by the PSAB's decision for two reasons. The first reason was that the Bank did not accept the PSAB's view that service in the Bank is public service, and consequently was not convinced that the PSAB had jurisdiction. The second reason was that the PSAB reached its decision through varification of the evaluative numerical record submitted to it by the Bank whilst, from the Bank's view, unaware of the details on which numerical evaluation is based. A letter by the Attorney General (128) to the Minister of Finance and national economy, explaining that the decision of the PSAB was in accordance with the "official legal policy" and requesting him to direct the Bank accordingly, and a directive made by the Minister to that effect, failed to move the Bank away from the position it had adopted. Moreover, the Bank applied to the Court of Appeal for a judicial review of the PSAB's decision on the grounds mentioned above. The Court of Appeal quashed the PSAB's decision for lack of jurisdiction. The Court of Appeal decision was in turn overruled on appeal to the Supreme Court (129).

The PSAB's original decision in Ennielane Bank's case was passed on 31 October 1977. The refusal of the Bank to abide by the decision and the course of appeal which the case subsequently took meant that the plaintiff had to wait until after the Supreme

Court had passed its decision on 26 March 1980. However had it not been for the personal intervention by the President of the Republic - (C.f Supra text above f.36) the plaintiff's period of waiting might have lasted well beyond this date or endlessly. A decision by the Supreme Court upholding a decision of the PSAB in circumstances similar to the case before us merely returns the plaintiff to his original position with the problem of enforcement of the PSAB's decision unresolved (130).

Lack of statutory authorization, and the position of the PSAB as a stratum in the bureaucratic hierarchy allow it to interfere with other government ministries' and units' actions only to the extent essential for declaration of the plaintiff's right. The PSAB does in practice maintain a curb on the extent of its interference even in cases where the Plaintiff's grievance is consequential upon a faulty main course of action which unless declared void makes rectification of the Plaintiff's position almost impossible. It is in such cases that the PSAB's inability to invalidate the principal course of action is directly felt on enforceability of the Plaintiff's right. To illustrate this I will give as example the range of cases relating to violation by government units of Plaintiff's promotional rights. Under the public service Laws promotion is a right for all employees and eligibility for promotion is determined on objective statutory bases (PSR 1975, SS.40-46). The commonest complaint among these cases is where an employee or employees have been wrongfully promoted to a higher scale sector or group while the plaintiffs or plaintiff, more eligible for promotion, have been

passed over (131). The view which the PSAB adheres to in such complaints is that whilst it may make a declaration as to the plaintiff's or plaintiffs' rights to promotion it cannot invalidate the ministry's or unit's resolution that caused some of the plaintiffs' colleagues to wrongfully occupy the formers' positions on the promotion list (132). The obstacle that faces the plaintiff or plaintiffs seeking enforcement of the PSAB's declaration is that their fate is left entirely to the defendant unit or department which, if it has decided not to ignore the PSAB's decision, has to either relegate some of its employees already promoted in order to give space for the promotion of the plaintiff or plaintiffs or to create a new vacancy or vacancies, in the scale sector or group to which the plaintiff or plaintiffs are demanding promotion, in order to accommodate them. Even for the bona fide department or unit desirous of rectifying a bona fide mistake the adoption of either alternative presents problems and requires the prior approval of, depending on the scale of the plaintiffs' posts, the Public Service (Financial) Affairs Chamber, the minister responsible for the public service or the President of the Republic. However, a government unit or department which, by knowingly acting against the Law, has deliberately denied an employee's right to promotion may not feel obliged to adopt either alternative (133).

4.C.5 Dependence of the PSAB's Legal Opinion

The grievances the PSAB deals with require for their proper redress a competent authority that is capable of reaching the right decision and enforcing it. Enforcement problems however

are not the only ones that face the PSAB. It is also the case that deciding on an employment grievance or claim may involve intricate legal issues and centre around legal rights that need for their decipherment and appreciation an authority whose legal training is comprehensive. A Board that is composed of ex-civil servants whose legal training is marginal may not be capable of formulating an independent approach that strikes a balance between interest of the public service and that of individual employees.

Lack of judicial and legal expertise drives the PSAB into relying on the line of official legal policy represented by the Attorney General's Chambers (134). Like any other government unit or department the PSAB may seek legal advice from the Attorney General Chambers and is bound by such advice (AGA 1981, 1982 SS.7). Since the Attorney General represents and defends the legal interests of the State from the perspective of the State, reliance by the PSAB on advice provided by the Attorney General's Chambers can influence the policy orientation of the former (135). The considerable detriment this orientation might impose on the interests of individual employees is most evident in a situation where the plaintiff seeking the assistance of the PSAB is an employee of the Attorney General's Chambers itself. The PSAB is potentially incapable of providing any relief in such a situation because the Attorney General's decision regarding the employee's claim, although that of a litigant is also simultaneously a legal opinion which the PSAB may not disregard (136).

4.C.6 Exclusiveness of the PSAB Jurisdiction and the Finality of its Decisions

4.C.6.a Exclusiveness of Jurisdiction

The wisdom of asserting exclusiveness of jurisdiction and finality of decisions of the PSAB may not from the employees' perspective be self-evident (137). It has been suggested from the government side, however that this assertion "aims at confining the settlement of public employment disputes within the administrative hierarchy of the State and thereby guaranteeing the efficient and spontaneous functioning of public utilities" (138). Restricting the settlement of employment claims to the PSAB does in fact in many ways work towards the achievement of the objectives identified above. The marginal legal training and civil service background of the president and members of the PSAB see to it that the application of public employment Laws, themselves as a general rule maintaining a balance in the employment relationship favourable to the State, is effected on the basis of a non-legal approach and, with the convenience of the public service as a paramount consideration. There are in this respect cases in which judges of the Civil Courts, with their comprehensive legal training and acquaintance with broader concepts of legal rights and duties, may have reached decisions different from those reached by the PSAB (139).

The approach of the PSAB towards employment claims -(C.f Supra f.94) - and the informal means the PSAB follows in seeking enforcement of its decisions - (C.f Supra F.81 and text above) -

provide a form of control that is capable of guaranteeing interests of individual employees only to the extent and within the limits that the convenience of the administrative authorities would require or allow respectively. Intervention of the civil courts may produce, decisions that are oblivious to the particularistic interests of administrative authorities, and, methods of enforcement whose effectiveness may not depend on the outcome of consultation among the various institutions of the State (140).

The willingness of administrative institutions to settle employment claims, on the one hand, and their determination that this should be done within the boundaries of the administrative hierarchy, on the other, is illustrated by the facts of the Graduates of the Telecommunications Institute 1983 case Ibid - (Supra f.139). Upon complaint, by the plaintiffs, to the Attorney General, the latter upheld their view and wrote (141) to the Telecommunication Corporation and the Public Service (Financial) Affairs Chamber advising that they could not lawfully reduce the scale of the plaintiffs' posts. However when the plaintiffs' counsel took the matter to the Supreme Court demanding annulment of the relegation decision and enforcement of the Attorney General's advice in support of the plaintiffs, the Attorney General abandoned the defence of the plaintiffs' cause. Instead, acting on behalf of the Corporation and the Public Service Chamber the Attorney General submitted that the Supreme Court had neither the jurisdiction to review the case nor to enforce the legal advice given by the Attorney General (142).

We have already seen that the PSAB has exclusive jurisdiction over appeals against disciplinary measures taken by Disciplinary Boards or Heads of Units (143). Exclusiveness of the PSAB's jurisdiction covers in addition, all claims and complaints arising from or relating to application of the Laws and regulations governing the individual employment relationship in the public sector (144). Moreover, exclusiveness of the PSAB's jurisdiction applies irrespective of the geographical location of the dispute. An employee aggrieved by a decision of the Governor of the Northern Region for example, may have to travel hundreds of miles to the PSAB in Khartoum so that his complaint may be heard (145).

4.C.6.b Finality of Decisions

The grounds and occasions on or in spite of which the Courts have consistently upheld the finality of the PSAB's decisions can be summarized as falling into (1) express statutory provision; (2) excess of jurisdiction; (3) status of the PSAB as a constitutional body; and (4) breach of the rules of natural justice. These are examined below.

4.C.6.b.1 Express Statutory Provision

Both the Supreme Court and the Court of Appeal have always invoked the CPA 1974 S.312-b read with the PSA 1973 S.30 as justification for their acquiescence into the Attorney General's advocacy of exclusiveness of the PSAB's jurisdiction

(146). However when it comes to the issue of finality of the PSAB's decisions the CPA 1974 S.312-b is irrelevant. The central issue in this latter instance is whether a decision passed by the PSAB is subject to judicial review at all. To that effect the PSA 1973 S.30-(3) however provides that "the decisions of the PSAB shall be final and their execution shall be obligatory".

Civil Courts in Sudan did on occasion review administrative decisions subject to the conditions set by the Law (147). On its apparent face however the recent controversy over the finality of the PSAB's decisions centres not so much around whether the Courts can review administrative decisions as around whether the PSAB is an administrative authority. However rather than the express provision about finality of the PSAB's decisions being treated as a conditional provision whose binding nature should depend on whether, judging by other criteria, the PSAB is an administrative authority it has by itself been taken as a factor in determining the status of the PSAB.

In the first two cases that came before it on the issue the Court of Appeal decided that the express statutory provision as to finality of the PSAB's decisions makes these decisions unreviewable (148). It was only after invoking the express statutory provision as a first ground for its decisions that the Court of Appeal in both cases apologetically expressed as the other ground the view that decisions passed by the PSAB in lawful exercise of its authority under the public service laws and regulations are not administrative but quasi-judicial

decisions which the Courts are powerless to revise. In the case that went on appeal (149) to the Supreme Court, the plaintiff counsel contested the construction of the PSAB's decisions as quasi-judicial on the ground that - inter alia - the PSAB is, a subordinate of the Ministry of Public Service, and therefore an administrative commission with advisory rather than judicial functions. Unimpressed by counsel's argument the Supreme Court ruled that "the express and unconditional statutory provision regarding the finality of the PSAB's decisions means that the legislature has intended to distance claims relating to the terms and conditions of public employment from the jurisdiction of the Civil Courts - Ibid P.3" (150). Public employment claims are, according to the Supreme Court, "a special category of claims in which the administrative element is overriding, and, which need for their proper disposal access to information and facts that are not easily accessible to the Civil Courts - Ibid P.4".

4.C.6.b.2 Excess of Jurisdiction

The Court of Appeal summarily dismissed the application in Saddar's case cited above even before making sure that the PSAB had acted within its jurisdiction. In its confirmation of the decision the Supreme Court endorsed this position taken by the Court of Appeal. Although there was no claim that the PSAB had acted outside its jurisdiction in this particular case. The omission of both Courts to investigate this possibility (151) demonstrated their lack of concern with excess of jurisdiction as

ground for review and was controversial enough to warrant a dissenting judgment (152).

A year later in *Anwar Ali Hussni -v- Ennielane Bank* 1979 the Court of Appeal allowed an application against a PSAB decision in which the latter had directed the defendant Bank to treat the plaintiff as promoted retrospectively from the date of his colleagues' promotion. The Court of Appeal overruled the PSAB decision on the ground that the Bank's employees were not subject to the PSAB's jurisdiction (153). Regarding the finality of the PSAB's decisions the Court commented: "the PSAB's decisions are final in so far as the PSAB has acted within its jurisdiction. Excess of jurisdiction empowers this Court, under both the PSA 1974 S.309 and the general principles of the Law to review the PSAB's as it does any other administrative decision - Ibid " (154). The respondents applied to the Supreme Court for nullification of the Court of Appeal judgment and restoration of the PSAB's decision. Upon admission of their joint appeal the Attorney General and the plaintiff's counsel questioned the presupposition on which the Court of Appeal assumed jurisdiction, namely that the PSAB is an administrative authority, and contended that the PSAB is a quasi-judicial authority that exercises judicial powers and derives its authority directly from the Constitution (156). The Supreme Court upheld the applicant's view and added that the unequivocal provision of the PSA 1973 S.30 makes the finality of the PSAB's decision binding, not only within the administrative hierarchy, but, also, upon the judiciary. However the Court

was quick to point out that "this may not mean that the PSAB's decisions would be protected even when the latter has exceeded its jurisdiction or acted against the Law . . . " (157). With regard to this particular case the Supreme Court considered Bank employees as public employees and as such subject to the jurisdiction of the PSAB. The Supreme Court's decision was in this respect however arbitrary and also possibly externally influenced (158).

There are two reasons which weaken the weight of the above-quoted Supreme Court comment as authority for reviewability of the PSAB's decisions on grounds of excess of jurisdiction. The first reason is that the Supreme Court based its reversal of the Court of Appeal decision partly on the separate ground that the Courts have no jurisdiction to review these decisions in the first place. The second reason is that the Supreme Court made no comment on its earlier endorsement of the approach the Court of Appeal had followed in *Saddar's case* - (Supra. Part 4.C.6.b). Both reasons make it unclear how such excess of jurisdiction or violation of the Law can be ascertained if the decisions of the PSAB are abinitio not subject to review by the Civil Courts. The practical effect of this approach came to surface a year later in *Mohamed Elmamoon Babikr Zerroog -v- the Dean, Institute of Theatrical and Musical Studies 1981* (159). Both the Court of Appeal and the Supreme Court dismissed the plaintiff's application on ground of finality of the PSAB's decisions even before thorough examination of the facts. The plaintiff in effect walked without a remedy even

though his grievance was consequential upon breaches of the rules of natural justice (160).

4.C.6.b.3 Status of the PSAB as a "Constitutional" Entity

The alleged quasi-judicial status of the PSAB and the alleged derivation of its powers from the Constitution were the main grounds on which the Supreme Court defended the finality of the PSAB's decisions in principle in Ennielane Bank's case. These were also the same grounds that were to be reinvoked and elaborated upon by the Court in subsequent decisions.

A year after its rebellious decision in Ennielane Bank's 1979 case the Court of Appeal accepted as Law the finality of the PSAB's decisions and, in 1980, summarily dismissed on this ground the application by the plaintiff in *Mohamed Elmamoon Babikr Zerroog -v- The Dean, Institute of Theatrical and Musical Studies* (161). The Court's decision was upheld on appeal to the Supreme Court. Rejecting the plaintiff's application the Supreme Court once more reasserted the finality of the PSAB's decisions. The PSAB "is", in the opinion of the Supreme Court; "a Court of Law even though it is referred to with a different epithet (i.e. Board) . . . " (162). In reaching this conclusion the Supreme Court, did not consider, the mode of constitution of the PSAB, the appointment of its members, their tenure of office and their legal qualification, and, paid no attention to the PSAB's position vis-a-vis other administrative authorities or its powers of enforcement. The Supreme Court cited instead the

historical background of the PSAB (163) and its status under the then Permanent Constitution of the Sudan 1973 (164) to support the conclusion that "the legislature in Sudan has always intended, for public policy considerations, to allocate adjudication of claims over the terms and conditions of public employment to a special authority . . . Ibid P.3".

4.C.6.b.4 Breach of the Rules of Natural Justice

In reaching the conclusion that the PSAB's decision in Zerroog case was final the Supreme Court ignored the plaintiff's complaint that he was not given a chance to be heard, to defend himself and that his dismissal was against the Law (165). Although this was partly due to the procedure of summary rejection which the Courts follow in dealing with applications against the PSAB's decisions it was also due to the reluctance which the Supreme Court showed in challenging express provisions of Laws and by-Laws on whatever ground. This is explained in the Summary below - (C.f infra the text above f.168).

Summary

Few concluding remarks are essential for completion of the discussion in this section. The first thing to be noted however is that the reasoning of the Courts in defending the finality of the PSAB's decisions do to some extent contradict their reasoning concerning the exclusiveness of the PSAB's jurisdiction. We have seen that both the

Court of Appeal and the Supreme Court have always upheld the exclusiveness of the PSAB's jurisdiction, over all claims relating to or arising from application of public service Laws and regulations, on the ground that the PSAB is an administrative authority whose remedies should be sought before such claims are taken to the Civil Court (166). Yet this has not prevented the Supreme Court and the Court of Appeal from holding, in the cases discussed above, that the PSAB is a quasi-judicial authority or a "Court of Law even though referred to as a Board".

Another observation is that the stance of the Supreme Court and the Court of Appeal confers on the PSAB a status, not only of a competent civil court whose decisions are not subject to review by either of them, but, also, of a court which, together with the Departmental Disciplinary Boards and Heads of Units as its subordinate strata, represents a system of administration of justice parallel to and independent from the judiciary.

Although the Supreme Court hinted in one case that the finality of the PSAB decisions would not authorize the latter to exceed its jurisdiction or act against the Law the practical outcome, for administration of the Law, of these limitations is minimal. This is so partly for the reason shown earlier (Supra part 4.C.6.b.2) and also for another reason. The other reason is that given the too wide jurisdiction which the PSAB possesses under statute, excess of jurisdiction is, of all the mishaps that befall its performance, the least frequent (167).

Finally, the decisions of the Supreme Court vindicating the statutory provisions, that assert finality of the PSAB's decisions, and, its reluctance to invoke or accept any jurisprudential arguments, whether of, natural Law justice, general principles of the Law or fundamental human rights (168), challenging or contradicting these express provisions go hand in hand with a line of policy that the Supreme Court in Sudan had adopted since the early 1970s. The question whether this line represented a change from a previous stance and the reasons for the change in case it did and the identification of the common-denominator of the areas of the Law that this line affected are examined elsewhere (infra. Part 4.B of Chapter 5). I state here the main pillars of this judicial policy as were made clear in one case (169). These main pillars were as follows:

1. The Courts should not invoke the general principles of Law, natural justice or fundamental rights as justification for contradicting a Law that the legislature has enacted. In the words of the Supreme Court " . . . to allow the Judge deduce principles from the idealist notions of 'good conscience' 'fundamental rights' and 'natural justice' is, to endow it with legislative powers which it is not entitled to hold, and to introduce an objectively unascertainable source of the Law and methods of deduction that will lead to confusion . . . Ibid P.162."
2. In invoking the principle of separation of powers or any other Common or Civil Law principle as a source of guidance and in arriving at conclusions through comparison of various constitutional systems regard must always be paid to the modifications that have

been introduced upon these constitutional or general principles in the economic and political context of certain developing countries in general - (the Court was referring explicitly to the Egyptian and Indian Constitutional and legal traditions) - and that of the Sudan in particular. Hence the Court to distinguish the Sudanese Constitution from the "British" and "American" "Constitutions" considered the Sudanese 1973 Constitution as identical with a "Socialist Constitutional Tradition" . . . "endowing the Courts with power to judge constitutionality of Laws but only in accordance with this written Constitution and without questioning the wisdom of legislative policy" Ibid P.148.

3. "The right of individuals to litigate before Civil Courts is, unless it is otherwise stated under the Constitution, not a fundamental right, and is therefore liable to restriction by by-Laws. Ibid Pp.138, 160-161."

4.D The Attorney General's Chambers

From its inception the Attorney General's Chambers was a department of the Ministry of Justice. In 1968-69 the office was abolished and its duties were assigned to the Under-Secretary of the Ministry of Justice. In 1972 the office was re-established within the Ministry of Justice. Following its abolition in 1973 most of the functions of the Ministry of Justice have since been allocated to the Attorney General's Chambers. The latter performs in addition to these functions its original role as advocate of the State.

Table 6 : Appendix to fs.171-174 and Text Above
Disputes Adjudicated on by the Attorney General in the Period 1980-1983
Distributed on the Basis of their Subject Matter and Identity of Applicants

No.	Subject of "Fetwa" (2)	Date and No. of "Fetwa"	Identity of Applicant	The Law Applicable	No. of other applications on the same issue.	Comments	Total
1	Whether dismissal with confiscation of pension within powers of Disciplinary Boards	AG/7/5/12 : 17/11/80	A Government Unit	ODO 1927, EDA 1976, SS.7	3	All "Fetwas" consistent	4
2	(3) DB Decision whether subject to review by head of unit	AG/7/3/32 : 24/10/1979	Head of Government unit	EDA 1976, S.15	5	Fetwa No.7/13/875/1976 distinguished	6
3	Management no-right of appeal against DB decisions	7/2/45 : 12/4/1983	PSAB	EDA 1976	1	Consistent	2
4	Definition and effect of inexcusable absenteeism; stoppage of salary	AG/3/A/864 20/5/1980	Employee	PSR 1975 S.38 EDA 1976, SS.6,7(1)i	5	Fetwa No.7/13/858 : 9/12 12/75 is contradictory	6
5	Contracting out of public service Laws; not allowed	AG/7/6 : 14/2/1979	Employees	PSA 1973, SS.4,30			1
6	Definition of Public Service	3A/1759 : 18/11/1982	Management	PSA 1973, S.3	4	Fetwa No. 507/81 contradictory	5
7	Rights of Probationary Employees	7/2/23 : 61/4/1981	Head of Government unit	PSR 1975, SS.23-25	3	All consistent	4
8	Pensionsable Officials rights to injury compensation	57/25 : 17/4/1983	Employee	WICA 1981, SIA 1974 and PSPA, 1975	1	Contradictory with No.7/43/9 : 31/3/1981	2
9	Rights and obligations of State-sponsored trainees and scholars	1A/2682 : 10/4/1982	Head of Government unit	National Training Act 1974, NTR 1976	3	All consistent	4
10	Social Insurance Act when applicable	3/A/828 : 9/3/1983	Head of Government unit	SIA 1974	1	Consistent	2
11	Suspension from duty, its conditions and limitations	AG/3A/1055 : 19/1/1981	Employee	EDA 1976, S.7(d)	1		2
12	Retirement in the Public or service interests	2A/1688 :	Employee	PSPA 1975, S.26	1		2
							40

(1) Compiled by the Author from - Reyad 1981-83 and Other Sources.

(2) "Fetwa" - Authoritative piece of advice.

(3) DB- Disciplinary Boards.

Finally a public employment dispute may come to the attention of the Attorney General because the aggrieved employee has chosen or, been directed to take his complaint against the offending government unit to the Attorney General (173).

For purposes of resolving disputes that come before it the Attorney General has the powers, equalling those of the Civil Courts in similar circumstances, to call any public servant for giving evidence or order him to offer any information or explanation or to submit documents. Moreover, legal advice tendered by the Attorney General's Chambers and its decisions concerning any arbitration award given in the process of settlement of a dispute are binding on all State institutions and "shall not be rejected save with the consent of the President of the Republic - AGA 1981, 1983 SS.7-8".

Disputes with which the Attorney General's Chambers deal under the judicial powers discussed above are not confined to disputes arising from or relating to the application of individual employment legislation in the public sector. But among the various State legal disputes that the Chambers handle, those arising from or relating to application of individual employment Laws in the public sector constitute an overwhelming majority (174). One reason for this is that, although the State-provided PSAB is the sole machinery for the settlement of such disputes, it is a single central body that is too small to cope with the expected annual case-load. Another reason is that due to the difficulties encountered in enforcing decisions against government

untis, a dispute may remain unresolved even after it has been adjudicated upon or reviewed by the PSAB, the Central Recruitment Board, or the Employment Exchange. What these bodies do when faced with obstinate government units is to direct the aggrieved employee to complain to the Attorney General (175).

However the vigorousness with which the Attorney General has defended the exclusiveness of the PSAB's jurisdiction as against the Civil Courts, has not prevented the Chambers from assuming both original and appellate jurisdiction over disputes arising from or relating to application of public employment Laws. This however reinforces the thesis that exclusiveness of the PSAB's jurisdiction is defended not for its own sake but as a means for confining settlement of individual employment disputes in the public sector within the administrative hierarchy of the State.

Bearing in mind the original and supportive roles which the Chambers plays in the administration of public employment Laws, examination of enforceability of the Chambers' decisions and consultations is essential for assessing the effectiveness of the Chambers' intervention in particular and the effectiveness of the system of administration of public employment laws in general. Despite the existence of express statutory provisions that make a decision or legal advice given by the Attorney General Chambers binding upon all State institutions - (AGA 1981, 1983 SS.7-8). It has been decided by the Supreme Court that these provisions do

not transform the legal advice or decision into legal rights that are judicially enforceable at the initiative of the person or persons in whose favour they are made. Delivering the judgment of the Supreme Court in that case (176) Zeki Abdul Rahman SCJ emphasised that; "no authority other than the Attorney General itself is entitled to follow up supervise or seek the enforcement of a legal advice given by the Attorney General and the latter is absolutely free not to seek the enforcement of its legal advice and decisions through the Court . . . " (177).

Conclusion

There are many reasons which make the protection provided by individual employment legislation in the public sector inadequate. These reasons may be summarized in the following:

1. Absence of legislative restriction on dismissal and other forms of termination of the employment relationship.
2. The introduction by statutes of various extra grounds for dismissal and termination of the employment relationship, e.g. the PSPA 1975 S.26 and the PSA 1973 S.22(g).
3. Absence of legislative control and the inefficiency of the administrative control provided on selection for employment.
4. Exclusion of the Civil Courts and the trade unions from participating in the control or regulation of the employment relationship.
5. The position of the administrative machinery provided for resolution of employment disputes as a stratum in the State administrative hierarchy and the resultant ineffectiveness of its intervention.

All these reasons are either direct or indirect creatures of a legal policy whose intervention in or abstention towards the field of the State-individual employment relationship are determined, not by a commitment to a sovereignty of the rule of Law or individual freedom and individual rights, but, by considerations of political control. The emphasis on administrative control, the enactment of rights and obligations whose scope differs with relation to employees of each sector and the provision of various systems of tribunals whose orientation and commitment towards protection of individual rights is dependent on the identity of the employer - (i.e. whether the State or a private employer) - or the nature of the rights involved, are elements of a form of legality that is consonant with and reflective of exigencies of political control.

It is more likely that it is the special position of public employees which makes them more adversely affected by these political policy considerations. There are two factors which make the control of the public employment relationships, in particular, essential both for enabling the functioning of the State apparatus and for implementing, and, attaining the specified objectives of economic planning. These factors are:

- (1) The position of the State, as, holder of the biggest share of the economy, proprietor of the most strategic economic activities, and, as an active and principal regulator of the economy.
- (2) The position of State employees as employees constituting, the vast majority of the working population, and, the brain nerves and limbs of the corporate centralized State.

While the satisfaction of political policy considerations may require a consolidation of State prerogative in matters relating to recruitment, discipline and termination of the employment relationship, it does not necessarily require that public employees' wages, salaries, holidays, leave and income supplements, should be kept below that of their colleagues in the private sector. It is rather the case that the State whilst monopolizing wages and salaries determination, endeavour, as far as the economic situation would permit, to obtain employees' complaisance to its command - (on the three strategic areas of employment mentioned above) - by frequently revising their payments and income supplements. Notwithstandingly, both because economic and policy considerations (178) do not always permit such revision in case of public employees and because private sector trade unions are relatively actively involved in the determination and administration of employment rights and grievances (179) recent findings have confirmed that the position of private sector employees is better (180). The position of the government as the sovereign power in the country concerned and that of public administrations as guardians of the interest of the community at large are everywhere partly accountable for the relatively - (i.e. in relation to the private sector in the country concerned) - different position of public employees (181). However, for the reasons explained below the experience of the Sudan is rather uncommon.

The scope of public employment subject to special Laws and administration in Sudan, is extremely wide, covering both fields of individual and collective labour relations and also all types of public employment. It has been noticed in respect of some other countries that, the extent of State intervention in Labour relations, and the scope

of collective negotiations depend inter alia on whether the employer is a government administration, a publicly-owned utility or a publicly-owned industrial or other undertaking. Workers' participation and collective bargaining are common practice in case of the latter two (Schregle 1974, 392-96). Furthermore there is rarely a country where the form and extent of State intervention vis-a-vis the individual employment relationship in the public sector is more obvious. The position in Sudan contradicts the general assumption (182) that the terms and conditions of public employment are better than those of employment in the private sector. Judging by the security of the tenure of office, the rate of payment and the way in which legislation providing for these rights is administered, the position of public employees in Sudan is worse (183). The "trend towards a wider participation of public servants in the determination of their conditions of employment" observed by the ILO in 1970 as "in progress in many parts of the World" (184) has not yet materialized in Sudan (185).

Another peculiarity of the Sudanese industrial relations is that "public interest", (185A) usually invoked by the Government as justification for intervention in any particular area of industrial relations, is neither statutorily defined nor subject to judicial interpretation. Likewise the manner in which administrative authorities interpret and apply the Law in specific situations is not subject to judicial review. Bearing in mind the shortcomings that are associated with performance of administrative tribunals in Sudan (186) arbitrary interpretation and misapplication of the Law are likely to be unavoidable.

For reasons mentioned elsewhere (187) the Courts in Sudan may not dare to challenge the express provisions of legislation ousting their jurisdiction. However the judicial approach to the issue of managerial prerogative and to the contract of employment in general discussed in Chapter 5 suggests that the public sector employees would have been more extensively protected had the Civil Courts been allowed to participate in administration of public employment legislation. Although this may apparently contradict my argument that the Supreme Court had adopted the stance discussed earlier there is really no contradiction. It is arguable that there is a lot which the Courts could have done without necessarily circumventing express statutory provision. Moreover the stance of the Supreme Court is not always representative of the attitude of the Civil Courts in general (188).

The extent to which some of the political policy - considerations referred to in this conclusion also affect employees of the private sector, the position of individual employment in the private sector as being a relatively less likely object for political control and the effect these considerations have on the orientation of individual employment Law in the private sector is examined in the following Chapter. That examination is conducted, with reference to the three areas of employment and against the background outlined in this Chapter.

CHAPTER V

THE PRIVATE SECTORINDIVIDUAL LABOUR RELATIONS AND THE LAW1. Introduction

Private sector individual employment law derives from several sources, mainly statutory but also collective negotiations and common law. It is administered partly by the Civil Courts partly by administrative authorities and in certain areas of the employment relationship by joint employer/trade-union arbitration. How these sources and administration of the law influence its development is explained at (1.C below). But first it is necessary to consider two preliminary issues. The first (1.A below) is why employees of the private sector are almost free from State's "commandeering-intervention"(1) and indeed in certain areas of employment appear to be protected by the State. The second (1.B below) is the extent to which the analysis of some commentators on private individual employment law in the Sudan can adequately account for the present state of the law. Examination of the first issue is important because differential treatment of the workers in the public and private divisions of capital might not, in the light of previous analyses of the class composition of the State in the Sudan, be anticipated. Critical examination of the second issue is necessary because the analyses advanced offer an empirical monocausal explanation that sharply differs from my own.

1.A. Factors Influencing State "Commandeering-Intervention"

As a prelude to the discussion I argue that the commonality of State "commandeering-intervention" at the level of collective labour relations testifies to the uniformity of the interest of employers and the State in so far as the minimization of the power of organized labour is concerned.

As explanation for the peculiar legal position of public sector employees the conclusion to Chapter IV has pointed to the bureaucratic governmental control over these employees . Although control is an essential element of the employment relationship in all sectors of the economy, the control which legislation gives to the private employer over his workforce does not, in contrast to that given to the State, particularly in areas of dismissal and discipline alter the contractual nature of the employment relationship in favour of the employer.

Any explanation of the differential treatment of public and private sector employees must start from the position of the centralized State as a force superior to all social and political powers including that of the nascent capitalist class. It is this superiority which enables the State to reject any notion of contractual reciprocity of the employment relationship in dealing with its own employees and to impose it or even override it in favour of employees in the case of the private sector employment. However this does not contradict my view regarding the relative autonomy of the State expressed in Chapter II. It rather means that for State control of collective labour relations, which is more politically and economically significant for both the State and employers

and therefore applied to all employees, to be effective a degree of protection of individual employees is in case of the private sector important not least because it undermines the pressure towards collective resistance. The question why this protection is a sensitive issue particularly in case of the private sector is explained below. The further question why protection of employees has become such a characteristic feature of private sector law is in turn explicable by the discussion under Part 1.C.

There are factors which make this differential treatment practically possible. One such factor is the existence of a general assumption on the part of both the government and employees that, as guardian of a supposedly "public interest" residing in public utilities enterprises and assets, it is not unreasonable for the government to tighten its control on employment of persons involved in the administration of these public bodies. However the perverted (2) interpretation which has been put on "public interest" in the last few years has weakened the faith of the workers in the moral commitment of political regimes to the cause of the public interest. Thus, while the above assumption may explain certain trends (3) that characterized the development of individual employment law in general in late 1960s and early 1970s it may not adequately explain later trends.

In contrast with the above perception of public employment, private employment is viewed as a relationship between two juridically equal State subjects (4). The privacy of interest involved and the relaxed government control enabled the courts to intervene in the regulation of the private employment relationship from as early as 1914

(5). However the Civil Courts in the post-independence era advanced the position of private employment even further. They recognized that juridical or contractual equality is an inadequate criterion for purposes of conceptualizing the rights and obligations of the employment relationship. Instead the courts appear to have taken into account the underlying economic inequality of the parties (6).

It was also the privacy of interest involved coupled with a distrust which the trade unions and some factions of the middle class in Sudan held for private enterprise (7) which made terms and conditions of employment in the private sector a ground for - inter alia - government-union confrontation throughout the 1960s and early 1970s. This distrust was further accentuated by the real insecurity of employment caused by the financial insecurity of small enterprises employing among themselves the vast majority of the workforce in the private sector (El Hassan, 1975.189-200). Although it was the public sector trade unions which were more influentially involved in bringing about changes in the individual employment law in 1969, 1970 and 1973 it was employees in the private sector who were to benefit most from this involvement and the changes it produced. This was to be the case both because the majority of public employees were (EEPO 1969), and later (CLC 1970, EEPO 1973/PSA 1973) all of them were to be, formally excluded from the application of the EEPO 1973 and its subsequent amendments, and also because of the operation of factors - (discussed infra Part I.C) - that have to date improved the practical operation of the law in case of the private sector. To recapitulate, the stance of the State towards private employment is influenced, directly by the political orientation of the trade unions and some fractions of the middle class,

the position of private employment as a possible source of friction, the distance of private sector employees from State bureaucratic control, and only indirectly, by the class composition of the State.

1.B. Inadequacies of Existing Analyses

All commentators (8) see the development of labour relations law as product of and concomitant with the struggle of the Sudanese labour movement. Some commentators have attempted to periodize the development of labour relations law on the basis of its correspondence with specific events in the political history of the Sudan (9). Yet this association cannot, without some qualification, adequately account for specific characteristics of both the form and content of labour relations law. In this sub-section I point to some of the questions which such an approach may not be able to answer.

Explaining the gradual emancipation which the law governing for example sickness leave and holidays has effected (10), solely with reference to trade union struggle leaves unanswered the question why the duration and payment of sickness leave for instance increased in 1969 while the law governing dismissal with notice remained unchanged until 1973 effectively nullifying the advantages gained from the increase of sickness leave pay (Cf. *infra* Part 3.A.1). One commentator registered his surprise that the EEPO 1949's dismissal with notice provisions (SS.10(1)) had escaped the attention of the 1969 Amendment although repugnant to international standards of labour legislation" (11), but is uncertain as to whether that was due on the one hand to weakness of the labour movement and the superior influence exerted by other social

classes or on the other to trade union satisfaction with the prevailing law (Hassan, 1979.139-141). However any assumption of trade union satisfaction with that law is difficult to accept in view of ample evidence (12) that the trade unions were, from as early as 1955, conscious of the effect which SS.10(1) had had in practice on other protective provisions of the law. It is I believe reasonable to conclude that, although it was a factor in attracting attention to the inadequacy of the law, trade union struggle by itself proved insufficient to bring about a change in the law (13).

A second question which the association of the trade union struggle with the development of individual labour relations law cannot answer is why the terms and conditions of employment have vastly improved during the 1970s and early 1980s, when the collective powers of individual trade unions and the labour movement in general had been crippled by collective labour relations and State security laws. This is a period that was marked by the introduction of social insurance and minimum wage legislation and a comprehensive revision of all individual employment laws that has vastly improved the position of the employee.

An association of trade union struggle and individual employment law also does not explain why legislative protection has been provided for special relatively organizationally weak classes of employees. In this respect, the 1952 Wages Tribunals Ordinance, The Employment of Children Ordinance 1930 and the special protection provided for female employees by The Industrial Safety Legislation (14) cannot be accounted for simply by trade union struggle. Indeed some of these Statutes pre-dated the existence of trade unions and the rest were introduced at a

time when the terms and conditions of employment of the best organized workers had been quite modest.

This alleged association also simplifies the processes - (examined *infra* Part 1.C) - which influence the legislative policy in the particular case of the private sector and by so doing also does not explain the rather different path of development which individual employment law in the public sector has, in contrast with the strength of trade union in this sector, been travelling.

I would further argue that this association also grossly underestimates the relevance of the stage of development and expansion of the material industrial base in the country (15).

The foregoing discussion suggests the alternative hypothesis that, bearing in mind the relative absence of commandeering State intervention in this area of employment, the properties of the form and content of the law are explicable by reasons derived from the operation of the factors discussed under Part 1.C below. The reasons are the following:-

1. The dominant judicial and political ideology. In this respect one commentator, a member of the judiciary, believed that the then dominant common law doctrine of contract with its conception of termination with notice as a contractual right (16) was to blame for the survival, for the 25 years - (i.e. between 1948 - 1973) of the EEPO 1949 SS.10(1) - (Hassan, 1979.140) (17).

2. The willingness of the State to adopt as law proposals made by the trade unions. It is often this willingness which ultimately determines both the form and content of the law. The State is never coerced into

accepting proposals for reform. Among many considerations intervening to determine the State's willingness to act are: (a) the political significance of the amendment proposed; (b) the moral and social necessity of the amendment proposed; and (c) the class composition of the political regime in charge of the State apparatus at the time. I have pointed out that some of these considerations account for the different treatment which each of the areas of collective labour relations and individual employment relations in general and that which the public and private divisions of the latter receive from legislation (18). Grounds (a) and (b) also account for, the strong protection which employees are given in respect of their health and safety in both the public and the private sectors, and for the rather relatively inadequate and sectorally discriminatory protection afforded to these employees as against dismissals. The extent to which political ideology of the regime in charge of the State apparatus can influence development of labour relations law is best illustrated by the political events that surrounded (i.e. preceded, accompanied and followed!) the enactment and withdrawal of the 1970 Consolidated Labour Code (CLC 1970) in Sudan (19).

3. The economic significance is also relevant in so far as the proposed or existing legislation may affect what influential employers and the State consider as optimum economic performance. Emancipation of terms and conditions of individual employment in the private sector during the 1970s and 1980s could in fact be attributed inter alia to the expansion in the industrial sector and appearance of big indigenous and immigrant capital which could willingly afford terms and conditions of service better than those that had been guaranteed by the pre-1981 legislation (20).

4. To say that trade union struggle is not the determinant factor is not to deny that it is a factor partly accounting for the present condition of individual employment law. The terms and conditions of employment and administration of the rules governing them in the private sector are in many respects better than that in the public sector, inter alia, because trade unions in the former sector perform, within the framework of the law, functions - (e.g. collective negotiations with employers and law-enforcement agencies) - that contribute to improvement of their members' position (21). Moreover, my argument does not mean that apprehension of the potential political power of the trade unions has not always been a latent reason for the apparently voluntary legislative protection which some governments have provided. My analysis endeavours to show that there are other factors which in the case of the private sector, influence both the mode and practical significance of this protection.

1.C. The Main Hypothesis of the Chapter

1.C.1 The Factors Influencing the Development of the Law

The frontiers of the juridico-political framework within which private sector individual employment law has been developing are drawn by the policy of the State vis-a-vis this area of employment. The internal characteristics (i.e. the specific features of the detailed rules) of this law within this framework are shaped by a multiplicity of secondary factors. These factors reflect on law not because of their inherent pre-eminence or because the economic position of employment in the private sector endows them with special influence but largely because of the stance of the State towards this area of employment and towards the

participation of these factors in its regulation. This is explained below.

Neither at the level of rule-making nor at the level of legal administration are the rights and obligations of private sector employees subjected to a State "commandeering intervention" of the type affecting the conditions of service of public employees. At the level of rule-making this is significant for example in understanding the distinction between dismissal in the private sector where legislation endeavours to restrict employers' common law contractual rights of termination and in the public sector where legislation, while preserving these contractual rights unrestricted, gives extra-contractual powers of dismissal on "public interest" grounds. It is also important in understanding why private sector trade unions, although governed by the same collective labour relations laws that govern trade unions in the public sector, can participate in the rule-creation process. The reason is of course that private sector individual employment law sets minimum standards whilst leaving the door open for further improvement through voluntary negotiations (22). This in turn paves the way for standard-setting by large employers and for some strong trade unions to influence the terms and conditions of employment for the whole sector.

At the level of administration the inapplicability of State "commandeering-intervention" allows the Civil Courts to participate in administration and development of the law. In contrast to the position in the public sector the jurisdiction of the Civil Courts over all private sector individual employment grievances is not at any stage ousted by legislation. The labour offices which supervise the implementation and administration of the law do so free from "commandeering-intervention".

Furthermore the decisions of these offices are in consequence always appealable to the Civil Courts.

In addition to these secondary factors of standard setting by big employers, trade union participation, judicial administration and practices of the labour offices, the development of private sector individual employment law is also influenced by State's protectionist-intervention. The question why this protection is in certain areas (e.g. dismissals) confined only to private sector employees is answerable by the previous discussion of the extra legal considerations that affect determination of the terms and conditions of public employees (23). The reason why protection, even where in areas such as selection for employment, holidays and sickness leave it applies to both sectors, in practice more positively affect the terms and conditions of private sector employees can be explained by the following:-

1. The manner in which private sector individual employment law is administered always ensures that protective provisions are effectively enforced.
2. The decisions, agreements and views of the different bodies involved in the administration of the law are at any given time, practical conclusions regarding the practical state of the law and its compatibility with ever-changing social and economic conditions. These practical conclusions often feature as proposals for reform made mainly by the Department of Labour but also sometimes by employers' and workers' organizations (24). Many such proposals made by these three bodies were eventually incorporated into each and every one of the statutes enacted in the period 1969-1981 (25).

It is because of this responsiveness of private individual employment law to extra legal changes that it has been subjected to five major revisions since 1968 - (i.e. in 1969, 1970, 1973, 1974 and 1981), compared with a single revision of public employment law during the whole period. This responsiveness to change also inheres in the legislative schemes (i.e. wage-tribunals and minimum wage) that determine the level of wages in the private sector. These schemes are by their nature generally less centralized and therefore more easily influenced by the trade unions than the Public Sector's Job Evaluation and Classification Scheme. In contrast with the position (26) in the private sector the level of wages and salaries of public employees has been revised only once since 1968.

The interplay of the secondary factors aforementioned might well produce a smooth and consistent development of the law. The reason why this is not in fact the case is explained by the influence which political considerations exert on the operation of these factors. This is demonstrated by the following:-

1. The 1970 Consolidated Labour Code (CLC 1970) - which it is claimed; ". . . proved to be unworkable mainly due to the unrealistically generous benefits it provided for workers . . . (Taha 1982.156 f.16) - featured as an item in a programme of social and political reform that had been launched by a socialist government and included among its other agenda the minimization of the role of the private sector in economic development. Although it is claimed that the Sudan Employers' Consultative Association (SECA) (27) was "instrumental in bringing about its ultimate and premature abolition (Taha 1982.145)" the CLC 1970 was

suspended mainly due to a political rift within the ruling - (communists and non-communists) - alliance and was officially abolished only after the military defeat of the communists and their supporters in July 1971 (28).

2. The Employers and Employed Persons Ordinance 1973 (EEPO.1973) also gave employees protection which exceeded limits considered by some commentators as adequate compromises between the interests of the parties involved (Taha & El Jack, 1973.39). The question why Numeiri's regime conceded to the trade unions' and labour offices' recommendations on the issue of this protection is also answerable by a political explanation. The introduction of the 1973 Amendment could not be separated from the political events of 1970-1971 and the patronage that the incumbent political regime, in order to mitigate the impact of withdrawal of the 1970 CLC (Consolidated Labour Code)(29) and weaken communist foothold, pledged for the trade unions thereafter.

3. To the dismay of many employers the 1981 Individual Employment Relations Act (IERA 1981) signalled the terms and conditions of employment in the private sector for even further qualitative and quantitative improvements. However these improvements were made possible as a result of the operation for 8 years between 1973-1981 of some of the factors I have identified earlier namely, standard-setting by big employers and some strong trade unions and the efforts of the Labour Department. There are three explanations as to why these improvements were enacted in spite of their opposition by some employers. The first is that recommendations for reform made by the Labour Department are more influential on government policy. Although the Sudan Employers Federation (SEF) would like to believe that the Department is biased towards the workers (30), there is another possible explanation as to why the recommendations of the Department may not

be welcomed by all employers. These recommendations are usually made on the basis of the contents of collective agreements deposited with the Department. These agreements usually however come from big and stable firms (31). Although the Department of Labour is possibly aware of this situation, the fact that the majority of employers in Sudan do not care to conclude written agreements with their employees or to deposit copies of these agreements with the Department, itself deprives the latter of the sources of information on the basis of which to make the appropriate recommendations.

The second explanation is on the one hand the "emphasis" which Sudanese trade unions have always placed on political bargaining - (i.e. negotiating with the government through the Federation for improvement of terms and conditions of all private sector employees) - and on the other the crucial "position" which the trade unions occupy as potential stabilizers or destabilizers of the political regime. The "emphasis" in the first limb of the argument produces demands that might not be compatible with the economic conditions of the majority of individual firms (32), while the "position" in the second limb persuades the government to buy off the trade union opposition at any affordable price.

The third explanation is that the multi-national corporations and Sudanese financial and other capitalists which are strong enough to influence the government labour policy are also simultaneously viable enough to observe at least the minimum legal standards of the terms and conditions of employment. Experience has shown that the interests of the "financial", "services" and "multi-national" capitals on the one hand and that of the average Sudanese industrialist on the other are not

necessarily coincidental (Kursany; 1983.119-123)(33).

1.C.2. The Effect on the Law

I mentioned at the end of Chapter I that there are various levels of ideologies of Law. I also in this respect mentioned that labour relations law in the Sudan is devoid of an economically-institutionalized or structuralized social ideology (34) and that I intended therefore to confine analysis of the ideology of individual employment law at the more superficial levels of rule-making and legal-administration (35). As a basis for further verification in the rest of the Chapter, I stated under Part 1.C.1 above that there are certain factors which influence the development of private individual employment law. The hypothesis of this part is that the operation of these factors affects this law in the two ideological respects explained below.

The plurality of the factors influencing the development of the law both at the levels of rule-making and legal-administration also affects the "formal" and "social" ideology of the law. The "formal" ideology of the law connotes; (a) the rationality which the law acquires as a result of the apparent impartiality of the bodies involved in its enactment and administration; (b) formal effectiveness of the law i.e. respect for the law deriving from an expectation that it will in fact be enforced; and (c) the technically and practically meaningful existence which the law assumes as a result of its insertion into the practices rites and rituals of the bodies involved in its administration and enactment and also as a result of accumulation of precedents decided on the basis of the law.

The "social" ideology of the law connotes the "social" effectiveness of the law i.e. the effectiveness depending on the objective expectation that the law would, irrespective of its potential formal enforceability, in fact be widely observed. The law would be socially effective if (a) its rules are accurately representative of the de facto balances of powers of the individual social relations they are purporting to regulate, and (b) the rights and obligations which the law provides are accordingly symmetrical with the economic and social position of the bearers - (i.e. the parties to the social relation). These two conditions are interdependent because the balance of the powers of the parties to a social relation and consequently the phenomenal form of this balance - (i.e. the substance of the terms and conditions that govern the relationship) - are always directly affected by the technical economic and social changes in material production (36).

Implicit in the discussion of the materials in the rest of the Chapter is that as a result of the plurality of factors influencing its development private sector individual employment law possesses all the ingredients of a "formal ideology" noted above.

With regard to "the social ideology" I argue that because these factors affect law at the superficial levels of rule-making and legal administration their operation is not necessarily conducive to development of a social ideology of the law. The latter needs for its existence an ascendent process of regulation of the terms and conditions of the employment relationship - i.e. regulation which is initiated by the interaction of employers and workers at the level of individual firms, and, through the interaction of the economic and political organizations

of these parties proceeds to assert itself as a societal fact before it is enacted as a "law". In contrast to this position the following are characteristics of the private sector individual employment law in Sudan:-

1. The stance of the State towards this area of employment and towards the various factors influencing its regulation is largely conditioned by political considerations.
2. The ability of trade unions and some employers to influence the legislative process derives not from the industrial powers of individual trade unions or numerical supremacy of these employers but from their disproportionately greater political power.
3. The judicial conception of the employment relationship and the techniques devised for the elucidation and elaboration of this conception are not necessarily an indigenous juridical expression of the social and economic condition of an indigenous employment relationship but creatures of a legal system that owes its existence to colonialism and practices to the English Common Law Tradition.

All these superstructural influences coincided to produce a private individual employment law that is "formally ideologically developed" but one which is also hardly representative of the economic condition of the majority of firms in the private sector. Even within the "organized" (37) private sector the number of employees who can practically - i.e. judging by workers organizational strength in and economic viability of individual firms - benefit from the law even without taking their employers to courts or tribunals is limited. This dependence of operation of the terms and conditions of employment on judicial and administrative enforcement has flooded the "Labour Courts" and the Labour Offices with a permanent overload of litigations (38).

The law appears formally ideologically developed and expanded, despite the tiny - (less than 15%)(39) - percentage of urban wage-employment which the "organized" private sector accounts for, only because of this largely juridical determination of the terms and conditions of employment.

However there is a further dimension to this superficiality of the law. The "organized" private sector (i.e. registered establishments with a permanent workforce of whatever size) to which individual employment legislation usually applies accounts for a small percentage of total employment in the "formal" (40) private sector as a whole. The latter covers in addition to employment in organized industries; casual employment in these industries, employment in construction, commerce, services and the formal agricultural sector. The law excludes these categories of employment either directly through express provision - (e.g. IERA 1981 SS.4(d) excluding agricultural workers) - or indirectly through imposition of a definite period of service, or a definite number of employees in the establishment, as minimum qualification for application of the law. Employees affected by this exclusion are politically weak either because, they are situated outside the urban centres or although within these centres, the casual nature of their work or the smallness and multiplicity of their employers make these employees organizationally weak.

1.C.3. The Method of Researching

Whereas I have argued in the two previous Chapters that the ideology of the law is directly explicable by the commandeeringly interventionist stance of the State towards collective, and public sector

individual, labour relations; I argue here that the ideology of the present law is explicable directly by the operation of numerous secondary factors and only indirectly by the stance of the State vis-a-vis individual labour relations in the private sector. However for purposes of a thesis on Labour Law and the State this does not make examination of the corpus of private sector individual employment law and its administration less important. This is so because the focus of the thesis has always been on examining the effect, which a stance of the State towards a particular area of labour relations has, on the ideology of the law regulating this area. Findings such as, that this stance is commandeeringly interventionist, protectively interventionist or sometimes abstentionist, and consequently, that the law regulating the particular area of labour relations is ideologically under-developed or developed are all directly relevant to the main theme of the thesis.

As with Chapter IV this chapter discusses the two broad areas or stages of the employment relationship subject to legal regulation, namely; (a) selection for employment and (b) the security of employment rights and tenure of office, and the machineries through which this regulation is administered. The matters and materials examined in the course of discussion include the sources, provisions, fields of application and administration of the law. The discussion endeavours to demonstrate the following:-

1. The extent to which the corpus and operation of the law reflect the contributions of the various factors claimed as influencing development of the law.

2. Whether development of the law is in consequence reflective of a particular mode of employment protection law (e.g. one which places more emphasis on the interests of the workers).
3. The "formal ideological" development, of the process through which the contributions of the various and sometimes contradictory factors become law, and, of the juridical discourse through which this law is communicated to its subjects and audience.
4. The extent to which the "social ideology" of the law is under-developed.
5. To the extent that the law is reflective of the particular mode noted above - (i.e. supra 2), the special characteristics of the factors responsible for this development. In so far as it is explicable by special characteristics of the Civil Courts and the Labour Offices this point will be considered under Part 4 of the Chapter.

2. Selection for Employment

I have mentioned earlier - supra text above f.37 Chapter IV - the reason for the virtual absence of control on selection for employment in the Sudan. I also indicated that any protection which accrues to prospective public sector employees is in fact consequential upon a policy of centralization of recruitment intended principally for the good of the public service. Although the need for centralization of recruitment in the private sector may be less urgent from government perspective, selection for employment in this sector has not remained without control. There are two reasons for this. The first is that the social and economic significance of manpower planning and statistics make a degree of central control important even in case of the private sector. The

second reason is that control on selection for employment in the private sector derives from the practice of an administrative machinery that contemplates as one of its principal objectives the protection of prospective employees.

2.A. Scope of Application and Administration of the Law

The provisions of the Manpower Act 1974 (MA 1974) relating to, registration with Employment Exchanges (MA SS.9, 11), the conditions for advertisement of vacancies by employers (SS.13(1)a), nomination of prospective employees by the Employment Exchanges and the obligation on employers to appoint from among those nominees (SS.13(1)b), apply to both public and private sector employees. The wordings of these provisions have already been examined in Chapter IV (41). However the scope of application and the conditions of administration of the law are different in the case of the private sector. Both aspects are explained next.

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2.A.1 The Scope

Determination of the scope of application of the MPA 1974 requires (a) examination of the classes of private employees to which it applies and (b) the number and type of private sector units to which it applies.

2.A.1.a Employees Governed by The MA 1974

With the exception of principal posts the holders of which are under The Agency Act 1974 considered as ostensible representatives of their employers (MA 1974 SS.13(b)-3) The MA 1974 governs the selection

for employment of all applicants irrespective of qualification grade or skill. Although the Minister responsible for labour is empowered to make exceptions no such exception has been made.

2.A.1.b Establishments Exempted

The MA 1974 exempts only employing units with less than ten employees (SS.13(1)-b). Likewise no additional criterion for exemption from The MA 1974 has in this respect yet been made by the Minister in exercise of his general powers referred to above (supra Part 1.A.1.a). One other possible exemption however is that of a company or corporation whose Act of association provides for its exemption from the MA 1974. I did not find an example of a company specifically exempted in this manner. In one case however a bank which is exempted by its Act from "the laws regulating service and post-service benefits" (42) invoked this exemption as defence against the Commissioner of Labour's charge that, by directly appointing applicants, it was violating the provisions of the MA 1974 (43). The Commissioner mistakenly accepted this as defence. Neither the Arabic nor the English citations - especially the former - of the MA 1974 would seem to justify its inclusion into the laws referred to by the wording of the exception (44).

2.A.2. Administration of the Law

There are two administrative bodies entrusted with administration of all provisions of the MA 1974 including those relating to selection. One is the Commissioner of Labour Department concerned inter alia with registration, nomination, and employment of applicants with at least

university qualification. The second is the Employment Exchange performing the same functions in relation to other classes of applicants. Both bodies fulfil their duties of selection and nomination on fair competition bases. They are empowered to nominate and direct the employment of applicants and determine the number of members of any special group - (determined with reference to sex disability race or otherwise) - to be employed by any employer (45).

There are factors which enhance effectiveness and comprehensiveness of statutory control over selection for employment in the private sector of applicants with university or higher qualifications. With respect to effectiveness it must be borne in mind that the law which governs the selection for employment of this class of applicants is the MA 1974. In contrast to the (PSR 1975), the (PSA 1973) and the (PSBR 1982) which govern the selection, for public service, of applicants with similar qualifications (46), the MA 1974 provides punitive sanctions against breaches both of its provisions and of regulations made under them - (MA 1974 S.26).

Although private employers as a matter of principle oppose the inclusion of punitive sanctions in employment law in general and have in particular complained about the discriminatory tendency of the law to reserve these sanctions for them (47), the view which the Labour Offices hold, at least in so far as selection for employment is concerned is different. According to one Director of a Labour Office; "punitive provisions have proved valuable and effective . . . and anyway in practice we invoke them only after all chances for an amicable solution have been exhausted" (48). However this may not mean that the existence of the

punitive sanctions may not itself effect the form of amicable solutions arrived at.

The scope of application of the MA 1974 has already been referred to. Suffice to mention as evidence of comprehensiveness that the jurisdiction which the MA 1974 gives to the Labour Commissariat over selection of private sector prospective employees with university or higher qualifications, contrasts with the limited jurisdiction which public service laws and the classification and exceptions made by them leave for the PSRBs in their dealing with prospective employees of similar qualification (49).

There are also reasons which make the application of the MA 1974 to all prospective private sector employees more effective than its application, and that of the other relevant public service laws, to prospective public sector employees. Public Service Laws and their administrators emphasise as the objective of control on selection for employment the interest of the public service. In contrast, the regulations subject to which the MA applies, and the practice of the bodies entrusted with their application, place much more emphasis on equality of job-opportunities for all unemployed, in case of the private sector (50).

Most important is the fact that many of the procedural lacunae that impede implementation of legislative control on selection for public service are peculiar to that sector. Any employment exchange or district Labour Office may prosecute any private employer who fails to comply with any of the provisions of the Act or its regulations. The

office or exchange may prosecute, either, upon receipt of complaint by a person who having been nominated by them is rejected by an employer in contravention of the MA 1974 SS.13(1)-b (51), or, on their own motion in respect of violations uncovered in the course of an inspection carried under the MA 1974 SS.25(1) (52). However instead of prosecuting

the Labour Offices sometimes refer the complaint to the geographically jurisdictionally competent Civil District Court. These District Courts may hear the dispute afresh, summon the labour officers as witnesses, order specific performances or inflict the punitive penalties provided for under the law (53).

Summary

Selection for employment is an area that in so far as the majority of employees in both the public and the private sectors are concerned is governed by the same Act although the regulations subject to which the Act is administered are different. However because there is no State commanding intervention with the autonomy of the agencies involved in the administration of the law in case of the private sector the Act and its regulations are "formally" effective. Hence although they theoretically apply to both sectors the provisions of the MA 1974 restricting direct recruitment and making mandatory the employment of members of special groups are potentially more likely to be enforced against private employers. However, notwithstanding this formal enforceability of the Law, it has been noticed that Employment Exchanges make no contact with potential employers or school and training institutions in their areas of jurisdiction, and themselves lack the facilities, for the testing of skills and aptitudes. In effect, "there is a

facade of matching workers with jobs by means of public action but there is little substance behind it . . . ILO Sudan 1976.118". "The Manpower Act 1974 . . . is excessively ambitious . . . and should either be amended or abrogated . . . Ibid."

Judging by the number of people who can actually benefit from the operation of this system of control on selection the MA 1974 and its administrative machinery are hardly "socially effective". The exception of establishments with less than 10 employees in effect excludes the majority of the urban labour force (ILO Sudan 1984.177). Moreover although employers subject to the MA 1974 are prohibited from directly appointing any applicant there is evidence to suggest that the exchanges have failed to fulfill employers' requests for casual or temporary work - ILO Sudan 1976.372. The reason for this is that the seekers of casual labour - (either because in fear of the possible delay involved or of the procedural requirements which placement through the exchange might entail in case the casual labourer so placed desires to change employers) - have so far shown no interest in benefitting from the system. Even among seekers of permanent employment, who constitute the vast majority on the exchange register, only a minority is actually placed each year - Cf Table 7. There are two possible reasons for this. The first is that, - (bearing in mind that there are only 28 exchanges for the whole country) - there could be huge operations of direct hiring of which the exchanges are not even aware. The second is that people apply to employment exchanges only after they have unsuccessfully exhausted their own personal efforts to find a job on the free market.

TABLE 7

The Rate of Placements to Outstanding Registrations

Year	No. of Registered Applicants	No. of Those Placed	%
1977-1978	102445	15016	14.7%
1978-1979	97288	11728	12
1979-1980	83956	16361	19.5
1980-1981	89970	11643	12.9
1981-1982	77369	8696	11
Total	451028	63444	14.1

Sources: Compiled by the Author from the statistics
of the Labour Department Annual Reports 1977-1981.

In spite of what has been said, the area of selection for employment is, compared with other areas, the least protected. This will be clearer the moment other areas have been examined.

3. Security of Employment Rights and Tenure of Office

Introduction

The private individual employment relationship has become a subject for official—i.e. as opposed to customary—regulation since the beginning of this century only. But, unlike that of public employment the regulation of the private employment relationship proceeded until 1948 on the basis of case-law. The fact that the judiciary was staffed by British judges (Hassan 1979.12) and that the permissibility of importing English common law principles and doctrines had been established by the year 1900 (54) meant that the content of case law derived wholly from the English Common Law of Contract. Due to, the short period of time involved (i.e. 1900-1948), the scarcity of litigation at that time and the tendency of litigation to recur more in certain areas than in others, judicial regulation was not comprehensive in any one single area let alone all areas of the private employment relationship.

The promulgation in 1949 of the first individual employment legislation - (The Employers and Employed Persons Ordinance, EEPO 1949) - did not put an end to the role of the judiciary in the regulation of the employment relationship. This is because the EEPO 1949 did not oust the jurisdiction of the Civil Courts. Although workers' struggle was a factor (55), it was not the decisive factor in the introduction of the EEPO 1949. The EEPO 1949 was like other contemporaneous ordinances

introduced by a colonial administration influenced in its turn by a myriad of external and internal conditions (56).

The provision in the Ordinance of penal sanctions (57), seen by some commentators (58) as a "most striking change brought about", marked the beginning of the duality of public and private law referred to earlier (59). Until now the practical significance of these sanctions lies in that they allow administrative authorities to inspect and effect implementation of the law on their own motion. Equally important however is the practical effect which these punitive provisions and the EEPO 1949 in general produced on the judicial perception of the employment relationship.

The weight of judicial authorities has since 1949 always tilted in favour of treating the EEPO 1949 as an enactment of public law (60). It is now firmly settled that the private individual employment legislation provides a minimum floor of rights whose maintenance is mandatory. This, in the words of the Supreme Court, is, "the interpretation compatible with the objective of the EEPO which, is, the protection of the weaker party against possible exploitation by employers. Hence, it is as a matter of public policy, mandatory to abide by its provisions and the courts are bound to declare any contract not so abiding as void . . ." (61).

Carried to its legally logical conclusions this judicial view has the following two implications: (a) in determining the legality or illegality of a contract of employment the court may ignore the mutual and express intention of the parties. Two recent cases - *Murad -v- Madeline* and

Central Trading Co. -v- S Diryas (62) - demonstrate this point. In both cases employers were held liable for unlawful dismissal under the EEPO 1973 SS.10(2) even though their contracts with the plaintiffs expressly stressed the probationary nature of the employment (63). Rejecting the argument that such contract is by its nature conditional the Supreme Court reasserted in the latter case; "remedying the de facto economic inequality inherent in the employment relationship was the crucial objective behind introduction of the EEPO 1949 and its subsequent amendments, and that, that introduction has transformed employment from a private contractual into a publicly-regulated relationship . . Ibid pp.171-172". (b) The construction of private employment as a State-regulated relationship does not and should not prevent the Courts from holding employers bound by their own undertakings of providing terms and conditions of employment better than those guaranteed by statute (64).

As a brief background this introduction has sketched in the general orientation of employment protection law and the role which legislation and the judiciary play in influencing this orientation. But the judiciary and legislation are not the only factors which influence development of the law. The following discussion of employment rights elaborates more on the contributions of these and other factors to the development of the law. It also reveals that either because, of the moral necessity of some of the rights involved or in anticipatory fear of the potential political influence of the trade unions, legislative protection of this area began at a time when the private sector was too under-developed to sustain standardized terms and conditions of employment. This discussion also suggests that the EEPO 1949 was the

source for the classification of these terms and conditions of employment as matters of "rights". All subsequent changes in the law - (including those effected through subsequent legislation) - were either quantitative improvements or remedies of technical flaws which the operation of the other factors or of some of them has respectively demanded or exposed.

The EEPO 1949 was, amended in 1969 and 1973 and finally repealed by the Individual Employment Relations Act (IERA 1981) in 1981. I will examine the rules governing the security of employment rights and those governing employees tenure of office under two main separate headings.

3.A. Security of Employment Rights

Judging by the contemporaneous economic and employment conditions of the private sector the promulgation of the EEPO 1949 was a considerable advancement for employees in this sector. The total number of persons employed in the private sector was then approximately 40,000. The vast majority of this tiny workforce was engaged in construction, commerce and other tertiary industries (65). The naturally temporary employment some of these industries provide, the smallness and financial insecurity of some of them and the then strong social and economic links the workforce had with their rural background (Fawzi, 1957.10) all combined to produce an uncommitted workforce, unstable employment and a high labour turnover. The latter were in turn factors militating against the adoption, as statutory minimum standard, of terms and conditions of employment advantageous to the workers.

The terms and conditions of employment introduced by the EEPO 1949 are advantageous to the workers also if judged by the condition of organized labour prior to promulgation of the Ordinance. Only one trade union with a then modest membership of 11,611 existed prior to the introduction of the Ordinance (66). Apart from strikes staged by this trade union there had been no organized labour unrest in the years that immediately preceded the introduction of the Ordinance. The strikes launched by the WAA had aimed only at realization of particularistic industrial gains (67).

The EEPO 1949 also introduced terms and conditions of employment that were until that time deemed extra-contractual. Had it not been for the EEPO 1949 the pre-independence courts in the Sudan might have hesitated for some time before recognizing as a matter of right employee's entitlement to "rights" (68) such as paid holiday, sickness leave and an 8.1/2 hour working day. One cause for such hesitation would have been that, English precedents on which Sudanese courts used to rely were, at least in respect of the first two rights, themselves equivocal (69). Moreover the courts in Sudan were until 1948 ready to apply English Common Law precedents but not the British statutes providing statutory protection for or extra contractual rights in favour of employee. In the case in which this principle was laid down (70) the employee claim for compensation was rejected by the High Court because; "there was neither proof of negligence on the part of the employer nor a term in the plaintiff's contract of employment to justify such a claim" (71). The court refused to import the principle behind the then English Workmen's Compensation Legislation (72) which allowed such claims for compensation. The reason for the refusal was that English

legislation "did not arise out of English Common Law, but introduced novel principles". Ibid.

In what follows I examine the floor of rights founded by the EEPO 1949 and supplemented by subsequent legislation" (73).

3.A.1. Employee's Right to Pay During Illness

The EEPO 1949 SS.21(1) introduced as right for employees who had completed two years of continuous service, a biannual 2 months - (one fully paid and the other half paid) - sickness leave. In spite of the "vast expansion of commercial and industrial activities, and the resultant increase in the urban workforce, that took place between 1948-1969" (74), the leave and the amount of payment introduced by SS.21(1) survived unaltered until 1969. Political campaigning by the trade unions between 1967-1969 (75) on the one hand and the economic conditions referred to above on the other urged the government to introduce an amendment, to the EEPO 1949, in 1969 (76). The EEPO 1949 SS.21(1) was affected only in two respects. In the first respect both the duration and the paid proportion of leave were increased. In the second respect a new SS.21(3) codified women's right to a fully paid 8 weeks maternity leave and, in case a woman is unable to resume work after expiration of the eighth week, to the sickness leave provided for by the EEPO 1969 SS.21(1).

Following the repeal of the EEPO in 1981, sickness and maternity leaves are now provided for under SS.26 and 25 of the Individual Employment Relations Act (IERA 1981) respectively. S.26 has

considerably improved both the qualitative and quantitative ingredients of sickness leave. Except for its SS.25"d" which prohibits dismissal of women during the maternity leave the IERA 1981 has not substantially changed the relationship between the law of sickness leave and that of dismissals. The reason why the clarification of this relationship is of practical importance is explained below.

From the time paid sickness leave was introduced and up to 1974 there existed no State-provided social insurance in Sudan. Furthermore the Social Insurance Act (SIA 1974) enacted in 1974 covers only employees who sustain "industrial injuries". Employers therefore, although they are free to discharge their liability through private insurance schemes or insurance with commercial companies, ultimately remain responsible to make the sickness leave payment provided for under the law. However the law of dismissals had for some time provided employers with an escape from this responsibility.

The inter-relationship between the provisions of the EEPO 1949 governing sickness leave and those governing dismissals always posed a problem. With the exception of the IERA 1981 SS.25(d), referred to above, the law of sickness leave does not place any restriction on employer's right to dismiss while the employee is on such leave. Although it gave an employee a two months paid sickness leave the EEPO 1949 also gave employers, subject to giving the necessary statutory notice (one week, two weeks, or one month) the right of terminating employment without any substantial reason whatsoever (EEPO 1949, 1969. SS.10(1))(77).

Writing in 1966 one commentator believed that; "forbidding an employer giving notice while his employee is absent on account of illness might unreasonably restrict employer's freedom of action. The answer of course could be for the State to make provision for payment of unemployment or sickness benefits . . ." (Kidd, 1966.205). However the State has not yet provided any such benefits. Moreover although, the IERA S.25(d) notwithstanding, no prohibition of dismissal specifically while the employee is on sickness leave has yet been made. The 1973 Amendment of the EEPO S.10(1) has restricted employer's powers of dismissal (78) with notice and, in effect, wiped out the negative effect the section previously had on sickness leave.

Moreover there is another part of the law which increases still the financial burden on private employers. Until 1981 the sickness leave provided for under the EEPO SS.21(1) was deemed to apply whether the illness was in fact a general one or an industrial injury or disease within the meaning of the WCA - (Workmen's Compensation Act) - 1973.S.32. The compensation provided for under the WCO 1949 and its subsequent amendments were on the other hand payable to the injured employee in addition to and independent of his entitlement under the EEPO SS.21(1). This was and, subject to changes introduced in 1981, is still the view held also by offices of the Labour Department (79). Under the WICA - (The Work Injuries Compensation Act) - 1981 SS.7(1) an employee whose inability to work is due to an industrial injury or disease is now entitled to a paid sickness leave to be calculated as follows:

1. full wages for the first 6 months;

2. half wages for the next 6 months plus the annual leave due with full pay;
3. one third of his wages for any remaining period until full recovery or medical proof of total disability.

An employee on sickness leave is not statutorily entitled to any payment other than his salary. There are however instances in which collective agreements provided for repayment to employees of all or part of expenses incurred in medical treatment for themselves or their dependents (80). Moreover, there is at least one case where a trade union demand for the recognition of such rights was upheld and awarded against the employer by an arbitration tribunal (81).

Summary

Bearing in mind that the SIA 1974 covers only occupational injuries causing a disability of at least 30% and provides insurance payment that is in the majority of cases lower than the compensation payable under WICA 1981, employers still take the greatest share of the responsibility for the occasional failures of safety precautions at work and full responsibility to pay during a non-occupational illness. This however reflects a development of the law that, in certain respects, is impervious to the economic position and possibly individual demands of the majority of private sector employers. This is partly due to the fact that the governments, conscious of the potential threat which the trade unions might pose for their stability often conceded these rights without much regard to their practical implications. Moreover the fact that Sudanese trade unions - (both public and private sectors) - have always

preferred political bargaining with the governments to bilateral negotiations with employers makes the private sector prone to descendent regulation and in a manner that imposes on this sector terms and conditions of employment fought for by the trade union movement at large. Bearing in mind that large numbers (82) of employees in the private sector are working in small and financially insecure establishments, lack of State-provided social security is bound to affect the practical implementation of the law and ultimately the employees.

The preceding discussion also suggests that different aspects of the employment relationship may attract variant degrees of protection - (e.g. as apparent in the comparison of dismissal and sick pay rules). This supports my view that the nature of the "right" involved is itself relevant in explaining the stance of the law towards this right.

The law appears as formally effectively enforceable whenever grievances have come to the knowledge of the authorities. Moreover despite its emphasis on employee's interest the law appears as since 1973 to have been evolving through the mutual efforts of the labour offices, the governments, the trade unions, and some employers. This however does not mean that the law is socially effective. Because of the qualification period it imposes - (IERA 1981 SS.26(1)) - the law benefits only permanent employees in "organized" industry (i.e. less than 15% of the urban labour force)(83). Even though totally unprotected casual labour is numerically significant. "Most firms employ up to 50% of their labour on casual basis. Moreover because of the high turnover rates of labour many workers do not stay long enough with one employer to get beyond this casual status - ILO Sudan, 1984.144-145".

3.A.2. Paid Holiday

The right to a paid holiday was introduced in 1949 and has been qualitatively and quantitatively improving ever since (the EEPO 1949, 1969, 1973 SS.22; the IERA 1981 S.22). The 1969 Amendment introduced a new SS.22(2) whereunder, employees who with approval of their employers postponed their annual holiday for one year were entitled to a double annual leave for the year after.

The 1981 IERA which repealed the EEPO improved and re-enacted under its SS.22(1)-22(4) these same rights. SS.22(3) of the IERA 1981 provides moreover for payment to an employee, upon termination of employment, of the equivalent in cash "of any holiday or proportion thereof to which such employee might then be entitled. The IERA (1981) SS.22(4) by unequivocally prohibiting the postponement of the annual holiday for more than one year also put an end to the ambiguity previously inherent in its predecessor the EEPO SS.22(2). The latter made clear neither the legality of postponement of a holiday for more than one year nor the legal rights of an employee whose holiday was thus postponed. The reason why the articulation of these points is of practical importance is explained below.

Bearing in mind a chronic shortage of skilled labour in Sudan it is the employers who usually demand postponement of or withhold permission to the annual holiday (84). Although the choice under the EEPO SS.22(2) was legally theirs, employees acceptance of proposed postponement was a tacit realization that there was nothing in the law effectively to stop employers from retaliating by dismissal where their

demands were not met.

Moreover, the position of the law was such that an employee who had accepted postponement of his annual leave for more than a year did actually run the risk of losing it or its equivalent in cash for good! This was so for two reasons. The first reason was that there was no obligation on employers to pay holiday pay arrears upon termination of employment. The second reason was that actions for recovery of arrears of payment due under a contract of employment were governed by the general law of limitation - i.e. (the Prescription and Limitation Ordinance PLO 1928) - which prescribed only one year for initiation of such actions. The interpretation put on this provision of the PLO 1928 was that the one year limitation period runs, not from the date of termination of employment, but, from the date of origination of the right claimed (85). This meant inter alia that a person could not claim arrears of payment over a period of more than one year even though he had been and was, at the time of initiation of the suit, still employed by the defendant (86). These two loopholes have now been adequately remedied by SS.23(3) (87) and SS.57(b) of the IERA 1981. Claims for "wages and other entitlements" can, according to the latter subsection, now be initiated within one year from the date of termination of the contract of service. This means that, as long as the contract of employment is legally in effect, employment claims are no longer extinguishable by lapse of time.

The guarantees provided for private sector employees by the IERA 1981 SS.22(4) and its predecessor the EEPO 1969 SS.22(2) are more favourable to these employees, than those given by the State to its own

employees (88). Moreover the provisions of the private individual employment legislation on holidays do not of course prevent private sector employees from providing more favourable holiday schemes - (EEPO S.23; IERA 1981 S.58). Some employers in the private sector do in fact offer many types of holidays (e.g. non-paid educational leave, paid emergency leaves, non-paid free leaves . . .) that are not even provided for by individual employment legislation (89).

As complement to the annual holiday provided for under the IERA S.22 an employee is also entitled to an extra annual fully paid leave for the number of days he usually needs to make a return journey to his original home provided that such leave shall not exceed 10 days - (IERA S.24). In a memorandum to the Presidency of the Republic the Sudan Employers Federation expressed its discontent with this "so-called leave" calling it, instead, "a novelty that distinguishes Sudanese legislation from labour legislation all over the World" (90). However this same right has been provided for public sector employees since as early as 1975 - (PSR 1975 S.74). In both sectors it is justified by the vastness of the Sudan, the poor condition of roads and transportation, the centralization of employment opportunities in the Greater Khartoum area and the urban-rural seasonal movement of the workforce.

Employees are also entitled to a leave with full pay on "official holidays and occasions" (IERA 1981 S.23). Moreover, apart from all these properly so-called holidays there are other instances in which the employee may absent himself and still remain entitled to his wage under the law IERA 1981 SS.13(2) (91).

Most of the points mentioned in the conclusion to Part 3.A.1 are also relevant in a conclusion of the present section. Although the provision of holidays for government salaried employees predated and possibly influenced the introduction of holidays for public sector manual workers and private sector employees - (both remained until 1973 governed largely by the same individual employment relations law; the EEPO). Subsequent development has in case of the private sector been influenced by the roles which the judiciary, the labour offices and some employers and the trade unions have been playing. This is evidenced by the way in which the law has been developing. Legislative changes were always introduced to remedy certain defects which the practical operation of the law had exposed.

As to the social ideology of the law it is obvious that the one year qualification period (IERA 1981 SS.22(1)) confines the benefit of the legislation to permanent employees in organized industries - (less than 15% of the urban workforce . . . ILO Sudan 1976.110). The implication of this confinement for the various aspects of social ideology of the law is examined in the summary of this Part 3.A.

3.A.3. Working Hours

The EEPO 1949 SS.13(1) introduced a maximum of 8.1/2 hours as the normal working day for adult males "employed on a daily-wage basis. Subsequent amendments of the EEPO 1949 generalized the limitation of the working day to all but few classes of employees - (EEPO 1969 SS.13(1); IERA 1981 SS.19(1). They also reduced work hours, changed the method of calculating, and, increased, the rate of overtime payment

(IERA 1981 SS.19-21), made overtime work largely optional and provided special protection for women and children (IERA 1981 SS.20-21, -27).

Non-manual workers whether technical, clerical or managerial staffs are excepted from the 8 hour working day now provided for under the IERA 1981 SS.21(1). However with this single exception the IERA 1981, in contrast to its predecessor (i.e. the EEPO 1973), gives only limited power to the Government to override its provisions. The vast powers, of excepting any industry or class of employees from the ambit of the EEPO 1973 SS.13(1), which the latter ordinance conferred on the Ministry of Public Service and the President of the Republic (EEPO 1973 SS.13(2)) was coincidental with the application of that ordinance to some public sector employees. Following the total separation of private and public employment laws accomplished in late 1973 and the enactment in 1981 of an exclusively private sector IERA, the EEPO 1973 SS.13(2) died with the official repeal of its ordinance in June 1981.

The prerogatives which the provision of the EEPO 1973 SS.13(2) once upheld for the government are now upheld by separate public service legislation. The counterpart provisions governing overtime work in the public sector are some evidence to that effect. The PSR 1975 SS.32(1)-(2) for instance give the Head of Department the power to ask any public sector employee to do overtime work at any time - SS.32(1). Moreover SS.32(2) provides that with the exception of cases enumerated under Table 7 of the PSR 1975 employees who do overtime work shall not be entitled to overtime payment. Although the employees excepted under Table 7 constitute a majority of public sector employees the rate of overtime payment fixed is in all cases less than that fixed by the

IERA 1981 SS.21(1)-(3).

For all private sector manual workers overtime payment is now a "statutory right". This according to judicial interpretation means that all work in excess of the normal working hours is overtime work and automatically entitles the claimant to overtime payment. Unless it is expressly stated otherwise the courts are also ready to regard employee's regular salary or wage, no matter how high it is, as exclusive of overtime payment (92).

Overtime work is one of the areas of labour relations commonly dealt with under collective agreements. This was the rule in 19 out of the 24 Collective Agreements (93) seen by the author. With few exceptions the substance of the agreements provide only a detailed account and methods of implementation of the rights already guaranteed by statute. One exceptional agreement makes overtime work always and in all cases optional (94). Other exceptions to the general rule are also 5 collective agreements (95) between employers and white-collar employees giving the latter overtime rights equal to those given to the manual workers. This could mean that although excepted by the IERA 1981 SS.21(4) this class of employees is in practice treated at least on equal footing with other protected classes. The same is not true of public sector white collar employees who although excepted from overtime pay - (Table 7 PSR 1975) are also not protected by collective agreements.⁽⁹⁶⁾

It is worth mentioning however that although almost all agreements (97) guarantee rights that are at least equal to the minimum set by the IERA 1981, the majority of the agreements had in fact predated the enactment of the IERA 1981! Bearing in mind that all these agreements I researched in the Labour Department happen to be indigenous to big and relatively stable industries, the above finding may justify the Sudanese Employers' Federation complaint that the provisions of the IERA 1981 S.21 has codified provisions of collective agreements prevalent in big industries at the time (98).

The work-hours provisions of the IERA 1981 do not specifically exempt in this respect any category of manual workers. It is rather idiosyncratic of work-hours law that its initial enactment contemplated the protection of only the least organized of the urban labour force (i.e. casual labour). The vast changes, in the scope of application and standards of protection of the law, that have materialized since 1949 are not unrelated to this idiosyncrasy. These changes are vast because they feature as influences which stronger classes of manual workers, bigger employers and increased involvement of the Labour Department have exerted on the law in subsequent years.

The law is fully operational, through joint employer - trade union arbitration, in big and economically stable establishments. It is also formally effectively enforceable whenever grievances are brought to the attention of the authorities. This does not however mean that the law is socially ideologically developed.

There are many establishments which, although small, usually require overtime work - (e.g. bakeries, restaurants and others in the transport and services sectors). Whether these establishments can afford, or do actually pay, the statutory minima is arguable. Such payment is not however reflected in the amount of normal and overtime earnings of employees working in these establishments (99). The law can do nothing about this because many workers, in fear of unemployment and retaliatory measures by employers, are coerced into accepting over-demanding and under-paid jobs. The inspection which the Labour Offices conduct on their own motion cannot possibly affect this result. There are only three regional Labour Offices in Greater Khartoum area compared with more than 2000 (100) establishments employing less than 10 workers for the same area.

Although the work-hours law exempts only salaried employees. The three months period of service specified as qualification for the application of the IERA 1981 - (in which work-hours law is embodied) - in effect excludes casual (101) labour. Hence the superstructural development of the law has totally reversed the wisdom, of protecting the weakest category of all employees, that underlay the introduction of the progenitor EEPO 1949 SS.13(1).

3.A.4. Wages

Both the mode of payment and the level of wages are subject to legislative control. The mode of payment covers two aspects. The first being the periodicity (i.e. length of intervals at which wages are paid) and the second being the medium of payment. Both aspects are

TABLE 8

Appendix to fs. 32, 82, 99, 214

Average weekly earning for wage earners and salaried employees in establishments
with five or more employees, classified by size of establishment,

March 1973 (1) (£s)

Size of Establish-ments	No. of Establish-ments	Wage earners				Salaried employees				Total			
		No. of Employees	Average earnings			No. of Employees	Average Earnings			No. of Employees	Average Earnings		
			Normal	Overtime	Total		Normal	Overtime	Total		Normal	Overtime	Total
5-9	867	5,125	2.97	0.07	3.04	518	11.65	0.06	11.71	5,643	3.77	0.72	4.49
10-14	265	2,670	3.43	0.09	3.52	377	12.97	0.04	13.01	3,047	4.61	0.09	4.70
15-19	118	1,636	3.55	0.06	3.617	359	12.52	0.17	12.69	1,995	5.24	0.08	5.32
20-29	132	2,411	3.77	0.16	3.93	727	13.29	0.14	13.43	3,138	5.97	0.16	6.13
30-39	74	1,927	3.91	0.25	4.16	607	15.61	0.19	15.80	2,534	6.77	0.25	7.02
40-49	36	1,106	4.35	0.22	4.57	455	18.00	0.21	18.21	1,561	8.32	0.22	8.54
50-59	106	5,926	4.26	0.27	4.53	1,433	16.82	0.12	16.94	7,329	6.724	0.24	6.96
100 +	124	37,356	4.97	0.32	5.29	6,591	15.81	0.29	16.10	43,947	6.16	0.32	6.48

Source: ILO Sudan 1976.369

(1) The Low Level of payment in smaller establishments is to some extent confirmed by more recent findings; ILO Sudan 1984.173.

extensively regulated (IERA 1981 SS.12(1)-(6)). Moreover in contrast with its predecessor - (i.e. EEPO 1973 SS.14-15) - the IERA 1981 SS.12(1)-(6) endeavours, in the few cases in which it leaves regulation inter alia of the mode of payment to the agreement of the parties, always to prescribe a statutory limit beyond which this freedom must not carry its bearers.

Because it is conditioned largely by extra-legal factors, determination of the level of wages is a phenomenon that may pose a challenge to statutory regulation. However this has not prevented the introduction of two statutory schemes - (Wages-Tribunals and minimum wage legislation) - purporting to effect such regulation. The Wages-Tribunals' has been in existence since 1952 - (The Wages-Tribunals Ordinance; WTO 1952). Following the repeal of the WTO 1952 and the re-enactment of a Wages and Conditions of Service Tribunals Act (WCSTA 1976) in 1976 Tribunals have since then been empowered to review both the wages and conditions of service and recommend minimum standards for both. Once they have been approved by the Minister responsible for labour the recommended minimum standards become law. In addition to the penalties imposed upon an employer violating such a law (WCSTA, 1976 SS.10(1)) and without prejudice to employee's right of action (S.10(2) Ibid) the Criminal Court shall order repayment, to the employee affected, of any balance of payment he has been deprived of as a result of employer's non-compliance with the law over any period of time not exceeding three years (Ibid SS.10(1)).

The Tribunals' scheme apply to employees, definable by industry, profession or geographical locality, who because of their division among multiple employing units - (e.g. bakery workers, lorry drivers loading and unloading workers . . .) are deemed organizationally weak (Hussein, 1983.211-212). Some of these workers are in fact organized and do actually participate in enforcement of the WCSTA (102).

The second and more recent scheme governing wage determination is the minimum wage legislation. Minimum wage legislation has been enacted only since 1974 - Minimum Wages Act MWA 1974. The MWA provides for a quantified minimum wage that must apply to all such regions as specified in Ministerial Orders published in the Gazette (SS.3-4). Since the introduction of the Act the minimum wage specified under it has been revised (103) twice and it is now under revision for a possible third time. The regions to which the MWA has so far been applied cover all the industrial centres and almost all cities and towns in the country. Although the rationality of discriminating against employees on regional basis might not be immediately clear this policy was initiated by a reasonable fear against imposing the wage standard of the highly industrialized and relatively highly expensive Greater Khartoum area on the rest of a vast and, largely agricultural country.

The MWA is administered by the offices of the Labour Department (104). The decisions of these offices are appealable or referable to the Civil Courts in the manner explained under Section 4 of this Chapter (105).

Both the WCSTA 1976 and the MWA 1974 apply only to employees in the private sector (MWA 1974 SS.3(2)a). This may give the impression that the State is confident of voluntarily providing for its own employees wages above the average standard in the private sector or the statutory minimum provided for this sector. However this is not necessarily always the case. There are complaints by public sector employees to the Commissioner of Labour that their employers are paying them salaries below the statutory minimum (106). Since it is not within his jurisdiction to deal with complaints by public sector employees the Commissioner refused to accept these complaints. There is even more evidence to suggest that workers in private employment receive wages that are generally higher than those received by employees in the public sector (107).

An important feature of Wages Orders made under the MWA 1974 is that they not only increase the minimum for low-paid workers but also rationalize pay differentials throughout the wage and salary structure in the light of such (108) increase. The ILO has recommended that in order to reduce the distortion of the structure of earnings on the urban labour market the MWA "must, be restricted to its protective function for low-paid workers and abandon for the time being efforts to rationalize pay differentials (109) . . ." ILO Sudan 1976.120.

The MWA 1974 " was a product of the tripartite discussion and determination of the government, the trade unions and employers" (ILO Sudan 1976.391). The Wages and Conditions of Service Orders that have been issued since the enactment of the MWA 1974 and the WCSTA 1976 are some evidence that the trade unions have managed to use the

TABLE 9

Wage Rates by Type of Employer
(£s per year)

Appendix to Footnote 107

Type of Occupation	Public	Private
Professional		
Mean	1,608	4,855
Max.	4,800	36,000
Min.	336	900
White Collar		
Mean	1,193	2,470
Max.	3,600	24,000
Min.	480	300
Skilled		
Mean	1,448	1,848
Max.	7,200	14,400
Min.	240	200
Unskilled Production		
Mean	923	1,105
Max.	2,160	4,800
Min.	336	280
Unskilled Service		
Mean	762	1,195
Max.	1,800	7,200
Min.	360	200

Source: ILO Labour Markets in The Sudan - Geneva 1984

administrative machinery set up under these Acts for purposes of improving the level of wages. Trade Union struggle appears as an important factor in this area of employment only because the legal and administrative frameworks drawn by both Acts have allowed them a wide legal scope within which they could freely move to influence legislative standards.

The law is formally effective, i.e. enforceable whenever grievances are brought to the attention of the authorities. Moreover there is some evidence that the law is widely observed among those to whom it applies. Thus it is suggested that the government wage policy is clearly felt in the labour market and that it is only within categories of workers excepted from the law that the wage structure tends to be more flexible and responsive to market pressures (ILO Sudan 1984 143-144). Nevertheless the MWA 1974 is largely superficial.

"The law does not formally cover 'seasonal agricultural workers', workers outside stipulated urban areas, workers in establishments which employ fewer than 10 persons, or workers in all establishments who are below the age of 18. Together these exceptions cover about three-quarters of the wage-earning population in the Sudan . . . ILO Sudan 1976.111." Pointing out that much more attention should be given to improving the wages and working conditions of employees in smaller establishments the ILO concluded; "we are far from decrying the sophisticated system of industrial relations existing in the Sudan, but so far as the welfare of the mass of the urban population is concerned it is largely irrelevant" ILO Sudan 1976.121.

Summary

The discussion under the preceding Part 3.A has endeavoured to identify the various factors claimed as influencing the development of the law. The materials examined reveal that the role of the courts is rather modest. The reason for this is possibly that regulation, whether legislative, voluntary or administrative, of the terms and conditions of employment discussed under this part largely affects not the legal form but the economic standards of these terms and conditions. Hence the pre-eminence of the roles which the trade unions some employers, legislation and to a less extent the Labour Department play. The latter could participate in the development of this area of protection because, in addition to its quasi-judicial jurisdiction, it mediates between the direct parties and also recommends revision of prevailing standards.

Despite the overall protectionist orientation, enactment of legislation in some areas, and improvement of standards in all areas, appear to be influenced by centralized tripartite negotiation (i.e. involving employers the trade unions and the government as in case of minimum wage legislation) - and standard setting by big employers respectively. To the extent that the law is impervious to the economic position of some employers this is not produced by biased government action. It is rather an effect of the specific manner in which relevant semi-autonomous factors operate to influence the law - (as explained *supra* Part 1.C.1).

Finally the social ideology of the law regulating the areas discussed reveals the limitations which the capitalist under-development of an economy in transition might pose for the operation of imposed legislative standards. We have seen that the law endeavours to overcome this by excluding certain categories of workers and employers from regulation. Nevertheless the size-diversity of establishments and workforces subject to the law is as great as to limit the overall spontaneous operation of the law. Even when rigorous criteria have successfully been adopted for limiting regulation to selected categories of workers and employers - (as in the case of minimum-wage law) - the final result is superficiality or elitism of the law - (i.e. limitation of the number of members of a group which can formally benefit from the law). This is another aspect of the social-ideological under-development of the law.

3.B. Security of Employees' Tenure of Office

Prior to enactment of the EEPO 1949 employment was viewed as a contractual relationship, and, as such, terminable with notice (110). The EEPO 1949 SS.10(1) preserved this right of employers, to dismiss without any substantial reason whatsoever, but specified minimum periods of the notice to be given (EEPO 1949 SS.10(1); IERA 1981 SS.34(2)). The law on dismissal with notice remained basically unchanged until 1973. From 1973 onward dismissal with notice has been restricted to few instances specifically listed under the law (EEPO 1973 SS.10(1); IERA 1981 SS.34(1)), and made subject to approval of the Commissioner of Labour (EEPO 1973 SS.10(4); IERA 1981 S.36)(111).

The EEPO 1949 also allowed an employer summarily to dismiss an employee for "wilful disobedience of a lawful order . . . gross misconduct . . . serious negligence . . . or wilful misconduct calculated to seriously injure employer's business" - (S.10(2)). Each of the breaches mentioned under SS.10(2) was intended to form a separate ground for summary dismissal (112). SS.10(2) remained in effect until 1969 when the Amendment introduced to the EEPO in that year (113) divided SS.10(2) into two main subsections; one dealing with termination by the employer and the other with termination by the employee - (EEPO 1969 SS.10(2)(a)-(b)). It further subdivided the grounds for dismissal by the employer - (i.e. those previously contained in the EEPO 1949 SS.10(2)) - into 8 specific grounds. Most importantly the 1969 Amendment made dismissal or termination of employment under SS.10(2)a-10(2)b subject to prior approval of the Commissioner of Labour (SS.10(2)-c).

Except for introduction of a new ground for dismissal - (i.e. reduction of the workforce for economic or technological reasons)(114) - the subsequent, 1973 Amendment of the EEPO, and its replacement by the IERA 1981 have not however substantially changed the grounds of summary dismissals catalogued in the EEPO 1969. Moreover the latter did not itself substantively change those previously contained in the EEPO 1949 SS.10(2). This course of development has made possible, side by side with statutory dismissals law, the existence of a wealth of judicial precedents the least recent of which are as relevant today as they were decades ago. To the extent that they interpret and complement statutory law the review of these precedents in the course of discussion will contribute to a better understanding of the law.

More important however is the significance of these judicial precedents to the main theme of the Chapter. The focus of the discussion is to demonstrate the role of the Civil Courts as one of the factors influencing the development of individual employment law, and whether and to what extent this role has contributed to the elaboration and elucidation of the form of the law. With regard to the substance of the law the discussion endeavours to explain the extent to which judicial approaches to the various issues considered, are compatible with the protectionist orientation of the law suggested by the discussion under the previous section. Both findings are relevant for assessing the ideology of the private individual employment law and comparing it with both the public sector individual and the collective labour relations laws.

3.B.1. Dismissal With Notice

There are few reported decisions under the EEPO SS.10(1) prior to 1969. Such cases as there were centred mainly on the scope of application of the section and the statutory requirement of notice. The Civil Courts had during this period affirmed the application of the requirement of notice as a statutory minimum that "does not and should not prevent the courts . . . from upholding the bindingness . . . and enforceability of contracts of employment offering better guarantees" (115). The courts also decided that conditional notice and warning do not fulfill the statutory requirement of notice (116), that to be effective notice must reach the actual knowledge of the employee - (i.e. mere posting of notice of terminating employment is not enough)(117), and, that the continuity of service stipulated as qualification for the right to notice is interruptable only by the proof that the contract had at one

time been terminated either with notice or under the EEPO 1949 SS.10(2) (118).

Dismissals reported to the Labour Offices under the EEPO SS.10(1) increased considerably in the period 1969-1973 (119). The amendment introduced since 1973 (EEPO 1973 SS.10(1); IERA 1981 SS.34(1)) however has made the law on dismissal with notice once more less conspicuous in the litigation arena - (either before civil courts or tribunals). This is the case because the instances to which dismissal with notice has been restricted fall into cases of; discharge of the contract by mutual consent, retirement on age ground, physical incapacity of the employee, frustration, completion of the work contracted for or expiry of the period of the contract, and termination during the probationary period (EEPO 1973 SS.10(1); IERA 1981 SS.34(1)). With the exception of the last ground which has been introduced only since 1981, these conditions, by their nature, rarely occur and, even when they do, seldom cause controversy under the dismissal law. The existence of any one of these conditions is technically easy to verify and in the majority of cases is relevant for purposes of laws other than that of dismissals (e.g. Work Injuries Compensation, Social Insurance, Pensions and Contracts Laws).

The introduction of dismissal during the probationary period coincided with the other new SS.6(4) of the IERA 1981 which fixes this period at 3 months. The concept of probationary period was introduced after the Civil Courts had in at least two cases refused to recognize the existence of such a period under the previous law (120) (i.e. the EEPO 1948-1973). Even now a decision of the Labour Court that notice of

dismissal during the probationary period must be given at least a month before its completion (121), practically reduces the probationary period to only 2 months. Employers have from their side already complained that, 3 months, is too short a trial period and is even more too short to allow for the survival of seasonal economic activity that could employ only seasonal labour. The seasonal economic activities insinuated usually last for more than 3 months. Employers are also adamant that the government should apply to their cause the same considerations that allow it - (i.e. the government) - to give itself 2 years of probation vis-a-vis its own employees (122).

3.B.2. Dismissal Without Notice

The grounds for this type of dismissal, are now listed under the IERA 1981 S.37 and can be compartmentalized under 3 main headings namely (a) wilful disobedience; (b) gross misconduct; and (c) serious negligence. In all these cases it is always the employer who must prove that he has not wrongfully dismissed the employee (123).

3.B.2.a Wilful Disobedience

To justify dismissal under this ground the order disobeyed must be within the contractual obligations of the employee. This principle espoused by the courts from as early as 1957 (124) is now incorporated into the IERA 1981 S.9 (125). Moreover the fact that complex and elaborated divisions of labour have not yet arisen so as to encourage implication of job mobility (whether occupational or geographical) clauses means that this concept of contractual obligation may in certain

situations still be determined on purely formal contractual or statutory bases (126).

Although the statutory law does not require proof of gravity or seriousness of the instance of disobedience the courts had in the past proved reluctant to allow dismissal for just a single isolated incident (127). In another case the Court of Appeal even decided that employee's appropriation of a sum of money he was ordered by his employers to deposit in their account "although was a wilful, was not an "unlawful" disobedience . . . and, therefore, . . . was not . . . a disobedience at all". This, in the opinion of the court, was because the money was appropriated in part satisfaction of salary arrears due to the plaintiff from his employers (128). It is now clear from the wording of SS.37(d) that to justify dismissal disobedience must amount to breach of contract.

3.B.2.b Gross Misconduct

Misconduct includes acts or omissions such as assault, breach of the duty of fidelity, absenteeism and immoral conduct. Even before any amendment was introduced to the EEPO 1949 SS.10(2) the Court of Appeal ruled in one case that an act which is "non curat de minimis lex" could not amount to a grave misconduct in the meaning of that subsection. In the opinion of the trial judge; "The right to work is as sacred as the right to life liberty and property and must not therefore be disturbed without very strong justification" (129). This stringent interpretation of the requirement of grossness or gravity of misconduct has been applied to all instances of misconduct.

Beginning with assault it has been decided by the Court of Appeal that verbally abusing the Manager of the Company and throwing a bundle of keys on his desk does not constitute an assault or any other ground for dismissal (130). A similar view was also taken by the Supreme Court in *Abbas Issa -v- White Nile Cotton Mills* (131). The latter court decided that to be an assault the employee's conduct must amount to an actual use of criminal force or criminal intimidation" (132). This in effect over-rules the Supreme Court's own previous decision - in *Siddig Osman Omer -v- Port Sudan Car Assembly Factory*(133) - that mere verbal abuse of the manager was an assault. The decision in The White Nile Mills' Case is now reaffirmed by the decision in *Mohamed Yousif Dahab -v- Abdel Bagi Omer Engineering Works Ltd* (134). Both the Court of Appeal and the Supreme Court upheld the Province Judge distinction between assaulting a manager and a person other than the manager and his view that to justify dismissal assault must in the latter case be "grievous physical assault". This is now the law as also incorporated into the IERA 1981 S.37(g).

Moving to the second instance of misconduct the IERA 1981 S.37 however lists only specific types of breaches of the duty of fidelity. These are; (a) deception by presentation of forged documents (135) or impersonation (136); and (b) disclosure of commercial or industrial secrets - (IERA 1981 SS.37(a),(e)). Some commentators believe that "although the list is meant to be exhaustive it should not, at least on public policy grounds prevent the inclusion of other equally serious breaches" (Hassan 1979.173). The Court of Appeal did in one case however decide that engagement in private work during working hours is a breach of the duty of fidelity - (137) even though this was not mentioned among the

breaches listed under the then EEPO 1969 SS.10(2)(1)(v).

Although some commentators see all types of breaches of the duty of fidelity as serious per se (Hassan, 1979.120) the Courts do not necessarily hold a similar view. Employee's engagement in private work, at his employers' premises and during working hours in one case (138) and employee's fraudulent appropriation of 2 pieces of wood belonging to his employer, in another (139) were held to be insufficient grounds for dismissal. In both cases the court relied on that the consequential monetary loss to employers was so insignificant as to make employees' actions not even criminally punishable - (i.e. on ground of *de minimis non curat de lex*).

The third instance of misconduct is unjustifiable absence. Absence was until 1969 dealt with by the courts as an instance of misconduct. The 1969 Amendment of the EEPO provided for dismissal on ground of "failure to carry out contractual obligations . . .". Most cases of absenteeism that came to the courts after 1969 were dealt with under this new ground. However following a revised re-enactment of this ground under the 1981 IERA it is no longer possible to treat all cases of absenteeism under it. The IERA 1981 SS.37(d) substitute the words "deliberate omission to carry out contractual obligations" for the old phraseology of failure to carry out such obligations. Hence, it is now possible to follow the old judicial practice of treating cases of absenteeism as instances of misconduct.

The courts have always maintained that in order to justify dismissal absenteeism needs to be more than just short term casual absence (140). In determining the seriousness of the effect absence has had on the employment relationship the courts take into consideration factors such as, the position held by the employee or the nature of his job, the actual damage caused by the alleged absence and the ratio of the total of the days of casual absence to the length of employee's service. In *Vasili Bamboulis -v- Osman Abdulla* (141) for instance absence for an aggregate of 104 days during a period of service of 7 years was held not long enough to justify dismissal. But absence for one month during a 6 months period of service was in another case seen long enough to justify it (142).

Decisions from 1969 onward continued this trend of narrowing absenteeism as ground for dismissal. In *Mohamed Nurain Khalifa -v- Modern Match Co* (143) the Court of Appeal reasserted that, "absenteeism justifies dismissal only when it is repeated or prolonged . . . Any other interpretation will endow the employer with a power of dismissal for the most trifling absence. This could not have been the intention of the legislature". A year later the same court ruled; ". . . casual absence for short terms with no effect on employer's interest does not amount to an omission to carry out contractual obligations" (144).

None of the decisions so far discussed, mention anything about deduction from wages for absence - (EEPO 1969, 1973 S.20) and the effect of such deductions on any subsequent claim for dismissal based on the same absence. In a recent case however the Supreme Court (145), after reasserting that casual absence and later arrivals "are not such a

gross omission of contractual obligations as to justify dismissal", also, added; "the employee in this case had already been punished by deduction from his wages . . . It is not therefore just to inflict upon him another punishment - i.e. dismissal - for the same mistake" (146).

The last instance of misconduct covers cases of immoral behaviour at the place of work and conviction with an offence affecting honour morals or honesty. Although covered by this broad label, drunkenness is also specifically provided for as a ground for dismissal under the IERA 1981; SS.37(d). Offences affecting honour morals or honesty, include such offences as; "theft, cheating, criminal breach of trust and the alike" (147), but do not include e.g. the offence of "causing grievous bodily harm" (148).

The wordings of both the EEPO 1973 SS.10(5)f and the IERA 1981 S.37(f) suggest that conviction is unnecessary in case an immoral act is committed at the place of work. This was also the view held by the Court of Appeal in *Albert Hanna Ishag -v- National Tobacco Co Ltd* (149). Some commentators believe that in all allegations affecting honour morals or honesty conviction is, irrespective of the venue of commission, always necessary (Hassan, 1979.180). Although it makes dismissal in all cases almost impossible before conviction and in spite of its discrepancy with the express wording of the sections the latter is the view that has been overwhelmingly applied by the Courts (150).

The individual employment legislation does not require the employer to wait until the conviction has become final in order lawfully to dismiss the employee. The courts however have held that the

conviction must be final. Dismissal based on a conviction that was later quashed by the appellate criminal court was held to have lost its lawfulness from the date the conviction was quashed (151). Moreover, to be lawful dismissal must take place after final conviction and not before it. In *Atta Mustafa Salih -v- Adam Harroon Fadl-el-Mula* (152) an employee was accused of theft and immediately dismissed by his employer. The employee was later convicted with theft on the same facts. The Court of Appeal ruled that because it was based on what was then a mere accusation the dismissal was unlawful.

3.B.2.c Negligence

It was generally accepted even prior to 1969 that to justify dismissal under the EEPO SS.10(2) the employee's act or omission must be seriously or grossly negligent (153). Up to 1969 the courts could judge the seriousness of negligence either by the nature of the act - (i.e. the magnitude of the risk involved) or by its consequences. The law has since 1969 made it clear that to justify dismissal the employee's act "must be a serious negligent act that has resulted in heavy financial loss to the employee (EEPO 1969 SS.10(2) C-II; EEPO 1973 SS.10(5)b; IERA 1981 SS.37(b)). It is now only after these two ingredients have been proved that the courts would approve the legality of the dismissal (154). However the possible practical outcome of this rule might in some cases prove unacceptable to employers (155).

3.B.3. Disciplinary Dismissal

Employers are required to make work rules and disciplinary regulations in writing and conspicuously display them at the place of work - IERA 1981 SS.48-49. Such rules and regulations are effective only after copies of them have been filed with and approved by the Commissioner of Labour (156). Even then these regulations and rules enable employers to impose only disciplinary measures short of dismissal.

In contrast to the position in the public sector it is not within private employers' powers to dismiss *inter alia* on disciplinary grounds before reference of the case to the Commissioner of Labour and it is then always the latter which would decide for or against the dismissal. Although there are a few firms (157) where management consults with trade unions over the making of work rules and disciplinary regulations and few in which management additionally accepts formation of joint union-management disciplinary boards (158), these consultations and boards do not empower the employer or the trade union to lay down effective procedure for dismissals or dismiss an employee. To be effective the procedures must even in this case first be approved, and, to be lawful each case of dismissal must likewise first be approved, by the Commissioner of Labour (159).

To recapitulate, irrespective of the seriousness of the violation alleged against an employee and of the formality of the disciplinary procedure adopted employers cannot lawfully dismiss without firstly satisfying the procedural requirements discussed under Part 3.B.6 below and secondly proving that the dismissal is in fact substantively valid in the manner described under the previous Part 3.B.2. Hence the concept

of disciplinary dismissal signifies dismissals that are distinguishable, not by their grounds, but, by the formality of the procedure through which they are imposed and nevertheless governed by the general law of dismissals.

3.B.4. Reduction of the Workforce on Economic or Technological Grounds

This ground was introduced in 1973 and has been in effect since then. There were two reasons which had possibly influenced its introduction. The first reason was that following the 1969-1970 nationalization and confiscation decrees and the denationalization measures that began in 1972 the new management - (both public and private) - of the firms affected (160) needed to re-establish their businesses on new economic bases. The second reason was the new emphasis which Numeiri's Regime, from July 1971 onward, placed on encouraging industrial investment and the transfer of technology (161).

An employer desirous of reducing his workforce must apply to the Commissioner of Labour for approval of the reductions (IERA 1981 SS.40(1)). The Commissioner may after considering the number, length of service, persons and trade union occupation of those to be made redundant and investigating the economic or technological changes alleged make a decision, regarding the application, within 2 weeks from the date of receiving it (162). Dismissal before obtaining the Commissioner's approval or in disregard of any condition to which his approval of the reduction is made subject is unlawful. An employee lawfully dismissed in accordance with the above procedure is not entitled to a compensation for loss of employment.

Although cases of reduction of the workforce are not, for the purpose of determining employee's right to notice, statutorily treated as cases of dismissal with notice - (i.e. under IERA SS.34(1)) - the Court of Appeal has decided that the employer must give notice or the monetary equivalent of the period of notice even if the reduction is effected with approval of the Commissioner (163).

The permissibility of uncompensated dismissal for economic and technical reasons is a gap in private sector individual employment law. The weakness of the law derives not so much from the possibility of abuse as from the vulnerability of employee's right to his job the law indicates and supports. The law does not provide any redundancy payment or compensation for employees dismissed on these grounds. However although the risk of abuse is also present (164), it is partly offset by countervailing efforts of, the Labour Offices, and in a few cases, the trade unions.

The Labour Offices do not usually approve dismissal on these grounds unless they are satisfied through field visits inspection and consultation with the Ministry of Industry, that the employer's complaint is genuine (165). Trade unions also guard against abuse either by directly negotiating with the employer the number and description of those to be made redundant (166) or by presenting to the Commissioner their own view regarding the redundancies and their approval (167).

The permissibility of dismissal on technological or economic grounds is in practice convenient to many foreign contractors who are resident in the country usually only for the period of their contracts.

Many of these contractors make periodical reductions corresponding to completed specific phases of the work contracted for. Workers affected by applications by foreign contractors constitute a high percentage of the workers affected by all applications for reduction of workforce (168). In cases where the foreign contractor has had more than one construction or engineering contracts the labour office refused to approve reduction upon performance of the first and insisted that the contractor use the same workforce for his other contracts (169).

Despite its apparent weaknesses the legal position of redundancies in the private sector is superior to its counterpart in the public sector. Reduction of the workforce is in the latter left to the discretion of the Head of Department or employing unit. Moreover the procedure of reduction itself is not supervised by the Labour Department or any other independent body (170).

Nevertheless, reduction of the workforce for economic or technological reasons is an area where the line of demarcation between public and private employment is relatively blurred. The control which the State exercises on import and export of raw materials and the influence which its fiscal policies exert on the choice between capital-intensive and labour-intensive techniques of industrialization (Hussein, 1983.242-244) are directly responsible for the economic (171) and technological conditions of employing units in the private sector. The concern which the State, in a centrally planned economy, shows for these policies may dissuade it from attempting any protectionist intervention in this area. However it is important to mention that the trade unions' leadership has not itself so far proved conscious of a need

TABLE 10

Appendix to Footnotes 168, 171, 206

Applications for Reduction of Workforce Processed by Khartoum North Labour Office
and the Khartoum Labour Office in the Period March 1981 - July 1983

Employer	No. of Firms Involved	No. of Redundancies Proposed	No. of Redundancies Approved	Average Days taken to reach decision	Reasons			
					Economic Deterior- ation	Completion of Contract	Political or Administ- rative	Others
Foreign	21	873	863	7	88	772	-	13
Indigenous	14	1255	1196	7	349	-	906 (1)	-
Total	35	2128	2059	7	437	772	906	13

Source: Khartoum North and Khartoum Labour Offices;
Industrial Disputes Monthly Report Files

(1) The high percentage of redundancies under this ground coincided with the closure of the distilling industries following the introduction of "Sharia Law" and government direction that the employees affected be treated under the IERA 1981 S.40

for protection in this area! (172). Such protection as there is of this area of private employment largely derives from the practices of the Labour Department and individual trade unions. Although a government department, the former, in so far as the bulk of private sector employment law is concerned, operates on autonomous professional basis that has remained unchanged despite the changes in political regimes and central governmental labour policies.

3.B.5 Constructive Dismissal

The EEPO 1969.SS.10(2)b introduced a right for the employee to terminate the contract of employment without notice in any one of definite instances catalogued by the sub-section. This same rule, was later to be incorporated into the EEPO 1973 SS.10(6), and, is now incorporated into the IERA 1981 S.38. The instances catalogued under the law could all be instances of breaches of contract by the employer. Furthermore the employee's right to terminate has always been subject to obtaining the prior approval of the Commissioner of Labour - EEPO 1969 SS.10(2)c; EEPO 1973 SS.10(7); IERA 1981 SS.39(1).

An employee who terminates the contract of employment in accordance with the above law is not entitled to any statutory compensation or reinstatement. Hence, if judged by the remedies which legislation provides for unlawful dismissal, there is no concept of constructive dismissal under labour legislation in the Sudan. This raises questions as to the relevance of the IERA 1981 S.38 and its predecessors. Although the role given to the Commissioner restricts employee's freedom to treat the contract as discharged by breach. The conciliatory

role which the Commissioner may play is totally useless for an employee who nevertheless insists on terminating the contract. Furthermore, the section is not a codification of an employee's right to resign because such a right is already provided for under other sections of the law - (EEPO SS.10(9), IERA 1981 S.41).

Although there is no decided case on the issue an employee terminating the contract in the manner discussed above may still be entitled to damages under the general law of contract. Finally, despite its apparent redundancy, the enactment of the EEPO 1969 SS.10(2)b was demanded by the trade union leadership. This and other SWTUF's subsequent recommendations regarding the same rule reveal certain flaws in the SWTUF's perception of employment law. The point will be examined in the summary of this Part 3.B.

3.B.6 The Commissioner of Labour's Factor

As already mentioned, the law has since 1969 made employer's right to dismiss without notice subject always to the prior approval of the Commissioner of Labour (173). Having discussed the substantial reasons that justify dismissal I now examine the effect which this procedural requirement has on the lawfulness of dismissal. Although specifically tailored for cases of summary dismissal this procedural requirement also applies to cases of disciplinary dismissal and redundancies. Hence its examination at this stage.

For the sake of articulation and brevity I will examine the effect of the procedural requirement in relation to five hypothetically possible situations. Two of these situations are crystal clear cases of lawful and unlawful dismissals respectively and have to be disposed of at this stage. The two are: (1) the situation where the employer dismisses for valid substantial ground and with approval of the Commissioner of Labour - in which case the dismissal is lawful (174); (2) the situation where the employer dismisses for insufficient substantial reasons and without referring the dispute to the Commissioner - in which case the dismissal is unlawful.

The first of the three remaining contestable situations is the one where the employer dismisses for substantively-valid grounds but before reference of the dispute to the Commissioner of Labour. The view accepted in the vast majority of cases is that dismissal is in such a situation unlawful. This view rests on the interpretation that the law stipulates the existence of a substantive valid reason, and obtaining of the Commissioner's approval, as two separate conditions both of which must be satisfied for the dismissal to be lawful. This was the view espoused by the Court of Appeal and the Supreme Court in three leading cases (175) and the one that has been applied in the majority of cases since then (176). Reasserting this interpretation in three more recent cases, the Labour Court, the Province Court and the Court of Appeal, without even discussing the alleged substantive grounds of the dismissals in all three cases, have accordingly held employers liable for unlawful dismissal on ground of their failure to refer the disputes to the Commissioner of Labour (177).

The justification for this majority view and for the interpretation on which it is based has been stated by the Court of Appeal as; "The fact that the propriety of dismissal is made conditional on the consent of the Commissioner indicates that the legislature intended to appoint the Commissioner as an indispensable referee in Labour disputes. We should therefore abstain from interfering with this clear intention." (178).

The second of the three contestable situations arises where the employer dismisses for substantively-valid reasons after reference of the dispute to the Commissioner but against the latter's disapproval of the dismissal. Until recently the Courts had not drawn any distinction between this and the first contestable situation discussed above. In many cases (179) the employer, even though had referred the dispute to the Commissioner in advance, was held liable for unlawful dismissal because of his subsequent dismissal of employee in defiance of the Commissioner's decision. Moreover, in the majority of cases where the unlawfulness of dismissal was upheld, the Courts had in fact compelled the employer to abide by the Labour Office's decision without even discussing the substantive grounds for the dismissal or the Labour Office's view of it (180).

In a recent case however both the Labour and the Province Courts agreed that once a dispute is referred to the Labour Office the latter's categorization of the dismissal must not exclude the Court from re-examining the alleged substantive grounds and judging the lawfulness or unlawfulness of the dismissal in the light of such re-examination (181). Both Courts are right in distinguishing this second situation, which relates really to conclusiveness or finality of the Labour Office's decisions, from

the first contestable situation which asserts the indispensability of the preliminary jurisdiction of these offices. But in so far as both Courts failed to distinguish between one employer who defiantly disregards the Commissioner's decision and another demanding a stay of execution of the Commissioner's decision until he has appealed to the Civil Court, their reasoning is incomplete (182).

The third contestable situation arises where the employer dismisses an employee with approval of the Commissioner but on substantively insufficient grounds. Because it involves questioning conclusiveness of the Labour Office's decisions this situation is in this sense similar to the second contestable situation. However in contrast to the more recent judicial view expressed in Kenana's case (182A) in respect of the latter situation the Court of Appeal has since 1975 established that an employer who duly obtains and relies on approval of the Commissioner will still be liable for unlawful dismissal if the grounds alleged by him and accepted by the Commissioner are in fact substantively insufficient (183). This rule has since then been consistently applied by the Court.

3.B.7 The Remedies for Unlawful Dismissal

From what has been said unlawful dismissal under Sudanese private sector law could be defined as dismissal in circumstances and for reasons that do not procedurally or substantively conform to those considered by statutes or the Courts as empowering the employer to dismiss (Cf. supra Parts 3.B.1-3.B.6). An unlawfully dismissed employee must either be reinstated or given compensation equivalent to 6 months

wages plus one month's pay in lieu of notice where applicable. There are three decisions, a Court of Appeal's and two Province Courts', to the effect that it is the employee and not the employer who must make the choice between receipt of compensation and reinstatement (185). In spite of the generality in which they are expressed the Province Court decisions were made in situations in which the employees were asking for compensation whilst the employers offered only reinstatement. The Court of Appeal decision supported the employee's claim for reinstatement. It is worth mentioning however that, although the Court of Appeal in an earlier case referred to the practical difficulties encountered in enforcing reinstatement on small employers, it had already agreed that the Law "has provided reinstatement as one of the remedies open to the employee" (186). Although not judicially binding on the Courts the Attorney General "Fatwa" in the Trial of El Fatih Muhyeddin & Others discussed earlier (187) is also confined to reinstatement of employees whose dismissal although unlawful under the Trade Union Law is not necessarily so under the IERA 1981.

Since it is the reasons and circumstances which justify dismissal that are specifically listed under the law, dismissals for reasons and in circumstances other than these excepted are all, equally unlawful and always remediable by one and the same compensation or reinstatement. It is an anomaly of Sudanese law that it thus adopts restrictive notions of lawfulness and unlawfulness and in effect equates all types of "unlawful" dismissals irrespective of whether such dismissals are due to e.g. racial or sexual discrimination or harassment, trade union activism, malicious intention or honest mistake on the part of the employer or to no reason whatsoever. In its 1981 Memorandum to the then Ministerial

Commission for Revision of Labour Legislation (MCRL) the SWTUF thought this anomaly remediable simply by repeal of the section of the law which provides for payment of the 6 months compensation to employees unlawfully dismissed (188). This was also the approach which the repealed 1971 CLC followed. This provision for compensation has, in the condition of employment relations law in the Sudan, paradoxically always operated as both deterrent and incentive: as deterrent to employers who are unwilling to pay the compensation, and as licence for otherwise unlawful dismissals to employers who are motivated enough to dismiss and pay the compensation accordingly (189). Despite this, the SWTUF recommendation had it been accepted would have worsened the position of a great majority of employees. The situation could alternatively of course be remedied by a provision, to be effected by legislation or the Courts, that the 6 months compensation shall be awarded, not in lieu of, but, in addition to damages under the general law of contract.

Summary

The purpose of this summary is to examine the implications of the discussion under the preceding Part 3.B for the objectives of the research outlined under Part 1.C.3. Beginning with the plurality of factors influencing development of the law, it is noted that the present standards of protection of employees' tenure of office owe their existence to legislation, favourable judicial interpretation and elaboration of statutory provisions and the supervisory and judicial jurisdictions which the Labour Department exercises over the administration of the Law. The apparent pre-eminence of the contribution of the Court derives

largely from the fact that this is an area of litigation where the issues contested centre around the technicalities of termination of employment. Hence, even where they have been initiated at the Labour Offices, disputes of this nature are often ultimately settled in Courts.

The pre-eminence of judicial contribution reflects positively on the formal ideology of the law. Although compatible with the general protectionist orientation of private sector individual employment law, judicial interpretation and elaboration of the law have always been founded on technical legal reasoning. Even if there are latent policies that underpin judicial decision-making, the autonomy of the judicial system and the internal rationality of legal reasoning constitute an outward appearance that effectively ensures the apparent neutrality of the law. Hence neither the workers nor employers have complained about the way the Civil Courts interpret and apply the law. Employers have even demanded the transfer of the quasi-judicial jurisdiction of the Labour Offices to the Civil Courts (190).

Also relevant to the analysis of formal ideology of the law is the formal effectiveness of rules. It is true to say that the rules governing the security of the tenure of office are effectively enforced whenever grievances are brought to the attention of the authorities. This formal effectiveness of the law is reinforced even further by expense-free litigation, as explained in Part 4, and the jurisdiction of the Labour Offices to prevent dismissals in the first place.

As to the mode of employment protection¹ the discussion also suggests that the law regulating the termination of employment is protectionist in orientation. Focussing on its development across time it is generally true to say that the standard of legislative protection has been gradually improving since 1949. The most important changes that have been brought about during this period were the installation of the Labour Department as an indispensable referee in employment disputes in 1969 and the amendment of the law of dismissal with notice and extension of the jurisdiction of the Labour Department in 1973. A few areas of the law of dismissal are also demonstrative of qualitative and quantitative improvements that have been made by the 1981 IERA. The most important quantitative improvement is the increase of the compensation for unlawful dismissal, from an amount equalling 3 months wages under the EEPO, to the sum of 6 months wages under present law - IERA 1981 SS.39(6). Other improvements made by the IERA 1981 include, the reduction of qualification period for after-service benefits, the generalization of these benefits to all cases of termination of employment (191) and the general increase in their amounts.

As to compatibility of judicial approaches with the protectionist orientation of the law, it can fairly be said on the evidence shown that with only few specific exceptions the contribution of legislation has always remained co-extensive with and sometimes even lagged behind that of sympathetic judicial interpretation of pre-existing law in the post-independence era. The 1973 amendment of the law of dismissal with notice, which was a legislative innovation, is one such exception. The Courts could not do anything about this rule prior to the amendment because the wordings of the section - (EEPO SS.10(1)) were too obvious

to allow of any other interpretation. A second possible explanation for this judicial abstention could also be that the Courts did not even have the chance of evaluating the practical impact of SS.10(1) because of the rarity of litigation under it (192). The observation by one commentator, quoted earlier - (supra text above f.16), that the Common Law concept of contract was then dominant in Courts circles also offers a third possible explanation. This observation is made more plausible by the fact that judicial decisions that openly challenged the contractualist conception of the employment relationship appeared only in mid 1970s after the amendment had been introduced. But, because some Courts had in their interpretation of the legal effect of absenteeism and other instances of misconduct proved ready to sometimes transcend this supposed contractualist ideology I am inclined to attach more importance to the other two reasons aforementioned.

There are certain areas of protection that are apparently difficult to reconcile with the general protectionist orientation of the law. These include constructive dismissal and the reduction of the workforce for economic or technological reasons. I have already argued that the nature of the right or area of employment concerned is sometimes relevant in explaining the stance of the law vis-a-vis such right or area. Hence I consider the circumstances that surrounded the innovation of dismissal on economic or technological grounds as partly responsible in this respect. However the attitude of the trade union leadership is partly responsible for the present stance of the law towards this ground and also towards constructive dismissal. Both because of the emphasis on political bargaining with the government and lack of expertise the recommendations which the trade union leadership makes do not always

reflect an awareness of the plant-level day-to-day problems in need of solution or of the measures necessary to solve them. It is therefore not surprising that some of the most practically significant legislative reforms were introduced upon the recommendation of the Labour Department. As a recent example the increase of the compensation for unlawful dismissal was definitely made on recommendation of the Labour Department and contrary to the confused submission of the SWTUF (193).

Likewise neither ⁱⁿ its 1974 or 1981 submissions did the SWTUF suggest any substantial change of the law relating to redundancies. In its 1981 Report however the SWTUF endorsed a proposal, made by the Ministry of Labour, that the power of approval of redundancies should be transferred from the labour offices to the Minister of Labour (194). To the extent that such a transfer would have meant the removal of redundancy cases from the quasi-judicial jurisdiction of the labour offices to discretionary prerogative of the Minister, the rationale behind its endorsement was not immediately clear.

The SWTUF was also of the view that where an employee terminates the contract of service due to the conduct of employer, in the manner described under the EEPO 1973 SS.10(6) - (now the IERA 1981 S.38), the case must be treated as one of dismissal with notice (195) - (i.e. under EEPO 1973 SS.10(1) or now the IERA 1981 S.34). Although it could have enabled employees terminating their employment under S.10 (6) to claim after-service benefits, the SWTUF argument, to the extent that it equates termination of employment under this section (which lists instances of lawful termination by the employee in reaction to employer's maltreatment or breach of contractual obligations) with dismissal for one

of the legal grounds catalogued by the EEPO 1973 SS.10(1), was extremely unwise. Although there is no concept of constructive dismissal under Sudanese statutory law there is nothing to prevent an employee whose dismissal is caused by a breach of contract by the employer from seeking damages under the general law of contract. Had the SWTUF recommendation been incorporated into the law it would have eliminated even this possible contractual remedy. The extension of after-service benefits to all types of termination of employment accomplished under the IERA 1981, has not by itself, as the SWTUF thought it would, bridged the gap which SS.10(6) and its successor S.38 open in the Law. However the gap is bridgeable by treatment of this type of termination, not as a dismissal under the IERA S.34, but, as an unlawful dismissal remediable with the 6 months wages compensation under the IERA 1981 S.39(6).

As to the social ideology of the law there are two aspects of the law that need explanation. The first, is the number of workers who actually benefit from the law and the second is the social effectiveness of the law - (i.e. wide-scale spontaneous operation of the law). As to the first aspect it must again be stressed that private sector employees as a whole are a minority and even within this minority the provisions of the IERA 1981 do not apply to casual and agricultural workers (196); the former category in particular constituting an important segment of the urban labour force. Bearing in mind the largely agricultural economy of the Sudan, the number of agricultural wage-labourers, (ILO Sudan, 1984.56,112) - their disorganization and poor conditions of service (ILO Sudan, 1984.54) - the exception of agricultural workers is another evidence of the elitism of the law.

In respect of the social effectiveness of the law the size-diversity of private sector employers and workforces and the economic position of some of the former are hardly conducive to the development of this ideological aspect. This makes the operation of the law totally dependent on the performance of enforcement agencies. This in turn tends to increase the burden on the 28 already overloaded - (i.e. by litigations under other, collective labour relations, manpower, wages and industrial safety laws) - Labour Offices in the Country. Table 11 shows that the number of employment termination disputes handled by the Labour Offices, increased considerably every time after the law has been amended - (in 1969, 1973 and 1981) - and, has been on the increase ever since.

Finally, to the extent that the rules discussed under the previous parts are formally effective and protectionist in orientation, these are attributes which are also partly explicable by the performance and orientation of the bodies entrusted with the administration of the law. This is examined next.

4. Administration of the Law

The discussion in this part focusses mainly on the factors influencing the performance and orientation of the bodies entrusted with the administration of the law. Where relevant these factors will be compared with those influencing the performance and orientation of these or other bodies administering public employment law. To illustrate the points made the discussion will in case of Labour Offices include case studies. There is no need for a similar inclusion in case of the Civil

TABLE 11

Number of Dismissal Disputes Handled by the
Labour Offices Prior To and After 1969

Year	Total of Disputes Under the EEPO & IERA	No of Disputes Over Termination of Employment	%
1965-1966	18128	89	,49 (1)
1977-1978	16125	10214	63.3
1978-1979	18171	11415	63.4
1979-1980	21002	17624	83.9
1980-1981	28291	25333	89.5
1981-1982	36153	29507	81.6

Source: Compiled by the Author from the Department of Labour Reports 1965-1966, 1977-1982, and the monthly reporting of individual complaints filed by the Khartoum North, the Khartoum, and Omdurman Labour Offices.

- (1) The Labour Offices did not have a formal jurisdiction to adjudicate on dismissal disputes prior to 1969. The figure suggests that the Labour Department handled few number of disputes in a consultative capacity prior to 1969. Cf Taha & El Jack, 1973.17.

Courts since sufficient Courts' decisions have already been examined. Although some trade unions do participate in administration of the law, they are not included in the discussion. There are two reasons for this. The first is that the effect of trade union participation has remained confined to individual firms and trade unions, and (with the exception of the situations, already shown under the previous parts, in which some individual trade unions exert some influence on individual employers in matters of overtime, wage-determination and redundancies) left no material imprint on the law in general or on its administration. The second reason is that collective labour relations law as the direct factor responsible for this confinement has already been examined in Chapter III.

4.A. The Labour Offices

Prior to 1969 the role of the Department of Labour and its offices was formally confined to inspection of factories and workshops and the monitoring of employment and manpower planning under the industrial safety and employment exchanges laws respectively. The 1969 Amendment of the EEPO placed the Commissioner of Labour as an "indispensable referee" (197) in certain cases of dismissal. Subsequent changes in individual employment law have generalized this jurisdiction of the Commissioner to almost all dismissals and grievances under the law.

Although the trade unions' discontent with the pre-1969 dismissals law was evident they had never however envisaged as part of their proposals for reform a role that the Department of Labour or any other government body was to play in administration of the law (Hassan,

1979.203). In their own words the promulgators of the 1969 Amendment justified the new role assigned to the Department of Labour arguing; "the proof . . . and application of the grounds that justify dismissal under the Amendment . . . need for their verification a formal investigation that has to be . . . carried . . . by somebody with especial knowledge . . . external to the dispute . . . and easily accessible" (198). This model of administration of individual employment legislation and grievances is possibly not peculiar to the Sudan (De Givry, 1968.364-375). According to one view its introduction in the Sudan may have even been influenced by ILO recommendations (199) (Hassan, 1979.205). Hassan does not provide any grounds for this belief. However the point is difficult to concede in the light of the fact that Sudan has not signed this or the 1983 ILO conventions (200). Nevertheless the educational influence which ILO-provided training programmes (201) may have had on labour relations law cannot be ruled out. Assuming that these programmes did influence the law, this does not challenge my argument that the development of the law is influenced by superstructural or external factors (Cf. *supra* Part I.C.1 of this Chapter, and the Conclusion in Chapter III).

The Department of Labour and its offices intervene in one capacity to protect employees against imminent dismissal and in another to redress grievances. In all cases of disciplinary dismissal, redundancies and dismissal without notice the Labour Department and its offices act as central governmental authorities whose prior approval is essential for legality of dismissals. In all other cases employers are not prohibited from taking immediate measures against employees, although the employee then has a right of appeal to the Labour Department and its

offices. In cases where the employer applies for approval of dismissal, or unlawfully immediately dismisses an employee, or the latter complains to the Department against measures - (whether dismissal or otherwise) - taken by the employer, the Department of Labour and its offices investigate and make binding decisions regarding the application or complaint.

The Department of Labour is a government body. The Labour Commissioner (i.e. Head of the Department) and the Labour Officers to whom he delegates his powers are ordinary public servants. There are 28 Labour Offices in Regional Capitals and districts all over the country from which Labour Officers operate. Decisions made by the district or any other Labour Offices are deemed decisions of the Commissioner of Labour and, therefore, appealable directly to the Civil Courts (202).

The function the Department of Labour and its offices perform in relation to private sector employees corresponds to that performed by "Heads of Department" and "Disciplinary Boards" in case of the public sector. However more to the advantage of private sector employees is that the Department of Labour and its offices are not directly a party to disputes. Most important however is that the intervention of the Department of Labour and its offices has as its objective (203) and does in practice operate to further protection of the interest of the employees (204). This is an objective hardly identifiable with the intervention or demonstrated by the practice of the public sector bodies.

Intervention of the Labour Commissioner and officers does not oust the jurisdiction of the Civil Courts. This has enabled the evolution of an integrated - (administrative-judicial) system of administration of the law. For employees this is a doubly advantageous arrangement. On the one hand it provides employees with the costless simple and fast service of the Labour Offices. Supervision by the Courts on the other hand safeguards against the shortcomings that are usually associated with the performance of administrative bodies carrying out judicial functions. Although each one of these advantages appears as achievable only at the expense of the other, this is not necessarily always the case. Complainants with crystal clear claims are under this arrangement protected from unnecessarily encountering delays that are inherent in the Sudanese legal process (205), while other complainants are allowed to appeal and additionally advised on their prospects of success.

It often takes the Labour Offices 15 days or less to dispose of any complaint under the law. This compares favourably with a lengthy judicial process that sometimes takes years to dispose of a similar complaint (206). However because the employee is always free to choose between complaining to the Labour Office or initiating a civil suit judicial delay does not mean that the integrated administrative-judicial system is disadvantageous to the employees. Anyway judicial delay is not a result of this integration but inherent in the Sudanese judicial system as a whole.

As to simplicity of procedure, an employee need only make a verbal complaint to the competent Labour Office. The task of verifying the section of the law governing the complaint and the remedies

awardable in the circumstances is entirely borne by the Labour Office. In contrast to this, judicial procedure including that of the "Labour Courts" (206A) restricts the Court to adjudicating the issues already framed and awarding the remedies claimed by the complainant. It is not therefore unusual for the Labour Court to acknowledge entitlement of the employee to rights but refuse to award them because they have not been claimed (207). Although the Civil Courts also accept labour suits free of charge (208) it is these, speed and simplicity of procedure, factors which *inter alia* encourage complainants to first seek intervention of the Labour Offices. Nevertheless, intervention of the Civil Courts is not totally without advantages.

In my discussion of public employment law and its administration I occasionally referred to shortcomings that are associated with the performance of administrative tribunals (209). Common to all types of labour tribunals in the Sudan these problems can now be summarized as arising from the following: (a) vulnerability to external influence; (b) incomplete knowledge of substantive law; (c) non-judicial techniques of weighing and standardization of proof; (d) inconsistency; and (e) insufficient powers of enforcement. Many of these problems are peculiar to the industrial tribunal system of the Sudan although few of them have been noted to exist worldwide (210). Although the Labour Offices are relatively immune (211) from governmental influence their performance is affected by all the other problems (212). It is here that the easy and free access to the Civil Courts works to offset these shortcomings and distinguish the private sector law and its administration from the public sector law. Many of these shortcomings are remediable upon appeal to the Civil Courts at the initiative of the employer the

employee or the Labour Office itself (213). Table 12 shows that the majority of Labour Offices' decisions disobeyed are usually referred to the Civil Courts for execution. Moreover, the cases that are not referred to the Civil Courts are usually those of employees who abandon further pursuit of their rights.

Furthermore, the work which the Labour Offices do is of special practical importance for organizationally weak employees in small employing units. Although small these units employ among themselves a high percentage of the workforce in the private sector (214). Out of the 32 unlawful dismissal cases that the Khartoum North Labour Office handled between September-November 1981, 12 came from units employing less than 10 persons, 14 from units employing less than 50 and only 6 from units with more than 50 employees.

The intervention of the Labour Offices does not preclude trade unions and employers from operating private schemes (215) for handling dismissals provided such schemes are more favourable to employees - (i.e. than statutory schemes) and that both the schemes and the dismissals processed through them are always antecedently approved by the Commissioner of Labour. An employer who agrees with the trade union to observe negotiated rules of dismissals that are in fact more stringent on the employer than the statutory rules will be held liable for unlawful dismissal if he dismisses in contravention of the negotiated , though not the statutory, rules (216).

TABLE 12

**Reinstatement and Compensation Orders Issued by KNLO
in the Period September-November 1981
(Appendix to fs 206, 212-213 and the text above)**

Total of Orders Made	Number of Orders Obeyed	Number of Those Disobeyed	Number of Disobeyed Orders Referred to Courts	Average No. of Days taken for the KNLO to reach a decision
32	16	16	10	9

Source: KNLO Monthly Reported Disputes;

Orders KNLO*7*1981-(non et seq)

KNLO*480*1981

It is worth mentioning in conclusion however that the performance of the Labour Offices has in the last 15 years been directly affected by the legal position of collective labour relations. The restrictiveness of collective labour relations law and the resultant obstruction of effective voluntary procedures have worked to inundate these offices with a huge annual case-load. Many of the defects pointed out in the preceding discussion may be due to the limited financial and personnel capacities with which these offices strive to cope with the overload.

4.B The Civil Courts

The Civil judicial hierarchy - (i.e. as opposed to the Sharia Judicial Hierarchy) - consists of District Courts (with preliminary jurisdiction), Province Courts (with appellate and preliminary jurisdictions), Courts of Appeals and a Supreme Court. It is the District Courts which deal with Labour actions at first instance. Decisions made by these District Courts are appealable to the higher Courts. There are certain District Courts that are designated as Labour Courts - (e.g. the Khartoum North Labour Court). This designation means that such Courts may as a matter of convenience deal only with individual employment claims. Cases that are referred to the Labour Court for enforcement of a Labour Office decision are usually dealt with as execution petitions. Litigants may take their claims directly to the Labour or any other district Courts. Actions directly taken to the Civil Courts are triable as ordinary civil suits.

TABLE 13

Appendix to Footnotes 205-206

Dismissal cases pending appeal or execution in the
Khartoum North Labour Court (1)
with the time they have taken to reach their
respective stages

Civil Suit No.	Date of Institution of Claim	Date of Labour Court's Decision	No. of Appeals the case went through	Date of Final Decision
DC-CS-263-1981	9.7.1980	30.11.1981	3	16.1.1984
DC-CS-5-1982	7.2.1982	20.11.1982	1	30.12.1983
DC-CS-335-1982	7.9.1982	Not passed until 1.3.1984	-	-
DC-CS-234-1981	21.11.1981	N.A.	2	5.1.1984
DC-CS-234-1980	26.1.1983	29.10.1983	-	29.10.1983
DC-CS-72-1983	11.1.1982	13.2.1983	-	13.2.1983
DC-CS-68-1981	17.3.1981	13.1.1982	1	18.1.1982
DC-CS-154-1981	1.4.1981	N.A.	1	29.1.1983
DC-CS-252-1981	5.12.1981	N.A.	1	9.3.1982
DC-CS-19-1980	12.11.1979	N.A.	1	21.3.1981
DC-CS-53-1981	Feb.1981	N.A.	2	6.5.1982
DC-CS-315-1982	22.8.1982	10.11.1982	2	18.12.1983
DC-CS-329-1982	1.9.1982	5.6.1983	-	5.6.1983
DC-CS-236-1981	23.11.1981	N.A.	3	28.9.1983
DC-CS-402-1982	20.9.1982	Not passed until 20.2.1984	-	-
DC-CS-488-1976	8.8.1976	25.7.1979	4	Last though not final decision 28.12.1983

- (1) The cases shown are all the cases the Court were to deal with within the week ending 24.2.1983.

There are two factors which influence orientation and optimality of Courts intervention with administration of the law. The first is the social and economic conditions of the Sudan. The second is, the intrinsic properties of the area of individual employment relations, and the provisions of individual employment legislation conditioning intervention of the Courts.

Beginning with the first factor, it is generally true to say that tribunals are by their nature special types of courts. There are sometimes reasons which cause a government to except a certain area of social relations from the general jurisdiction of the Civil Courts and set tribunals for its regulation. The stance of the Civil Courts vis-a-vis the area excepted and the wish of the government to accord more or less protection for the classes of people affected is one of many other possible reasons which may prompt the setting up of and determine the powers to be given to such tribunals. The stance of the Civil Courts towards regulation of the employment relationship is determined inter alia by the position of the judiciary in the social and economic establishment and the social background of the judges. "The story has been sufficiently told for it to be established that this relationship can be understood only in the framework of a class analysis" (Clark and Wedderburn, 1983.166) (217).

In Britain for instance "the tendency of the judges to read statutes in the light of the Common Law and their inability to break away from Common Law concepts" have been identified as reasons for an observed "marked upturn in the use of tribunals in the administration of new jurisdictions in . . . the Labour Law area" (218) during the 1960s and

early 1970s. From a doctrinal analysis perspective some writers are ready to blame this inability and tendency and the resultant traditional stance of the Courts towards the employment relationship on the techniques of judicial decision-making alone (219). Techniques are however mere instrumental forms for articulation of the points of view which the judges take on substantive issues. It is not the techniques but the points of view on substantive issues - (in its turn determined in the manner explained at the end of the above paragraph) - which build up the general orientation of Courts' intervention in a specific area of social relations (220). Tracing these points of view to their social and economic origins and rediscovering them within the language of judicial discourse can only be effected with the assistance of sociological analysis of law and its administration (221).

Civil Courts in Sudan follow judicial techniques of decision-making that are almost the same as those of their British progenitors. These same techniques have since Independence however been used to reach decisions that are not detrimental to employees (222). This is explicable by the position of the judiciary and the social background of the judges. Judging by either factor the Civil judicial hierarchy in Sudan is not the establishment of any particular class. The building of this hierarchy started only from 1900 under the auspices of colonial rule and with material and human resources that had had no link whatsoever with the pre-1900 era or any ruling class from that era. Until 1956 the jurisdiction and size of the judiciary (223) had been dwarfed by colonial omnipresent military and political administration. From 1956 onward the development of the civil judicial hierarchy has remained co-extensive with development of other segments of the State apparatus. The judges

TABLE 14

Appendix to f.223

Number of Civil Cases and Judges until 1950

Year	Average Number of Civil Cases	Number of Qualified Judges
1900-1905	4,182	3
1906-1910	7,175	5
1911-1915	15,919	5
1916-1920	14,305	6
1921-1925	16,822	6
1926-1930	12,019	8
1931-1935	6,667	12
1936-1940	7,089	12
1941-1945	5,124	11
1946-1950	7,178	10

Sources: Zaki Mustafa (1971) .231

and lawyers who have joined the legal profession since then are drawn from different social backgrounds - (courtesy of free and regionally equally distributed educational opportunities that have also been expanding since 1956). The judiciary is, in conclusion, a hierarchy parallel to the administrative, military and political hierarchies that constitute the structure of the centralized State. Unlike other hierarchies the relation among the various strata of the judiciary and between these strata and other hierarchies of the State are supposedly regulated in such a manner as to make the judiciary subject only to the rule of law.

In practice however the judiciary is not immune from the purges that after every political change, affect all segments of the State apparatus. Even in times of stability the Supreme Court and the Courts of Appeals are in particular not always free from political intrusion. In the economic and political conditions of the Sudan described under Chapter II there has so far been no room for such a thing as total judicial independence. The Courts cannot effectively interfere with matters - (no matter how wide and controversial these matters are) - which the political regime does not want them to interfere with. The Courts may either acknowledge this practical limitation of their intervention and follow the pragmatist approach of seeking to legitimate the very restrictions imposing it (224) or, otherwise make decisions that may only be contemptuously ignored by the political regime (225). This takes me to discuss how the individual employment relation is in particular itself relevant in determining orientation of the Courts,

It could be argued on the basis of what has been said, that the independence of the Courts is only violable by intervention of the political regime. I have mentioned elsewhere (226) that the intervention of the political regime with the autonomy of other social institutions is guided by certain politically relevant factors. Because the private individual employment relationship is relatively - (i.e. in relation to collective and public employment relationships) - politically insignificant State commandeering intervention with administration of the law regulating it is minimal. This is true in cases of both institutionalized - (i.e. legislation ousting jurisdiction of the Courts) - and non-institutionalized - (i.e. contingent obstruction of the course of justice) interventions. Relevant also in explaining orientation of judicial intervention are the considerations pointed out earlier as responsible for shaping political and legal attitudes towards the individual employment relationship (227).

The unequivocal provisions of the individual employment relations law regarding reference of disputes to and obtaining of prior approval of the Commissioner sometimes prevented some Courts from deciding other than in favour of the employee even when such decision was harsh on the employer (228). Coupled with the circumstances that accompanied introduction of the 1969 Amendment in general, this unequivocality has led the Courts to interpret as the objectives of individual employment legislation in general, and of these provisions in particular, the protection of the employee (229) or of the interests of both the employer and the employee (230). All these interpretations contrast with that applied by the Courts in case of public employment law. The Courts see and accept as justifications for existence and exclusiveness of jurisdiction of public sector tribunals (e.g. PSAB) the need for the protection of the

integrity and interest of the public service (231).

Conclusion

It is generally true to say that private individual employment law is formally ideologically developed, protectionist in orientation, socially ideologically under-developed and influenced in these and other respects by a plurality of factors. This condition of the law is an indirect result of the stance of the State towards this area of Labour relations and vis-a-vis the factors influencing its regulation.

Each one of the relevant factors - (i.e. judicial administration, administrative enforcement, trade union-government political relation and standard setting by employers) - affects the law either at the level of rule-making or the level of interpretation and administration of rules or at both. Each one of these factors is in turn conditioned by certain social and economic circumstances that make its operation at the respective level or levels conducive to development of the formal ideology and under-development of the social ideology of the law.

In contrast with private sector employment law, and due to the stance of the State towards its enactment and administration, public employment law is formally ideologically under-developed. The weight of text and materials presented in this and the preceding Chapter are in each case themselves reflective of the practical formal ideological condition of the field of study. In contrast to the unreported and inaccessible (232) administration of public individual employment law the administration of private sector law is widely reported accessible

comprehensive on all aspects of the law and legally rational in its approach.

As to the under-development of the social ideology of the law it is endemic to both the public and private divisions of employment law, although the symptoms of this under-development are in both divisions different. Because of its generality to the analysis in the previous chapters examination of the social ideology of the Law will be dealt with in the Conclusion.

CONCLUSION

The general hypothesis of the thesis has been that the form of law is determined by the dominant form of relations of production but that the substance and ideology of the law are in turn conditioned by social and economic development within this form of production. The first parts of Chapter I have argued for a methodological approach which if applied to the study of empirical labour relations law may provide the *prima facie* explanation for holding such a hypothesis in the first place. The third part of Chapter I has elaborated the arguments of the hypothesis explaining in particular the mechanism of determination of the form of law and the instrumentalization of the State (i.e. through economic and political class struggles of the social forces of production) in the transmission of the effect of social and economic change on the law.

Chapter II has been a particular statement and elaboration of this general hypothesis in relation to the Sudan. As a prelude to knowing the dominant form of law the Chapter has endeavoured to explain what specific form of economic relations is dominant in the Sudan. The argument of the Chapter has been that economic relations in the Sudan are vastly "non-capitalist". But that this does not mean the dominant form of the State and Law are also non-capitalist. To explain this paradox I have argued that the centralized State and Law in the Sudan, far from being autochthonous structures, are Capitalist forms that were imposed from outside the social formation. From this I have drawn the conclusion that because, as a united whole, it is governed by this State and Law the Sudanese social formation is one in which " Capitalist

economic relations" are politically dominant.

Whereas the political dominance of Capitalist economic relations is by itself sufficient for determining the form of law; it is not however equally sufficient for determining the substance and ideology of the law. Development of the latter is conditioned by expansion of the economic and social foundation of Capitalist relations of production. The Chapter has argued that this foundation is under-developed in the Sudan. This under-development is manifest in the quantitative subordination of relations that can be categorized as socially and economically Capitalist. The argument has been that Capitalist economic relations and the Capitalist path of development are, notwithstandingly, politically dominant only because of the lead given to them by the State. The centralized State is by itself the biggest single employer of the majority of wage-labourers. The Chapter has also pointed out to many factors which make State-sponsored economic planning likewise biased towards the Capitalist path of development.

The under-development of the substance and ideology of labour relations law is a reflection of the wider under-development of the social and economic foundation of Capitalist relations of production in the Sudan. Sudanese labour law is in effect merely statutory regulation designed to achieve certain policy-objectives formulated and given pre-eminence by the State. Although systematic operation of various areas of industrial relations is itself part of these objectives, it is an operation which, is always perceived from the standpoint of the State, and, as an objective is always secondary among other considerations which influence a particular mode of regulation of industrial relations.

Most important among these other considerations are: (a) exigencies of descendent political control by the State; (b) the role of the State as a lever of Capitalist reproduction; and (c) the position of the State as employer of the majority of wage-earners.

Having outlined the factors which condition under-development of the substance and ideology of labour relations law the thesis has then examined the extent to which laws regulating the different areas of labour relations in the Sudan are reflective of this under-development. My argument has been that laws regulating all areas of labour relations in the Sudan are devoid of a socially and economically structuralized ideology. However with regard to the formal ideology of the law the argument has been that, depending on the type and extent of State intervention in these different areas, the laws regulating collective, public individual and private individual labour relations reflect varying degrees of formal ideology. The extent and type of State intervention are themselves determined by the respective significance of each one of these areas of labour relations for the considerations claimed above as influencing that intervention.

To explain the formal ideology of the law the discussion has centred on the substantive content of rules and the processes of law-making and legal administration. The focus of the discussion has been on examining whether and to what extent these content and processes enhance or undermine the "formal impartiality" and "formal enforceability" of the law.

With regard to collective labour relations law the findings have been that: (a) neither at the level of enactment of the basic rights of association nor at the level of improvement of wages and conditions of service do the majority of trade unions participate in the determination or administration of the law; (b) the authority to make and the authority to administer the law are sometimes consolidated into one and the same hands; (c) the law is generally "commandeeringly interventionist"; (d) the limited protection which this law in few places provides for trade unions and their members is superficial and non-enforceable; and (e) the law is hardly distinguishable from the economic and political thrust exerted on it by the State. To the extent that collective labour relations are the most extensively-regulated this is explicable as an apparent apprehension of the potential threat which the uncontrolled power of organized labour might pose for political stability of a State that has so far failed to provide the working class with a permanent interest in the economic and political establishment.

Public sector employment law is distinguishable from the above law in that it in certain places provides detailed statements of employees' rights as against their employer - i.e. the State. Hence in so far as "employment rights" are concerned this law is in this sense protectionist. However upon examination of, the substantive rules governing employees' tenure of office, and, the determination and administration of the law the conclusion has been that public employment law is equally "commandeeringly interventionist". Statutory powers of dismissal on "public interest" and "service interest" grounds, and the discretionary powers of dismissal exercisable by "Ministers" and "Heads of Departments", undermine the contractual basis of the employment

relationship. For its part statutory law does not provide any alternative demarcation between lawful and unlawful dismissals. Even when dismissal takes place as a result of misapplication of statutory law, the agencies responsible for administration of the law cannot effectively rectify the position. These agencies include tribunals consisting as a matter of fact of the "Ministers" and "Heads of Departments" themselves or of "Disciplinary Boards" constituted by them, and of a central tribunal (PSAB) which is likewise a stratum in the State bureaucratic hierarchy. Furthermore "Heads of Departments", "Ministers" and the President of the Republic not only administer but also make the law. The jurisdiction of the Civil Courts is ousted both by express statutory provision and by self-imposed restrictions on the Courts.

This unilateral and rather arbitrary determination and administration of public employment law and the convergence of judicial and legislative powers they involve affect both the formal effectiveness and impartiality of the law. The practical condition of existence of public employment law affects also the academic discipline dealing with this law as its subject of study. Decisions of the bodies administering this law are unreported and hardly accessible on record. Even when some of these decisions were made available and examined the result has been that they are totally devoid of any juridical conception of the employment relationship. Hence, as apparent from the discussion in Chapter IV, even when employment disputes have reached the Civil Courts, the focus of adjudication has been on issues relevant largely for purposes of the Administrative and Civil Procedures Laws.

The mode of determination and administration of public employment law in vogue in the Sudan consolidates the control of the political leadership over the internal functioning of the State bureaucracy and is also crucial for the success of central determination of wages and conditions of employment.

The position of private sector labour relations exempt them from control on some of the grounds relevant with regard to other areas. It also generally affects the scope and orientation of State intervention in this area. Moreover, although the control of this area may also equally contribute to primitive accumulation of Capital, the possible political friction the imposition of such control might cause in the particular case of the private sector is greater a countervailing consideration.

The non-applicability of State "commandeering intervention" to individual labour relations in the private sector has paved the way for the intervention of other secondary factors in its regulation. As a result of this plurality of its sources and the autonomy of the bodies vested with its administration, private sector employment law is apparently impartial, rational and formally enforceable.

The analysis of the "social ideology" of the law has been given a wider scope throughout the discussion of private employment law in Chapter V. To explain the reason for this I need first to recall my earlier arguments regarding the empirical foundation of legal studies and the plurality of levels of explanation. What distinguishes private sector employment law is the practical and social existence which the participation of the many contributing factors give to it. The practical

condition of existence of this law introduces also simultaneously a new level of empirical data that is worth investigation. The examination of this empirical data and that of its implication for the law are important. To rest content with the apparent plurality of the law and with the conclusions regarding its formal impartiality and enforceability may give the impression that private sector employment law in the Sudan is not any different from individual employment law in developed Capitalist societies. To show that this is a false impression I have gone beyond the formal facade and pointed to a discrepancy between what the law endeavours to achieve and what is practically achievable in the economic and social conditions of the private sector in the Sudan.

The above discrepancy is caused by the superstructuralness and specific operation of the factors influencing the development of private sector employment law. This superstructuralness applies also of course to the centralized State and reflects more adversely on public sector and collective labour relations laws. Because the centralized State monopolizes, to the exclusion of other superstructures and factors the determination and administration of the latter laws these laws are in consequence deprived even of a "formal ideology". The case of the private sector shows that although plurality of the factors influencing development of the law might enhance its formal ideology it cannot however by itself make the law socially effective. That to be socially effective the law has to be representative of the "balances of powers" of the parties to, or bearers of, the individual relations it endeavours to regulate. The law cannot be so representative in the Sudan because of the political pressures exerted on the law from above. The thesis has argued that the phenomenon of descendent "political" control is itself

produced and in this sense explicable by the underdevelopment of the economic and social foundation of Capitalism in the Sudanese social formation as a whole.

The state of the law in the Sudan discussed in the last three Chapters adds to the weight of empirical evidence that the substance and ideology of the law are determined by the stage of social and economic development. The fact that private sector employment law possesses some ingredients of formal ideology does not affect the validity of such evidence. I have in this respect already pointed out that the ideology of law consists of a sum total of levels of ideologies of law. Formal ideology is only one and the most superficial of these levels. Hence even if private sector employment law is formally ideologically developed this formal ideology is supported neither by social nor by socio-historical levels of ideologies. The formal ideology of private sector employment law is even more superficial because, far from being a reflection of underlying material relations of production indigenous to the Sudan, it is a creature of superstructures that are themselves not indigenous to that country.

NOTES AND BIBLIOGRAPHY

NOTES TO CHAPTER 1

(TOWARDS A GENERAL THEORY OF THE STATE AND LAW)

(1) Cf. also Korsch, 1970.44.

(2) Thus Korsch demands "the application of the materialist conception of history to the materialist conception of history itself (Korsch, 1970.92, 118).

(3) Lenin Philosophical Notebooks.319 vol.38 Collected Works quoted in Lukacs, 1978.22-23.

(4) For the need to distinguish between scientific concepts and philosophical categories within Marxian theory Cf Althusser 1977.50-52.

(5) I do not claim that this is the only valid distinction between science and philosophy. It is however adequate enough to illustrate my point that there are two levels of theorization within Marxian theory. The extent to which the highest of the two levels can be claimed to be philosophical is shown in the course of the discussion. For the possible distinctions between science and philosophy Cf. (Korsch, 1970.45-67)(Bottomore, 1985.371), (Bhaskar, 1979.5-10)(Althusser.1977 30-68).

(6) Marxist philosophical materialism expounded by Engels (Dialectics of Nature Moscow 1954), Plekhanov and Lenin Cf (Jordan 1967).

(7) Plekhanov, FPM.111, Lenin PHN 82, CW38.p233, CW.14.15, CW15.p.406, CW.16.348 and Jordan 1967.184,210.

(8) Engels expounded the Dialectics of Nature and his own classification of the so-called Laws of the Dialectics. Plekhanov revised and rearranged the laws of the dialectics and placed more emphasis on their application within the socio-economic historical environment. Lenin followed Plekhanov, but, also propounded epistemological materialism. Stalin placed more emphasis on voluntarist interpretation and utilization of dialectical materialism in development of so-called doctrine of scientific socialism. Cf Jordan, 1967.151-294.

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- (9) Destratification of science is a substantive¹ or methodological conception of science that (isolates a necessary connection or relation from others essential to its existence or efficacy within the domain of reality) Cf Bottomore 1985, 404-408, 254-262.
- (10) Quoted in Bottomore, 1985-256. Cf also Jordan, 1967.313-315 and Marx in *Kolnische Zeitung* No.179 1842.30 "Philosophy does not stand outside the world, just as the brain does not stand outside man merely because it is not in his stomach!".
- (11) Marx *Capital I* 1983.29; "To Hegel the life process of the human brain . . . is the demiurgos of the real world and the real world is only the external phenomenal form of the idea. With me, on the contrary, the ideal is nothing else than the material world reflected by the human mind . . ." Cf also Lenin, PHN.104 CW38 Moscow 1960.
- (12) Cf *infra* f.64 and the text above.
- (12a) Cf *infra* fs.19, 41.
- (13) Cf *infra* Part 2.B.1.d.
- (14) Hegel describes the process of knowledge within the mind as one of contradictions involving a thesis (condition of equilibrium) antithesis (disturbance of equilibrium) and synthesis (re-establishment of equilibrium on a new basis). Hegel argues - *Werke* 2nd edit vol 3 p.434 Quoted in N Bukharin, 1969.79-80; "It is said that there are no sudden changes in nature . . . yet we have seen cases in which the alteration of existence involves not only a transition from one proportion to another but also a transition by a sudden leap into . . . a qualitatively different thing . . .".
- (14a) Hook, 1971 presents the same argument as follows; "Within (the social) whole, the moments of opposition are the objective conditions (thesis) which are independent of immediate consciousness (but not of history) and the human needs and desires (antithesis) which project

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possibilities on the basis of those conditions. At a certain point, as a result of objective conditions on the will and thought of a definite class action (synthesis) results. An attempt is made to actualize the objective possibilities generated by the interaction of the social environment and the human needs. By means of class action the 'moments of opposition' are transformed into 'phases of development' . . . "There can be no consciousness without mechanism and no social mechanism without consciousness . . . p.71".

(15) Thus, Marxian theory, becomes a particular statement of Feuerbachian Genetic Materialism and asserts the ontological priority of nature over spirit, matter over mind, body over consciousness, brain over thought and the development of the productive forces over the development of human society Lenin CW2 1960.21, MEC 1960.46,55,90,323,326; Plekhanov FPM 7,21; Jordan 1967.188.

(16) Cf Althusser, 1977.76 - (My endorsement of Althusser's views is subject to the reservations expressed in various places throughout the Chapter); (Hyppolite, 1969.95-96,126,127).

(17) Cf Capital Vol III Chaps.13-15, Capital I (1967).151-152 and the Grundrisse 1973 146-147,151,270.

(18) Especially f.3 and text p.7 and f.1 and text p.9.

(19) Thus Plekhanov argues; "the self-development of the forms of production is only a metaphorical way of speaking about men acting in a certain manner" DMVH 732-733. Also quoted in (Jordan 1967.310).

(20) Cf Cohen 1978.86-87, 216-289 as example of erroneous approaches that posit the pre-existence of distinctively separate "economic structure" and superstructures, and, as if unaware that this very position undermines the tenet of "Marxian philosophy", nevertheless pretend to offer an explanation of the relation between the two supposedly on the

basis of that philosophy.

(21) J Hirsch, *the State apparatus and social reproduction*, in J Holloway and Sol Picciotto Ibid p.57, identifies the tendency for the rate of profit to fall as crucial in analysis of the State. Hirsch is right and to this category could be added many other crisis situations at the stage of distribution. But these are only effects, of causes (e.g. concentration and centralization of capital and extent of socialization of social labour produced by it, and, productivity of labour) that take place at the production stage. These effects materialize as a result of the influence which the "causes" exert on the State via economic and political class struggle. A theory of the State based on an empirically observed correspondence between the situation of capital valorization and the "State" activity disregards the importance of the analytical interrelation of class struggle and the State not only as a key to grasping the State but also as a guidance for the right emplacement of these empirical observations. Hirsch analyses are analyses of phenomenal forms of social relation (e.g. value profit commodity tendential development of value) which substitute, as a subject of their study, the contradiction between these forms for the contradiction between the social actors. They are also analyses of form because they draw limitation frameworks for capitalist development formulated not with reference to history or experience (i.e. substance) but by analytical derivation from the general laws of capitalist production and the combination of its elements. This latter is the sense in which they are unable to relate to the substance of the historical process. Cf also Colletti 1972 who although starting from different perspective utilizes the opposition of "value" and "use value" to reach the conclusion that Marx's analysis of contradictions are specific to Capitalism.

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- (22) Quoted in (Jordan, 1967.302).
- (23) Marx MEGA 1/6 p.538; Manifesto of the Communist Party SWi 32-61 Quoted in Jordan (1967) 313.
- (23a) Cf *infra* the text above fs.25-26.
- (24) Marx, Capital I (1983) 713-715.
- (25) The process of production is complete as soon as the means of production have been converted into commodities whose value exceeds that of their component parts. Reproduction is the incessant renewal of this same process Marx; Capital I 1983 pp.529-32.
- (26) Marx Capital I 1983 pp.448,451,282. In another place discussing co-operative factories of the labourers Marx wrote "they show how a new mode of production naturally grows out of an old one, when the development of the material forces of production and of the corresponding forms of social production have reached a particular stage. Without the factory system arising out of the capitalist mode of production there could have been no co-operative factories Marx Capital III 1962 p.431.
- (26a) As examples of changes in the mode of labour control within Capitalism Cf *infra* Parts 3.A and 3.B.3.
- (26b) Cf *infra* Part 2.B.1.a.
- (27) Marx, Grundrisse, 1973.748 ff.
- (27a) This expression is used in several other places in the Chapter. I use it to stress that empirical data cannot directly explain or substantiate a philosophical theme or a general theory. "Analytical accentuation" is a concept borrowed from Weber (Weber, 1969.90). It designates Weber's technique of classifying the "scientific" investigational process into stages each corresponding to a definite level of analytical accentuation - (e.g. historical interpretations - historical knowledge -

descriptive types - ideal types - theory Ibid p.66, 94). Marx uses a formally similar method of stratification (i.e. of levels of abstraction Cf infra f.44). The substantive difference between the two methodologies is of course that Weber's is analytical and Marx's is dialectical. Marx viewed his method as naturalistic and derived from and applied to an equally structured and differentiated reality. Weber viewed his methodological stratification as a one-sided analytical accentuation of one-sidedly emphasized view points. Both views distrust the "scientific" truth of phenomenal interconnections of things and stress that to discover their scientific significance these interconnections must be subjected to rigorous stratification or abstraction. Thus Marx believes; "all science would be superfluous if the outward appearances and essences of things directly coincided" (Capital III Ch.48). Weber also believes; "It is not the actual interconnections of "things" but the conceptual interconnections of problems which define the scope of the various sciences" Weber, 1969.68).

(28) Cf also Cohen, 1978.86-87, especially his reply to (Raymond Williams 1973.6).

(29) Balibar interposes that his "combination" is a synchronic connection in which not only the places of factors and their relations but also their nature changes. But it is not enough from a Marxian perspective to merely establish a synchronic combination. It is essential to analytically link that synchrony to a diachronic/synchronic development of the combination. As it stands Balibar model is a combination of substance possessing its own "atemporal" structural movement. This is structuralism whether Balibar likes it or not (Balibar Ibid 225-226).

(30) M Glucksmann 1974 "The notions of determination by a structure and synchronic causality are peculiar to structuralists. They are also very simple - explanation for them involves laying bare the internal mechanisms of a social formation or cultural item and the relationships between its different orders . . . Ibid pp.149-50." The opposition of synchronic and diachronic/synchronic explanations counterposes the notion of system to the notion of system/evolution - or systematic evolution (Jakobson and Tyanyanov, 1966.60). Marxian theory emphasises both the evolutionary and systematic characteristics of social phenomena. "The system which Marx was analysing was a social system in movement. The logic of co-ordination must be modified by the logic of succession. The whole at rest must be regarded as a limiting case of the whole in movement . . . The equilibrium which is analysed in the present cannot be regarded in complete independence of the equilibrium which preceded it; and that it already contains within itself indications of the general character of the equilibrium to be realized in the future . . ." Hook, 1971. 64-65. Although Althusser endeavours to distance himself from the structuralism of Levi-Strauss. The extent to which Althusser's own theory is not structuralist is not all clear Cf Glucksmann, 1974.167 and Clarke, 1981. 223-235.

(31) Marx; Capital III 1962.798; Material conditions like social relations "are on the one hand prerequisites on the other hand results and creations of the Capitalist process of production; they are produced and reproduced by it". Cf also Lukacs 1932.22 "The most essential element of Marxian conception . . . is the dialectical relationship of subject and object in the historical process". Quoted in Giddens 1971.189.

(31a) Cf *infra* f.39.

(32) Thus the substantiation of the thesis of primacy of the productive forces and of determination of the superstructures by the economic structure becomes with Cohen 1978 a matter for formal logical explanation or linguistic interpretation (*Ibid* 160-174). To do the former Cohen also reduces "correspondence" to a mere functional-explanatory-formal-logical concept (*Ibid.*160). For a similar criticism of (Cohen,1970) Cf Clarke 1980 f.85 p.95. Cohen and Elster approaches disregard or deny (Elster 1985.37) an essential ingredient of Marxian philosophy namely, that formal logical thinking is significant only within certain limits and constitutes a particular instance of dialectical thinking." (Plekhanov, *FPM.* 112-113,115,117-120); (Jordan 1967.192) Jordan, 1963.294.

(33) Despite the overall similarity Cohen and Elster have different views on certain details Cf e.g. Elster 1985. 30-31, 258-260.

(34) For general meaning of historicism and human nature in Marxism Cf. Bottomore, 1985. 210-211, 214-217. Marxism is not historicism in the sense in which Korsch would like it to be (Korsch, 1970 esp. 51, 118). Nor is it historicist in the sense in which Popper thought it is (Popper, 1960) - Cf also Bottomore, 1985. 210-211. Nevertheless, Marxism is not "anti historicist" in the sense in which Althusser thought it was (Althusser, 1975. 119-144; 1969. 221-247)! Althusser anti-historicism eternises the epoch of capitalism and projects this eternity into both the future and the past. Althusser therefore empiricises the historical epoch of capitalism and idealises its essence. "Thus the critique of empiricism conceals the truly empiricist foundations of Althusserianism - (Clarke 1980. 74). Henceforward whenever I use "historicism" I reserve it solely for this empiricism of the historical epoch, and idealization of

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"ideological appearances of law and the State . . . present within it.

(35) Althusser, 1969. 110-116, 229, 255 and generally 86-255).

(36) Clarke 1980. 81 f.18; Sumner, 1979.49.

(37) Cf *infra* Part 2.B.1.e.

(38) Althusser conception of the "economic structure", his structuralization of the social totality and his "theoreticisation" of Marxian philosophy are interrelated. If we agree with Althusser that the economic is, the elements he (Althusser, 1975.176) enumerates - (i.e. Labour power, direct labourers, masters who are not direct labourers, object of production instruments of production) - in their combination of substance, we end up with a structure - (a combination of substance of the subjects and objects of the historical epoch) whose very conception implies solidity and whose existence in a definite form is therefore inexplicable without presupposing a "legal-political and ideological superstructures as conditions antecedent to that existence - (Althusser Reading Capital Ibid 177-181). Althusser then gives "the economic structure" the credit for calling in specific superstructures but, counterposes that the economic structure assigns determination to these superstructures for ever. "From the first moment to the last the lonely hour of the last instance never comes Althusser, 1969. 113." On the basis of this, Althusser substitutes structural causation - (consisting simply in explanation of synchronic interconnection of phenomena Glucksmann 1974. 149-50) for Marxian hypothesis of ever-continuous dialectical interaction of the economic structure and the superstructures. Having thus denied Marxian dialectical method any application in history or concrete history Althusser then moves to construct it in the sphere of philosophy.

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(39) This distinction between "History" and "history" is based on Marx's distinction between social process of production in general and "historically determined" forms of this process respectively-Marx; Capital III. 1962. 798. Although it is claimed that Marx is Eurocentrist (Bottomore 1985. 200) he considers his analyses of capitalist societies of Europe as exemplification of a general materialist philosophy that is reflective of the development of all forms of societies Jordan 1967. 299 - Marx; Capital I. 1983. 179.

(39a) Cf supra f.27a and the text above.

(40) Plekhanov, FPM.80; DMVH.731 also quoted in Jordan 1967. 347.

(41) Thus commentators who blame the inadequacy of the metaphor of base and superstructure are prey to this misidentification (e.g. Williams 1973). Althusser has rightly noted; "the fact that the metaphor of the structure is a metaphor matters little . . . since in philosophy one can only think through metaphors". Althusser, 1976. 139-140.

(42) Marx Capital I 1970 London 10; Grundrisse, introduction (1973) Cf also Bukharin, 1969. 93-101. Methodological individualism begins and ends its inquiry into the human societies with a consideration of the properties, rationally imputed or empirically determined of the individual atoms themselves (Bhaskar 1979. 1-91).

(42a) The causal criterion - (as opposed to a normative criterion) means that the causes which produce a social fact are separable from the function which it has in society . . . The causes which give rise to a given social fact must therefore be identified separately from whatever social functions it may fulfill . . . Cf Giddens 1971. 82-91.

(42b) Methodological collectivism is in certain respects opposed to individualism (Cf supra f.42). Broadly stated, the former emphasises that societies cannot be studied merely from the point of view of the

consciousness of the individuals involved and that the influence of factors which escape consciousness and help to shape it must also be examined.

(42c) Durkheim's "externality" designates two senses in which social facts are "external" to the individual. "Firstly every man is born into an on-going society which already has a definite organization or structure and which conditions his own personality" . . . "Secondly social facts are external to the individual in the sense that any one individual is only a single element within the totality of relationship which constitutes a society." (Giddens 1971. 87). With Marx the reality of social facts is due to derivation of the latter from production relations that are themselves at any given time socially determined (Marx Grundrisse 1973. 156). The "consolidation of what we ourselves produce into a material power above us, growing out of our control, thwarting our expectations, bringing to naught our calculations, is one of the chief factors in historical development up till now". Marx, the German ideology CW5. 19-539. 47-48. Also Q. in Elster, 1985. 100.

(42d) Cf *infra* Part 2.B.1.a.

(43) Quoted in Jordan 1967.302.

(44) (Marx Capital I 1983.19) Cf also Bottomore 1985 407-408.

(44a) "Levels of socialization" is a phrase used in several places throughout the thesis. Marx uses the expression "socialization of labour" or "socialized production" - Capital I 1983.715 - to connote the extent of expansion of spontaneous social organization resulting from the concentration and centralization of capital. Durkheim uses a concept of "dynamic density" or "organic solidarity" to connote the social cohesion connected with expanded functional interdependence in the division of labour - (Giddens 1971.77-78). Levi-Strauss (1968b.312) develops a "geological" conception of the social totality viewing it as composed of

different types of interacting and possibly ordered layers levels and elements. He enumerates among these the "kinship system", "social organization" and "social stratification" whether economic or political - Glucksmann, 1974.34). I synthesize these views in developing a conception of a social formation as made up of concrete hierarchical - (i.e. judging by the level of societality they reflect) - structures and practices. Within a historically determined social formation, "economic relations" at the individual level - (i.e. at the material production or enterprise level) - constitute the substratum or lowest level of societality. Next to them in the degree of socialization are "economic relations" among labourers and relations among owners of the conditions of production and also the relation between the economic organizations of these two classes. At still a higher level of socialization is the relation between the political organizations of the two classes. The Centralized State with its various centralized apparatuses constitute the apex of the hierarchy. This hierarchical order governs the relation among the different social structures as well as among the social and political practices; Cf *infra* fs. 75, 77, and also Durkheim (1938) pp.12-13.

(45) Thus Otto Neurath 1973 remarks; "Marxist sociology is a sociology on materialist foundation in which the task is to discover laws of highly complicated social machines in action and then if possible these laws have to be reduced to their elementary relationship . .. 371" Quoted in Bottomore 1975.28-29.

(46) O. Neurath 1973 views the framework of Marxist Sociology as "the whole structure of an age conditioned by the situation of the time". *Ibid* 358. Cf *supra* f.30.

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(46a) Cf *supra* f.44a.

(47) On methodological monism of historical materialism Cf. (Korsch 1970.52-54; Marcuse, 1963.320). On the importance of psychoanalysis Cf (Erich Fromm, 1970).

(48) Jordan, 1967.305; Elster, 1985.300-304, Acton 1955.143.

(49) The class struggle in France 1848-1850 (1850) and the Eighteenth Brumaire of Louis Bonaparte (1852) in MESW Moscow (1962) Vol.I.

(50) This is the explanation offered by Elster, 1985.300!

(51) Cf also Jordan, 1967.307-310.

(52) Marx; Eleventh thesis on Feuerbach, theses on Feuerbach CW5. Quoted also in Althusser 1977.40.

(52a) Thus it is suggested; "As a philosophy . . . Marxism . . . like every macro-theory requires a micro-theory to work; but it does not focus attention on the details of such a theory. Bottomore 1985.228.

(53) Cf Lenin. Critical remarks on the National Question CW20.224-6 1960 Moscow; MEC 335-344 CW14 1960 Moscow, Althusser 1977.63-67 and Althusser 1976.68.

(54) Cf Bottomore, 1975. 36,40-41; Gareth Stedman Jones 70.NLR. 44-47. The extent of similarity between Lukacs and Korsch ideas is disclosed in (Korsch 1970. 91-92).

(54a) Thus "For Marx and Hegel the social system constitutes a whole . The mutual determination of function and structure becomes intelligible only from the point of view of the whole system Hook, 1971. 63". Cf also Marcuse, 1963. 313.

(54b) Cf *infra* Parts I and 3.A of Chapter II, and f.103a and the text above in this Chapter.

(55) Cf e.g. *infra* Part 3.A of Chapter II.

(55a) Cf *supra* the last sentence of footnote 34.

(56) In French Trans. of *Grundrisse* Dietzverlag 1953. Quoted in L. Althusser, *Reading Capital* English Translation NLB 1975 p.187.

(57) I shall always use this phrase - (or sometimes the phrase complex social relations) - to denote agglutination of different individuals or groups of individuals along the identical manner in which they relate to the means of production as distinguished from a simple social relation between two or more individuals vis-a-vis the means of production, in its isolation from other similar relations Cf *infra* Part 3.B.2.

(58) Marx 1857 Introduction pp.17-18 "Before distribution is distribution of the product, it is : (i) the distribution of the instruments of production; and (ii) what is a further definition of the same relationship, the distribution of the members of the society into the different kinds of production (subsumption of the individuals under determinate relations of production). The distribution of the products is obviously only the result of this distribution which is included within the production process itself and determines the articulation of production. It is obviously an empty abstraction to consider production while ignoring this production which is included in it. Production must start from a certain distribution of the means of production." Quoted in L. Althusser, *Reading Capital* p.175.

(59) 1979 Academic Press p.97.

(60) In interpretation of concrete historical situations the emphasis is of course shifted from these analyses of forms to analyses of substance. This means that the focus will then be on discerning the concrete phenomenal forms or modes of expression which economic relations assume and their empirical inter-relationship at various concrete levels of a concrete social totality.

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(61) In a period of transition (i.e. a period of beginning of a mode of production) for subsumption to be effected at the "societal" level, the use of external force (i.e. force external to economic relations) is always inevitable. Cf K. Marx, on the use of law and State power in the transition to Capitalism in, *Capital Volume (I)* pp.667-693 1983 Lawrence and Wishart.

(61a) Cf *supra* f.60 and the text above.

(62) For the definition of the "balance" of power and its distinction from an "equilibrium" of power Cf *infra* f.98 and the text above in Chapter II.

(63) It is the essence of economic relations as balance of power between people, derivative of factors external to people which make these relations "indispensable and independent of men's will" Marx *Preface* 1962 362-363.

(64) Marx *Preface* 362-63; Cohen 1978.30.

(65) "Value exists only in articles of utility, in objects: we leave out of consideration its purely symbolical representation by tokens. (Man himself, viewed as the impersonation of labour-power, is a natural object, a thing, although a living conscious thing, and labour is the manifestation of this power residing in him." . . . Marx *Capital I* 1983 p.196. Cf also Marx comment on Rossi *Ibid* pp.169-170. Cf also; Cohen, 1978, 42-45; Marx *Capital I* 1983. 535-536; Marx *Preface* where the productive forces are qualified as the "material productive forces *Ibid* p.362-363". For a different confused definition of the productive forces as "relations of production" Cf Balibar 1975.253.

(66) "The labour-process, resolved as above - (p.174) - into its simple elementary factors - (1. labour power; 2. the subject of that labour power; and 3. its instruments) - is a human action with a view to the

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production of use-values, appropriation of natural substances to human requirement; it is the necessary condition for effecting exchange of matter between man and nature; it is the everlasting nature-imposed condition of human existence, and therefore is independent of every social phase of that existence, or rather, is common to every such phase." Marx Capital I 1983 p.179.

(67) Cf *supra* f.14.

(67a) For the definition of "equilibrium" Cf *infra* f.98 and the text above in Chapter II.

(67b) Thus Marx states in the Preface (MESW I 1962. 362-63) that the economic structure of a society is constituted by its relations of production and naturally "correspond to a definite stage of development of the material productive forces". In Capital III 1962.772 Marx contends; "It is always the direct relation of the owners of the conditions of production to the direct producers - a relation always naturally corresponding to a definite stage in the development of the methods of labour and thereby its social productivity - which reveals the innermost secret the hidden basis of the entire social structure . . ." Cf also in Bottomore, 1985.42-43; "The economic structure is not conceived as a given set of institutions, productive units or material conditions; it is rather the sum total of production relations . . ." Cf also Marx Capital I, 1983.85-86 where the "mode of production" and the social relations corresponding to it are referred to as the economic structure. However this latter text is made with reference to the Preface above. The "mode of production" is also reductively used in this text to connote the material relations of production.

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(68) For views which agree with my interpretation Cf; G A Cohen, 1978.29, G V Plekhanov and Lenin in *Lenin's Philosophical Notebooks* CW38 1961.405-408; N Bukharin 1969.149; Gramsci, 1971.432; Bottomore, 1985.43. For views which differ and reply to them Cf Ibid Cohen, 1978 f.2 and the text above p.29.

(69a) Cf *supra* last sentence in f.34.

(69) Thus Acton, 1955.167 is right that the economic or material basis of society cannot be clearly conceived apart from the legal moral and political relationships of men. But the belief that Marx conviction is to the contrary of this is due to the confusion of the philosophical and scientific levels of analysis. This distinction is always essential for a consistent understanding of Marx ideas. Cf also Cohen 1978.234-235.

(70) Cf *supra* f.34.

(71) Cf; Bottomore, 1985.373; Clarke, 1980.73-74.

(72) Cf *supra* f.44a for the meaning of "levels of socialization". For further elaboration Cf *infra* fs.73, 77.

(72a) "Roles" designate the managerial and working functions which owners of the conditions of production and labourers, respectively, perform in the process of production; being always a reflection of the parties' relation to the means of production. Cf *infra* Part 3.A.

(73) Cf *supra* f.44a and *infra* f.77.

(74) Cf Poulantzas 1982.85-93.

(75) The basis for this hierarchical organization could be the extent of concretization in cases of structures and the level of communality in case of practices. Both Lenin and Plekhanov argued for a principle of "emergent evolution" indicating the materialization of phenomena and its passage from a lower to a higher state - Lenin MEC (1960) 261-2 PHN (1960) 97, 109, 221, 283, 360 Cf Jordan 1967.129-249.

(75a) *For the relevance of this discovery to the theme of the thesis Cf infra Part 3.*

(75b) *This means transcendence via critical examination of the empirical and phenomenal representations these forms possess and of their significance. This distinguishes it from an idealist transcendentalism which achieves its purpose by dehistorization of reality or destratification of science. Cf Bashkar, 1979; Bottomore, 1985.256.*

(75c) *Cf supra f.72a.*

(75d) *Thus Marcuse, 1963.315 emphasising the historical nature of Marxian dialectic writes; "The negativity and its negation are two different phases of the same historical process, straddled by man's historical action . . ."*

(76) *Gramsci, Prison Notebooks.208, 428; Lenin Collected Works 31, 226-227 quoted in Lukacs (1973) 141-142.*

(77) *Two important points to add here: (a) - levels of socialization referred to here comprise, in addition to the limited connotation they have, so far, been given, - (i.e. as structural hierarchical levels of existence of an economic relation e.g. individual level, economic-social level and the political social level) - among themselves an unmeasurable series of social phenomena (i.e. superstructural levels of socialization) whose effect is to solidify or direct the action of a unity at or towards a particular structural level, or to bridge the gap between structural levels of socialization. Furthermore not every change in the economic structure produced by development of the productive forces would produce a contradiction across all the levels of socialization. The disturbance of the balance of powers inherent in economic relations, as manifested by its effect, is not therefore always visible. The disturbance is visible only when contradiction resolves into action at high*

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structural levels of socialization e.g. the levels of economic social relations and political social relations; (b) the characterization of contradiction as one between relations of distribution is only an abstraction which while emphasising the most important contradiction, is not meant to underestimate contradictions at superstructural levels of socialization (cultural, ideological and ethical levels) nor to simplify the process of social evolution by presenting it as a phenomenon unproblematically reducible to economic conflict.

(78) This "overdetermination" is different from the Althusserians' "Overdetermination" in that it is subject to structural changes in the capitalist mode of production and also therefore to ideological and political class struggle instigated by these changes. The Althusserians' overdetermination is impervious to these structural changes and cannot also possibly be overcome by ideological or political class struggle - Cf *infra* f.86. The process of social evolution I describe under this part is also different from that formulated by N Bukharin, 1969.104-242. N Bukharin, argues that there are three types of contradiction: (a) an external contradiction between society and nature; and (b) an internal contradiction within society among different series of social phenomena and (c) a contradiction between the movement of the productive forces and the socio-economic structure of society. The fact is that the external and internal contradictions are two different stages in the process of social evolution and by no means two distinct contradictions or processes. Instead of basing a theory of historical materialism on the basis of the contradiction between the process of social evolution - (comprising both the external and internal contradictions) - and the determination of the superstructures in society, Bukharin endeavours to base it on the internal and external contradictions. His model of

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historical materialism in effect looks more like a model of sociology in which contradiction is conceived as inherent in the historical process and men and classes as actors whose predestination is the fulfillment of that contradiction. For other criticisms of Bukharin Cf Gramsci Prison Notebooks.419 and Lukacs, Political Writings 1973.135.

(79) Dobb identifies the genesis of industrial capitalists in a petty production which establishes itself solidly on the basis of feudal society, and, through increased productivity, escapes from feudal restrictions, arrives at its own disintegration and thereby creates the capitalist relationship. However, Kohachiro Takahashi - p.87 - rightly stresses the importance of explaining the development of the productive forces which historically made inevitable the bourgeois movement which abolished the traditional feudal production relations (i.e. explaining the development of industrial capital which necessitated bourgeois revolution) - Maurice Dobb *Studies in the Development of Capitalism*, 1972. K Takahashi in Rodney Hilton (edit) *The Transition from Feudalism to Capitalism* 1976 NLB p.68.

(79a) Cf *infra* f.84.

(80) Bettelheim; *La Construction du Socialisme . .*" *La Pensee* No.126 April 1966. Quoted in Poulantzas 1982.157-158.

(81) Cf *supra* f.19 and the text above.

(82) Cf *infra* Part 1.C. of Chapter II.

(83) "The revolutions of 1648 and 1789" - In *England and France* - ". . . did not represent the victory of a particular social class over the old political system . . . The victory of the bourgeoisie was at that time the victory of a new social order." Marx, *The Bourgeoisie and the Counter Revolution*, Marx, K and Engels, F (1972) *Articles from NRZ* p.183 Progress Publishers Moscow.

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- (84) The politico-economic structure of the new order, though an embryo of a potential social system, lacks the "social". It will eventually develop into a mature socio-economic order when, due to expanded reproduction within the new forms of economic relations, the political begins to respond to the mediation of the 'social' between itself and the economic. For this reason Marx sometimes, refers to the phase of primitive accumulation - (in which the bourgeois state exists, but, in economic-corporate primitivism) - as a prehistoric stage of the capitalist mode of production. Marx; Capital I p.668, 1983 Lawrence and Wishart.
- (85) "The retroaction of the State power upon economic development can be of three kinds: it can proceed in the same direction, and then things move more rapidly, it can move in the opposite direction in which case the State will go to pieces in the long run in every great people . . ." Engels, Letter to Conrad Schmidt, 27.10.1890, MESC 399-402 1934 Moscow.
- (86) Poulantzas - (Nicos Poulantzas; political power and social classes Verso 1982) - proposes a theory of a capitalist State which, from its inception, is relatively autonomous. He attributes this intrinsic autonomy to the combination of elements peculiar to the CMP. The separation of the direct producers from the means of production characteristic of the CMP determines, in his view, the specific autonomy of the political and the economic in this mode as opposed to the union of direct producers with means of production, characteristic of non capitalist modes of production, which presupposed political relations of domination and servitude (pp.29-33). On the basis of this he conceives the political as the global role of the State (p.51) through which it keeps the dominated classes in their economic isolation - (i.e. through mystification of economic inequality by the juridical equality underlining

the political (pp.188-191). How does he reconcile this interpretation with determination by the economic structure? Poulantzas interpolates that the economic is determinant in the last instance which in his model takes the form of the political. The obvious theoretical flaw in Poulantzas' work is that by conceiving determination by the economic structure, not as an ever-continuous dialectic between the material and social substance of a production epoch, but, as something that took place at the beginning of the CMP - (Cf supra fs.29-30 and the text above) he reduces determination by the economic to a travesty. The disastrous outcome of this erroneous formulation is that the incessant process of production and reproduction of material life and its social consequences across different stages of development of the productive forces is looked upon as over-determined by a global political architected by analytical deduction from the combination of elements peculiar to the CMP.

Relative autonomy of the State vis-a-vis the field of class struggle is looked upon as a reflection of this structural or analytical autonomy of the political. Class struggle is, in effect, bound to be the prisoner of these structures (pp.256-257). The theory of relative autonomy of the State becomes with Poulantzas a theory of absolute autonomy of the political. What is more, because the economic is, for all practical purposes, absent, the political becomes also the overdeterminant instance. We end up with a static model of the State and the CMP and a reversed dialectic in which the political determines the course of material development. Poulantzas does all this on the basis of a philosophy that promotes ideology to the rank of science attributing to it an independent historical existence while relegating the process of production of material life to an ideology. Poulantzas does

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not spell out these convictions but they are implied throughout his analysis. Look for example at his basic assumption that the juridical autonomy of the political mystifies economic inequality. With Poulantzas mystification is, not simply an ideological constraint whose effectiveness is subject to underlying and everchanging material conditions of existence but an absolute overdetermination of people's ability to know that inequality or to fight it. Hence his denial that ideological dominance can be overcome (p.204-206). He nevertheless is ready to argue that revolutionary change is possible (i.e. even from a position of ideological subordination). This seems to contradict a basic principle that knowledge of the sensuous consciousness of the conditions for change (i.e. overcome, of ideology or mystification) is the first step towards action for change. Even Hegel would not accept the oblivion of such a principle let alone Marx (Cf Hegel, *phenomenology of mind* in: *The Philosophy of History*, New York Dover (1956).

Poulantzas' thesis of the "dominant juridico-political" is identifiable with Althusser's early theory of ideology. Denouncing that position Althusser later writes "I saw ideology as the universal element of historical existence: and I did not at that time go any further . . . The absence of contradiction was taking its toll: The question of the class struggle in ideology did not appear. Through the gap created by this "theory" of ideology slipped theoreticism . . . And so on" Althusser 1976.141. Notwithstandingly Poulantzas position on this issue remained unrevised. To reach the conclusion that the political is autonomous Poulantzas this time following Balibar, places much emphasis on the following text; "In all forms in which the direct labourer remains the possessor of the means of production and labour conditions necessary for

his own means of subsistence the property relationship must simultaneously appear as a direct relationship of lordship and servitude . . ." - Marx Capital Volume III p.771 1962. Marx is emphasising that there is nothing inherent in the system of distribution of the means of production, in these forms, to explain the social relations of dependence and that they must therefore be extra economic or external to the material relations of production. Balibar (Ibid pp.220-224) and Poulantzas - (Political power and social classes Ibid pp.29-33) conclude from this that because the capitalist owns and possesses the means and objects of production - (the implication is that the worker, by operation of economic necessity, is left with no choice but to sell his labour power) - economic conditions in the CMP by themselves perpetuate the process of production without the need for importation of extra economic pressures. This to them implies autonomy of the economic instance. Autonomy of the economic in turn implies autonomy of the political. This interpretation overlooks the following: a) The point is not that the extra economic political of the pre-capitalist forms continued to exist and gained autonomy as a result of the autonomy which the economic has acquired under the CMP, but that the transition to capitalism featured the termination of the extra economic political and the beginning of a political personified by the domination of the conditions of production over the producers-Marx in Pashukanis selected writings 1980 p.95; b) the writers' occupation with analytical theory lead them into ignoring the historical process through which the capitalist mode of production became consolidated and the implication of that on their theory of autonomy of the political. Cf Marx; Capital I p.669.

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(87) Examples of wage-fixing and compulsory labour legislation could be the Statutes of Labourers (23 Edw.III (1349) cc.1-8; 25 Edw.III (1350) St.1, 34 Edw.III (1360) cc.9-11) - In England and the Ordinance of King John 1350 in France. In respect of the former their chief features were (1) the fixing of wages; (2) compulsion of the landless to work; (3) annexation of the Law of Master and Servant to the Criminal Law. Jenks, 1912.321. The first of these statutes (i.e. 23 Edward III 1349) "found its immediate pretext (not its cause . . .) in the great plague . . ." Marx Capital I 1983.258. Cf also Macfarlane 1978.150-151). In respect of other uses of the law referred to in the text Cf Marx Capital I 1983.686-693, 252-286.

(88) According to Marx this era begins, in the history of English working class, from around 1800 (Marx Capital I p.264). But, Cf infra Part 3.B.3 as a complementary to the discussion in this part.

(89) Marx consider this socialization and the legislative changes it prompted in England as a product of the conversion of the manufacturing system into the factory system Marx; Capital I 1983 pp.448-451, 282).

(90) We can legitimately assume that representatives of a class are the ones who know better than anyone else the sub-system of distribution best favourable to the interest of their class. The first task facing a class desirous of promoting its own conception of the sub-system of distribution would then be the seeking of access to the institutions of the State (i.e. Education institutions, the media, institutions of the Centralized State) and it is here that material might (wealth) asserts its supremacy. Cf pp.196-236, in Ralph Miliband, the State in Capitalist Society Quartet Books 1983.

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(91) The autonomy of these organs means their apparent immunity from control, for service of divisional interest, by anyone single class. Two more points need to be added here: (a) because some of these organs or some of their constituent institutions have existed even before the extension of the franchise to the majority of the population the interrelation of the judiciary the executive and legislative organs may not always possess the effectiveness of making each one of them autonomous; (b) while class struggle within the ideological forms of Capitalist Society can affect the manner in which these organs are interrelated and to that extent secure their structural autonomy, it cannot however by itself neutralize the class affiliation of the potential occupants of these organs. In this respect Miliband - (Ralph Miliband, 1983) investigation of the social backgrounds of the members of the State apparatus far from being a substitution of an effect of dominance for the cause of dominance (i.e. which is, dominance of the capitalist system of distribution of the means of production), as Poulantzas sees it (Poulantzas, *The Problem of the Capitalist State* NLR No.58.73), is rather a further investigation of that dominance at a specific empirical level of socialization and of its implication for the neutrality of "the political system". These two factors may compound to lead an organ into producing an image irreconcilable with its supposed autonomy. See for example in case of the judiciary in GB; (Griffith, 1981.61-85, 209-242); (Clark and Wedderburn, 1983.166-173); (Wedderburn 1971, 304-387) and the decisions in *Osborne -v- ASRS* 1911.1 Ch.540; *Quinn -v- Leathem* 1901 AC 495; *Taffvale -v- ASRS* 1901 AC 426.

(92) Cf John Austin "the province of jurisprudence determined". *Lecture I* pp.1-25 2nd edit 1861 John Murray. Thomas Hobbs *Dialogue* 1971 UJniversity of Chicago Press. Hans Kelsen "Pure Theory of Law"

University of California Press 1967 pp.1-58.

(93) Friedrich Carl von Savigny; "System des heutigen romischen Rechts Berlin edition 1840". System of Modern Roman Law English translation by W Holloway 1867. G F Puchta cursus der institutionen. Leipzig 1841.

(94) Earlier writers supported their idealist empiricism of "society" by theories which see its evolution as determined by the natural laws governing the working of the Universe (as implied by the writings of the economists of laissez faire; Adam Smith Malthus and Ricardo) or the Laws of biological evolution (Herbert Spencer) - (J W Burrow Evolution and Society 1970.223); (Lloyd, 1985.551).

(95) In Ehrlich's own words: "Justice is a power wielded on the minds of men by society . . . 1936.203". In the illustrations he offers Ehrlich (198-203) implies a society which is external to its atomistic individuals. Yet he offers no "realistic" basis for this externality (i.e. it is simply a reification of society). Furthermore it is this "unrealistic" duality of individuals/society which blurs the fact that this "power wielded on the minds of men . . ." might in fact be a derivative of the power of a certain class of men within "society".

(96) The sociological method of "jurisprudence" finds its best utilization at the hands of Roscoe Pound. This, however, is more than just a coincidence. Pound's realistic approach of abandoning the use of the sociological method in the search for the truth of law (what it is and how it relates to economic social and political power or what Pound refers to as "claims to self assertion") and confining its application to furthering the effectiveness of a pre-given system of law "under the standards of the given civilization", provided the soil for the empirical potential of sociology to materialize - (Roscoe Pound Philosophy of Law

(Revised edit) 1954). In the science of society, the true and the concrete real do not necessarily coincide. To take either of them for the other is to idealise the essence of the subject (i.e. society) and thus prevent knowledge of its truth. To take the concrete real for what it is - as Pound does - is a rational choice because, it avoids confusing the findings of the empirical method with the findings of general theory (i.e. philosophy) and thereby trim the sociological method (which is an empirical method) to its real size Cf A Gramsci Prison Notebooks Ibid pp.425-432.

(97) Pashukanis: *Selected Writings on Marxism and Law*, Piers Beirne and Robert Sharlet (Ed) 1980 Academic Press.

(98) "Commodity-exchange" is itself an ideological form of capitalist relations. Pashukanis knows this very well, but, instead of transcending this ideological appearance of relations to their realistic essence he bases his theory of law on the ideological appearance thus transforming the latter into an idealist essence. To explain this I give the following example: The relation of A (an employee in a food processing factory) to B (owner of the factory) although might, due to market circulation, appear as one of commodity-exchange is in fact not so, because the commodity which A tender (e.g. 7 hours of A'S labour) to B, is exchanged for foodstuff which took - e.g. 5 hours of A'S labour to produce. This is not "essentially" a commodity exchange relationship. A has simply been dispossessed of 2 hours' worth of his labour-power. The fact that A in the example is paid in kind is insignificant since this is the ultimate essential result if instead of taking a single capitalist and a single labourer we take the class of the capitalists and the class of the labourers as a whole (Marx, *Capital I* 1983.533). The law worth examination is not the law directly implied by commodity exchange on

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the market, but the law that keeps A subjected to B and thereby makes possible the commodity exchange epiphenomenon.

(99) John Holloway and Sol Picciotto (1978) 18-19, Isaac D Balbus.11 Law and Society Winter 1977.572.

(100) Pashukanis does not observe the qualitative difference between capitalist production and commodity production. He often speaks of the former as an enormous accumulation of the latter (Ibid p.62) or of Capitalist Society as one of commodity owners (Ibid p.75). Capitalist production differs from commodity production in that with the former the property laws of commodity production changes into laws of capitalist appropriation Marx Capital I 1983 p.550-51.

(101) Pashukanis is ready to argue that Human history of which law is only an ideological form is a product of this evolution (i.e. historical development of matter). However the interpretation which he places on this development is one of extreme "economism". Pashukanis presents the "commodity-exchange" phenomenon as possessing its own extra-social motor of motion, and living social relations as subordinate to this hypostatized power.

(102) Pashukanis concludes from this that, because of the primacy of relations in kind, legal forms were extremely underdeveloped in Medieval Europe (Ibid p.44) - the implication being that primacy of relations in kind would not permit a rational interpretation of authority. Cf Pashukanis reply to Stuchka Ibid p.195. On another page (Ibid p.90) Pashukanis approvingly quotes Marx as saying: "Club law is nevertheless law". To reconcile this with the main theme of his analysis (i.e. the legal as rational interpretation of authority) he introduces, for the first time in the text, a distinction between law and the legal order giving the indication that the latter is the rational final result of development of

the former.

(103) There is an unbridgeable gap between Pashukanis subjective political commitment (grasped from the utterances he makes reminding his reader of his acceptance of Marxist mainstream) and the theoretical discourse of his work. In a bid to bridge it he grafted a class function on top of his rational state. He classified those areas of public law and state functions which do not fit his image of the legal order as belonging to its class function, and, the other functions which do fit, together with his commodity exchange laws as belonging to the rational state (i.e. the State) (Ibid pp.59, 73, 92-93). Pashukanis analysis does not show where this class function derives from. Moreover he introduces a duality which obscures rather than explains the idea of the State and Law.

(103a) Cf Sumner, 1979.273.

(104) If the State and public law (e.g. labour law) are determined by economic relations so too of course is private law which indeed in essence only sanctions the existing economic relations between individuals which are normal in the given circumstances. Engels; *Ludwig Feuerbach and The End of Classical German Philosophy* MESW (3) III 370-72 1970 Moscow.

(105) A relation of the ancient commune to the earth is in this respect one of property relation as against other communes or tribes, but the relations of each of its constituent members to the earth and to the commune are organic or metabolical relations (Marx; *Grundrisse*. Ibid).

(106) The analysis in this paragraph does not suggest that men had, historically, settled individually and only later formed communities. Such a suggestion would be against the weight of obtainable evidence - (Cf Marx; *Pre-Capitalist Economic Formations* pp.139-148 1964 Lawrence and Wishart). The analysis here relates, rather, to development taking

place within a secondary - (as opposed to primitive or communal) social formation (Marx, *Ibid* p.145). On an attempt at visualizing transition from a communal formation to a class formation Cf S Amin; *Unequal Development*, English Translation, 1976 Monthly Review.

(107) Thus in case we have e.g. a set of relations in each of which (L) owns the land and the means of labour and (S) possesses them, and, another set of relations in which (C) owns and possesses the land and the means of labour and (W) owns only his labour power; all existing side by side in the same geographical locality, complex social relations appear when, due e.g. to competition over land, Bs unite together and, with the help of their subordinates (Ws), oust (Ls).

(108) A class exists when association of either of the poles of an economic relation with other poles, of other economic relations, corresponding to itself in their relation to the means of production has been completed at the "highest level of socialization". This completion signifies the existence of a class as an organized social force (i.e. a structure). This does not mean that there is no class struggle prior to this status. Every social practice by a fraction of a class undertaken with a view of realizing that existence is, theoretically speaking, a class struggle. There is class struggle even in the case of complete negation, by one class, of the structural existence of another. There is class struggle wherever there are opposed interests, which consists of these opposed interests in their unity, no matter how embryonic the social organizations representing these interests. On the distinction between structures and practices, Cf Poulantzas; *political power and social classes* *Ibid* pp.85-98.

(109) The use of stage of development of the productive forces as an indexation of development of the substance of law must not be understood as meaning that every instance of development of the productive forces over a period of time would necessarily produce an amendment of the law over that period of time. Development of material productive forces affects law only through its effect on class struggle. Law as an index of a balance of power can only be changed by a disturbance of that balance of power through class struggle at different levels of socialization. More importantly, class struggle should not be reduced to the contradiction between workers and capitalists. While this is the most important potential contradiction, it is only at an advanced stage that class struggle in capitalist society becomes so polarized. The definite stages of class struggle which indexed the development of the substance of law during the secondary and the first decades of the contemporary forms of exchange between capital and labour comprised in addition to the contradiction between capital and labour a multiplicity of contradictions within the capitalist classes between the manufacturers and industrialists and between the capitalist class and the landowners - (as specific examples Cf the division within the capitalist class which accompanied the enactment of the Factory Act of 1833 in England, in Marx; Capital (I) p.265-286). K Wedderburn (the worker and the Law 1971 Penguin p.239) has also noticed that it would be wrong to assume that the "protective statutes" developed in any smooth or logical progression. Rather they were the historic product of a swaying struggle between reformers workers unions and factory inspectors.

(110) DN Pritt, *Employers, workers and trade unions*, 1970 Lawrence and Wishart p.15. Cf also Neville Kirk 1985 xi where it is suggested that the onset of Mid-Victorian stability and reformism is inter alia attributed to emergence of a re-established and dynamic capitalism which greatly enhanced the scope for class manoeuvre.

(111) This was done in 1871-75 and featured the following legislation; Trade Union Act 1871, Criminal Law Amendment Act 1871, Employers and Workmen Act 1875 and the Conspiracy and Protection of Property Act 1875.

(111a) But see how this policy of voluntarism was partly replaced in 1971 and has now been "ruptured" and largely replaced by a new policy of restriction in (Wedderburn, 1983(a).499-507); and Wedderburn, 1985.36-49).

(112) Cf C Sumner, 1979.52.

(113) David M Trubek, 1984.582.

(114) Cf Melvyn Dubofsky (1981) Criticism of K E Klare (1981) and Staughton Lynd (1981) in *Industrial Relations Law Journal* Vol.4:496.p.498.

(115) Cf Beirne 1977, Thompson 1977, Quinney 1974, and the comments in Sumner 1979.253-256.

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(SOCIETY THE STATE AND LAW IN UNDERDEVELOPED SOCIAL FORMATIONS)

(1) Among critics of dualism Laclau (Laclau 1971) was the first to counterpose that commercialization although penetrates into remote peasant zones does not transform pre-capitalist relations. For scholars who consider urban centres as "Capitalist", Laclau has thus inspired espousal of a new dualism - (one which exists in spite of commercialization. For Laclau himself there is no such dualism because of his readiness to assert non-capitalism of the entire social formation - see *infra* Part 1.B.

(2) Henceforward the phrase "non-capitalist", if unqualifiedly used, shall mean "non-fully-capitalist" - (i.e. relations so described shall differ only in forms of organization from capitalist relations. Hence I see this as a difference of degree.

(2a) Cf *infra* f.10.

(2b) Paradoxically, the possibility of transition seems to depend on the ability of pre-capitalist economic relations to reproduce and expand their forms of organizations. Dobb (1976) holds a similar view - see *supra* f.79 in Chapter I.

(3) This is true for two reasons: (1) unequal exchange - (i.e. in the labour - cost of commodities exchanged between the two sectors) - and (2) monopoly of price determination by the Capitalist sector.

(4) This is so because of legal restriction on ownership of land imposed to give priority to the State central economic and social planning - (Cf Land Settlement and Registration Act 1925, and, Land Acquisition Act 1930) - and also because of lack of resources for purchase of capital goods necessary for expansion.

(5) Improvement of infant mortality, and population growth do not by themselves - (i.e. in absence of causes mentioned under fs.3-4) explain why rural zones fail to accommodate their own population.

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- (6) *Kursany (1983) b.*
- (6a) *Cf infra Part 1.B.*
- (7) *See supra Part 2.B.3 in Chapter I.*
- (8) *Cf Snyder 1981.296 where transition is described within a theoretical framework that does not always imply the virtual displacement or inevitable destruction of all previous economic or legal forms as is sometimes suggested - e.g. Wolpe 1980.1-3.*
- (9) *Cf supra fs.44a, 75, 77 in Chapter I.*
- (10) *I use this phrase - (without implying any inevitability of transition) - to describe a level of a non-capitalist economic relation which is taxonomically non-capitalist as opposed to the sum total of the relation which - (because of its inclusion of this and other capitalist or "non-capitalist" levels) - is non-capitalist in the sense previously defined supra f.2.*
- (11) *Cf supra f.3.*
- (11a) *Cf infra f.64 and text above.*
- (12) *In the balance of the Chapter and throughout the thesis I ascribe a particularly dominant role for descendent political control enabling it to influence economic social and cultural changes.*
- (13) *Accounting for more than 83% of the population in Sudan in 1973 (ILO.Sudan.1976).*
- (14) *For the case of the Sudan Cf Hussein 1983 Chapters I-II.*
- (15) *i.e. A class structure that consists of different classes of one and the same mode of production Cf infra f.41 and the text above.*
- (16) *Even when they focus on the internal class structure underdevelopment theorists continue denying it any specificity - (i.e. do not recognize that that class structure possesses its own internal motion which is alone responsible for its continuity). It is either a class structure defined by dependence (Dos*

Santos 1978 p.79) or determined by dependence (Frank p.1). Amin (1976) does not attribute any significance to internal class structures. Cf *infra* fs.59-64 and the text above.

(16a) Consequential upon this is also my agreement that the social and ideological appearance - or "forms of exploitation" - which a "form of economic relations" at enterprise level assume is not by itself enough for determining the specificity - (i.e. whether capitalist, feudalist or otherwise) - of "the form of economic relations" . . . Cf *infra* f.65 and the text above.

(16b) Cf *supra* Parts 3-3b in Chapter I.

(17) Banaji's analysis would have been more intelligible, but still sweepingly general, if its scope had been limited to the concrete situation of the Third World. For in that case he may, like the "underdevelopment" theorists, be able to claim that these laws of motion are determined by a World Capitalist System. Cf Peter Fitzpatrick; Law plurality and underdevelopment in D Sugarman (edit) *Legality Ideology and The State* 1983 Academic Press p.165.

(18) There is considerable body of Third World literature on the issue of categorization (i.e. as Capitalist or otherwise) of the economies of that part of the World. In addition to "underdevelopment" literature, which is reviewed next, there is modes of production approach which treats the issue as part of a conviction in a theory of exclusiveness, co-existence or articulation of modes of production. This is to be found in the works of Pierre-Philippe Rey 1973, Meillassoux 1972, Bradby 1975, Banaji 1977, Aidan-Foster Carter 1978, and Laclau 1971. However the mechanism through which capitalism preserves or excludes antecedent modes of production is not clear from these works. There is a considerable neglect of class structure and class movement as a motor of preservation or exclusion depending on the historical specificity of the class structure under consideration. Poulantzas (1974) points to class struggle as the

basis for conservation or dissolution of antecedent modes (p.148). Amin (1976 p.77) touches on the issue when he suggests that capitalist accumulation is exclusive of other modes of production if it is "autocentric" but does not go beyond his economic structures to answering the question of why that is the case. Banaji (1972) and Alavi (1975) provide attempts at relating the questions of dominance of the capitalist mode of production and that of transition to the specificity of the class structure created by imposition of capitalism from without. Banaji's earlier remarks on the issue (Banaji 1972 pp.2498, 2502) are completely absent in and, in effect obscured by his subsequent works (Banaji 1977, 1983). This leaves only Alavi as consistent defender of a theory of a post colonial indigenous class structure. Because of its relevance to the theme of my analysis Alavi's view will be dealt with later in detail.

(19) Peter Lloyd, *a Third World proletariat?* 1982 George Allen and Unwin. Giovanni Arrighi and John S Saul *Essays on the Political Economy of Africa* Monthly Review Press 1973. L S Senghor *Nationhood and The African Road to Socialism* Presence Africaine 1962 p.129. Frantz Fanon "The Wretched of the Earth" *OP.Cit* pp.122-126.

(20) G Arrighi and J S Saul *Ibid* pp.105-152.

(21) A G Frank *Lumpenbourgeoisie lumpendevelopment* (1972) Monthly Review Press.

(22) Cf Hussein (1983), pp.40-48, 67-74.

(23) Cf Nicos Poulantzas (1982) *OP.Cit*.pp.104-110.

(24) A class is both an economic - (i.e. a relation to the economic structure; an economic position) - and a political (i.e. organizational) existence. Between these two levels of existence lies, in case of European classes, a history of struggle and industrial and social revolutions which shaped European classes in their historical specificity - (i.e. with a distinct cultural heritage and identity) -

(Lloyd 1982). The appearance of class organizations in under-developed social formations was contemporaneous with the appearance of "classes" as economic categories. This contemporaneity of "class consciousness" with the emergence of the economic category is due to the role which the State Law and external influences have been playing in the creation of class organizations and class consciousness.

(25) Alavi.1975 and Banaji 1972.

(26) S Amin (1976) *Opcit.*

(27) A G Frank (1972) *Opcit.*Page I. Dos Santos (1978) *Opcit.*p.57.

(28) Amin 1976 pp.198-206.

(29) This may not of course be the subjective belief of "under-development" theorists. However it is the conclusion destined by the logical discourse of their argument.

(30) Amin 1976.pp.198-206.

(31) Cf *supra* Part 2.B.1 in Chapter I. Cf *infra* fs.59-61 and the text above.

(32) Cf *supra* f.18.

(33) Cf e.g. *infra* Part 3.B. and *supra* f.96 and text above in Chapter I.

(34) Cf *supra* f.18.

(35) Cf (M Glucksmann, 1974.139), (K Popper 1960.26-34, 102), (Heller, 1984.165-168), Althusser, 1970.184, and Marx Capital I Part III Chapter II, Value price and profit Part VI. Capital III Chapter 48.

(36) Cf also Hindess and Hirst (1975.15, 263) (1977.1-57) Cutler et al (1977), Banaji (1977), *supra* Part 2.B.3 in Chapter I, *infra* f.63, and (Lock, introduction, 1976.14).

(37) Cf *supra* Part 2.B.3. in Chapter I.

- (38) *"In Hegel's Philosophy of Right Civil Society includes economic relations - and it is in this sense that the term is used by Marx for example in the Jewish Question . . . Gramsci 1971.208. "Production relations logically expressed comprise what Marx following Hegel called civil society Pashukanis 1971.66.*
- (39) *Cf supra the conclusion to Chapter I.*
- (40) *This diagnosis is undertaken and a similar finding is reached infra Part 2. Cf also supra Part 1.B.*
- (41) *I use this word to indicate that "non-capitalist" as defined earlier (f.2 and text on p.2) is still an umbrella description covering various types of "non-capitalist" economic relations (e.g. feudal, petty commodity production slavery . . .).*
- (42) *Superficial political participation by classes of the non-capitalist periphery within the social formation is of course possible e.g. by exercise of the franchise under a parliamentary regime. But, at least in case of the Sudan, this is not an effective participation. This is because (a) extension of the franchise to classes of the non-capitalist periphery may only, be effected by a class or classes of the "Capitalist Society", and last as long as it is in congruence with interests of the latter classes. Otherwise the latter may terminate that right through military coups or general strikes; (b) although the political party(ies) representing classes of the non-capitalist periphery may hold a majority of seats in parliament there is nothing they can do to stop the Military from taking over or the trade unions from destabilizing and eventually over-throwing the political system. The Army which is the only guardian of political authority and itself a faction of the "State-bureaucracy" - Cf infra f.45 has much in common with modernizing political elements (Halpern 1963) than with traditional political commitment often prevalent in the non-capitalist*

periphery.

(43) Cf *supra* Part 1.B.

(44) See *supra* and the text above fs.39-40.

(45) The bureaucracy or the bureaucratic apparatus is used throughout the text to mean the specific system of organization and internal functioning of the State apparatus (bureaucratism). I use the term State apparatus in a wider scope to include the entire organization of production in the public sector. In this sense almost the whole "capitalist society" may be construed as a hierarchical organization of production with its base stratum made of manual and non-manual workers in public employment - (constituting more than 60% of the workforce in Sudan) and its top stratum made of the heights of the bureaucracy. The "heights of the bureaucracy" signifies the social category of executives in the different divisions of labour that make up the State apparatus. But we may note that the heights of the bureaucracy is not only the sum total of top positions or their occupants in each of a number of otherwise qualitatively equal divisions of labour or professions. The manner in which different professions or divisions of labour are arranged is itself 'reflective of a hierarchical organization.

(46) Cf *supra* f.42 and the text above.

(47) Although this dominance was due to expertise the fact that there was no "proper" classes - (i.e. no criterion, for stratification of statuses, other than expertise) made "possession" of expertise a temporal class position - Cf *infra* f.66b.

(48) "Classes" necessarily means social categories defined by their relation to the economic structure - (this is so in Marxist theory). See Poulantzas, 1982.

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(49) As relations of power - Cf supra Part 2.B.1.a in Chapter I - capitalist relations of production do not depend for their "expansion" on the success - (i.e. the achieved general social utility) - of economic undertakings. Even when they proletarianize peasant communities and increase inequalities such undertakings expand capitalist relations of production.

(50) Pre-colonial society in the Sudan was a closed traditional one based on a subsistence rural economy. The advent of Islam did not change matters in this respect. Indeed, during the period beginning with the Fung Kingdom and up to the eve of the Turkiyya Islam enhanced the powers of the tribal leaders through the introduction of a theory of obligation based on religion (ILO Sudan 1976).

(51) Political development since independence in Sudan is illustrative of the forms of alliances that are structurally possible in the context of an underdeveloped social formation. The Parliamentary era represents, in effect, a form of alliance in which a heights of the bureaucracy (i.e. Leadership cadre of the traditional parties which, in addition to a spiritual leader, consisted of professional elites) and a small capitalist class sought augmentation of their constitutional power through fostering an alliance with agents of the pre-capitalist periphery. The 1969-1971 Military era represents an alliance between a heights of the bureaucracy and the lower strata of the bureaucracy made possible by the adoption, as political programme, of policies promoted by the urban working class (In Hussein 1983). The 1971-1985 military era represents an alliance between a heights of the bureaucratic apparatus and a capitalist class. We may note, that, on occasion the working force remained outside the alliance the state system was defective i.e. either was too fragile because of its dependence on the support of agents of a pre-capitalist periphery in case of parliamentarianism or too coercive and rigid because of its elitism and superficiality - i.e. not only exclusive of participation by the working class

but also inherently incapable of enabling participation by agents of a pre-capitalist periphery in case of military dictatorship. On developments since independence in Ghana Cf (Damachi 1974). For a comparison with other African States Cf (Davies 1966). Sudanese experience could also support a thesis that the prevalence, at any given time in the history of a particular social formation, of one form of alliance or another is to a great extent influenced by - inter alia - the extent of destruction of pre-capitalist economy and proletarianization of peasant communities. This is a major factor because it affects rural urban migration and thereby intensifies contradiction among classes of the capitalist society through its effect on employment opportunities wages and conditions of employment and the social conditions of the urban population in general.

(52) Cf infra f.55 and, supra subtitle 2.A.

(53) Cf supra f.42 and the text above.

(54) The credit goes to Alavi (Alavi 1972) for introducing an idea of overdevelopment in the analyses of the State in post-colonial societies. However I borrow the appellation to describe a state apparatus whose 'superiority is due to its nature as a level of existence of economic relations (i.e. capitalist economic relations) which are historically superior to other economic relations in the social formation. This "overdevelopment", therefore, affects class struggle and the class structure (i.e. because these are, in the final analysis, limited by their specific underlying economic relations) and, is, in turn reproduced by them.

(55) State bureaucracy in underdeveloped social formation may be considered as a level of a sub-system of distribution (i.e. of roles in production and shares of the product) which was set by the metropolitan states to fit a system of distribution of the means of production they had imposed on the colony.

Despite the frequent changes to which the system of distribution of the means of production has from time to time in the post independence era (e.g. through nationalization, de-nationalization, socialization) been subjected, the bureaucratic apparatus, as a level of a sub-system of distribution has retained its main characteristics. As a moulding pre-existing level of a sub-system of distribution bureaucratic organization may impose constraints on the potential of a change of the system of distribution of the means of production. The bureaucratized socio-technical division of labour is thus at the heart of Capitalist exploitation and may, even in a supposedly socialist economy, operate to generate a new bourgeoisie - Cf Lock, introduction 1976. 9-22.

(56) Concluding from an analyses of the Sudanese situation, Kursany (Kursany 1983) wrote: "The absence of both political and economic democracy in "under-developed capitalist countries" is largely responsible for the parasitic capitalist class which depends on the bureaucratic apparatus of the State for its very existence as well as for increasing its income and rate of capital accumulation". With due respect, although there is a parasitic capitalist class which depends on the bureaucratic apparatus, it is in the first place the dominance of a state apparatus which makes that parasitism possible, and, in the second place, decree the absence of political and economic democracy, and not the vice-versa. The fact that a system of liberal democracy - (which Kursany sees as the solution Ibid.p.122) - had twice been imposed but failed to stop the military from taking over or the State apparatus from being infested with "parasitic capitalists" (Cf Mahmoud 1983 p.113) suggest that absence of political and economic democracy is a mere phenomenon.

(57) Cf infra f.63 and the text above.

(58) Cf *supra* fs.25-30 and text above. For additional empirical data sources Cf (Mehmet 1978) Adelman and Morris 1973), (ILO 1973) and (Chenery et al 1974).

(59) Thus A G Frank (1972.1) defines underdevelopment as "product of bourgeois policy formulated in response to class interests and class structure which are in turn determined by dependence! See also Dos Santos 1978 f.69 p.79.

(60) Cf Limqueco and McFarlane et al (1983).

(61) Consequential upon this is my disagreement with the thesis that dependence is eternal. This is a view theorists of underdevelopment hold - (Amin 1976.351-364) (Dos Santos 1978 f.69 p.79) and Frank 197 1967 (1969) - because of their attribution of dependence to factors external to the underdeveloped social formation.

(62) This is possible because of the role, heights of the bureaucracy play in preponderating these interests Cf *supra* pp.35, and *infra* f.67 and the text above.

(63) I believe that unless it is shown to be based on movement engendered by class struggle within that mode, the view of a mode of production as a living organism which can "dissolve" "articulate with" or "dominate" other modes becomes a symptom of a simplistically economistic approach - (Cf *supra* Part 2.B.3 in Chapter I, and, Lock, introduction 1976.14) - and a fictitious anthropomorphism. See *supra* f.18.

(64) i.e. Subjected to Capitalist exploitation whilst lacking the forms of organization essential for enabling them to negotiate the terms of that subjection. Explanation of the persistence of pre-capitalist forms of organization on grounds of resiliency of pre-capitalist modes of production (Rey 1973) is naive, because it assumes that this persistence is self-imposed whilst

the truth is that it is an intensification of existing backward forms of exploitation brought upon rural communities by operation of forces - (classes within the "Capitalist Society") - external to them - see (Banaji, 1972.2499 and f.11) and (Banaji, 1977-8).

(65) For further discussion of this and of the theoretical plurality of social forms Cf *infra* fs.82-91 and the text above.

(66) Many articles are written and different views scattered here and there are expressed on the subject of the State in post-colonial societies - (Cf in particular: Pompermayer and Smith 1973, O'Brien 1976, Leys 1975, 1976, Longdon 1977, Evans 1979, Ziemann and Lanzendorfer 1977, Saul 1974. The approaches adopted range from underdevelopment and dependency theories to bureaucracy, overdevelopment and class analysis - (reviewed in Snyder 1980). Despite the different approaches adopted relative autonomy of the State in post-colonial societies is seen as the booty which the many contributors share out among themselves - see Roxborough 1979 p.119 where the general acceptance of a theory of relative autonomy is reiterated. (A) The analyses of those who took underdevelopment or dependency theory is to a great extent tainted with the economism of that paradigm. From this perspective Evers theory (Evers 1975) is an example of the fantasies social science will end at if "dependency" and "underdevelopment" presuppositions are to be the ultimate terms of reference . . . Cf Ziemann and Lanzendorfer *Ibid* p.160. Ziemann and Lanzendorfer provide an extended enumeration of characteristics of the peripheral state but unfortunately floating without an organizing theoretical theme. This is so because they approved - (in agreement with Evers; in Ziemann and Lanzendorfer *Ibid* footnote 112) ruling out the relevance of the internal class structure and preferred to extrapolating - (as all theorists of the Dependent State do) instead from changes in a supposedly international

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economic base to social changes in the periphery.

(B) My conclusion regarding the group whose organizing theme is bureaucracy - (Fanon 1967, Meillassoux 1970, Mamdani 1975, Shivji 1976, Seidmann 1978) is that the bureaucracy cannot be conceived of as a ruling class or an effective class except when this status is awarded on the basis of an economic position the "heights" of the bureaucracy are shown to occupy, and, on the understanding that the heights of the bureaucracy rules from this position not as a bureaucracy but as a class i.e. their power derives, not from a relation to the non-economic bureaucratized structure, but, from the economic position which their occupation of a bureaucratic function, in a class structure peculiar to underdeveloped social formations, enables them to enjoy. See also *infra* f.51.

(67) These are: (a) the State in post-colonial societies is not the instrument of a single class. "None of the three propertied classes dominates the State apparatus or subordinate the other two Alavi Ibid pp.71, 62; (b) once the controlling hand of the metropolitan bourgeoisie is lifted at the moment of independence no single class has exclusive command over the bureaucratic-military oligarchy; (c) the far-reaching interventions by the State in the economies of post-colonial countries both by way of a network of control in which the vested interests of the bureaucracy are embedded and a direct appropriation and disposition of substantial proportion of the economic surplus.

(68) Alavi does not expressly suggest this nor is it clearly implied by his analysis. This being the case it is not at all clear why the bureaucratic/military oligarchy should remain autonomous. Relative autonomy of the State is a class relation i.e. a configuration of powers and countervailing powers of classes. Alavi by depriving his military/bureaucratic oligarchy of a class base undermines the grounds on which he may argue for an autonomy of the State. If the State is a baseless superstructure in an admittedly class

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society what chances are there against its manipulation by anyone of the classes in that society? If we accept that the State is overdeveloped in relation to the classes which Alavi recognizes, what chances are there against manipulation by the military-bureaucratic oligarchy of the State to serve its interest as a class?

(69) Autonomy of the State vis-a-vis dominant classes can only be established by the antecedent proof of its autonomy in relation to the dominated classes. This is the essence of relativity of State autonomy.

(70) Alavi recognizes a mutual co-existence and a convergence of interests of the propertied classes (Alavi Ibid pp.74-75). He also accepts that the common commitment of preserving the social order unites the three propertied classes and brings the military-bureaucratic oligarchy within their social matrix (Alavi Ibid p.72).

(71) Following an approach of class analysis other writers - (Leys 1975), (O'Brien 1976) have also arrived at the conclusion that the State in African social formations is relatively autonomous. Leys for instance by assimilating the position in Kenya - (though he does not limit the outcome of his analysis to Kenya) - to that one, analysed by Marx (MESW 1962), which prevailed in France during the first decades of the second half of the 19th Century, (Marx Ibid p.243) proposes that the leader in an African State is not the agent of any one class but enjoys a measure of independence. The analogy of the Kenyan State to that of 19th Century France is far-fetched. This is so because, Bonapartism was a phenomenon of the Capitalist type of State in whose social formation the dominance of the CMP was already established. The relative autonomy of the Bonapartist State was not a negation of bourgeois hegemony in 19th Century France (Poulantzas 1982 p.258). It was rather a situation in which the economically - cum ideologically hegemonic class (the bourgeoisie) temporarily lost control of the centralized State due to the strictly political

struggle of the dominated classes.

(72) See *supra* f.51 the comment on, Leys 1975. Alavi's theory of the overdeveloped post-colonial State is original. But his visualization of a "relative autonomy" that could stand independently of the configuration of powers and countervailing powers of classes within the social formation is in line with Poulantza's theorization of an inherently relatively autonomous Capitalist State - Cf *supra* f.86 Chapter I. See also how this tendency is manifest in discussions presented by Roxborough 1979.118-122.

(73) For definition of "historical determination" Cf *supra*, Part 2.B.3 in Chapter I.

(74) O'Donnell (1980.717) has also noticed that the industrial bourgeoisie and its counterpart - the industrial working class - have in underdeveloped countries resulted from public policies.

(75) Cf *infra* the Conclusion to Chapter III.

(76) i.e. "balance of power" as defined *infra* f.98.

(77) Cf *infra* f.106 and the text above Cf also (Althusser, 1977.135-141).

(78) This is because, I believe, these bureaucratized controls are creatures of a class structure that is not conducive to autonomy. This could of course also be proved, at a less abstract level, by empirical data showing the share each one of these superstructures gets in social control (taking as specific example labour relations) and their tendency to overlap and sometimes merge into political control at the expense of public (democratic or plural) - and judicial controls. These are issues extensively covered in the balance of the thesis.

(79) Cf *supra* f.41 and the text above.

(80) (Bryde, 1976) also speaks about a "pluralistic African legal system" (*Ibid* 116), but uses the terms loosely to imply heterogeneity without necessarily implying a pluralistic ideology - (i.e. a belief in a theoretical plurality of modes of production and social forms). In many places the impression given is that

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"customary law" is receding (*Ibid* p.110, 113). He approaches the survival of "customary law" and "official law" from the angle of their compatibility or incompatibility with modernization and development planning (*Ibid*.108-123).

(80a) The number of page given in reference to (Fitzpatrick 1983(b)) designates not the number of page in the AJLS but in a mimeograph of the manuscript.

(81) Only a terminological distinction is offered between "plurality" and "pluralism" (Fitzpatrick 1983.160). Conceptually however the two are not taxonomically different. The former opposes that all social forms are reducible to the economic structure the latter opposes that State power is reducible to that of a class whose dominance is determined by the economic structure - (Cf *infra* f.96) - they are in effect one theory of plurality at two different levels of social relations.

(82) Determination by the economic structure does not of course mean that different series of social phenomena do not possess their own internal logic and intelligibility as synchronic totalities. There is no contradiction between economic determination and possession of these characteristics. This is specially so if it is born in mind that evolutionist socio-economism has a systematic character - (i.e. it is a synchronic diachronic process). Cf Jakobson and Tyanyanov 1966.60. Cf *supra* f.30 in Chapter I.

(83) Cf Glucksmann, 1974.167, Clarke, 1981.223-235, and *supra* f.30 in Chapter I.

(83a) "The materialist conception of history is monistic as far as the origin of various social phenomena is concerned." Plekhanov; for the sixtieth anniversary of Hegel's Death, *Selected Philosophical Works*, Trans. R Dixon Vol.I., Moscow s.a. pp.455-83. Quoted in Jordan (1967).342. Cf *supra* f.27a in Chapter I.

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(84) Cf *supra* Part I, and also, for the connection of economic and social relations, *supra* Part 3.B.1 of Chapter I.

(85) It is no surprise that such evidence came overwhelmingly from anthropologists - (Cf Fitzpatrick 1983.164) - such as Meillassoux *Study of the Guro in the Ivory Coast*, Pollet and Winter *Study of the Soninke in Mali* . . . Cf pp.289, 331 of David Seddon 1978 et al. Cf also Bradby (1975).146 and Wolpe (1980) et al.

(86) Fitzpatrick 1983.160.

(86a) Cf *supra* the text above footnote (103a) in Chapter I.

(87) Cf *supra* f.2(b) and the text above.

(88) Cf *supra* footnote 60 and the text above and Part 3.B.1 all in Chapter I.

(89) Cf *supra* Part 2.B.3 in Chapter I.

(90) Cf *supra* the Conclusion to Chapter I.

(91) Cf *supra* Parts 3-3B in Chapter I.

(92) Cf Althusser 1976.47-54.

(93) The fact that a legal administration and a comprehensive body of legislation (which was in fact a codification of English Common Law precedents or a copy of English legislation; at least in cases of the Sudan India and Nigeria) - were introduced from the earliest days as part of a bureaucratized administration, which for the first time extended a central authority over these social formations, as we know them now by their political boundaries, enabled colonial law not only to be the dominant law but also a symbol of modernization and unity to which the post-colonial nationalist leadership, aware of the ethnical heterogeneity of the national formation, strongly adhered (Mustafa 1970, Lutfi 1968). Colonial law included laws aiming at regulation of relations whose underlying economic structure was brought in on a large scale by colonialism itself (e.g. Administrative Law, Commercial Codes, Labour Law). Also it included laws which appropriated for themselves fields of application

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which, although existed before colonialism, were, because of their existence at "high levels of socialization", deemed too universal to be left to the diversity of local customs. As part of Sudanese customary law the Sharia rules of criminal law, were in this respect substituted by a penal code incorporating the English Criminal Law of precedents. Moreover the authority of English precedents in all fields was established as part of the Sudanese legal tradition by a first generation of judges and lawyers who were predominantly British and subsequent generations of Sudanese judges and lawyers trained in the tradition of the English Common Law. The binding effect of English precedents was and is still being upheld sometimes at the expense of customary law. In fact legislation itself, either through its comprehensiveness or sometimes express provision (SS.5, 9. CJO 1929) curtailed the incorporation of local custom. Akolawn 1968.230

(94) For a different view of the origins and perspectives of "British Industrial Relations pluralism Cf Hyman, 1978.16-40.

(95) But see Wedderburn, 1983.61 where it is suggested that "the debate about industrial democracy suggested again, however, that Kahn-Freund did not espouse pluralism only as a method of explaining what happens (as he claimed in 1977)".

(96) The different theories of pluralism (i.e. classical-liberal, neoliberal and neocorporatist) subscribe to a broad premiss that dilute State political power into a pluralist multiplicity of decision centres between which "equilibrium" is automatically realized by the concertation of the various "power groupings" or "pressure groups" or "de facto powers" - (enterprises, trade unions, consumer organizations) representing the economic forces of an "integrated" society (Laski 1931, 1948) (Kaiser 1956). On the concept of pluralism, it is necessary to remember that it does not merely serve to designate a multi-party political system as opposed to a one-party system, but that it is also extended to a

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whole "integrationist" conception of the social system in its ensemble (Poulantzas 1982 p.266). For a liberal pluralistic perspective of the system of industrial relations Cf (Kerr 1955).

(97) One commentator - (R Hyman 1982.100) - has in this respect observed a contrast evident in some pluralist writings between commitment to a pluralistic conception of industrial relations and their value-judged views about the possibility or desirability of conflict reconciliation in this field. This is also evident in Fox's 1979.107 reply to Wood and Elliott (1977). Coincidentally this is a tendency which has also been noticed to exist in some earlier sociologist writings - (e.g. Weber's; in Giddens, 1971.190).

(98) It is important, from my perspective, to distinguish between a balance of power and an equilibrium of power. I use "equilibrium of power" to connote equality or inequality of peoples relations to the means of production. In this sense a capitalist society rests on a disequilibrium of power. A "balance of power" is used to connote a definite stage of the class struggle in a capitalist society as manifested in specific concessions and compromises that have to be made, at this stage, on the terms and conditions governing the relations of distribution in society so that the society may continue to maintain its integrity. A balance of power in this sense does not need for its existence an underlying equilibrium of power. A balance of power (or an artificial or ideological equilibrium or consensus of social phenomena) does exist in a capitalist society in spite of the underlying disequilibrium of power in that society because the dominant section in that society from a position of hegemony "coerce" the rest of society not only into accepting that disequilibrium as a fact of life but even into smuggling in that acceptance and seeking to maintain the status quo. The visualization by pluralism of a balance of power, in so far as that meant to indicate an observed overall willingness on the part of all classes and organizations to compromise and make

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concessions, is justified. Clegg holds that the pluralist ethics does not postulate a balance of power (Clegg 1975.315). Yet for a consistent reading of Clegg's argument - (Cf Ibid 310-311) I assume that he is actually dismissing postulation of what I define as an "equilibrium of power". From a different perspective Hyman 1978 distinguishes between procedural rights and substantive interests arguing that, students of British Industrial Relations pluralism, evaluate the former far above the latter. I do not consider this as challenging the proof of the overall phenomenal willingness. Although emphasis on procedural rights does play down the significance of fundamental and continuous antagonism of interests. The fact that conflicts supposedly manifesting this antagonism arise in such a manner as to make them resolvable within existing procedural arrangements, means that the fundamentality of this antagonism is not yet reflected by trade union industrial and political practice. As a science of praxis "industrial relations pluralism" should not be blamed for playing down an aspect that is not sufficiently manifest in practice.

(99) The emphasis by pluralists and critics on morality or immorality of a pluralist conviction obscures the fact that the objection to pluralism is not only an "ideological" one - (i.e. is not only based on the value-judged benefit or detriment it might bring for a particular class or for society). Pluralism as a political and legal theory is unacceptable in the first place not because it is, or it is not the manager's ideology or because it did or did not cover and sanctify class inequalities of power or because of the reformist ideology it does or does not imply - (Goldthorpe 1977, Fox 1974.282, Miliband 1969.155-156, and Clegg 1975). Before that and apart from all these questions, and they are all important, pluralism is unacceptable because as a theory it misidentifies what is phenomenal for what is real and overestimates the epistemological value of the former.

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(100) I use the phrase politico-economic - (i.e. economic relations in their crude political manifestation) - forms to distinguish third world classes and political forms from their European counterparts which are "socio-economic" forms - (centralized or organized forms of existing social relations which - (i.e. the latter) are in their turn economic relations in their social manifestation). The intention is to distinguish between political organizations - (parties governments trade unions) - which, are superficial levels of underlying social layers in a developed capitalist society in which they exist, and, together with these layers and their economic infrastructure constitute a socio-economic form, and the political organizations, of an underdeveloped social formation, which have no developed, crystalized underlying social base, and, economic infrastructure. The latter are original and their existence and practices are susceptible to and give more space for human intervention. See *supra* fs.24 in this Chapter and *supra* Part 2.B.2 of Chapter I.

(101) It is usually the case that after every political change the civil service is purged. This was the case in 1958, 1964, 1969, 1971 and 1985 in Sudan. The objective is to implant in the bureaucratic hierarchies elements whose loyalties are certain. These purges are by no means limited to levels above permanent under secretaries. Some have noticed that party governments during the parliamentary era were also guilty of such practices - (Mahmoud 1983) (El Tayeb 1967).

(102) Cf *supra* fs.44a, 75 and 77 in Chapter I.

(103) Cf *infra* fs.164-169 and the text above in Chapter III.

(104) Cf *supra* the Conclusion to Chapter I.

(105) Cf *supra* Part 3.B.3 in Chapter I.

(106) Cf *supra* Part 2.A of Chapter I.

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(107) This is also a specific application of the general methodological principle - (supra Part 2.A of Chapter I) - that explanation of one set of phenomena by another does not deprive either of them of its internal characteristics.

(108) For definition of, and, the distinction drawn between "balance" and "equilibrium" of power Cf supra f.98.

NOTES TO CHAPTER 3
(COLLECTIVE LABOUR RELATIONS AND THE LAW)

- (I) Cf *supra* Part 3.B.3, and the Conclusion in Chapter I.
- (II) Cf *infra* the Conclusion to this Chapter.
- (III) Cf *supra* fs.56-65 and the text above in Chapter II.
- (IV) This proposition is founded on the theoretical discussion made in parts 2 and 3.B of Chapter II. However it is also substantiated at a less abstract level, by empirical materials discussed in this Chapter, Chapter IV and Part 4.B of Chapter V.
- (V) Cf *supra* Part 2.A-2.C.2 and fs.82-83 and the text above in Chapter II.
- (VI) (Hussein 1983.6, Chapter II) (Willard A Beling 1968) (A Gladstone 1980) (Damachi 1974 90-107) (Ioan Davies 1966).
- (VII) Cf earlier comment that the State apparatus is overdeveloped in relation to the urban classes - Chapter II Part 2.B.1.

(1) Civil Secretary Circular No.CS/37/A12 19.8.1946, in Fawzi 1957 p.26.

(2) Sudan Monthly Records Feb-March 1946 in Fawzi Ibid p.33.

(3) Fawzi - (Ibid pp.26-33) - mentions as reasons behind this little success: (a) these committees "were to operate in a situation where no tradition of Labour organization or Labour management relations existed" Ibid p.26; (b) "opposition from private employers . . . " Ibid pp.28-29; (c) "wages and terms of service were, to the disappointment of employees, outside the committees' jurisdiction . . ." Ibid p.28; (d) "refusal of some workers to participate in the formation or work of the committees . . ." Ibid p.28.

(3a) Trade Union Ordinance 1949 S.5 (15.3.1949).

(4) S.G. *Development of Trade Unions and Organization of Labour* (mimeographed Khartoum s.a. quoted in Beshir 1978.194; Abu Issa, 1981.1-24 and (Hussein 1983.118-120).

(5) Cf *supra* f100 and the text above in Chapter II.

(6) For a comparison with the distinction, adopted in Western Europe and the USA, between economic and political action Cf, Wedderburn 1972.320-23) (L J McFarlane 1981.452-59) (G Morris 1982.27).

(7) Fawzi (1957) pp.65, 92.

(8) The characteristics of this orientation and instrumentalization of legislation for its achievement are described in Hussein 1983.117-120.

(9) Cf *supra* Part 3.B of Chapter II.

(9a) In the words of one commentator, "The Western conception of human rights that gave birth to freedom of association implies curtailing the powers of the State so as to ensure maximum individual freedom and the recognition of collective rights in a pluralist society . . . Perhaps that conception may be superseded by another which frequently prevails in countries that are late developers . . ." (Caire 1977.109).

(9b) Cf Table A and B.

(10) ~~Kahn~~Freund and Hepple see that strikes are not prohibited in democratic countries because inter alia they are a social necessity (Kahn-Freund and Hepple 1972.4-9), see also Wedderburn 1971.340-344 - or that such a prohibition would be ineffective. The so-called less pragmatic arguments against prohibition of strikes - "i.e. the equilibrium argument, the autonomy argument, the voluntary labour argument, and the psychological argument - are not conditions of existence of a right to strike. They are simply different ideological perceptions of that existence and justifications through which it came to be accepted as a right - Cf Davies and Freedland 1984.694.

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(11) This is of course the position in Sudan. Compare with the voluntariness and purpose of Registration and Certification under British Law - In Davies and Freedland 1984.171-178 and Elias Napier and Wallington 1980.28-29. The office of a Registrar of Trade Unions with powers *inter alia* to refuse registration in circumstances similar to those discussed below (*infra* Part 1.A.1) exists in many under-developed countries (Erstling 1977.26-28). The extent and purpose of the control which this office exerts depend in each case on the orientation of Labour legislation of the particular country.

(12) SS.9(1) of the TUO 1949 and the TUO 1966 limit the number of members who could apply to form a trade union at a minimum of 10. Section 9(1) of the 1960 TUO fixed the minimum eligible for application at 50. SS.25(2) and 26(2) of the 1971 ETUA and the 1977 ETUA respectively require that application should be made by members of a provisional committee elected by employees desirous of forming a trade union.

(13) Since the Ordinances did not specify who could object to an application and who could not, presumably anyone could.

(14) See also SS.9/28 of the ETUA 1971 and now SS.9/29 of ETUA 1977 which are similar to previous sections.

(15) Identical with Section 28(c) of the ETUA 1971 and the present SS.29(c) of the ETUA 1977.

(16) Under SS.31(1) and 32(1) of the 1971 and the 1977 ETUA's respectively power to make regulations vests with the Minister of Public Service. The colonial trade union ordinance - the TUO 1949 - required that all such regulations be laid before the House of Parliament. However this proviso was repealed by the 1958 Military Government and never resurrected not even by the Parliamentary Government" Trade

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Union Ordinance 1966 (TUO 1966). CF S.20 of the TUO 1966 and SS.14(1) of the TUO 1960.

(17) The High Court under SS.14 of the TUO 1949 and its 1960 and 1966 Amendments. The same Court under SS.30(2) of the ETUA 1971. But the Court of Appeal under the ETUA 1977 SS.25(4), Cf *infra* Part 1.A.3.

(18) To meet the government's demands the SWTUF ought to have dissolved and reorganized itself into three separate federations. The motive behind the governments' move was political, namely to weaken the SWTUF opposition to their policies. Cf Taha 1970 125-140 and Hussein, 1983.76,92. Cf *infra* f.53 and the text above.

(18a) Taha, 1970.132; Hussein, 1983.94.

(18b) Warburg, 1978.110; Taha, 1970.113; Hussein, 1983.82-83; Cf *infra* text above f.23.

(19) Registration of trade unions striking for political objectives could be cancelled on ground of "unlawfulness of objective" under the TUO 1949 SS.18(1)(b) because the dispute is not a trade dispute under the RTDO 1949 SS.2(5). In June 1961 the Sudan Railway Workers Trade Union (SRWTU) was dissolved just 3 days before launching a strike. Although the Military Government claimed that the strike was political it did not bother to invoke these relevant sections of the law as justification for the dissolution. Parliamentary Governments although preserved these powers of dissolution for political strikes did not use them. To some of the strikes that they regarded as political the Parliamentary Governments reacted instead by invocation of criminal sanctions and mass dismissals; Hussein 1983.106 f.88, El Rai El Am 10-15 June 1966; and Fawzi, 1957.116. Cf *supra* text above f.18a and *infra* text above f.22.

(20) Cf Hussein, 1983.108-112, 142-145, 165-166. This gives a description of the changes that took place and their implication for the trade unions.

(21) Cf section 18(1)-e of the TUO 1960 and SS.6(1)/31(a) of the present ETUA 1977 read with S.17 of the State Security Act 1973 and its 1981 amendment. See also Resolution of the Registrar of Trade Unions No.RTO/TU/32/V:1/4/1984 in Sudan Government -v- The Doctors Trade Union. See El Sahafa 1/4/1984 and 2/4/1984.

(22) Cf RTDA 1966. S.28.

(23) Cf El Sheikh 1967, Taha 1970.113 and G Warburg 1978.110.

(24) Accountants and Cashiers Trade Union -v- The Officials and Professionals Trade Unions Federation CA/CV.RV/89/1980 "unreported". Quotation translated from original text (in Arabic) per El Asad CAJ pp.12-13. For a more recent example see the events that preceded accompanied the Registrar of Trade Union decision - No. RTU/TU/32/V: 1/4/1984 - dissolving The Doctors Trade Union in El Sahafa 1-2 April 1984.

(25) These are: (1) the Timing of Workers Trade Union Elections Regulation 1975, 1979; (2) the Timing of Officials and Professionals Trade Union Elections Regulation 1975, 1981, 1982; and (3) the Conduct of Trade Union Elections Regulation 1983.

(26) Sudan Government (Ministry of Health) -v- The Doctors Trade Union 1984 Ibid Registrar of Trade Unions -v- The Taxi Drivers Trade Union 1975 SLJR 132, and Accountants and Cashiers Trade Union -v- The Federation of Officials and Professionals Trade Unions - 1980 Ibid.

(27) Teachers Trade Union -v- The Registrar SC/CV.CASS/246.1982, Mohamed Babikir Omer -v- The Registrar AC/CV.RV/402/1982.

- (28) Cf SS. 9-13 ETUA 1977 and SS.28-30 ETUA 1971.
- (29) Cf on the one hand, *The Accountants and Cashiers Trade Union -v- The Federation of Officials and Professionals Trade Unions* - (1980) *Ibid*, *Sudan Government (Ministry of Health) -v- The Doctors Trade Union* (1984) *Ibid*, and on the other *Mechanical Transport Workers (Sectional) Trade Union -v- M T Workers Trade Union* CA/CV.RV/546/1982, and *The Marine Ports Workers Trade Union -v- El Shiekh Yousif and Others* CA/CV.RV/23/1981.
- (30) Cf *Awad A/Gadir -v- The Registrar of Trade Unions and The Ministry of Transport* AC/CV.RV/13/1983.
- (31) Cf *The Registrar -v- The Railway Workers Trade Union* SC/CV.CASS/154/1978, and, *Mohamed Ahmed A/El-Mannan -v- The Customs Officers Trade Union* RTU/TU/75/1982.
- (32) *Supra* f.17 and the text above.
- (33) Cf SS.14 and 18(4) of the TUO 1949 and the TUO 1966.
- (34) SS.14 and 18(4) of the TUO 1960 and SS.5, 8 of the TUO (Amendment) Act 1960. As to the legal position regarding privilege of official documents Cf; *K Vasdev Law of Evidence in the Sudan* OUP 1980.
- (35) SS.28(2) and 30(2) of the ETUA 1971.
- (36) Cf *infra*.Chapter V Part 4.B.
- (37) *Registrar of Trade Unions -v- The Taxi Drivers Trade Union* SC/CV.CASS/230/1975. The Supreme Court considered that the ETUA 1971 was a statement of the Law before the promulgation of the PCS 1973 and the CPA 1974 and accordingly ruled that the proviso did not oust its jurisdiction to review the Province Court decision (37). The decision was a mere procedural adaptation of the ETUA 1971 to the subsequent Statutes and was therefore in accordance with the Law.

(38) ETUA 1977 SS.25(4).

(38a) Cf *infra* f.43 and the text above.

(39) The Explanatory Memorandum to the 1977 ETUA S.25(3) reads "We saw that the Registrar decisions should be treated as judicial decisions . . . and executable as such before the Court."

(40) National Water Authority Workers Trade Union -v- The Minister of Public Service - (SC.CV.CASS-150-1980). The Applicants petition for a judicial review of the Registrar's decision was dismissed by the Court because, in its view, "The Registrar performs a judicial function and its decisions are appealable against not as administrative decisions, but, as judicial judgments". But see also The Marine Ports Workers Trade Union -v- El Shiekh Yousif and Others (1981) *Ibid* where the Eastern Court of Appeal albeit aware of the above Supreme Court decision ruled that the Registrar is "a mere public official". Quotations translated from original text in Arabic. The latter decision coincides with an earlier Khartoum Court of Appeal decision in the Accountants and Cashiers Trade Union (1980) Case *Ibid*.

(41) TUO 1949 S.7, TUO 1964 S.7 and the ETUA 1977 SS.25(1).

(42) Following the abolition of the Ministry of Public Service in 1981 the Registrar has since then been subordinated to the Attorney General.

(43) The Customs and Excise Officers Trade Union -v- The Department of Customs and Excise (1978) SLMR.70. Cf. also Hussein 1983.196-200.

(44) Obiter Dictum per Saddig Selman CA.J in the Customs and Excise Officers Trade Union Case *Ibid*. Cf Hussein 1983.*Ibid*.

(45) Hussein 1983.196-200. In the Customs and Excise Officers' case the Court of Appeal rejected the application for execution of the Registrar's decision because in the opinion of the Court "it is for the Registrar to enforce its own decisions or seek their enforcement through

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application to the Civil Courts" Ibid p.73. Because the defendant in this case - (i.e. the Customs and Excise Department) - is a public sector unit, the Registrar - (itself being a government department) - cannot possibly take the matter to the Civil Courts. Disputes between government departments can only be referred to the Attorney General. For further discussion of these procedural impediments on public employees and the means of enforcement available to the Attorney General itself Cf. infra Parts 4.A - 4.D of Chapter 4.

(46) *Cf Prosecution No.34/1975 Kober Police Headquarters; Sudan Government (Registrar of Trade Unions) -v- The Managing Director of National Footwear Company Limited. For a whole year after the prosecution the employer was never summoned or questioned and there is no evidence that he was in subsequent years. What is certain is that the 24 Trade Union Officials and members dismissed by him in defiance of the law were never reinstated. Cf file no. LO/KN/37/IR/71 Volume II.*

(46a) *ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, Report 111 Part IV para 31 International Labour Conference 43rd session Geneva 1959. Q. in Erstling 1977.27-28.*

(46b) *Cf infra; summary to Part 4.C of Chapter 4; and Part 4.B of Chapter 5.*

(47) *Executive encroachment upon judicial independence when there is a conflict between the two is of common occurrence, not only in Sudan, but, in several other under-developed countries. For examples, of such encroachment, from Uganda, Ghana, Zambia, Tanzania Cf. African Research Bulletins Nos.(72)p.2608C, (70)p.1741B, (69)1479C. Cf Bryde 1976.69. In certain other African countries a duty of the judges to "obey" the interests of the revolution is incorporated in the constitution*

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and enforceable in practice by disciplining of judges who fail to do so. Cf Article 62 of Algerian Constitution. Cf also cases of Guinea and Ethiopia in Bryde 1976.68.

(47a) This is subject to the explanation given *supra*; Paragraph below note 31.

(48) Article 5.ILO; The Freedom of Association and Protection of the Right to Organize Convention 1948. Cf *supra* Tables A and B.

(49) *Ibid* Articles 1, 7 and 8(2).

(49a) On the influence of this factor on the orientation of Sudanese trade unions Cf Hussein, 1983.48-49. Until now the Public Sector in Sudan employs 58% of total employment in the modern sector of the economy, Cf Abdin, 1983.2 and *infra* Part 1.B of Chapter 4.

(50) TUO 1949 SS.27(1) "No employee of the Public Services might be a member of a union not catering exclusively for such employees and SS.27(2) "Unions of employees of the Public Sector shall not federate affiliate or participate in joint action with any other Union comprising members not employed in the public services or with any political organization . . .".

(51) Negotiation of self-Government had commenced earlier from 1946 Cf Beshir 1974.170.

(52) Fawzi 1957.112-121.

(53) On 14.2.1952 the Legal Secretary reiterated before the Legislative Assembly: "If a strike were called otherwise than by the individual unions themselves all the persons participating in the strike would be liable to legal proceeding". Minutes of Legislative Assembly Session 14.2.1952 Q. in Fawzi 1957.106.

(54) Cf *The Umma* 18.3.1956 and *El Rai El Amm* 18.3.1956. Cf Fawzi 1957.107,

(55) Cf Hussein 1983.60 f.88; H Kitchen 1959.16.

(56) The TUO 1960 contained several provisions aiming exactly at this objective. Section 2 of the Ordinance excluded classified officials and unclassified employees of the Government from forming trade unions. Likewise SS.9, 27 of the Ordinance confined the right of association to workers engaged in firms employing more than 50 workers thereby depriving 60% of the workforces of their right to organize - Hussein 1983.80.

(57) Hussein 1983.154-162, 80.

(57a) Cf also Hussein 1983.79-85.

(58) Cf also SS.27-(1) whereunder registered trade unions were prohibited from affiliating federating or taking joint action with any organization that was not recognized under the provisions of the TUO 1960, and SS.27(2) whereunder persons employed in the public sector were prohibited from joining any trade union the members of which are not employees of that sector.

(58a) This reference gives a description of the events trials and execution and the sources of information available on them.

(59) Cf *infra* Part 1.C.2.c.

(60) Hussein 1983.106 f.88 and *El Rai El Amm* 11, 12, 13 June 1966.

(60a) This discusses the trade union - government relation during this period.

(60b) For a discussion of the trade unions role in the overthrowal of General Abboud Military Government in 1964 Cf. Hussein 1983.85. For the part which the trade unions and the professional associations played in bringing about the downfall of President Numeiri's Regime in April

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1985 Cf. *The Times* 30.3.1985, 1.4.1985; *The Guardian* Saturday 6.4.1985.

(60c) Cf. Hussein 1983.77-78, 97 where this original interpretation is given. It is important however to point out that the vulnerability of the parliamentary Governments in the Sudan does not alter modify or contradict the thesis of the dominant political. There is a difference between the political as defined earlier (*supra* part 3.B Chapter 2) and the concrete political form which the political assume at a given point of time. Vulnerability of the Parliamentary framework of governance means not that the political is not dominant but that this particular framework is unsuitable for centralizing the configuration of powers within the under-developed social formation.

(61) For other possible reasons Cf *supra* text above f.20.

(62) SS.9 ETUA, 1971, 1977 and S.2 of the Trade Union Organizational Structure Regulation 1972 - (now the Trade Union Elections Practices Regulation 1982) - and the Trade Union Bases of Organization Regulation 1972-1981 Cf. *supra* f.16 and text above.

(63) Cf. *infra* Parts 1.C.2.c and 2B.

(64) Cf. Hussein, 1983.227-229; for a description of this scrutiny and its application in specific situations. 150 out of a total of 35,000 members of the Political Security Police nominated by a leaflet distributed in Khartoum on April 6 1985 were also registered members of Trade Unions.

(65) For a description of the measures introduced during this period Cf Hussein, 1983.208-209. Cf. also the State Security (1973) and (1981) Acts and The Exercise of Political Rights Act 1974.

(66) Cf *supra* f.29 and the text above.

(67) Cf *The Accountants and Cashiers Trade Union -v- The Officials and Professionals Trade Unions Federation* 1980- *Ibid*, *Sudan Government -v- The Doctors Trade Union* 1984 *Ibid*, and *The Post and Telegraph Workers Trade Union -v- The Federation of Workers Trade Union* (1979) *Ibid*.

(67a) This gives a description and examples of the restrictive and corruptive practices respectively.

(68) Hussein 1983.228 where a discussion of this rift is given.

(69) *The Times* 30.3.1985, *The Guardian* 6.4.1985.

(70) This is so because terms and conditions of the individual employment relationship are determined statutorily - (IERA 1981, EEPO 1973, 69, 49). Wages are also determined by minimum wages legislation (*Minimum Wages Act* 1974 and *Wages Commissions Act* 1974). As to the scope and effect of application of these Acts see *Infra* Part 3.A.4 of Chapter 5.

(71) Cf. *supra* fs.72-73, 77 and the text above in Chapter I.

(72) It is important however to emphasise that this does not mean that for an employment relationship to become autonomous "Law" and the "State" should first become abstensionist. It is rather the case that Law and the State become less interventionist - (or autonomous) as a result of the self-emancipation of employment relationships toward autonomy. This emancipation is motivated *inter alia* by development of the substance of the Capital and Labour relationship; - (i.e. means and objects of Labour + Labour power) - enabling it - (i.e. the substance) - to increasingly assert itself as a third factor which, if the process of production is to continue should be taken into consideration when determining the terms and conditions of the employment relationship. Cf. *supra* Parts 3.A and 3.B.3 of Chapter I.

(73) CF *INFRA* F. 74.

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(74) See also SS.143 of the 1974 and 1983 Penal Codes. Although superseding each other these three codes have remained identical in the order of serialization of sections and to a considerable extent very much the same in substance. Whenever reference is made to a penal code without date the implication is that the section referred to is the same under three codes and still the law.

(75) None of the strikes reported to have taken place in Sudan prior to 1949 was staged by workers or labourers in private employment. Cf. Beshir 1977.190-193 and Fawzi 1957.79.

(76) Beshir Ibid 190-191 and Fawzi Ibid 55-73.

(77) But when the WAA held a political demonstration on 14.5.1948 to protest against government's proposals for a Legislative Assembly the colonial administration quickly reacted by suppressing the demonstration and arresting its organizers (i.e. the WAA's executive). Officials of the WAA were subsequently dismissed tried and sentenced to imprisonment.

(78) The TUO 1949 S.5 "The purposes of any trade union shall not by reason merely they are in restraint of trade be deemed to be unlawful so as to render such trade union or any member thereof liable to prosecution for conspiracy or otherwise or render void or voidable any agreement entered into or signed by the trade union. Compare with S.3 of the British Trade Union Act 1871. Only after de jure recognition of the rights of association and organization that trade unions came to exist in fact.

(79) Compare with S.3 of the British, Conspiracy and Protection of Property Act 1875 and S.1 of the Trade Union Act 1906.

(80) Cf SS.3(1) of the British TUA 1906.

(81) For definition of the phrase Cf. SS.2-(5) of the RTDO 1949.

(82) Cf supra f.74.

(83) For the position of the Law on these issues in Britain Cf Hepple and O'Higgins, 1979.204-205. Although no such rules have yet been made by Sudanese Courts it is very unlikely that the Courts would, abandon their tradition of following English precedents, and, hold otherwise when the time comes.

(84) S.228 of the 1983 PC provides for an additional punishment of whipping!

(85) Four of these sentences were reduced on appeal to 6 months. The abortive strike was planned by the SWTUF as a threat to the Government for the immediate release of the President and Secretary of the Federation. Both officials had a year earlier been tried and sentenced to imprisonment for their abetment of unlawful unionization and a general strike by members of the Police Force in June 1951. Members of the Police Force are by Law - (SS.4 of the TUO 1949, 1960, 1966 and S.4 of the ETUA 1971, 1977) - prohibited from forming trade unions.

(85a) For an analysis of the Trade Union political involvement during this period Cf Hussein, 1983.63-99.

(85b) Cf supra fs.59-60 and the text above.

(85c) Cf supra the paragraph below n.22 on text.

(85d) With regard to the massive political changes indicated Cf supra the text above f.20. For an analysis of the social and economic consequences which implementation of economic development planning had and their impact on the labour and legislative policies Cf Hussein, 1983.166-175, 245-253.

- (86) See SS.6, 11(b)(c) and 15 of the TUO (Amendment) Act 1960 and S.17 of the Trade Disputes Act 1960.
- (87) Cf the TUO 1966 SS.22(3),(5),(6).
- (88) Cf K. Bechtold, 1976.261-263.
- (89) Republican Order No.4 Article 13 26.4.1970.
- (90) For a description of thee events and the extent to which they were provoked by the February suspension of the CLC 1970 Cf (Hussein 1983.123-145).
- (91) S.27 of the RTDA 1971.
- (92) The State Security (Amendment) Act 1981 20.6.1981.
- (93) S.105 of the PC, 1983 - (P.O No. 30 1983). The Code is still in effect. Because it was enacted as part of a move, supported by many present Islamic Institutions, to islamize all laws in the country the code has survived the demise of the Numeri's Regime and the abrogation of its security laws.
- (94) See *supra* f.78.
- (95) The Trade Disputes Act (TDA) 1960 S.2.
- (96) Cf. *infra* Part 2.B.
- (97) The RTDA 1966 S.28, and section 31 of the Industrial Relations Act (IRA) 1976, and the ETUA 1977.
- (98) The RTDA 1966 SS.5,6,8 and the IRA 1976 SS.6,7,9.
- (99) Cf. *supra* the text above fs.81-82; the RTDA 1966 S.28, ETUA 1977.S.33.
- (100) This was also true under the TDA 1960, SS.5-9/16-17.
- (101) Cf. the Trial of El Fatih Muhyeddin and Others SC-CV.CASS-220-1981.
- (102) Cf. the Supreme Court view in El Fatih Muhyeddin Ibid that "the courts cannot interfere at any of the stages of a dispute prior to arbitration" Ibid p.4. Since arbitration awards are final and conclusive the Courts may not interfere even after arbitration! Quotation

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translated from original text in Arabic.

(103) This is especially true in cases of victimization - (either with or without approval of the Commissioner of Labour) - since the State or private employer may invoke as "formal" grounds for dismissal SS.37(d), SS.22(g) - (infra fs.121, 136) - of the Individual Employment Relations Act (IERA) 1981 and the Public Service Act (PSA) 1973 respectively. Another reason for this is that appellate Courts concern themselves with reviewing judgments whilst leaving execution entirely to the Court of first instance. In cases where the Court of first instance is an administrative tribunal without adequate power of enforcement - (which is true of all Labour tribunals in Sudan) - the complainant may remain without a remedy even though he has obtained a favourable judgment from the highest judicial authority.

(104) Customs and Excise Officers Trade Union -v- The Department of Customs and Excise LC-R-37-C-116-5-D-26-1980.

(105) Metal Sheet Industries Ltd -v- MSI Workers Trade Union KN-LO-37-IR-"A"-85-1973.

(106) Bata (Sudan) -v- Bata Officials and Technicians Trade Union. MPSAR -IR-37-A-6-1-5-D-10-1979 and letters No. KNLO-37-IR-A-135 : 26/3/1983; KNLO - 11/5/1980.

(107) Cf. *infra* the conclusion to this Chapter.

(108) Cf. El Rai El Am 11.6.1966.

(109) A.G Changers File No. AG/CC/"B"/715/1968.

(110) African Contemporary Record Vol.XII 1979-80. B.103.

(111) Hussein 1983.256.f.26 and Sudan Government -v- Abbas El Khidir El Hussein and Others Prosecution No.103/1981.

(112) *El Sahafa* 2.4.1984, and issue No. 1952 of the *Middle East* 2.4.1984 and Registrar decision No. RTU-TU-32-V-1984.

(113) *Cf. Registrar's Decisions* No. RTU-TU-32-V-1984 *Ibid* S.GV. The Doctors Trade Union, RTU-TU-75-1982 Customs and Excise Officers Trade Union, and the Court of Appeal decision in; Accountants and Cashiers Trade Union CA-CV.RV-89-1980 *Ibid*.

(114) *Teachers Trade Union (Upper Nile Province) -v- Malakal District Commissioner* NO-LOM-UNP-TU-37A-3.

(115) Although it is a Federal authority the Registrar has no regional or provincial divisions to deal with, or channel, regional complaints, to the centre. In practice however regional political authorities settle industrial disputes in the manner they deem fit without consultation with the registrar or regard to the trade union and industrial relations laws.

(116) *Cf* also S.28 of the RTDA 1966 and S.17 of the TDA 1960.

(117) *El Fatih Muhyeddin and Others (Ibid) Prosecution* No.6088/1980.

(118) *Bata (Sudan) Ltd -v- Bata Technicians and Officials Trade Union.* 9 members of the Trade Union were arrested on the Company's premises on 6.11.1979; *Cf* file No. KNLO-37-IR-B-135. See also *Sudan Textile*

Factory -v- STF Workers Trade Union in Sudan May 1981.23-25.

(119) Among those who spent more than five years are members of the Bata Trade Union and the Textile Industries Trade Unions. See *Generally Amnesty International Report on Sudan* 4.12.1979.

(120) *Marples Ridgway Ltd* KN-LO-37-IR-37-1983 especially letters dated 29.3.1983, 27.3.1983 and 7.4.1983.

(121) SS.37"d" of the IERA 1981, SS.10-(5)d of the EEPO 1973, SS.10-(2)a (iv) of the EEPO 1969 and SS.10(2) of the EEPO 1948.

(122) *Metal Sheet Industries Ltd -v- MSI Workers Trade Union* KN-LO-37-IR-A-85-1973.

(123) *Cf Manager of Dar Essahafa -v- Adam Ahmed Mahdi* AC-RV-246-1970, *Abdel Raheem Beshir -v- Adam Ennur Maroaf* SC-CV.CAS-31-1975, *Atta Mustafa Salih -v- Adam Haroun Fadl El Mula* AC-APP-736-1976 and *Adam Mohamed Ahmed -v- Blue Nile Packaging Corp.* AC-CV.APP-323-1976.

(124) *Sudan Textile Factory -v- STF Workers Trade Union*; SWTUF-LR-37-A-1-2-4-1974.

(125) *KUSU Automatic Bakery -v- Marco Majok*; KNLO-317-1981.

(126) *Cf supra fs.104-106 and the text above.*

(127) *Infra Part 1.C.4.*

(128) *The IRA 1976 S.11, the RTDA 1966 SS.11-18 and the TDA 1960 SS.5-9.*

(129) *Cf Sudan Footwear Factory -v- SFF Workers Trade Union* SWTUF-IR-37-A-1-2-2-1976, *Marples Ridgway -v- M R Workers Trade Union* KNLO-37-IR-37-1983, *Khartoum Spinning and Weaving Co -v- KSWC Workers Trade Union* Sudanow May 1980.23-25, *Sudan Textile Factory -v- STF Workers Trade Union* Sudanow May 1981.23-25.

(130) *Supra f.129 and the text above.*

(130a) *For a discussion of the practical limitation and negative consequences of the 1973-1983 legislative labour policy in Sudan Cf Hussein 1983.224-253.*

(130b) *Cf supra f.128 and the text above.*

(131) *Cf infra Part 4.C of Chapter 4.*

(132) *Cf supra f.9 and the text above.*

(133) *For specific examples of interventions at the expense of the interests of the direct employer and of both the employer and the employee Cf the cases cited infra fs.36 - (Ennielane Bank Case) - and 5*

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in Chapter 4 respectively.

(134) See how this political orientation of the trade unions is imprinted on both the form and content of the 1970 Consolidated Labour Code; in Hussein, 1983.120-121.

(135) S.8 of the IRA 1976, S.7 of the RTDA 1966 and S.5 of the RTDO 1949.

(136) PSA 1973 SS.22'g' PSPA 1975 SS.26(1)b Cf *infra* Part 3.B of Chapter 4.

(137) Following the 1973 amendments of the EEPO 1949 sections 10(2) a(iv) and SS.10(2).C were renumbered as SS.10(5) and 10-(7) and following the repeal of the 1949 EEPO by the 1981 Individual Employment Relations Act (1981 IERA) the substance of both sections is now incorporated under SS.37"D" and 39 of the 1981 IERA - Cf below footnote 138.

(138) These and other grounds of dismissal under private sector individual employment law are elaborately discussed under Part 3.B. of Chapter 5. The above brief statement of the law at this stage is justified by the need to make my argument regarding the relation between the law of dismissal and collective labour relations law immediately clear.

(139) See Memorandum sent by workers to the Minister of Public Service and Administrative Reform on 18.1.1972 where SS.10(1) of the 1949 EEPO was described as "a loophole in the law that enables employers to victimize trade union activists. See also Explanatory Note by the Commissioner of Labour in File No. 37-6-6-11-1 D L Khartoum.

(140) SS.21 of the ETUA 1971 and the ETUA 1977.

(141) *National Footwear Co.Ltd -v- NFC Workers Trade Union*, KN-LO-37-IR.1-70-1976. The employer has a bad industrial record known to the Commissioner. At the time of this decision there were complaints that the employer had already dismissed 21 employees including trade union officials. The Commissioner ought to have used his discretion under the law and withheld approval of the subsequent dismissals or at least referred the case to the Registrar of Trade Unions Cf *infra* Part 1.C.4.c.

(142) Cf *infra* Part 3.B.4 in Chapter 5.

(143) Cf *El Nielane Textile Factory -v- Thureyya Ahdel Wahab* (CA*CV.RV*226*1979).

(143a) For other applications of the rule Cf. *infra* Table 10 in Chapter 5.

(144) *National Footwear Co. -v- NFC Workers Trade Union* Ibid f.141.

(145) *Abdel Mutaleb Adam -v- Marples Ridgway Ltd*; KN-LO-37-IR-37-1983.

(146) *Sudan Clothes Factory -v- SCF Workers Trade Union*; Collective Industrial Disputes: Monthly Reports December 1977 File No. KN-LO-37-IR-3.

(146a) Cf *infra* Part 3.B.7 of Chapter 5.

(147) SS.39 of the IERA 1981, SS.10-(8) of the EEPO 1973, and SS.10-(2)d of the EEPO 1969. The remedies for unlawful dismissals in general are discussed under Chapters IV and V.

(148) SS.10-2(d) of the EEPO 1973.

(149) SS.36 of the EEPO 1973 provided a sentence of 6 months-2 years imprisonment and an LS 500-1000 fine. See now S.60 of the IERA 1981.

(150) *National Footwear Co. Ltd -v- NFC Workers Trade Union* Ibid and, *Abdu Atta -v- Metal Sheet Industries Ltd* KN-LO-37-IR-A-85-1973.

(151) Cf (a) *El-Rubi Transport Co -v- ETC Workers Trade Union* KN-LO-37-IR-1-1 : Vol II-1983; (b) *Medical Products Co.Ltd -v- MPC Workers Trade Union* LD-IR-37-G-6-1-O-TU-25-1981 and (c) *Sudan Government -v- El Fatih Muhyeddin and Others* 1981 Ibid.

(152) S.39 of the IERA 1981.

(153) Cf also S.21 of the ETUA 1971.

(154) IERA 1981 SS.37'd', EEPO 1973 SS.10(5)d.

(155) Cf supra f.147 and the text above.

(156) Cf letter No. DL*IR*37*Y*21*70*Vol.II, in File No. KNLO-37-IR-1-70 and the case of *Mirghani Mohamed Abdella -v- NFC Ltd* Ibid the same file.

(157) *The Trial of El Fatih Muhyeddin and Others* SC*CV.CASS*220*1981.- Cf.supra f.117 and the text above.

(157a) The Company's Counsel exhausted all appellate channels simply to establish the criminal nature of the defendants' action. However it is not clear why that was necessary - (unless as a delaying tactic) - for the main issue of reinstatement. The jural correlative of the lawfulness of the strike is immunity from the Criminal Law, but not in addition to that an obligation on the employer to reinstate. The employer could legally resist reinstatement irrespective of the lawfulness or unlawfulness of the strike.

(158) Letter No. RTU-10-0-2-61-Vol.II.

(159) Letter No. KLO-IR-37-A-O-Vol.II.

(160) Letter No. AG-TU-TD-333 25.4.1982 and 4.5.1982.

(161) Letter No. SWTUF-17-A-3-23.8.1982.

(162) Letter No. AG-TU-TD-333-6.9.1982.

(163) SS.6(4) of the Interpretation of Laws and General Clauses Act 1974 "the provisions of a subsequent law shall prevail over those of a preceding law to the extent necessary for removing any inconsistency . ."

(164) *El Rubi Transport Co. -v- ETC Workers Trade Union* KN-LO-37-IR-1-1-Vol.II-18.3.1983.

(165) Cf *infra* Chapter 4 Part 3.B.

(166) SS.22(g) of the PSA 1973 and, PSPA 1975 SS.26(1)b.

(167) Cf *infra* Chapter 4 footnote 49 and text above.

(168) As to the manner in which discipline is imposed Cf *infra* Parts 3.B.3-4.AB of Chapter 4.

(169) Cf. *infra* Part 1.A of Chapter 4 and *supra* text above fs.102-104 of Chapter 2.

(169a) Cf Diagram I below.

(170) Cf *supra* f.131 and the text above.

(171) *Infra* Chapter 4 Parts 4.C-4.C.6.

(172) *Post and Telegraph Workers Trade Union -v- the Telecommunication Corporation* LD-HQ-PS-47-A-1-1980, -and- *Soba University Hospital Nurses and Sisters -v- Vice-Chancellor University of Khartoum* File No. LD-IR-37-U-6-1-5-"N" 1979.

(173) Cf *supra* f.43 and text above.

(174) Cf *supra* the cases cited under fs.43-46 and the text above.

(174a) Cf *supra* Part 2.B.1.e of Chapter I, and *infra* the conclusion to this Chapter.

(175) Cf *supra* f.100 in Chapter 2.

(175a) Cf *infra* f.177, and *supra* Part 2.B.1 of Chapter 2.

(176) Cf *supra* f.22 and the text above.

(177) This role is inherent because it is essential to internal functioning of the State itself. It is mentioned earlier that the State structure constitutes in itself the vastest portion of the Capitalist economic structure in the social formation (supra Part 2.B.1 Chapter 2) and that the hierarchy of State bureaucracy corresponds to a hierarchy of capitalist divisions of labour (supra f.55 Chapter 2). This allowed the inference that the Centralized State acts as a corporate capitalist - (supra paras below f.101 Chapter 2). The internal functioning of the State apparatus - (or bureaucracy) itself requires maintenance of a balance between State expenditure and revenue. To maintain this balance the Centralized State constantly manipulates the factors affecting social distribution i.e. imposes restriction on wage increases, minimises the pressure power of certain social groups, and imposes a tax-policy biased towards investment and investors - Cf. Hussein 1983 pp.253-54.

(178) Cf *infra* the conclusion to this Chapter.

(179) Supra f.169 and the text above.

(180) Cf supra f.16. Powers of the Minister of Public service to make regulation under SS.31(1) of the 1977 ETUA can be delegated to the Reistrar or the Commissioner. In exercise of powers thus delegated the Registrar has in fact made several pieces of legislation including the Trade Union Election Practices Regulation 1983 and Timing of Elections Regulations 1971, 1981. Cf. supra f.25.

(181) Banks Employees Trade Union -v- The Minister of Finance and National Economy Arbit. No. LD-LR-37-"G"-6-D-3.5.1979, and, Central Electricity and Water Authority Officials and Technicians Trade Union -v- CEWA Arbit. No. LD-LR-37-G-6-D-29.5.1980.

(182) Memorandum No. 3106 MPSAR 19.12.1979.

(183) Memorandum No. MPSAR-26-"B"-7-23.7.1980.

(184) Following dismissal and imprisonment of 7 members of the SWTUF executive on 8.12.1958 several trade unions agreed to press for their release and reinstatement. The Minister of Labour not only refused to negotiate with representatives of the Unions but also ordered their immediate arrest - Beshir 1977.212. A demand by the Mechanical Transport Workers Trade Union for reinstatement of two of its members dismissed for their part in a strike in August 1966 was also met by stern warning from the Minister of Transport that the dismissed employees were capable enough of pursuing their own rights and that the Trade Union was wrong in campaigning on their behalf. Following another threat of dismissal the Trade Union called off its threatened industrial action and gave up supporting the cause of the dismissed employees Cf El Rai Alam 11.8.1966.

(185) S.15 of The Public Service Act 1973 and *infra*.Part 2.A.2.b.

(186) From an interview with the Commissioner of Labour Khartoum North, March 1984, translated from Arabic.

(187) Cf *infra* f.5 in Chapter 4.

(187a) Cf *infra* Part 2.B, and the text above fs.191-192.

(187b) Cf f.189 below.

(188) This is best evidenced by the surge in number of this type of disputes following the introduction of the Job Classification and Evaluation Scheme in 1978. See Dept of Labour Annual Reports 1979/1980.29, and 1978/1979.

(189) See SWTUF statistics: (a) Industrial disputes for the period between 1.7.1979 - 31.12.1981; and (b) Disputes referred to arbitration in the period between 1.1.1979 - 31.12.1981, in SWTUF-IR-37-A-1-2-2.

- (190) Memorandum No. MPSAR-3106-19.12.1979.
- (191) Cf *supra*; Parts 1.C.2.b - 1.C.2.c; and f.57a and the text above.
- (192) S.8 TDO (Arbitration and inquiry) 1949, SS.22(2) RTDA 1966, S.32 of IRA 1976, and SS.20(1), 25 of the IRA 1982.
- (193) *Customs and Excise Officers Trade Union -v- Department of Customs and Excise* LD-LR-37-C-116-5-D-26-July 1981. See also *The Stevedores Trade Union -v- Flour Mills Corp.* KN-LO-37-IR-V, *The Bank of Sudan -v- The Bank Employees Trade Union*, *Technical Engineers -v- The Communication and Telecommunication Department*, *The Doctors Trade Union -v- The Ministry of Health* (11.6.1981) *Veterinary Surgeons Trade Union -v- The Ministry of Agriculture* (18.10.1979), *Central Electricity and Water Authority -v- CEWE Employees Trade Union* 29.5.1980; All in SWTUF; *Disputes Referred to Arbitration between 1/1979 - 31/12/1981*; SWTUF-IR-37-A-1-2-2.
- (194) *Accountants and Cashiers Trade Union -v- The Auditor General and The Ministry of Finance*, LD-LR-37-M-24.12.1978.
- (195) There are many cases in which the Government refused to abide by arbitration awards. See for example *Veterinary Surgeons Trade Union -v- The Ministry of Agriculture* Arbit. No. LD-LR-37-"G"-6-D 28.7.1979, *Central Electricity and Water Authority Workers Trade Union -v- CEWA* *supra* f.183 and text above. See SS.25(1) of the IRA 1976.
- (196) This was a Minister-without-portfolio status enabling the then incumbent to give advice to the Presidency of the Republic on matters relating to the Public Service.
- (197) Ministerial Commission Report on Labour Legislation Khartoum 1981 pp.220-221.

(197a) Nevertheless legislation sets minimum standards that apply irrespective of the agreement of the parties Cf *infra* Part 3.B.3 of Chapter 5.

(198) S.58 (IERA 1981), S.6 of the Minimum Wages Act 1974, and SS.35 of the EEPO 1949, 1969, 1973.

(199) S.60 the IERA 1981 SS.36 of the EEPO 1973, 1969.

(200) Khartoum Spinning and Weaving Co.Ltd 1973/1976, Sudan Textile Factory Ltd 1975/1978 and Blue Nile Spinning and Weaving Co. 1975/1977. All in, the Labour Department Collective Agreements, File No. LD-IR-37-A-8.

(201) In two cases the Commissioner decided that the demands put forward by the Trade Unions were unlawful because "in breach of a subsisting collective agreement" Khartoum Spinning and Weaving Co. -v- KSWC Officials Trade Unions; KNLO-Collective Disputes-Monthly Reports No.37-IR-3-April 1979, Bata (Sudan) -v- Bata Officials and Technicians Trade Union KNLO-37-IR-"A"-35. In 24 other disputes in which employers were to blame for alleged breaches, the Commissioner did not take any formal action against any.

(202) Cf *supra* Bata (Sudan) -v- Bata Officials and Technicians Trade Union, f.201.

(203) From an interview with Sayyed Omer at the Khartoum North Labour Office conducted by the writer in February 1984. Quotation translated from Arabic.

(204) Coldair Engineering Ltd -v- C E Workers Trade Union KNLO-Collective Disputes Monthly Report No.37-IR-3 October - December 1982.

(205) *Medical Products Co.Ltd -v- The Company's Workers Trade*
DL-LR-37-"G"-6-1-5-D-25.

(206) SS.36(1) of the IERA 1981 fixes the period of limitation for application to the Commissioner at 15 days from the day the dismissal is effected.

(207) See also, *Dar Ettegleef -v- El Dar Workers and Officials Trade Union KNLO - Monthly Reports - March-June 1980*, and *Khartoum Spinning and Weaving Co.Ltd -v- KSWC Workers Trade Union KNLO Monthly Reports July 1979.*

(208) The problem of breaches of collective agreements by employers is so acute that at one time the percentage of disputes caused by this factor amounted to 71.4% of all instances of conflict in the Sudan Cf (Hussein 1983.214). See Table (2).

(208a) All these are terms and conditions of employment provided for by Statute. Cf *infra* Table 3 and Chapter 5 Part 3.A.

(209) Agreements must by law provide for terms and conditions of employment that are at least equal to those guaranteed by Statute. One of the three agreements here was still in force when the new 1981 IERA came into effect introducing terms and conditions better than those provided for by the agreement. The employer was adamant that the agreement must prevail. The other two are cases where the Commissioner gave his approval subject to certain amendments to be made on the agreement, but long after the directive to amend was made the Trade Unions were still complaining.

(210) Cf *supra* Parts 1.C.2.a - 1.C.2.c.

(211) Pieces of legislation abolished were the Trade Disputes Ordinance 1949 and the TDO (Arbitration and Inquiry) 1949.

- (212) See also SS.5(1) of the TDA 1960 and S.12 of the RTDA 1966. Under both Acts the period within which the parties should enter negotiations was three weeks.
- (213) S.31.IRA 1976 and SS.11(2) of the RTDA 1966.
- (214) The Commissioner may report the trade union to the Registrar who can in turn - inter alia - order its immediate dissolution. See supra fs.21 and 113 and the texts above.
- (215) See supra table (2). There are practical difficulties involved in imposition of these penalties on employers see supra f.128 and the text above.
- (216) SS.14-16 of the IRA 1976, SS.13-15 of the RTDA 1966, and SS.6-7 of the TDA 1960.
- (217) SS.17-18 IRA 1976, SS.16-18 RTDA 1966, and SS.9-10 TDA 1960.
- (218) SS.20-25 IRA 1976, SS.21-23 RTDA 1966 and SS.13-14 of the TDA 1960.
- (219) This is the language adopted by the TDA 1960, the RTDA 1966 and the IRA 1976 Ibid.
- (220) Commissioner of Labour -v- University of Khartoum Teachers Trade Union DL-LR-37-"G"-6-1-5-D-25 December 1979.
- (221) CA-CR.RV-177-1981 Ibid.
- (222) Quotation translated from original judgment manuscript in Arabic.
- (223) Bata Officials and Technicians Trade Union -v- Bata (Sudan) Ltd KNLO-37-IR-"A"-35-May 1980.
- (224) S.29 IRA 1976, SS.27-29 RTDA 1966, and SS.16-18 of the TDA 1960.
- (224a) Cf. Table 4.
- (224b) Per Khawgelly El-Mubareck in the Session convened on the 15th March 1981. Minutes of meetings of The Industrial Relations Law

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Commission 1981 (Set up by Republican Order No.1 1981);
Department of Labour Khartoum. Quotations translated from original
Arabic text.

(225) Ibid per Khawgelly El-Mubareck.

(225a) Cf K El-Mubareck's memorandum as summary of this view - Ibid.

(226) Cf supra the text above fs. 196-197.

(227) But Cf ILO Sudan 1976.392 where it is claimed that prohibition of
strikes has brought about some industrial peace.

(228) Cf supra Parts 1.B.3 and 2.B.1.e in Chapter I.

(229) Cf supra Part 2.B.2.b of Chapter I.

(230) Writing about Pakistan Raza also observes that " . . .
governmental process has inherent tendencies not to re-evaluate major
policy decisions made in the past in particular contexts of economic and
political circumstances. Loaded with day-to-day problems the effort
becomes focussed on fighting bush fires, in administering the law, rather
than on a critical reappraisal of the basic premises of policies . . .RAZA
1967 BJIR.209".

(231) Cf Ahmed Hassan El Jack and Chris Legget; *Industrial relations
and the political process in Sudan* - (See how some of the details which
these writer mention about the role of the Registrar are also erroneous;
in Hussein 1983.222-23 f.76)-; A E A Taha and A H El Jack 1973.38-39;
A E A Taha 1982.155; S S Agabani, (1972).1-62; Taha and El Jack,
1976.1-15.

(232) A E A Taha and A H El Jack, 1973 "A".40. For a critical
discussion of the concept of "development" in relation to Sudanese
Labour Relations policy Cf Hussein, 1983.239-245.

(232a) *El Jack and Legget 1983.25-40; Taha and El Jack 1973 "A".35-40; Agabani; 1972.1-62.*

(233) *This word is used here and in several places in Chapter V. It connotes a governmental intervention, in industrial relations, with the objective of protecting employers' interest. As such it is the opposite of protectionist intervention which aims at protection of the employee.*

(234) *Thus some private sector employment statutes have been described as unrealistically ambitious; ILO; Sudan 1976.118,121.Cf infra Chapter V; Parts 1.C - 1.C.3.*

(THE STATE-INDIVIDUAL EMPLOYMENT RELATIONSHIP AND THE LAW)

- (1) *There are two Acts which cut across this division, namely: The Work Injuries (Compensation) Act 1981, S.4; and The Social Insurance Act 1974, S.4. It is to be noted however that the SIA 1974 covers those among government employees who are not covered by the pension scheme. The uniformity of the social objective of the legislation in cases of both private sectors and State employees accounts for the generality of the Acts. Both Acts fall without the scope of analysis in this Chapter. Despite their application to both public and private sector employees the administration of the two Acts is assumed by a different authority in the case of each sector.*
- (2) *This is so either because administrative bodies represent both the makers and administrators of rules (e.g. in case of discipline, or in cases of anti-discrimination and fair competition principles since there is no substantive legislation on the latter two) or that the non-judicial status these bodies have, coupled with the exclusive non-judicial role they play in administration of existing legislation, direct development of the case Law accumulating under this legislation along an administrative rather than a legal tradition.*
- (3) *Cf. infra, Part 4.A of Chapter 5.*
- (4) *The Individual Employment Relations Act 1981, SS.48, 58. Cf. infra Part 3.B.3 Chapter 5 for examples of favourite arrangement. Cf. supra Part 2.A.1.a Chapter 3 for reasons why it is necessary to bargain in order to enforce statutory protection.*
- (5) *The Public Service Act (PSA) 1973 S.21. See also Attorney General "Fatwa" No. AG/7/6 date 14/2/1979 where it was decided that an Employment Committee constituted within the Ministry of Foreign Affairs and including members of the consulate and*

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diplomatic staff trade union has no jurisdiction to consider employment grievances and that such grievances may only lie to the Public Service Appeal Board (PSAB). For a general discussion Cf. *supra* parts 2.A.1.a - 2.A.1.b in Chapter 3.

- (6) Cf. *infra*. the Conclusion to this Chapter.
- (7) Ministry of Justice; Letter No. Mj/L/752/1 dated 24/1/1971.
- (8) Ministry of Irrigation -v- Abram Dow AC*CVRV*317*1982.
- (9) Murad Saad Hanna -v- Madeline Sami SC - CV.Cass-267-1975 (1975) SLJR.185. Cf.*infra* Parts 3, 3.B.1-3.B.2 in Chapter 5.
- (10) Cf. *infra* part 1.B.
- (11) Cf. *infra* f.14.
- (12) Cf. *infra* parts 3.B - 3.B.2 of Chapter 5.
- (13) Thus the TUO 1949 s.27 stipulated that employees of the public sector should not be members of trade unions of employees outside that sector nor should trade unions of public employees federate with affiliate to or participate in the formation of any labour organization for the purpose of realizing any of their objectives. The TUO 1960 S.2 defined a worker as, for all purposes of trade union legislation, any person, in the employment of any employer . . . who is engaged in manual work . . . But does not include the classified officials or unclassified employees of the Government. The Trade Disputes Act 1960 S.9 provides that the Minister for Labour may refer a dispute to arbitration without the consent of the disputing parties if the dispute is between the government and its workers or employees. Finally the TUO 1966 provides that, a "trade union which includes persons in the public services shall not federate affiliate or otherwise take joint action in furtherance of its objectives under its constitution, with any

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political organization" sic.

- (14) *Cf. also pp.109-116, 123-131 and 140-145 opcit. The work referred to discusses significant changes that the 1970 CLC purported to maintain and the events surrounding its withdrawal.*
- (15) *Cf. infra part 3.B.6 of Chapter 5.*
- (16) *Cf. infra Part 3.B.6 in Chapter 5.*
- (17) *Cf. supra f.7 and the text above.*
- (18) *The period between 9/2/71-10/5/1973 witnessed major political and administrative changes affecting both the structures and personnel of the public service. The condition of the public service and its laws was being reviewed by a commission which eventually reported its recommendations in 1973. Purges of employees undesired by the Regime had thrived. It was in all respects a transitional period - Hussein, 1983. 108-146). There is no reported Court or Labour office decision regarding the position of public employees covered by the EEPO 1969 during this period.*
- (19) *The Public Service Act 1973 (PSA 1973) SS.2-3, the Employees Discipline Act 1976 (EDA 1976) S.3 and The Public Service Regulation (PSR 1975).*
- (20) *Cf. supra f.8 and the text above, and infra part 4.B.2.*
- (21) *Cf. also (Hepple and O'Higgins 1971) Public Employee Trade Unionism in the United Kingdom : the "Legal Framework" especially Chapters III and V.*
- (22) *S.M. El Telmowi; Disciplinary Action. A "Comparative Study" Cairo 1975 in Arabic. Cf. infra the Conclusion to this Chapter.*
- (23) *Cf. supra f.5 and infra part 4.C.4 of this Chapter; Cf also supra parts 2.A.1.a - 2.A.1.b of Chapter 3.*

- (24) *The role which Law plays in controlling industrial relations is not equally marginal in all developed Capitalist societies as among themselves. But when these societies are opposed, as a category, to under-developed social formations the role which "Law" plays in shaping industrial relations appears to be more prominent in the latter. The social process of Law-making peculiar to each category of societies means that the content of legal norms may not be manifestive of equally liberalist contents in the case of each category of societies.*
- (25) *International Encyclopaedia for Labour Law and Industrial Relations (ELL) R.(Blanpain edit. Kluwer 1979 Volume 5.*
- (26) *ELL Supplement May 1979. 209-210; NJAC Report 1967.22 HMSO London 1967.*
- (27) *Taft-Hartley Act 1947 S.305 (61.US Stat. 136.1947). By the early 1980s nine states allowed at least some public employees to engage in strikes. Cf. ELL Volume 10, Supp.31 May 1983, 269; and also Hogler and Kirsciun, 1984 f.9.p.482.*
- (28) *Civil Service Law 200-214 (McKinney 1973).*
- (29) *Cf. especially the decision in Board of Education -v- Huntington Inc.1972 cited in the reference Opcit. For the recent position of the American Law on this issue Cf. EEL Volume 10, Supp.31 (May 1983) pp.219-220; S D Anderman, 1982.85-86.*
- (30) *Members of the Police and Armed Forces have always been governed by special Laws - Officials Discipline Ordinance 1927 S.3. In 1973 members of the judiciary and the Prisons and Fire Brigade Forces were added as exceptions from the field of application of individual employment Laws in the public sector -*

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The Public Service Act 1973 S.4. Because of their supposed special position and subjection to special laws the discussion in this Chapter will not focus on employment in these units. Another general observation about Sudanese public service Laws is that, with the exception of members of the forces mentioned above, and employees in high level leadership posts, they apply to all employees in all divisions of public employment without regard to distinctions as that between central government and local authorities employees, or, industrial and non-industrial civil service or white and blue-collar employees. For the position in Britain Cf (Hepple and O'Higgins 1979.64, 1971.9-39).

- (31) Although their posts are unclassified, manual workers constitute the vast majority of public employees in the Sudan. In 1972/73 the number of employees in unclassified posts, in Greater Khartoum area alone, was 51,391 compared with the 55,611 employees in classified and superscale posts all over Sudan for the same year. The number of employees in unclassified posts recorded also an annual rate of increase of 15%. Compiled from statistics in (Al-Teraifi 1980) and the (ILO Sudan 1976.481).*
- (32) PSA 1973.SS.2-3, EDA 1976.S.3. Cf. supra f.19.*
- (33) "Organized sector . . ." is used here to refer to permanent workers in the public sector or registered establishments of whatever size in the private sector. The statistics given do not cover workers in the unorganized sector - i.e. casual labour in "organized" industry and labour within the "Informal Sector" of the economy. Workers covered by the statistics are also covered by labour legislation and highly unionized. The Labour Department statistics given below are therefore a fair estimate of*

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the position. (Cf. ILO Sudan 1984. 144-145). There are two patterns of statistics available. The first is that of the Labour Department, conducted on annual basis, and, the second is that of the ILO 1976 comprehensive survey of the Sudan (ILO Sudan 1976). According to the former the number of unionized employees in the public sector is 683,539 and that of unionized employees in the private sector is 152,777 (Labour Department 1979-80). The ILO survey provides statistics for the Greater Khartoum area only and puts the percentage of those employed by the Government at 46.3% and that of those employed by the private sector at 32.4% out of a total workforce of 202,400 (ILO Sudan 1976.336).

- (34) *The Public Service Appeals Board -v- Ennielane Bank* CA*CVRV*1*1979 (1979) SMLR April June 1986, SC*CV CASS* 1980 unreported.
- (35) *Kurdofan Commerce and Engineering Ltd.* The Solicitor General's decision on the Company's application - (No. KCO/AC/507/81-30/9 1981) was that: (1) "The Company may amend its memorandum of association to include a clause for enabling it to issue its own terms and conditions of service and; (2) there is nothing to prevent the Company from applying the Individual Employment Relations Act 1981 if the conditions and terms of employment recognized under that Act are more beneficial to the employees than the provisions of public service Laws".
- (36) The statement between brackets was made by the then Advocate General in a personal interview conducted by the writer at the Attorney General Chambers Khartoum on 26/1/1984. Cf. also the dispute between the Minister of Finance and the Banks

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Employees Trade Union where an arbitration tribunal sitting in April 1979 had to consider whether members of the disputing trade union were public employees and therefore barred from demanding a house bonus by Presidential Decree No.338 - (Cf. *supra* part 2.A.1.a Chapter 3). The Tribunal preferred allegedly on public interest grounds not to decide on the legal position of the Bank's employees. File No. SWTUF*LR*37*A*1*2*4*1979.

- (37) Davies and Freedland (1984) p.79, (1979).454 give the following reasons: (1) prior existence of the employment relationship is seen as conferring a vested interest in the continuance of his employment; (2) the claim of the existing employee dismissed is seen in individual terms while the claim of the applicant is generally limited to his claim as member of a certain disfavoured group; (3) no pre-existing relationship, between employer and applicant, by which the fairness of employer's decision can be judged.
- (38) Cf. *supra* part 3.B of Chapter 2.
- (39) Anglo-Egyptian Treaty for the Administration of the Sudan 1899 - (AET 1899).
- (40) Explanatory memorandum to the Public Service Regulation 1975 in Public Service Laws and Regulations issued by the Ministry of Public Service. Government Press 1976.
- (41) Central Recruitment Board, 2nd term report 25/4/1978 - 24/4/81.
- (42) Cf. *infra* part 2.B.2.
- (43) Cf. *infra* f.48 and the text above.
- (44) There is no trace of any pre-entry closed shop arrangement or any other similar collective arrangement which the trade unions in Sudan, either in the public or the private, have managed to

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negotiate so far with employers.

- (45) Paragraph 7 of a booklet entitled "Guidelines on Selection" emphasises that, "no person shall be appointed in any post in the public sector unless he or she is a holder of a security clearance certificate from the State Security Department" (i.e. the secret political police). Although the latter has been abolished paragraph 7 is still in effect.
- (46) i.e. those qualified to fill posts in Scale (A and P).
- (47) Presidential Order No.PO/1/A/5/4 - 28/7/1976.
- (48) Cf. *supra* text above f.43.
- (49) See Presidential Order No.12 1975; Organization of Government Operations Regulation 1975. Under the Regulation the Minister of Finance - (who is also the Minister responsible for the public service since 1981 - Cf. Presidential Decree No. 807 1981) - may ask any ministry or department to submit before him information concerning any matter which may incur a financial burden on his ministry (OGOR 1975.S.5-(5)). However while this power may enable the Minister to demand information before accepting an application for creation of new posts, it does not in any way give him the power to intervene in determining the persons of those who may fill the posts. Moreover, in all cases the Finance Minister's success in obtaining information or taking action depends on the discretion of the minister from whom the information is sought *Ibid.* OGOR 1975.SS.5-(5).
- (50) There is no accessible citation of this and other CRB decisions. The facts of the case the decisions taken and deadlock arrived at were dictated to the author by the Secretary of the CRB in a formal interview conducted by the author at the CRB Khartoum

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13/3/1984. Unpublished decisions and procedures of the CRB were not then open to inspection by outsiders. Furthermore minutes of procedure and decisions in specific cases are not usually reported in the CRB report.

- (51) Cf. *supra* f.49 and the text above.
- (52) This is the position as can be inferred from: (a) legislative arrangements that govern disputes of government departments or units as among themselves - (The Attorney General Act 1981, 1983 SS.7 and the Attorney General's Chambers Regulation 1983 SS.10(a), 34) - and between anyone of these units and members of the public - (the Civil Procedures Acts 1974 (CPA 1974) SS.33(2)-3; the Civil Justice Ordinance 1929 (CJO 1929) S.109) Cf. *infra* f.57 and text above, and generally part 2.B.2 and (b) the established practice of the Board as summarised by General Secretary of the Central Recruitment Board in an interview conducted by the writer at the Board's building on Tuesday 13/3/1984.
- (53) Government central units making new appointments have to obtain, for purposes of budgetary control, the subsequent approval of the Public Service (Financial) Affairs Chamber - which is also a government unit subordinate, since P.O No. 807 1981, to the Ministry of Finance and National Economy. The Chamber can in theory withhold approval if the appointments are not made through the Central Recruitment Board. However the effectiveness of this type of control has to be assessed within the boundaries of the ministerial jurisdiction referred to earlier *supra* f.49.

- (54) *This is a literal phrase not a legal concept. There is no such concept under Sudanese labour Law Cf. infra Part 3.B.5 in Chapter 5.*
- (55) *Cf. infra parts 2.A - 2.A.2 of Chapter 5.*
- (56) *Cf. supra f.31.*
- (57) *Mudawi Mohamed Ismail -v- Ministry of Education SC*CV CASS*261*1982; Mekki Ali El Azharry -v- Ministry of Health SC*CV CASS*441*1977 infra part 4.AB.*
- (58) *For a similar distinction in British Industrial Relations practices Cf. Hepple and O'Higgins 1979, para 125-127 pp.54-55.*
- (59) *Cf. Labour Department Annual Report 1978-1979.49.*
- (60) *Cf. infra introduction to Chapter 5.*
- (61) *Cf. infra parts 4.C and 4.D.*
- (62) *Civil Service Department; Ministry of Public Service and Administrative Reform, statistics for 1980.*
- (63) *Cf. supra f.30.*
- (64) *Cf. supra f.57 and the test above; and also f.52.*
- (65) *This is personal information based on data collected from (a) the Sudan Development Corporation during the period 1980-March 1981; and (b) the Petroleum Corporation 1984.*
- (66) *Cf. supra fs.36, 45 and text above.*
- (67) *Cf. supra fs.50-58 and text above, and infra part 4.C.4.*
- (68) *Laws enacted within the first thirty years of colonial rule included inter alia; the Officials Salaries Orinance 1905, the Sudan Government Pension Ordinances 1904, 1919, 1922, the British Transferred Officials Ordinance 1928 and the Sudan Government Provident Fund Ordinance 1930.*

- (69) Thus the Trade Disputes (Arbitration and Enquiry) Ordinance 1949 S.8 provided that: "where any dispute referred to an Arbitration Tribunal involves questions of wages or hours of work or other terms or conditions of or affecting employment which are regulated by any law in force other than this Ordinance the Arbitration Tribunal shall not make any award which is inconsistent with the provisions of such Law". The Regulation of Trade Disputes Ordinance 1949 S.5, excepting public employees from the protection provided under the Ordinance, reads: "Nothing in the preceding section shall be construed as exempting from disciplinary measures or civil or criminal liability any permanent servant of the Government who breaks his contract of service in contemplation or furtherance of a trade dispute. See also *supra* f.n.13.
- (70) PSA 1973 S.10 "Regulations shall prescribe salary and wage structures, grading systems, as well as the methods of fixing salaries and wage rates". Ibid S.20: "Regulations shall determine the hours of work and other conditions of service". See also the PSA 1973 SS.17, 19-(1), 21 and 27.
- (71) Cf. PSR 1975 SS.99-130.
- (72) *Customs and Excise Officers' Trade Unions -v- The Department of Customs and Excise; the Labour Department dispute* No. L/R/37/C+E/116/5/D/26. Cf. also *supra* parts 2.A.1.a - 2.A.1.b Chapter 3.
- (73) In the volumes of the "Laws of the Sudan" statutes are referred to by their original date of enactment. Subsequent amendments are only footnoted.

- (74) *Cf. supra part 1.C.3 Chapter 3. In addition to instances enumerated there, executive members of trade unions and the Trade Unions Federation were dismissed and put on trial in 1956-57 and 1958 by Parliamentary and military regimes respectively (Elrai El Am 11/6/1966) and Taha 1970.113). However "interest of the service" was invoked as a ground for dismissal of 195 economically unwanted workers by the Ministry of Construction and Public Works in 1972 MCPW/A/W/43/51/1972.*
- (75) *PR*PSC*AB*40*L*2*6456 (unreported) Cf. infra. Text above f.121.*
- (76) *This is personal information based on classification of notes of "dismissal in the public interest" issued to employees in Departments including Sudan Airways, Ministry of Health, Ministry of Commerce, Ministry of Information and Culture and Ministry of Transport.*
- (77) *Cf. infra part 4.C.*
- (78) *The stance of the PSAB on this issue was disclosed to the writer by Sayyed/Omer Mohamed Ibrahim member of the PSAB in a personal interview in February 1984. On some occasions employees dismissed under the PSPA 1975 S.26-(1)b complained to the Attorney General - (Cf infra part 4.D.) - against misuse of the powers conferred by these sections. In one such case - (AG*2*A*1688) - The Attorney General wrote to the department concerned reminding it of the employee's right to know the reasons that led to his dismissal.*
- (79) *Cf. infra part 3.B.7 of Chapter 5.*
- (80) *Adam Mohamed Abdel Mumin and others -v- Sudan Estates Bank PR*PSC*AB*40*L*10 7228*1983. In this case the plaintiff was employed as a messenger in a Khartoum branch of the defendant*

state-owned Bank. Following a transfer of administration of the branch to members of the Police Force and a resolution by the new management to "policize" all posts in the branch, the plaintiff's post was taken over and he was accordingly dismissed without rights on grounds of the abolition of the post - (PSA 1973 S.22f). Upon complaining to the Public Service Appeals Board (PSAB) the latter saw that the situation in which the plaintiff was dismissed was not one of abolition of post. The PSAB accordingly decided that the plaintiff should either be reinstated or, if not possible, be paid an after-service gratuity to be calculated in accordance with the PSPA 1975 S.31 plus a compensation equalling six months' wages for arbitrary dismissal. For the reasons explained in the text below the PSAB's decision is unsubstantiated and faulty. Following receipt of the judgment the employer protested to the PSAB - (letter SEB dated 9/1/1984) against propriety of the decision. In its letter of 19/2/1984 (No.PSAB-40-R-10-7224) the PSAB reasserted its earlier stance. By the time I left the country (22/3/1984) the employer was still convinced that the PSAB's decision was erroneous and determined not to abide by it. No decision to appeal had until then been taken. My efforts to know subsequent development through correspondence have all failed.

(81) Cf. *infra* parts 4.C.3 - 4.C.4.

(82) Cf. *infra* part 3.B.3 of Chapter 5.

(83) Disciplinary Boards are statutory institutions. Hence the EDA 1976 refers to them always in capital letters as proper names.

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- (84) *Establishments or units, whose hierarchical organization may not fit that of Disciplinary Boards outlined under the EDA 1976 SS.9-14, or, which because of their distinctive function may require a special disciplinary system, can apply to the President of the Republic for exemption from certain provisions of the EDA 1976. See Application No. UK/VC/2-2 : 31/7/1982 by University of Khartoum to the President of the Republic seeking exemption from provisions of the EDA 1976 and of its 1981 Amendment.*
- (85) *EDA 1976 S.5 defines Head of Unit as meaning the Commissioner of a Province the Under-Secretary of a Ministry or a General Manager of any public corporation.*
- (86) *Compare with the position of public employees in Britain, in Dismissal Procedures NJAC Report HMSO London 1967 esp. paras. 40, 42, 47, 55.*
- (87) *Compare with the position of public sector employees in Britain, in S D Anderman, BJIR Vol.8 p.360.*
- (88) *Mohamed El Mamoon Babiker Zerroog -v- the Dean Institute of Theatrical and Musical Studies SC/CV CASS/292/1981.*
- (89) *Under the PSR 1975 S.23 all employees except those appointed by order of the President of the Republic shall be appointed on probationary basis for a period of two years. Employment on permanent basis commences only when the "Head of Unit" either during, or upon or after expiration of, the probationary period, being convinced of the employee's qualification and competence, has notified him in writing that he has been so employed. Nowhere under the Law is the "Head of Unit" expressly empowered to summarily dismiss an employee in the probationary period upon failing to satisfy the competence and qualification*

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test. Nor does the Law provide any procedure for termination of employment in this type of situation.

- (90) In reaching its decision the Supreme Court was possibly influenced by argument of the Attorney General, on behalf of the defendant Institute, that determining the fulfillment of the qualification and competence condition is a management prerogative and that before this determination, the plaintiff does not qualify for trial by a Disciplinary Board. See also the Attorney General "Fatwa" No. AG/7/2/23 : 16/4/1981 and *infra* part 4.C.6.d.
- (91) Penalties inflictible under the EDA 1976 S.7 include *inter alia*: (1) suspension from duty with loss of pay; (2) retardation of promotion or freeze of increment of pay for at most two years; (3) reduction of pay and grade; (4) dismissal; (5) dismissal and forfeiture of at most one fourth of gratuity or pension; (6) dismissal and fine equalling 5% of after service benefit plus any payment deserved in lieu of notice.
- (92) The President may instead of submitting the petition to the PSAB for advice, personally confirm the measure taken against the complainant or annul it EDA 1976 S.20.
- (93) Assumption of jurisdiction, by the Court, in disregard of this requirement renders the proceedings null and void; *Atbara Philanthropic Society -v- the Director of Estates* (1942), *Pensions Department -v- Blue Nile Company* (1981) and *People's Armed Forces -v- Amal E.Y. Kuboshia* (1980).
- (94) The CPA 1974 S.312(b) and the CJO 1929 make admission of an application for judicial review of administrative action conditional upon proof that the applicant has exhausted all available means of redress before seeking judicial assistance. Because they perceive

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public employment claims as administrative claims the Civil Court in Sudan have invoked the provisions of these Acts to disclaim jurisdiction.

- (95) (CA*CV.RV*187*76*1976) and (SC*CV.CASS*441*1977).
- (96) (SC-CV CASS - 261 - 1982).
- (97) See *supra* f.5.
- (98) Compiled by the author from the Labour Department Annual Reports 1973-1979 and the SWTWF; Statistics on Collective Labour Disputes and Disputes Referred to Arbitration, for the period between Jan.1979 - December 1981 in File No. SWTUF/LR/37/A/1/2/4.
- (99) Sudan Workers Trade Union Federation.
- (100) (Fawzi 1957.104)
- (101) (Taha 1970.140).
- (102) Cf. *supra* fs.184-186, 192 and the text above in Chapter 3.
- (103) The Public Service Regulation 1938. Transfer and Travel Allowance Regulation 1934. Leaves and Holidays Regulation 1934.
- (104) Cf. Civil Secretary of the Sudan; note to the Council September 1942. Appendix 5 in Beshir 1978.266.
- (105) None of these memorandums exclusively dealt with establishment of a Public Service Commission. They however indicated the problem of administration and determination of employment grievances and the need for a body other than the "Head of Departments or Ministers" Cf. Beshir 1978 250-263.
- (106) Cf. comment by the Civil Secretary in the Note quoted above in Beshir, 1978.269. and *supra* part 2 in Chapter 2.

- (107) Cf. *Muddathir A/Raheem* (1969), (*Bakheit*, 1965).
- (108) *The Constitution's National Commission: Constitution of the Sudan 1958 Article 70-(1).* The provisions of the 1953 and 1956 Statutes regarding the functions and constitution of the Commission are not different from those recommended by the 1958 Constitution. Indeed the National Commission had borrowed its recommendations on the issue from these two previous Statutes. Cf. also Articles 130-131 of the *Transitional Constitution of the Sudan 1985*.
- (109) The failure of the different party-Governments that reigned between 1956-1958, to implement the Statutory provisions regarding the establishment of the Commission was due to their instability and disagreement (*Beshir 1978.202*).
- (110) *Beshir 1978.226*.
- (111) *Explanatory memorandum to the Employers and Employed persons Ordinance (Amendment) Act 1969 (No.1969)*.
- (112) *ODO (Amendment) Act 1969 SS.1-15.* Thus in one case where the Minister of Communication and Transport confirmed the decision of a departmental disciplinary board dismissing the plaintiff, the Ministry of Justice decided that the Minister's confirmation of the decision was within his powers and in accordance with the Law! *Mj/L/66-5/Vol.II : 2/9/1969*.
- (113) In the case cited above the Ministry of Justice believed; "the Council of Ministers has the jurisdiction to deal with the application made by the plaintiff against the Minister's decision. "In exercising this jurisdiction the Council of Ministers may, depending on its findings, uphold the Minister's decision, increase or reduce the sentence against the plaintiff, order a retrial or

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- amend both the findings and sentence." Compare with the powers of the Governor General under the ODO 1927 S.25.
- (114) Cf. the CJO S.109, the CPA 1974 SS.33(3) and the Attorney General Act 1973, 1981, 1983 SS.
- (115) Cf. *supra* f.14.
- (116) Cf. *supra* f.7 and the text above.
- (117) Presidential Order No.807 : 30/12/1981 and the Public Service Commission Regulation 1982 (PO No.7 1982).
- (118) PSCR 1982 SS.24-25, and the PSAB Regulation 1973 SS.16-17.
- (119) This is the position as stated by Sayyed Omer Mohamed Ibrahim member of the PSAB in a personal interview conducted by the writer in February 1984. Cf. *Anwar Ali Hussni -v- Ennielane Bank* (1977), *Mudawi Mohamed Ismail -v- Ministry of Education* (1982).
- (120) Cf. *supra* f.78 and the text above.
- (121) (PR/PSC/AB/40/L/2/6456/1984.)
- (122) The PSCR 1982 S.4 fixes the duration of offices of the President and Members of the Commission at three years renewable for another three years by order of the President of the Republic. See for a comparison SS.7-8 of the British Tribunals and Inquiries Act 1972.
- (123) It is worth mentioning that this is a status which the Commission has enjoyed only since 1982. Before this date the Commission was a subordinate of the Ministry of Public Service. Despite its obvious shortcomings the present position of the Commission represents the ideal which previous Constitutions and Statutes aspired to. See *supra* part 4.C.1.

- (124) *Cf. supra fs. 119,121 and the text above; Beshir Hamad El Beshir -v- The Department of Customs and Excise 1984 Ibid; infra fs. 130/132 and the text above.*
- (125) *Cf. infra f.136.*
- (126) *To be eligible for appointment as legal adviser of a government unit the applicant must possess as minimum qualification an LLB and the Certificate of Admission to the Bar. This qualification is not required for appointment on the PSAB. Some members of the PSAB do not possess any legal qualification.*
- (127) *This is the legal opinion of the Attorney General regarding the bindingness of the PSAB's decisions and its application in specific situations. The description "official legal policy" is used by the Attorney General itself - Cf. infra f.128 and the text above.*
- (128) *Letter No. AG/7/6 : 8/12/1977.*
- (129) *See supra footnote 36 and the text above.*
- (130) *Cf. supra f.102 in Chapter 3; Customs and Excise Officers' Trade Union -v- The Department of Customs and Excise 1978 SMLR.70 where the Court of Appeal ruled that application for execution of a Court decree should be made only to the same Court that issued the decree" per Sadiq Salman J.; and Eisha Ali Sid Ahmed -v- Ali Dawoud 1967 SLJR.114 where it was decided that "once an administrative decision becomes final it is for the administrative authority to enforce it".*
- (131) *Omer Ali Ageeb and Others -v- the Ministry of Finance and Economic Planning PSAB*40*S*5*G*7102*1983, Anwar Ali Hussni -v- Ennielane Bank PSAB*40*L*2496*1977, Mahmoud Gemal Saddar -v- the Attorney General CA*CV RV*141*1977 Mohamed El Soofi A/Galil -v- Sudan Agricultural Bank CA*CV RV*108*1977.*

- (132) Thus in *Omer Ali Ageeb and Others -v- the Ministry of Finance* (1983) Ibid, the Ministry deliberately disregarded the statutory criteria provided for determining eligibility for promotion and used instead a subjective criteria with the effect that the plaintiff and eight other assistant under-secretaries, who, had the Ministry acted lawfully would have been eligible for promotion, were left behind. The plaintiffs complained to the President of the Republic who in turn referred the case to the PSAB for advice. The PSAB upheld the plaintiffs' view that the Ministry had acted against the Law and that most of those promoted were in effect less eligible for promotion than the plaintiffs. The PSAB however left it entirely to the Minister of Finance - (who is simultaneously the Minister responsible for the Public Service) - and the President of the Republic to decide upon the fate of those who had already been promoted and incidentally that of the plaintiffs. By the time I left the country on 22/3/1984 the issue was still unsettled and the Ministry was still adamant in its defence of the "suitability" criterion by whose innovation it undermined the plaintiffs' chances for promotion.
- (133) In *Anwar Ali Hussni -v- Ennielane Bank* 1977 Ibid the intransigence which the Bank has shown in resisting all attempts at rectifying the plaintiff's position may not be unrelated to the suspected malice, on the part of the management that had led to mistreatment of the plaintiff in the first place. See also *Omer Ali Ageeb and Others* Ibid supra f.89.
- (134) Cf. letter No. PSAB/40/L/2496 : 14/6/1979 in which the PSAB requested the Attorney General to advise on whether the PSAB has jurisdiction over claims brought by employees of State

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Commercial banks. Cf. also *infra* f.92 and the text above.

(135) Cf. *infra* f.136 and text above.

(136) *Mahmoud Gemal Saddar -v- The Attorney General* (1977) *Ibid.* The plaintiff, a clerk was transferred from the judiciary, where his name was the third on the list of candidates for promotion, to the Attorney General Changers where his position was relegated to the twelfth on the Changers' promotions list. The plaintiff's complaint to the Changers' Under-Secretary was rejected on the ground that the PSR 1975 S.41-(4) gives the power of determining the position, of a transferred employee, on promotion lists to the head of the unit to which the employee is transferred. The subsection referred to gives the head of unit this power subject to the circumstances of each case. It might have well been argued for the plaintiff that his position on the list of his original employer was a circumstance that ought to have been taken into consideration. However the PSAB hinting the legal weight which the Attorney General's opinion has, decided, on 17/5/1977 not to intervene with the Changers' decision.

(137) Compare with the system of administration of private individual employment Law *infra* Parts 4.A-4.B in Chapter 5.

(138) Per the Attorney General before the Supreme Court in, *Mahmoud Gemal Seddar -v- S.G (The Attorney General 1978)* *Ibid.*

(139) In *Mahmoud Gemal Seddar (Ibid)*; respect for the plaintiff's accrued rights may have persuaded a civil court to protect them by invoking an interpretation similar to the one I invoked, under footnote 136, or, by accepting the plaintiff's counsel submission that his client ought to have been given a chance to know the loss

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he was going to incur by accepting the transfer. The general principles of the Law - (Cf. letter No. AG/3/A/1273 : 22/11/1983) may have also persuaded the Civil Courts to agree with the plaintiffs in the *Graduates of the Institute of Telecommunications -v- the Telecommunication Public Corporation* (SC*CV CASS*11*1983) that since the Corporation has initially employed them in a particular scale, it cannot after seven years of continuous service, unilaterally degrade the scale of their posts. See also *Mohamed El Mamoon Babikr Zerroog -v- The Dean Institute of Musical and Theatrical Studies* (SC*CV CASS*292*1981), where infringement of the plaintiff's natural rights to be heard, to be given a chance to defend himself and to know the charges against him may have persuaded the Civil Courts to invalidate the procedures taken against the plaintiff. The Court of Appeal did exactly that in the *Central Electricity and Water Authority -v- Mohamed Hamid Ahmed* 1971.

- (140) The stance of the Civil Courts, vis-a-vis control of the employment relationship, suggested by the analyses in these paragraphs contrast with the position in Britain where the Industrial Tribunals were introduced partly to protect the workers and the protective legislation against prejudices of the Common Law judges Cf. *infra* part 3.B.2.a - 3.B.2.b, 3.B.3 and generally part 3.B.2 of Chapter 5. See also part 4.B of the same Chapter.
- (141) Letter No. AG/3/A/1273 : 22/11/1983.
- (142) Cf. *infra* f.123 and the text above.
- (143) Cf. *supra* part 4.AB.

- (144) PSA 1973 S.30. Exclusiveness of the PSAB jurisdiction was one of the grounds on which the Supreme Court dismissed plaintiffs' application in the Telecommunications Institute (1983) case *Ibid.* See also *Ebram Dow -v- Ministry of Irrigation* 1982 *Ibid.* In the latter case, the plaintiff's complaint against arbitrary dismissal was upheld by a district labour court and a province court which ordered the defendant Ministry to pay him compensation under the EEPO 1948 and the IERA 1981. The Court of Appeal annulled decisions of both Courts on the ground that the plaintiff was a State employee whose grievance could only be dealt with by the PSAB.
- (145) Cf. *Mudawi Mohamed Ismail -v- Ministry of Education* 1982 *Ibid.*
- (146) Cf. *supra*; part 4.B.2 esp. f.95 and the text above.
- (147) *Building Authority of Khartoum -v- Evangellos Evangellides* 1958 SLJR.16. These powers and the conditions to which their exercise is subject are now incorporated in the CPA 1974 SS.309-315.
- (148) *Mahmoud Gemal Seddar -v- the Attorney General* 1977, and, *Mohamed El Soofi Abd El Galil -v- Sudan Agricultural Bank* 1977 *supra* fs.131,136,139.
- (149) *Mahmoud Gemal Seddar Ibid.*
- (150) Quotation translated from original judgment manuscript in Arabic p.3.
- (151) Excess of jurisdiction need not necessarily be specifically alleged by the applicant. In all other cases of judicial review of administrative decisions, the Courts usually invalidate decisions on this ground on their own motion.

- (152) *D A Siddig SC.J dissenting agreed with the submission of the Attorney General that the PSAB is a quasi-judicial authority, but, quoting Denning; the Discipline of the Law 1979 pp.70-72, contended that "the provision regarding the finality of the PSAB decision does not oust the jurisdiction of the Courts. The latter must always intervene if the quasi-judicial authority has erred in Law or exceeded its jurisdiction. He therefore did not agree that the Court of Appeal was right in summarily dismissing the application before investigating the claim". Ibid pp.5-6.*
- (153) *See supra f.36 and the text above.*
- (154) *Quotation translated from original text of the MLJR in Arabic p.88-89.*
- (155) *The Attorney General usually represents State units in legal proceedings before the Courts. In this particular case the dispute was initially between a State Bank, whose service the Attorney General conceives as public service, and one of its employees. Following the ruling of the PSAB based on the view that service in the Bank is public service, and, the challenging by the Bank of that ruling before the Court of Appeal, the Attorney General found itself defending the finality of the PSAB's decision side by side with the employee's counsel and against the Bank which it is supposed to represent. The decision of the Court of Appeal in favour of the Bank and the subsequent request made to it by the PSAB to advise on the situation led the Attorney General to apply, for a revision of the Court of Appeal's decision, to the Supreme Court, ironically on behalf of the same PSAB which is according to the Attorney General an independent tribunal and not an administrative unit in the State hierarchy.*

- (156) Reference is made to the Permanent Constitution of the Sudan 1973 Article 205; "There shall be a Civil Service Commission which shall have jurisdiction to decide the affairs of the Civil Service including complaints. The Law shall prescribe its constitution, powers, jurisdiction and functions." Cf. now Sudan Transitional Constitution 1985 Article 130.
- (157) Quotation translated from original judgment manuscript in Arabic P.2.
- (158) Cf. *supra* f.36 and the text above.
- (159) SC*CV CAS*292*1981 unreported. Cf *supra* fs.88,90 and the text above.
- (160) Cf. *infra* part 4.C.6.b.4. Cf also Mahmoud Gemal Saddar -v- the Attorney General SC*CV CASS*109*1978 where the plaintiff also walked without a remedy even though his grievance was consequential upon a breach of the Law. *Supra* f.136 and the text above.
- (161) Cf. *supra* fs.159, 88, 90 and the text above.
- (162) Quotation translated from judgment original manuscript in Arabic p.3.
- (163) The Court emphasised in particular the point that a Public Service Commission with *inter alia* jurisdiction similar to that of the PSAB has always been provided for by various constitutions and statutes in the history of the country Cf. *supra* part 4.C.1.
- (164) Cf. *supra* f.156.
- (165) Cf. *supra* fs.88-90 and text above.
- (166) Cf. *supra* f.95-96 and text above esp. the decisions in Mekki Ali El Azharry -v- Ministry of Health (1976), and Mudawi Mohamed Ismail -v- Ministry of Education (1982).

- (167) So far there has been only one instance in which a Court decided that the PSAB acted without its jurisdiction and the decision was reversed as erroneous on appeal to the Supreme Court. Cf. *Anwar Ali Hussni -v- Ennielane Bank* supra f.36 and text above.
- (168) Cf. the arguments by the plaintiffs' counsels in *Mahmoud Gemal Saddar -v- the Attorney General* 1978, *Mohamed El Mamoon Babikir Zerroog -v- The Dean, Institute of Musical and Theatrical Studies* 1981.
- (169) *Eastern Khartoum Tenants -v- Sudan Government* (October-December 1979 MLR p.137). The plaintiffs, tenants of shops owned by Eastern Khartoum Council applied to the Court of Appeal against an order of eviction issued by the Commissioner of Khartoum Province, under the Evacuation of Public Premises Act 1969. The Court of Appeal accepted the application and ordered a stay of execution. Whilst the plaintiffs application was still being heard before the same Court the President of the Republic issued an amendment to the EPPA 1969 whereby Courts were prohibited from "reviewing any order or action taken or is deemed taken" under the Act (EPPA 1978 S.4). Following the amendment the Court of Appeal refused to continue with the hearing. The plaintiffs' counsel petitioned the Supreme Court to declare the amendment unconstitutional. The Supreme Court dismissed the petition on the ground that the amendment was not unconstitutional.
- (170) Situations may arise in which the Attorney General becomes the judge of its own case - (Cf. supra fs.136, 139). It is difficult to separate the arbitrary interpretation of the Law in such situations (Cf supra f.139, 136) from this convergence of executive and judicial functions.

- (171) See table (6) .
- (172) *Anwar Ali Hussni -v- Ennielane Bank* (1977) *Supra* fs.128, 141.
- (173) See *Graduates of the Telecommunications Institute* 1983 where plaintiffs voluntarily complained to the Attorney General. Cf. also *Fatwa No.AG/3A/83/11 : 27/1/1982*. Cf. *infra* f.141.
- (174) 40 out of 59 compiled selected pieces of legal advice the Attorney General Changers offered in the period between January 1980-April 1983 related exclusively to disputes arising from or relating to application of the Public Service Laws and regulations. Out of another 50 consultations selected over an unspecified period of time, 34 related, also, exclusively to disputes over individual employment claims in the public sector. See Edward Reyad; selected *Fetwas* by the Attorney General Changers. The Attorney General Changers Khartoum May 1981, 1983 (unpublished).
- (175) Cf. *supra* f.119.
- (176) *Graduates of the Telecommunications Institute -v- the Telecommunication Corporation* (1983). Cf. *supra* fs.139, 141.
- (177) Quotation translated from original manuscript of the Supreme Court judgment delivered by Z Abdel Rahman, in Arabic p.3.
- (178) Cf. *supra* Part 2.A.1.b of Chapter 3.
- (179) Cf. *infra* parts 3.A.3 - 3.A.4 of Chapter 5 and also *supra* part 2.A.2.a of Chapter 3.
- (180) Cf. *infra* Table (9).
- (181) ILO Joint Committee on the Public Service (JCPS); Report and Resolutions. ILO Official Bulletin Vol. LIV 1971 375, 380; Hepple and O'Higgins 1971.33.

- (182) *ILO JCPS Ibid 375; (Schregle, 1974.404). Cf in contrast Hepple, 1982.69-80.*
- (183) *These are the same factors on the basis of which the position of public employees is regarded as better. Cf. supra works opcit. f.182.*
- (184) *ILO Freedom of Association and procedures for staff participation in determining conditions of employment in the Public Service Report II. JCPS Ibid. 382,380.*
- (185) *Sudan has not signed the ILO 151 Convention on Labour Relations (Public Service) 1978, Cf Supra Tables A & B in Chapter 3.*
- (185A) *Sudan is also unique in its invocation of "public interest" as excuse for circumvention of statutory law or statutory regulation of the administration of such law. Cf. in contrast the meaning and usages of the concept of "public interest" in Britain in Wedderburn & Murphy, 1982 especially Hyman opcit.95.*
- (186) *Cf. infra. Part 4.A in Chapter 5.*
- (187) *Cf. infra Part 4.B in Chapter 5.*
- (188) *Because the Supreme Court is more prone to political influence Cf. supra f.47 and text above in Chapter 3 and infra Part 4.B in Chapter 5.*

(THE PRIVATE SECTOR INDIVIDUAL LABOUR RELATIONS AND THE LAW)

- (1) *The meaning this term is intended to connote has already been explained Supra f.233 and the text above in Chapter III.*
- (2) *Cf supra, the text above fs.76, 36 in Chapter IV*
- (3) *E.g. Public Sector Trade Unions' acquiescence into Governmental control of public employment and their acceptance of Government view that the 1970 Consolidated Labour Code (1970 CLC) did not apply to Public Sector employees were products of this assumption.*
- (4) *Cf supra f7 and the text above in Chapter IV.*
- (5) *Bittar v Apkar Petrikian JC-App-9-1914 1 (SLR) 60. In this first reported Case the Judicial Commissioner asserted the status of employment as a "contractual relation . . . terminable upon service of reasonable notice".*
- (6) *This was the view of the Supreme Court in Suhair Diryas v Central Trading Co Ltd 1975 (SLJR) - 166 and Murad Saad Hanna v Magdauline Sami 1975 (SLJR) - 185. In the latter Case the Court concluded that "the notion of absolute contractual freedom is no longer viable in the area of the employment relationship..." Ibid p.187.*
- (7) *Cf Beshir, 1978 - 226; A E Ali Taha, 1970, 104-110; Hussein, 1983 - 248. This is an orientation which is possibly also shared by similar classes in some other under-developed countries; C K Wilber, 1979 - 34-38.*
- (8) *Cf (Fawzi, 1957 - 149), (Hashem, 1964 - 14), (Taha, 1970), (Hassan, 1979 - 13 f4) and the Supreme Court Judgment in Central Trading Co Ltd v Suhaier Diryas, 1975, SLJR - 171.*
- (9) *Hashem, 1964 14-15 and the Supreme Court Ibid.*
- (10) *Cf infra parts 3.A.1 - 3.A.2.*

- (11) Hassan, 1979 - 140.
- (12) Cf SWTUF A preparatory call for implementation of the 3rd Annual Council's decisions relating to achievement of Workers Immediate Demands January 1955, 12-14, also Memorandum of the Provisional Secretariat of the SWTUF to the Minister of Public Service 18.1.1972.
- (13) Hassan, 1979 himself at some point favours this view. Cf pp 139-141 Ibid.
- (14) Workshops and Factories Ordinance 1949; The Workshops and Factories Regulations 1952, Ss. 25(1) a-c.
- (15) Cf *infra* text above f20 and part 1.C.
- (16) Cf Davies and Freedland (1985) 432; Hepple and O'Higgins, 1979 - 241, where the position under British Law is discussed.
- (17) But Cf *infra* the text above f192.
- (18) Cf *supra*; text above fs 82-83 Chapter II.
- (19) For a description of these events cf (Hussein, 1983, 109-110, 123-131, 140-145).
- (20) Cf *infra* fs 97-98 and the text above.
- (21) For the reasons why Public Sector Trade Unions cannot do the same Cf *supra* Part 2.A.1 in Chapter III.
- (22) The IERA 1981 S.58; see the position of public employment law *supra* f192 and the text above in Chapter III.
- (23) Cf *supra* the conclusion to Chapter IV.
- (24) Cf Taha, 1982 - 145 and *infra* the summary of Part 3.B.
- (25) Cf Taha, 1982 - 145 and the summary of Part 3.B.
- (26) Cf *infra* Part 3.A.4. Revision of the level of wages and salaries of public employees began by the introduction of the first phase of the JECS in 1978. The scheme has not yet been fully implemented.

- (27) This is an Employers Association established in 1969 "in reaction to the growth in the number and powers of Trade Unions". It deals exclusively with industrial relations - A E Taha, 1982, 144-45.
- (28) Cf *supra* f14 in Chapter IV.
- (29) Cf *supra*; f14 in Chapter IV, and; f19 and the text above in this Chapter.
- (30) Cf *infra* fs 204, 155.
- (31) Cf *infra* fs 97-98 and the text above.
- (32) Cf *infra* Table 8.
- (33) Cf Abdin 1983 - 100 where it is claimed that the total MNCs employment in Sudan is approximately 3,000 - 4,000 or 3% of total wage employment. This is a gross underestimation because it focuses mainly on permanent firms to the neglect of firms in the construction industries; some of which are referred to in Table 10 in this Chapter.
- (34) Cf *supra* the last three pages in the Conclusion to Chapter III.
- (35) *Ibid.*
- (36) Cf *supra* Parts 3.B.1 - 3.B.3 in Chapter I.
- (37) For the definition of this term see below; and also *supra* f33 in Chapter iv.
- (38) Cf *infra* Table 11.
- (39) ILO Sudan 1976, 110.
- (40) The "formal" sector connotes economic activity characterised by large-scale operation and a high degree of Capital intensity. The ILO Sudan 1976 estimates total employment in the formal sector - (including both public and private formal sectors) - at 1.6 million workers (*Ibid* 110). If we deduce from this an estimated 100,000 agricultural workers in public sector projects and the 683,539 (cf *supra* f33 Chapter IV) employees in the organized public Sector, the percentage of private

sector employees covered by legislation (300,000) to total employees in the formal private sector (816,461) is still 36.7%.

(41) Cf *supra* Part 2.B.2 in Chapter IV.

(42) Faisal Sudanese Islamic Bank Act 1977 (No 33) SS.6(a). A company exempted in this manner is usually required by Law to provide terms and conditions of employment which are at least equal to what is guaranteed under Sudan laws.

(43) Letter No SFIB-M-52 - 7.12.1982.

(44) The MA 1974 is a law of *Is'tikh'dam* - (i.e. a process of recruitment) and not *Khid'ma* - (i.e. an employment relationship or service).

(45) SS.24(e)-(h) of the MA 1974 (Amendment) 1979; - (No 41). Cf also MA Regulation 1979.

(46) *Supra* Chapter IV Part 2.B.1-2.B.2.

(47) Sudan Employers Federation Memorandum No CMH-"M" "L"- "L"-47-"A"-5- 3.8.1982 - to the President of the Republic.

(48) *Per el Sir El Hussein Mustafa*, Director, Khartoum District Labour Officer - interview by the writer on 28.1.1984.

(49) *Supra* f32 (a) and the text above in Chapter IV.

(50) Cf in this respect SS.25,17(f), 14 of the PSRBR 1982, the PSR 1975, the PSA 1973 respectively and *supra* f32 in Chapter IV, cf in Contrast Clauses 6, 10 of the Explanatory Memorandum to the MA 1974 In MPSAR, Book 1976 362-363. Cf also Manpower Regulation 1979 paras 3-6.

(51) *Sudan Glass Co Ltd v IDRIS Khalafalla* "KNLO-154-1981".

(52) *Samira Khalil and Zainab Hassan v Sudan-Emerates Investment Co Ltd*. "LD-IR"-37-"G"-6-1-5-1982" and ALAYYAM No 11068 17.10.1983; and *Fajr Bakeries Workers v Hashim Saad Hashim*

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DC-CS-169-1977.

- (53) *Cf infra* Parts 3.B.6, 4.
- (54) S4 of the Civil Justice Ordinance 1900; Later Ss5, 9 CJO 1925.
- (55) *Cf supra* Part 1.B; f8.
- (56) *Cf supra* text above f1 in Chapter III.
- (57) S36 of the EEPO 1949.
- (58) Hassan, 1979 - 14 and Hashem 1964 - 14.
- (59) *Cf supra* Chapter IV, Part 1.A.
- (60) Saeed Salih v Sudan Shipping and General Stores AC-CV.RV-186 - 1962, Sir el Khatim el Atta v El Dosh Secondary Schools SC-CIV Cass-225 - 1975. In contrast *cf*; Abdel Maseeh Tesfay v El Tawfik Coptic Schools for Girls (1960) SLJR. 40.
- (61) Per D R Siddig; SCJ in Murad Saad Hanna v Madeline Sami (SC-CV.Cass-267) 1975 SLJR 185.
- (62) Central Trading Co v Suhair Diryas (SC-CV.Cass-149) 1975 SLJR - 166; Murad Saad Hanna v Madeline Sami Ibid.
- (63) *Cf infra* the text above fs 120-121 and the IERA 1981 SS.6(4), 34(1)e.
- (64) Muffit Co Ltd. v Khadiga' Safwat; CA-CV.RV-889 - 1975) 1975 SLJR - 320. *Cf also* Athnasios Saceliou v Lappas Engineering Workshops Ltd (1960) SLJR 191, and Omer Mohamed Abdulla v Gezira Board AC-CV.RV-617-1969) unreported; and the EEPO S.35; the IERA 1981 S.58.
- (65) *Cf*; Explanatory Note; The EEPO (Amendment) Act 1969.
- (66) This was the Workers Affairs Association Fawzi 1957-66.
- (67) For Objectives of the WAA *Cf* Fawzi 1957, 38-39.
- (68) *Cf supra* Chapter III; text above fs 9-10.

(69) Cf *Petrie v MacFisheries* (1940) IKB 258. Cf also Hepple and O'Higgins, 1979 - 142. In relation to limitation of the working day Cf the direction by Parke J; "...As the Ten Hours Act of 1844 was a law to restrain the exercise of Capital and property, it must be construed stringently". Quoted in J L and Barbara Hammond, *Lord Shaftesbury* London 1923 - 135 and Hepple and O'Higgins 1979, f88 p.162. Cf also Wedderburn, 1971 - 243.

(70) *Hassan Hussein v Sudan Gov. Railways* "HC-CS-55-1926".

(71) *Ibid* Quotation from original manuscript. Also quoted in (Kidd, 1966 - 193).

(72) *Workmen's Compensation Act* 1897, 1925. Cf Wedderburn, 1971. 287-288, where the introduction of automatic compensation and the merits it has had are discussed.

(73) As to the method of explanation adopted and the objectives of the discussion cf *supra*. The conclusion to Chapter II and Part 1.C.3 of this Chapter respectively.

(74) Cf the Explanatory Note to the EEPO (Amendment) Act 1969 (No 1 1969).

(75) Hussein, 1983. 85-99; Taha, 1970. 130-134.

(76) Act No 1, 1969.

(77) Cf *infra* part 3.B.1.

(78) *Ibid*.

(79) *Mohamed Ali Hamid v Sudan Textile Factory* KNLO *18*1981.

(80) *Oil Corporation Ltd v the Loading and Unloading Workers Trade Union* 1980-1982 Collective Agreement, Sudanese Kuwaiti Packaging Co Ltd; both in Files No LD*IR*37*A*B-8.

- (81) *Bata (Sudan) Ltd v Bata Workers Trade Union* LD*IR*37*"G"*6-*1*5*D10*1979.
- (82) Cf *infra* Table 8.
- (83) ILO; Sudan 1976, 110.
- (84) Sudan Chemical Industries Co and SCIC Workers Trade Union, Collective Agreement 1971-1976 Article (4); in LD*IR*37*A*B-8 and; Ahmed Ali Ahmed El tayeb v Sudan Textile Factory Ltd. KNLO*94*1981*27.9.1981.
- (85) Cf the Judgments of the Labour Court, the Province Court, the Court of Appeal and the Supreme Court in Mohamed el-Malyick el-Basha v The International Churches Council (Khartoum) DC-CA-130-1981, PC-Cvapp-106-1982, CA-CVRV-808-1982, and SC-L-36-1983 respectively.
- (86) *Ibid.*
- (87) Employees are now automatically entitled to accrued holiday rights upon termination of employment. This applies even if the termination was in fact due to resignation; Michael George Androwos v Sudanese Glass Co Ltd KNLO-389-1981.
- (88) Public Sector employees who postpone their annual holidays for e.g. one year are entitled, in the year thereafter, to only a maximum holiday which is in the vast majority of cases less than the double of the annual leave. This is so even though the length of annual holidays is almost typical for both public and private sector employees cf SS 69(2) and Schedule 2 of the PSR 1973.
- (89) The Sudanese Faisal Islamic Bank; Conditions of Service Regulations SS 27-43 June 1981.,
- (90) Sudan Employers Federation (SEF) Memorandum to the President of the Republic and the Ministerial Commission for Revision of Laws No; CMH-"M L"-47-"A"-5 Date 3.8.1982.

(91) Some of these instances have given rise to a few litigations. See as examples; *Cotton Textile Factory (Bagair) v CTF workers Trade Union* KNLO-37-IR-D-1982, *Shems-eddin Ali Ahmed v Sudan Textile Factory* (DC*CS*263*1980)(CA*CVRV*NA*28.10.1982) Supreme Court Judgment on 16.1.1984; *Nasser Ahmed Nasser v Khartoum Talis Manufacturing Co* (CA*CVRV*236*1981)(SC*CVCass*188*1981) and *Abdulla Hamad Sulieman v The Police Cooperative Insurance Project* DC*CS*122*1981).

(92) In *Mahgoub Dreisa v Spence Ltd* - (DC*CS*602*1982; CA*CVRV*557*1983) - for instance the Court upon finding that the employee had over a period of two years daily worked in excess of the normal working hours, treated the excessive work as an unpaid overtime work, and ordered the employers immediately to pay him in retrospect. Although the LS75 monthly salary which the employers regularly paid was such a relatively high salary, as to enable them to claim this as evidence that the employee's long working hours had been taken into consideration. Both the Labour Court and the Court of Appeal rejected this argument and treated the LS75 as the employer's basic salary.

(93) All Agreements were made available to examination by the Labour Department. Files No LD*IR*37*A*B-8.

(94) *Sudanese-Kuwaiti Packaging Co Ltd*; Agreement of 8/1/1975 - 1980.

(95) *Blue Nile Cigarette Co* Agreement of 1975-1977, *Blue Nile Spinning and Weaving Co* Agreement of 1976-1978, *Sudan Textile Factory Ltd* Agreement 1973-1974, 1978-1981, *Khartoum Spinning and Weaving Co* Agreement of 1973-1976 and *Bata (Sudan)* Agreement of 22.7.1979.

- (96) Cf *supra* Chapter III Part 2.A.1.b.
- (97) Cf *supra* Chapter III Table 3 - (above f209 Chapter III).
- (98) SEF Memorandum pp 4-5; *supra* f90.
- (99) Cf Table 8.
- (100) There are more than 1,000 units employing less than five workers - not included in Table 8. Cf ILO Sudan 1976 -121.
- (101) As to the importance and size of casual labour cf ILO, Sudan, 1984, 144-145 and *supra* the text below note 83.
- (102) The organization of one of these classes of workers - (The Loading and Unloading Workers Trade Union) - is in the practice of blacklisting and imposing embargos on employers who pay below, the statutory minimum, or, even the rate of payment maintained by the Trade Union in the particular geographical area or industry. The same Trade Union is also active in pressing - (through the Workers Trade Union Federation SWTUF) - for periodical review of the wages and conditions of service statutorily recommended for a certain area or for all areas. Cf respectively; the Loading and Unloading Workers Trade Union KNLO - Collective Disputes - Monthly Bulletin - 37-IR-3 October December 1979; and the Loading and Unloading Workers Trade Union letter to the SWTUF dated 25.4.1978 in (SWTUF-IR*37*A*1*2*3).
- (103) It was LS16.500 in 1974 and became LS28 in 1979 (Act No 38).
- (104) Cf; Mohamed Adam Musa v El Hadi Mamoon El Merdi (KNLO*13*1981).
- (105) Cf *infra* Part 4.A.
- (106) Cf complaint No DL*IR*37*W*6*"B"*4. By members of a Western Sudan District Police force against their employer - the County Council; MohamedSalih Syied v the Ministry of Agriculture - (DL*IR*37*S*6*"A"*3); ILO Sudan 1984, 144 where it is claimed that the

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de facto minimum wage in Port-Sudan and Khartoum is higher than that in the Public Sector.

(107) Cf Table 9 and ILO Sudan 1984, 144, f8.

(108) The Act stipulates additional wage increases above the Statutory minimum for workers whose wages equal or exceed this minimum at the time of its introduction.

(109) The ILO justifies its recommendation by claims that a minimum wage system of this type encourages capital-intensive methods of production, discourages the entry of new firms and tends to eliminate marginal firms...ILO Sudan 1976, 112".

(110) *Bittar v Apkar Petrikian* JC*App*9*1914 1.SLR.60.

(111) Cf *infra* Part 3.B.1.

(112) Cf Hassan, 1979-85, and Imam J in *Ali Ashry El Siddig v Yanni Paneeras* (1960) SLJR 74, and *Vasili Bamboulis v Osman Abdulla* 1960 SLJR 1968.

(113) Act No 1 1969.

(114) Cf *infra* Part 3.B.4; esp f. 163 and the text above.

(115) *Athnasios Saceliou v Lappas Engineering Workshops Ltd* (1960) SLJR 191.

(116) *Ali Ashry El Siddig v Yanni Paneeras* 1960 SLJR 74.

(117) *Sayyed Mustafa Khalil v Pier Liogi Batanino* (AC=CVRV-380-1965) unreported.

(118) *Vasili Bamboulis v Osman Abdulla* (1960) SLJR 168.

(119) The existence of both SS 10(4) and the twin SS 10(2) of the EEPO 1949 prior to 1969, and the right to after-service benefit attached to termination with notice under the EEPO 1949 SS.10(1) made the EEPO 1949 SS 10(2), which until 1969 allowed employers directly to dismiss (i.e. without reference of the dispute to the Labour Commissariat) - without

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notice or after-service benefit, a less expensive and more favourable - (i.e. for employers) - ground for dismissal. Following the restriction in 1969 of dismissal under the EEPO 1949 SS 10(2) employers resorted to dismissal with notice under the EEPO 1949 SS 10(1) which survived the 1969 Amendment. Hence the aforementioned increase of dismissals under the EEPO SS 10(1). Cf, the SWTUF provisional Secretariat Memorandum to the Minister of Public Service 18.1.1972, and the Department of Labour annual reports for the years 1970-1971, 1971-1972 where the increase is noted though no statistics are given.

(120) *Central Trading Co v Suhair Diryas* (1975) SLJR Ibid, *Murad Saad Hanna v Madeline Sami* (1975) SLJR Ibid. Cf *supra* f62 and the text above.

(121) *Osman Mahmoud Rashid v Shivron (Sudan)* (KN*DLC*CS*12*1982) unreported.

(122) SEF Memorandum Ibid pp 1-2. For the position in the Public Sector cf *Mohamed El Mamoon Babikir Zerroog* and the materials discussed *supra* fs 88-90 in Chapter IV.

(123) *Mirghani Mohamed Suliman v Ahmed Ali Abdel Karim* AC*CVRV*52*1968 unreported.

(124) *El Shiekh Mustafa El Amin v Muneer Salem* AC*CVRV*3*1957" (unrep.) and *Ethiopian Airlines v Mustafa Ali Abu Baker* SC*CV Cass*217*1973 "unreported".

(125) IERA 1981 S 9; "Except in cases of emergency affecting the safety of the workers and the place of work, employers shall not demand employees to do without their consent work basically different from the work contracted for".

- (126) *Cf* Mohamed Hussein Malick v Kenana Sugar Co DC*CS*68*1981. As to the position of the Law with regard to job mobility in other countries cf the Case of Britain in Paul Davies and Mark Freedland, 1985, 301-303, 532-535.
- (127) *Cf* Imam J in Vasili Bamboulis v Osman Abulla (1960) SLJR 168-169.
- (128) Christos Simon v SD Mendoros (AC*CVRV*15*1956) (unreported).
- (129) *Per* Mudawi J in Awad Saleh v Blue Nile Brewery (1965) SLJR 27. For facts of the case cf *infra* the text above f139.
- (130) John Cotsoridis United Ltd v Berj Malkhesian AC*CVRV*642*1970 (1972) SLJR 82.
- (131) SC*CV Cass*68*1977.
- (132) *Ibid* - Quotation translated from original text in Arabic.
- (133) Siddig Osman Omer v Port Sudan Car Assembly Factory SC*CV Cass*137*1976 unreported. Hassan 1979 observes that in its judgment of the White Nile Mills' Case the Supreme Court did not refer to its former decision in Siddig's Case. However in its judgment in Dahab's Case the Supreme Court reiterated its position in White Nile Mills Case even though its judgment in Siddig's Case was cited before it in detail by the Province Judge.
- (134) (DC*CS*193*1980) (PC*CVAPP*41*1981)(CA*CVRV*195*1981)(SC*CV CAS*200*1981).
- (135) Mohamed Ali Sakran v Port Sudan Cinema and Theatre Co Ltd CA*CVRV*12*1964 unreported.
- (136) Ahmed Abdella Abdel Samad v Sharaf International (KLO*37*"B"*1978 (1.11.1978)) unreported.

(137) *Dawel Bate Abbaker v Saleem Metias* CA*CVRV*239*1971 unreported. Although, under British Law, this is a well established implied term of the contract even in relation to work outside the normal working hours - (cf *P Davies and M Freedland* 1985 312-313). It has been introduced by the Sudanese Court of Appeal only since 1971. Furthermore its application has so far been confined to the Case involving work during the normal working hours. Cf below f138 and the text above.

(138) *Vasili Bamboulis v Osman Abdulla* (1960) SLJR 168.

(139) *Awad Saleh v Blue Nile Brewery* (1965) SLJR 27.

(140) *Khalafalla Ahmed Mohamed Saleh v Beshier Ibrahim Saeed* AC*CVRV*634*1969 (unreported), cf *infra* fs 141-146.

(141) (1960) SLJR - 168 *Ibid*.

(142) *Basily Bushara v Abdulla Mohamed Omer* (1967) SLJR 118.

(143) CA*CVRV*382*1975 (unreported).

(144) *Adam Mohamed Ahmed v Blue Nile Packaging Co* (CA*CVRV*-323*1976) unreported.

(145) *Mohamed Yousif Dahab v Abdel Bagi Omer Engineering Works* SC*CV Cass*200*1981 (decision passed on 9.1.1984).

(146) Quotations translated from original judgment manuscript in Arabic. The Law under which the Case was decided (the EEPO 1973 SS 10(5)d) did not require the omission to be serious or gross. The Supreme Court is simply perpetuating the judicial view that prevailed prior to 1973.

(147) *Adam Mohamed Ahmed v Blue Nile Packaging Co Ltd* - *supra* f144.

- (148) Ibid.
- (149) AC*CVRV*893*1975 unreported.
- (150) Khartoum Manufacturing Co v Ahmed Omer Ahmed (CA*CVRV*-762*1971, Abu Seid National Transport Co v Saad Abdulla Mohamed Gameel (CA*CVRV*517*1974), Bata Nationalized Corp. v Mohamed Abdel Tam Ibrahim (CA*CVRV*595*1975), Atta Mustafa Salih v Adam Harroon Fadl el Mula AC*CVRV*736*1976 (all unreported).
- (151) Ministry of Health v Khidir El Khowad (AC*CVRV*437*1974) unreported; and Abdel Raheem Beshier v Adam El nour Maarroof SC*CV Cass*31*1975 (1975) SLJR p 87.
- (152) AC*CVRV*736*1976 unreported.
- (153) SS 10 (2), Fadl el-Mula Abdulla v Blue Nile Packaging Co Ltd AC*CVRV*83*1966 unreported, cf also Hassan, 1979, 128-131.
- (154) Suliman Hagana Bushara v Bata (Sudan) - CA*CVRV*454*1983 unreported.
- (155) The contrasting decisions in Cotton Textile Factories v El Tayeb El Amin El Idris (KNLO*92*1981) and Khartoum Teital Oil Mills v Adam Hussein Massabbal (KNLO*387*1981) will illustrate the point. In the first Case an employee whose main job was the preparation of dyes negligently prepared a combination that irreparably damaged 4,000 yards of fabric. In the second case the employee omitted to switch off a valve thereby causing the adulteration of 18 tons of high-quality and low-quality oils. In both Cases the employee's act was held grossly negligent. Nevertheless the Office approved dismissal in the first and refused it in the second Case. The reason given was that the oils could still be reprocessed and separated. Following employer's depiction of this second decision as "biased" and "irresponsible" and his refusal to abide by it the Case was referred to the district Labour Court for

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execution. The decision of the Khartoum North District Court to which this Case was referred is neither reported nor available on record.

(156) *Modern Matches Manufacturing and Distributing Co v MMMDC Workers Trade Union* KNLO*37*IR*3 October-December.

(157) *Blue Nile Spinning and Weaving Co 1975-1977, Flour Mills (Sudan) Ltd, Khartoum Spinning and Weaving Co Ltd 1973-1976, Sudan Chemical Industries Ltd 1971-1976 and Sudan Soap Factory Ltd 1970-1973* All in; LD*IR*37*A*B-8.

(158) Cf; e.g. *Khartoum Spinning and Weaving Co Ltd 1973-1976* Ibid.

(159) *Hassan Gumaa v Reynold Aluminium Factory* KLO*37*"B"*1*62*1980.

(160) Listed under the Banks Nationalization Act 1970 and the Companies Nationalization Act 1970.

(161) Cf the Development and Promotion of Industrial Investment Act 1972; and the Encouragement of Investment Act 1981.

(162) The Commissioner is not required by law to pay attention to these considerations. However this is the consistent practice of the Labour Offices I visited. Cf e.g. *Sudanese Kuwaiti Transport Co Ltd* KLO*IR*37*A*1*App*Vol 3, *El Neilane Textile Factory v Thuriyya Abdel Wahab* - (CA*CVRV*226*1979)(1980)SMLJR Jan-March 156.

(163) *El Neilane Textile Factory v Thuriyya Abdel Wahab* Ibid.

(164) Cf *supra* Chapter III Table I.

(165) Cf *Parker Drilling International (Sudan) Application* No KLO*IR*37*A*1*App*Vol 3*1982.

(166) *Loading and Unloading Workers Trade Union v Sea-Ports Corporation*; DL*IR*37*"G"*6*1*Vol(1)*1982).

- (167) *United Plastic Industries Ltd and UPI Workers Trade Union; KLO*IR*37*"A"*1*App*Vol 3*1982, and, Sudan Textile and Related Industries Workers' Trade Union v El Neilane Textile Factory SWTUF*LR*37*"A"*1*2*3*1978.*
- (168) *Cf Table 10.*
- (169) *Brown Boveri and Cie (a San Marco International Construction Branch) KNLO*37*IR*3*1983.*
- (170) *Cf Rayea Sweet Factory and Kirikab Manufacturing Co. In which employees of these - (then Public Sector) - Companies unsuccessfully complained to the Department of Labour against mass redundancies KNLO*37*IR*3*1982.*
- (171) *Only indigenous firms suffer from this incursion, the majority of such firms that apply for reduction of the workforce on economic grounds - (cf Table 10) do so because of shortage of raw materials or competition from abroad.*
- (172) *Cf infra f194 and the text above.*
- (173) *Cf supra f128 and the text above. The sections read as follows "in all Cases of dismissal.." without notice "the Contract of Service shall not be terminated until after the dispute is referred to the Commissioner of Labour and his Consent to the termination is obtained" S 39 IERA 1981, SS 10(7) EEPO 1973, 10(2) "C" EEPO 1969).*
- (174) *Adam Mohamed Rizig v Bata Nationalized Corp. AC*CVRV*644*1975, Muawia Toto v Teital Oils Co AC*CVRV*917*1975.*
- (175) *Manager of Dar El Sahafa v Adam Mohamed Mehdi AC*CVRV*-246*1970, Abdel Raheem Beshier v Adam El Nur Maarroof SC*CV Cass*31*1975 Ibid, Atta Mustafa Salih v Adam Harroon Fadl el-Mula AC*CVRV*736*1976.*

(176) Cf e.g. *Idris Adam Idris v Starbag Co* (SC*CV Cass*324*1976), *Abbas Ali Kamair v Ali Yahia* AC*CVRV*321*1970, *Atlas Factory v Abdel Raheem Abu Bakr Mahmoud* AC*CVRV*295*1976.

(177) *Mohamed Nassir v Ahmed Hussein* DC*CS*268*1982)(PC*CVApp*217*1982), *Ahmed Ali Daleel v Satti Osman* DC*CS*53*1981) PC*CVApp*270*1981 CA*CVRV*87*1982, *Gumaa Harroon Ibrahim v Omer Awadalla* (DC*CS*236*1981) (PC*CVApp*40*1982)(CA*CVRV*137*1982). All unreported.

(178) *El Dosh Secondary Schools v Sirrel Khatim El-Atta* AC*CVRV*514*1974. There was a minority view; "that the Law merely creates a presumption...which is rebuttable by proof of a substantive valid ground". This view was expressed by H Riyadh SCJ in *Abdel Karim Ahmed v Mustafa Ahmed* (SC*CV Cass*31*1975; (1975) SLJR 87). H Riyadh appears to have abandoned this view in the more recent judgment in *Gummaa Haroon Ibrahim v Omer Awadella* (SC*CV Cass*169*1982).

(179) *American Sewerage Co v Hussein Rock Dal*; (CA*CVRV*506*1970); *Manager of Dar Essahafa v Adam Mohamed Mehdi*(AC*CVRV*246*1970); *Bata Nationalized Corporation v Mohamed Abdel Tam Ibrahim*(AC*CVRV*595*1975); all unreported.

(180) Cf supra the Cases cited under f177.

(181) *Mohamed Hussein Malick v Kenana Sugar Co* (DC*CS*68*1981) (PC*CVApp*18*1982).

(182) Compare *American Sewerage Co v Hussein Rock Dal* (CA*CVRV*505*1970) with *Manager of Dar Esshafa v Adam Mohamed Mehdi* AC*CVRV*246*1970.

(182A) Supra f.181.

- (183) *Cooperative Society v Mohamed Osman Izzeldin* AC*CVRV*55*1975.
- (184) *White Nile Cotton Mills v Abbas Issa El Hulu* SC*CV Cass*68*1977 (1977) SMLJR (March), *Adam Mohamed Ahmed v Blue Nile Packaging Co* CA*CVRV*323*1976(1977) SMLJR July-September.
- (185) *Mohamed Nassir v Ahmed Hussein* (PC*CVApp*217*1982), *Sayyed Faiyyad v Peter Akeg* (PC*CVApp*20*1982), *Khartoum Transport Co v Mahdi El Ghali* (AC*CVRV*734*1981). All unreported.
- (186) *Bata Nationalized Corporation v Abdel Tam Ibrahim* AC*CVRV*-595*1975 unreported.
- (187) For discussion of the Attorney General's Fatwa No AG*"M"- "T"*333*1982 and the Trial Case cf *supra*. The text above fs 157-160 in Chapter III.
- (188) SWTUF Memorandum to the 1981 MCRLI pp 13-14.
- (189) Cf *supra* text above fs 148-151 in Chapter III, and, also Table I.
- (190) SEF Memorandum (*supra* f90) - pp 3-5. The reason for the demand is employers' suspicion of the impartiality of Labour Offices cf *supra* f155 and the text above.
- (191) IERA 1981 S 44 compared with the EEPO S 25.
- (192) Cf *supra* Part 3.B.1.
- (193) Cf Report of the SWTUF 1974 Conference to the 1974 Ministerial Commission for the Revision of Labour Relations Laws. Minutes of the Third Meeting 24.2.1974. Cf *supra* the text above f188.
- (194) SWTUF 1981 Memorandum, *supra* f188.
- (195) SWTUF 1974 Report - (*supra* f193) pp 13-14.
- (196) IERA 1981 SS 4(b), 6(4), 34(2)a-c.
- (197) Cf *supra*. Court of Appeal in *El Dosch Secondary Schools v Sirel Khatim El-Atta* (1974).

- (198) *EEPO (Amendment) Act Legislative File No AG*CVL*1969 Attorney General Chambers.*
- (199) *Hassan is referring specifically to ILO Termination of Employment Recommendation No 119 1963.*
- (200) *Cf supra Tables A and B in Chapter III.*
- (201) *The ILO does provide such programmes for the Labour administration in the Sudan. Training has started since early 1960's and it is still attracting a considerable number of personnel.*
- (202) *The Commissioner will not accept appeals against district Labour Officer's decisions. See in this respect; Wad Numeiri Coop v Omdurman District Labour Office LD*R*G*2*Sec*1983 (5 April).*
- (203) *Cf Explanatory Memorandum to the EEPO 1949 (Amendment) Act 1969 pp 2-4.*
- (204) *This is so judging by the functions they perform and also by their interpretation of the law in specific situations. In respect of the latter employers believe that the Labour Offices are biased towards the workers, and, desire that part of their jurisdiction be transferred to the Civil Courts; cf "SEF Memorandum" Ibid f90 pp 3-6, and also supra f155 and the text above.*
- (205) *Cf Table 13.*
- (206) *Cf Tables 10, 12 and 13. (206A) Cf. infra Part 4.B.*
- (207) *Mohamed Yousif Dahab v Abdel Bagi Omer Engineering DC*CS*193*1980.*
- (208) *Civil Courts Circular No 24, 11.3.1976.*
- (209) *Cf supra Parts 4.A - 4.C in Chapter IV, and fs 29-31 and text above and Part 1.C.4.C in Chapter III.*

(210) Cf in particular (El Cock, 1969. 7-9), (Farmer, 1974. 59) and (Joseph, 1983. 398-403).

(211) This is an immunity that is due not to positive safeguards offered but to relatively less pressing need on the part of the State to influence the decisions of these offices. If the Government wishes to intervene there is nothing to stop it from doing that. Cf *supra*; Note (1) in Table 10.

(212) In relation to the problem of knowledge of substantive law cf; Hamadto Sweet Factory; Application No KLO*IR*37*A*1*App*Vol 3*1982; Watania Distillery Co Application No KNLO*37*IR*1*1*Vol 2*1983; Abdel Rahman Bushra v Friendship Palace Hotel KNLO*267*1981; Seamen Trade Union, Application No LD*HQ*"AM"*47*"A"*1*1983 and Mohamed Gumaa Ibrahim v The American Embassey DC*CS*72*1983. In relation to unsatisfactory Techniques of decision-making cf; Taha El Roubi Transport Co v Ismaael Derrag Hussein KNLO*84*1981; Mekki Refrigeration Factory v Abdel Rahman Gibriel Hussein KNLO*104*1981; James Paul v Tag Abdella Workshop KNLO*541*1981. With regard to inconsistency cf; El Neilane Textile Factory Application No KLO*IR*37*A*App*1*Vol 3*1978; Khartoum Asbestos Co v Abbaker Mohamed KLO*37*"B"*1*11*57*1981 and Beshir Omer Hassan v Taha El roubi Transport Co KNLO*37*IR*3*1981; Sudan Textile Industry v Alega Ateem KNLO*428*1981; Khartoum North Asbestos Co v Rashid el-Mahdi KNLO*120*1981; Hussein Abdel Farrag Gumaa v Pharmaceutical Products Laboratory KNLO*247*1981 and Taha El Ropubi Transport Co above; Soap and United Products Ltd v Abdel Karim Ibrahim KNLO*163*1981 and African Holloware Factory v Yousif Mohamed Gumaa and others KNLO*350-355*1981. In respect of enforceability cf Table 12.

- (213) Cf *supra* the text and materials under Section 3.B.6 and Table 12.
- (214) Cf El Hassan, 1975 189-200; and *supra* Table 8.
- (215) One such a scheme is that of the Medical Products Co and its Workers Trade Union provided for in the Collective Agreement of 1978-1983, Articles 9(a) and Paragraph 3(10-14).
- (216) Compare *Suemia Hassan Kuku v Khartoum Spinning and Weaving Co*, with *Sharaf Metal Products v Badr Eddin Ageeb Mubareck* in; KNLO-3-1981 and KNLO-454-1981 respectively.
- (217) Cf also Lord Justice Scrutton statement quoted in Clark and Wedderburn 1983 166; "...it is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants one of your class and one not of your class".
- (218) Farmer 1974, 55, Hepple and O'Higgins, 1979. 46.
- (219) Hepple and O'Higgins mention in this respect; "rigid...literal approach...", '...over refinement'... 'hair-breadth legal distinctions"... and "formality" Ibid 46.
- (220) Cf Griffith, 1981 195-207, 61-85; Wedderburn and Clark 1983 166-184; Lord Justice Scrutton (1923) 1 Cambridge Law Journal 8; Robert Stevens, 1979, 589-627.
- (221) Cf how sociological analysis could give more satisfactory explanations; in Hyman, 1982 95-104; Miliband, 1983 124-131; Griffith, 1981 195-207.
- (222) Cf *supra* the text and materials in Parts 3.B.2 - 3.B.3.
- (223) Cf Table 14.
- (224) Cf *supra* fs 26, 117 and the text above in Chapter IV.

- (225) *Joseph A Garang and others v the Supreme Commission and others* 1968 SLJR 1, the Supreme Court decision in this Case - that an amendment, of the then Transitional Constitution was unconstitutional - was ignored by the Government. Cf Hussein 1983 94-95.
- (226) Cf supra fs 82-83 and the text above in Chapter II.
- (227) Cf supra Part 1.A.
- (228) Cf *Sudan Railways v Atem Akwal Yac* (AC*CVRV*121*1971) where Shiebieka CAJ upholding an interpretation discussed earlier - (supra text above fs.175-76) remarked that although he could see "the harsh and strange results that may ensue from upholding such an interpretation in this particular Case where it has actually been proven that the employee was guilty of serious misconduct, the subsection is clear and admits of no other interpretation."
- (229) *El Dosh Secondary Schools v Sirel Khatim El Atta* AC-CVRV-514-1974, supra f178 and text above, (Hassan,1979 213).
- (230) *Ali Ahmed Nugud v Abdulla Mohamed Abdulla* AC-CVRV-325-1972 unreported where it is remarked; "the 1969 Amendment has reformulated Section 10(2) in such a way as will protect the interests of both parties", *Sudan Gov v. Mahdi El Ghali* (AC-CVRV-734-1971) where it was remarked; "...The role played by the Commissioner is a conciliatory one with the object of maintaining good employment relations".
- (231) Cf supra f111 and the text above in Chapter IV.
- (232) Even those Public employees grievances tried by the PSAB are treated as Classified Secrets. Access to such materials is possible only with permission of the Minister and under constant supervision of a PSAB official who will select the materials to be seen by a researcher.

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