THE EVOLUTION OF AIR LAW IN KENYA AND ITS CURRENT CHALLENGES

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ABSTRACT

This thesis examines the historical evolution of air law in Kenya, its content and current challenges. Part One is a historical introduction designed to provide a brief background knowledge and information necessary for a proper understanding of the geo-political and socio-economic foundation of air law in Kenya. It focusses on colonization process of East Africa with particular reference to Kenya.

Part Two discusses the character and content of British air law and regulations exported to Kenya respecting aviation and attempts to analyse at the juridical basis of these regulations, Orders in Council and sub-delegated legislation. Effects on transition to independence on these laws is also examined in this part.

Part Three identifies and analyses the major post-independence developments in air law and the present regulatory system. Kenya's practice with regard to international aviation treaties is also briefly discussed.

The final part is an incursive summary of the preceding parts and possible conclusions drawn therefrom. Here, we also proffer some suggestions we think might be useful to Kenya's overall regulatory system.

RESUMÉ

Cette thèse examine l'évolution historique du droit aérien du Kenya, de son contenu et de ses défis actuels.

La première partie est une introduction historique qui a pour but de donner une brève connaissance des éléments du droit aérien kenyan et des informations nécessaires pour une bonne compréhension de ses fondements géopolitiques et socio-économiques. Elle se penche aussi sur le processus de colonisation en Afrique de l'Est en se référant particulièrement au Kenya.

La seconde partie expose le contenu et les caractéristiques du droit aérien britannique et de ses règles exportées au Kenya. Elle essaie de même d'analyser la base juridique de ces règlements, décrets-lois et autres règles subalternes. Les effets sur ces lois de la transition vers l'indépendance sont aussi examinés dans cette partie.

La troisième partie identifie et analyse les principaux développements qui ont suivi l'indépendance en ce qui a trait au droit aérien et à son système actuel. La pratique au Kenya touchant les conventions internationales sur l'aviation est aussi brièvement traitée.

La dernière partie est un résumé des parties précédentes ainsi que les conclusions possibles tirées de celles-ci. Nous proposons de plus quelques suggestions que nous pensons utiles pour l'ensemble du système législatif kenyan.

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ULTIMATELY THE ETERNAL PRAISE IS TO THE ALMIGHTY.

The views and opinions expressed in this work are done in a strictly personal capacity and do not necessarily depict the opinions of the Department of Defence or the Government of Kenya.

LIST OF ABBREVIATIONS

AC	Appeal Cases
AFCAC	African Civil Aviation Commission
AFRAA	African Airlines Association
AJIL	American Journal of International Law
BEAC	British European Airways Corporation
BOAC	British Overseas Airways Corporation
BYIL	British Yearbook of International Law
CAP	Chapter
Cmnd.	Command Papers
EAAC	East African Airways Corporation
EAATA	East African Air Transport Authority
EAC	East African Community
EACAB	East African Civil Aviation Board
EACSO	East African Common Services Organisation
EAHC	East African High Commission
EEC	European Economic Community
HMSO	Her Majesty's Stationery Office
IATA	International Air Transport Association
ICA	Inter-Carrier Agreement
ICAO	International Civil Aviation Organization

KB	Kings Bench
LN	Legal Notice
OAU	Organization of African Unity
SI	Statutory Instrument
SR&O	Statutory Rules and Orders
UN	United Nations
UNGA Res.	United Nations General Assembly Resolution
UNTS	United Nations Treaty Series
WMO	World Meteorlogical Organization

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To my country

and those who live to defend it.

INTRODUCTION

Goedhuis, one of the renowned jurists in the field of civil aviation, has stated that law serves to control the methods of satisfying the needs of mankind. Therefore we must begin by ascertaining what these needs are in the realm of aviation.[1]

In the realm of civil aviation, as in any other sector, the singular need in Kenya today is economic development. The Economic Commission for Africa declares:

> ... the major problem of the present era is economic development. It encompasses almost all sectors of the society. A jurist, as a member of this society in transition, cannot afford to be a mere observer. He must also make some positive contribution towards the common action of elimination of poverty.[2]

Undoubtedly, because of the nature of the problems of development, professionals from other disciplines rather than law will be more directly involved. But the lawyer still has something to offer, especially in the areas of law and policy as they influence the socio-economic and political development of his society.

As we trace the profile of aviation jurisprudence in this work, we observe that law and policy may represent two different concepts. Law, taken separately in the title of this thesis, is an abstract or collective term for the body of rules operative in the aviation activity compliance with which is secured through an accepted or recognized machinery consisting of arbitral tribunals, national courts, the ICAO Council, the UN Security Council and the International Court of Justice. Policy on the other hand, as employed in

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[1] D. Goedhuis, *Air Law in the Making*, 1938.

[2] UN Doc. E/CN. 14/1NR/28 (1963) para. 7.

the body of the text, is an abstract or collective term for the definite courses or plans of action, selected from among alternatives and in the light of given conditions, to guide and determine present and future aviation decisions and operations in Kenya.

Furthermore, laws and policies, as used in the main text of the thesis, are concrete rules, regulations, decisions and declarations. Some rules of law may contain some policy element, and some policy regulations and decisions may have some legal element, thereby making the joint usage of the two concepts in the work inevitable.

In outlining the current challenges to air law in Kenya, it has been necessary to refer to the "socio-political" climate in the East African region especially from the dawn of colonization. This thesis would be superficial if it did not also make the point that political stability and rectitude are essential for development.

The significance of this thesis may be seen from the angle that legal scholarship has had great influence on law and policy makers in other aviation regions. In those regions, either legal writing has stimulated the decision makers into action, or they have in many cases given expression to the tendencies that had developed doctrinally. That kind of influence is yet to be felt in Kenya. I am nevertheless, optimistic. The famous author, Will Durant, has written: "We are all imperfect teachers, but we may be forgiven if we have advanced the matter a little and have done our best. We announce the prologue and retire; after us, better players will come".[3] It would be pretentious for this thesis to lay claims to any spectacular novelties in air law that do not exist in any of the existing literature on the subject. It only attempts to order the socio-economic, political

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[3] Will Durant, *Story of Philosophy* (in the Introduction).

and legal facts and to make a connection between them rather than leaving them to drift at large. In so doing, the author is mindful not to make it a fact-cataloguing exercise lest the work becomes founded on the rocks of superficiality and hence of little value. A significant feature of the thesis is its change of emphasis on certain issues.

CHAPTER ONE

HISTORICAL SETTING

1.1 General

Lying across the equator on the Eastern seaboard of Africa, the Republic of Kenya is bounded on the north by the Sudan and Ethiopia on the south by Tanzania and on the west by Uganda and Lake Victoria. The territory has a total area of 582,646 square kilometres and an estimated population of 25 million in 1994 with a projected growth of 2.8 per cent per annum.

Penetration of East Africa by foreign nationals first began with Arab slave traders from Arabia and Persia who had settled on the coast long before any Europeans came to East Africa. When the Portuguese arrived in the 16th century on their way to East Indies, they found the Arabs firmly entrenched there. The Portuguese built a fortified installation on the Kenyan coast named Fort Jesus, which soon brought them into conflict with the Arab Moslems at the coast. In the ensuing struggle however, the Portuguese were ejected and had to withdraw southwards to the area of present-day Mozambique, thus leaving the Eastern seaboard of Africa to the undisputed supremacy of the Arabs.[4]

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[4] For a detailed account of the contemporary history of Kenya, see: Reginald Coupland, *East Africa and its invaders from the Earliest Times to the Death of Seyyid Said* (Oxford: Oxford University Press, 1938); Reginald Coupland, *The Exploration of East Africa 1856-1890* (London, Toronto, 1939); Gerald Portal, *The British Mission to Uganda in 1893* (London, 1894); Charles Elliot, *The East Africa Protectorate* (London, 1905); W. McG. Ross, *Kenya from Within* (London, 1927); N.F. Hill, *Permanent Way* (Nairobi, 1949); L.S.B. Leakey, *Mau Mau and the Kikuyu* (London, 1952).

Britain first appeared on the scene in East Africa in the 19th century in the course of the abolition of the slave trade. In 1822, she obtained the consent of Iman Seyyid Said, the Arab potentate of the East African Coast, to search Arab ships for slaves. Contact was not made by any Europeans with the interior until 1848, when two German nationals, Johanne Ludwig Krapf and Johannes Rebmann, evangelists for the Church Missionary Society, penetrated and explored the hinterland.

By the middle of the 19th century, the strategic importance of East Africa as a staging post on the sea route to India had become apparent to the British India Steam Navigation Company, which had, under its chairman Sir William Mackinnon, established in 1872, regular steamship services between East Africa, England and India. In 1877, Sir William Mackinnon obtained from the Sultan Barghash a concession to administer the territories of the Sultan and manage its customs ports.

A German explorer, Dr. Karl Peters, had been active in East Africa and by 1885 had concluded treaties of protection with some local chiefs in the area. In order to protect the interests of the Sultan of Zanzibar, the British Government was induced by the action of the German Government to join with Germany and France to define, in 1886, the territorial claims of the Sultan of Zanzibar.[5]

Britain and Germany also agreed between themselves that apart from the coastal strip of ten miles over which exercise jurisdiction. The two powers would exercise joint influence in the territory between Rivers Ruvuma (Tanzania) and Tana (Kenya). By a

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[5] The territorial claims of the Sultan were contained in a letter cited by Sir Kenneth Roberts Wray, *Commonwealth and Colonial Law* (New York, Praeger, 1966) at 757.

subsequent agreement, this territory was apportioned between Britain and Germany so that Britain took the area "North of a line running from the mouth of the Umba River, opposite Pemba Island and skirting North of Mount Kilimanjaro to a point where the 1°5' Latitude cuts the Eastern share of Lake Victoria. The German sphere was south of that line."[6]

Responsibility for the administration of the British sphere of influence was assumed by a British Company. Sir William Mackinnon's British East Africa Association reluctantly took over this responsibility. On April 18, 1888 the Association was incorporated by Royal Charter as the Imperial British East Africa Company (IBEA Co.)

1.2 The Penetration of the Hinterland - The New Mobility Created by the "Uganda" Railway

Actively engaged in the quest for annexation of colonies on behalf of the Imperial German Government, Dr. Karl Peters had attempted to extend German Authority to Buganda where British and French Missionaries had been active from 1877. This German action infuriated the British Government. It was expected that the imperial British East Africa Company would take adequate measures to neutralize German designs in the area. This, however, the company was unable to do, given that it did not possess the material resources to engage in that type of diplomatic activity. Although a protectorate was declared over Buganda in 1894, it dawned on the British Government that in order to:

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[6] *Encyclopeadia Britannica*, vol. 13 (1961) Edition at 341.

(a) maintain a continuous presence in the hinterland;

(b) secure the head waters of the Nile; and

(c) fulfil international obligations with regard to the suppression of the slave trade assumed at the Brussels Conference in 1889-90,

a railway should be constructed to link Mombasa on the Eastern Coast to Lake Victoria in the West hinterland. Work on the railway, which was carried out by Indian coolies imported into East Africa for this purpose, was commenced in December 1895 and reached Kisumu (then known as Port Florence) on Lake Victoria in December 1901.

1.2.1 The Proclamation of the East African Protectorate

A Committee headed by Sir Gerald Portal which was commissioned to report on the East African territories had, in 1894, recommended, *inter alia*, that the Charter granted to the Imperial British East Africa Company should be revoked and that reasonable compensation be paid to by the British Government to the Company for the loss of its Charter. The Committee also recommended that the British Government should assume direct responsibility for the administration of the territory. These recommendations were accepted and adopted. On July 1, 1895, the East Africa Protectorate was proclaimed at Mombasa with Sir Arthur Harding as the first Commissioner.

For the first ten years of the proclamation of the Protectorate, the administration was engaged in pacification of the hinterland as risings and revolts by the native

populations became rampant. The Chief causes of these revolts were the series of Orders in Council issued between 1901 and 1904[7] which gave to European immigrants from England, attractive land grants and concessions on rich agricultural lands in the hinterlands then made accessible by the railway. The native populations felt restless at the pressure of the new wave of immigrants who were progressively dispossessing them of their communally held agricultural lands and driving them to the barren edges in small holdings in "reserves". Furthermore, unlike in Nigeria or Ghana, the native populations in Kenya did not have any recognisable indigenous entrenched political organisations which would have facilitated the introduction of the indirect rule system of government.

1.3 Kenya Becomes a British Colony: Political and Constitutional Developments

In the 18th Century, Britain had learnt the colonial lesson in the American colonies, that a policy of taxation without representation might lead to friction between a settler element and the mother country. As the native population in Kenya were poor and could therefore not be taxed to pay for the railway or other expenses incidental to the development of the hinterland, the burden of taxation to pay for the railway fell squarely on the shoulders of the European settlers. Therefore, in order to involve European settlers in the administration of the country, an Executive Council composed of European farmers was appointed in 1905 to advise the Governor Sir Percy Giroud.

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[7] L.S.B. Leakey, *op. cit.*

In 1907, a nominated legislative council was constituted to provide machinery for administration and law-making in the territory.

When the First World War broke out in 1914, most of the European farmers offered their services to fight in the East African campaign over the German Colony of Tanzanyika. This resulted in a financial set back for the economy of Kenya. After the war, efforts to induce European immigrants to Kenya did not meet with much success.

Therefore, in June 1920, His Majesty's Government promulgated an Order in Council annexing the East African Protectorate to His Majesty's dominion under the name of the Colony of Kenya.[8]

From this time onwards, European settlers were granted elected representation in the legislative Council. By the end of World War II, Africans were for the first time nominated to the Legislative Council, thus making Kenya the first East African territory with an African in the Legislative Council. In 1948, the East African High Commission was set up to administer certain services of mutual benefit to Kenya, Uganda and Tanzanyika.[9] The outbreak of Mau Mau rebellion accelerated African advancement to an elected majority government. In June 1963, Britain granted Kenya international self-government (Madoraka) and on 12 December of the same year, it achieved independence (Jamhuri) and became a republic within the Commonwealth with the first Prime Minister designated as the President and Head of State.

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[8] Kenya (Annexation) Order in Council, 1920; S.R.O. 1920 No. 2342, S.R.O. and S.I. Rev. II, 673.

[9] See *infra*, chap. 3.

Britain, France, Germany and Portugal were the principal participants in the scramble to annex Africa into spheres of influence. Because their claims conflicted, a conference was convened in Berlin in 1884-1885 whereby an orderly partitioning of Africa was arranged. Agreements and treaties were subsequently signed carving out Africa into colonies. That colonization process was integral in the early evolution of air law in Kenya is implicit in the fact that the metropolitan state exercised sovereignty over the Kenyan air space. This is because Article 2 of the Chicago Convention[10] considered territory of a state to include territories under its suzerainty, protection or mandate. Accordingly, colonized African territories were generally considered as cabotage zones in the bilateral air agreements concluded by Europe during colonization.[11] Secondly, as will be seen in subsequent parts of this thesis, the general aviation law and policy operative in any part of Africa was essentially a replica of that obtaining in the metropolitan country administering the particular territory. Writers have aptly remarked that everywhere in the anglo-phonic Africa, English law "provides the residual law of the territory".[12] Because there is a general cast of English legal culture colouring the Kenyan legal system, it is easy from remarks as general as these to conclude that the aviation in Kenya is basically English law. Claims typically made about English law by its apologists are that politically, English law is said to embody fundamental democratic

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[10] *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295; ICAO Doc. 7300/6 [hereinafter *Chicago Convention*].

[11] For example, Britain granted cabotage rights to SAS (1952) between Nairobi - London on the London-Copenhagen-Johannesburg route.

[12] Professor E. Allot, *Essays in African Law* (London: Butterworths, 1960) at 25.

rights; methodologically, the common law is said to express a pragmatic temper that permits it to accommodate changing circumstances and place. How these acclaimed characteristics hold true for Kenya will be assessed at the conclusion of the thesis.

British interests in the territory that became Kenya date from a treaty that the British government entered into with the Sultan of Zanzibar in 1875. The treaty, however, did not concern Kenya. The treaty concerned Zanzibar and the ten-mile coastal strip of what later became part of Kenya. It is that treaty that gave rise to the British claim of influence over the hinterland to the Zanzibar protectorate during the Berlin Conference of 1884-1885. In 1888 a royal charter was granted to the Imperial British East Africa Company[13] to develop and administer the hinterland to then British Protectorate of Zanzibar. The company, however, lost its authority over what is now Kenya in 1895, when the British government proclaimed an "East African Protectorate". The protectorate was loosely administered first from Zanzibar and eventually from Nairobi. There was no government properly so-called; the Commissioner who administered the protectorate had vague and undefined authority over a large area.

By the East African Order in Council 1897, the British government took over the administration of the region from the IBEA Co. and under Articles 51 and 52 thereof, Her Majesty the Queen of England delegated legislative and executive powers to the Commissioner and allowed the Queen's regulations to apply to native courts. Full jurisdiction was, however, conferred on the protectorate authority by the East African

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[13] Hereinafter referred to as IBEA Co.

Order in Council 1902, sections 12(1) and 15(1) empowering the Commissioner to make ordinances for the peace, order and good governance of all people in the protectorate.

The Kenya (Annexation) Order in Council 1920 declared the Kenyan territory, other than the ten-mile coastal dominion of the Sultan of Zanzibar, to be a British colony. This Order was made at the same time as the Kenya (Protectorate) Order in Council of the same year which related exclusively to the ten-mile coastal strip. As a result of these two imperial orders, Kenya officially became a colony and protectorate of Britain and as a political unit, it was to be administered from Britain.

1.4 The Evolution of the East African Community: Historical Antecedents

As indicated in our introduction, the three East African countries of Kenya, Tanzania and Uganda being geographically contiguous, and their colonial boundaries having been drawn (as in the rest of Africa) without account being taken of the ethnic or linguistic compositions of the local populations affected by those artificial frontiers, do present, *prima facie*, a definite and logical picture of a composite political entity where artificial boundaries together with their consequences disappear.

From the earliest days of British activity on the East African mainland, the question whether Uganda and Kenya (Tanzanyika being at that time under German sphere of influence) should be centrally administered as one country; or if not, where the geographical boundaries demarcating the two territories should be drawn had been a contentious subject for debate. In 1899, Sir Harry Johnstone in his capacity as special

Commissioner to Uganda had articulated the desirability for the British government to provide for the territories of Kenya and Uganda to be jointly under a single administration.[14] His recommendation in this respect was, however, ignored by His Majesty's government.

In spite of the setback which befell Sir Harry Johnstone's idea, compelling economic reasons represented by extension of railway from Mombasa to the Kenyan hinterland, soon forced the British government to re-examine the issue once more. As we indicated above,[15] the opening up of the interior of Africa and the consolidation of the British presence therein as a counterweight to German designs in the area, meant that the British government should find the money to extend the railway westwards even beyond the so-called "White Highlands".

The decision to levy taxes on European farmers to pay for the railway, meant that more of the land to the west of Kenya Protectorate would be made available to European agriculture. In Uganda, the natives, mainly in Buganda, fearing a diminution in the authority of their native government and/or in the prestige of the Kababa, opposed all suggestions of unification, centralization, control of supervision of their native government by a protectorate government based in Kenya.[16] It was not until the end of the first World War that this matter came to the fore; this time with the appearance of

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[14] Sir Harry Johnstone, *The Uganda Protectorate*, vol. 1 (London, 1902), chap. 8.

[15] *Supra* Sect. II.

[16] In 1925, and as amended subsequently from time to time, His Majesty's Government, by Order in Council, did create the office of High Commissioner for Transport under the *Kenya and Uganda (Transport) Order in Council*, 1925: Cf. S.R. and O (1925) No. 1458 at 1674.

the former German Colony of Tanganyika, now a mandated British territory to be included in any possible future integration.

a) The Governors' Conference

As the title suggests, the Governors' Conference was a conference of British colonial governors of Kenya, Tanganyika and Uganda with the British President of Zanzibar meeting to discuss, agree on or frame common policies to be applied in the territories for which they were respectively responsible. The first conference convened in 1926 and it became a useful forum for co-ordinating policies on such subjects as railways and customs tariff. It was also useful as a forum for co-ordinating the war effort of the East African territories during the Second World War. It is worthwhile to state here that the Governors' Conference could not have discussed aviation matters prior to 1945 when the *East African Territories (Air Transport) Order in Council, 1945* was promulgated. Furthermore, neither the Orders in Council providing for the administration of each of the territories of Kenya, Uganda or Tanganyika conferred any authority on the Governors concerning aviation, nor the letters patent appointing each of these colonial governors nor the Royal instructions issued to them. Jurisdiction in respect of aviation was therefore specifically reserved for His Majesty's Government in the United Kingdom by virtue of the colonial clause in Article 40 of the Paris Convention.[17]

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[17] *Convention Relating to the Regulation of Aerial Navigation*, 13 October 1919, 11 L.N.T.S. 173, 1922 U.K.T.S. 2 [hereinafter *Paris Convention*].

Appraising the suitablity of the machinery of the Governors' Conference for achieving the desired objective of economic integration of the East African territories the Colonial office itself made the following observations:

> The Governors' Conference is a body which was established by administrative direction of the Secretary of State and which has no juridical or constitutional basis. It functions without public debate or discussion and its decisions are normally based on material available only the the Governments concerned and not to the general public. In practice it is frequently necessary for the Governors, having agreed in the conference to a certain course of action, to present their Executive and Legislative Councils with what amounts to a *fait accompli*. By its nature the Conference is not well designed to enlist the support of public opinion and to take full advantage of the considerable body of expert knowledge and experience which is available in East Africa. In fact it must be admitted that, althouth it has served an important purpose, the Governors' Conference in its present form is no longer an appropriate or effective means of discharging the important responsibilities and functions which must continue to be performed on an inter-territorial basis.
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> When common legislation is necessary, the procedure is to present identical ordinances separately to the three legislatures. This is not only unwieldy, but it places the territorial Governments in the positions of being unable to accept the amendments of any kind as a result of debate without destroying the very uniformity which the legislation aims to achieve. At the best the ordinance which is passed first froms the model for the other legislatures and their debates become unreal. The procedure is manifestly unworkable as a permanent arrangement.[18]

These defects having been diagnosed, the Colonial Office in 1947 set up an East Africa High Commission[19] structured to take account of the defects of the Governors' Conference which it was designed to replace.

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[18] *Inter-Territorial Organisation in East Africa* (Colonial Office Document No. 191). This document is also cited in *The East Africa, Report of the Economic and Fiscal Commission* (otherwise called the Raisman 1961 Committee Report), London H.M.S.O. Cmnd. 1279 at 2-3.

[19] *Inter-Territorial Organisation in East Africa - Revised Proposals* (Colonial Office Document No. 210) Cf. *Ibid.*

(b) The East Africa High Commission

The Order in Council[20] creating the High Commission was made by His Majesty's Government on December 19, 1947 and was brought into operation on January 1, 1948 by proclamation made jointly by the Governors of the three territories in their respective official gazettes. The Order in Council was in six parts. The preamble stated clearly the objectives of His Majesty's Government as follows:

> It is desirable and expedient in the interest of good government to make provision for the control and services of common interest to the inhabitants of the colony and the Protectorate of Kenya, the first territory of Tanganyika and the Protectorate of Uganda and for the purpose to establish an East Africa High Commission and an East Africa Central Legislative Assembly for the Territories.[21]

We shall not delve into a detailed analysis of the provisions of this Order in Council. For fullness, we will merely highlight pertinent parts with civil aviation content. We should call attention to section 7 thereof wherein the administrative powers and services to be administered by the High Commission were specified in two schedules.[22] In addition, it was provided for the High Commission "to take over the functions of and to replace the East African Air Transport Authority"[23], "to appoint advisory consultative

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[20] *The East Africa (High Commission) Order in Council, 1947*, 1947 No. 2863. The Laws of the High Commission - Revised Edition 1951 at 305-326.

[21] *Ibid.*

[22] *Ibid.*, sect. 9(1)(a), sect. 88.

[23] *Ibid.*, sect. 9(1)(c).

bodies"[24] and "to take over the functions of the East African Transport Policy Board".[25]

Finally in Part II, it was provided that the High Commission should publish in the Gazette, "(a) all Bills; (b) all Acts; and (c) all such other matters as the High Commission may consider should be published."[26]

One is struck by the reference to "all Acts". The Central Legislative Assembly established by the Order not being a Sovereign Legislature could not legitimately refer to its legislations as Acts. Judging by the general practice of Colonial Legislatures, Legislations of such bodies were generally referred to as Ordinances. On attainment of independence, and by special legislations termed "Adaptation of Laws", "Ordinances" became "Acts", etc.[27] One wonders whether the intention of His Majesty's Government was to accord some sovereign status to the Central Legislative Assembly or whether it was an error in legal draftmanship. On the other hand, it might be that what was meant were "Acts of the Imperial Parliament", and not the Central Legislative Assembly of the High Commission.

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[24] *Ibid.*, sect. 9(1)(d).

[25] *Ibid.*, sect. 9(1)(e); This included civil aviation or civil aviation related matters such as the East African Directorate of Civil Aviation, the East African Income Tax Departments, the East African Posts and Telecommunications Departments, the East African Meteorological Department, Services arising out of the functions of the High Commission as East African Air Authority, the East African Customs and Excise Department and the East African Radio Communication Services.

[26] *Ibid.*, sect. 11.

[27] In Kenya for example, this was achieved by Legal Notice No. 2 of 1964.

1.4.1 Impact on Aeronautics in East Africa

With the promulgation of the East African Territories (Air Transport) Order in Council on October 30, 1945,[28] the Governments of Kenya, Tanganyika and Uganda and Zanzibar founded on January 1, 1946 the East African Airways Corporation. Before the end of that year, the Corporation had acquired aircraft and was responsible for the running of all the domestic services in the four territories. By 1956, the Corporation had proposed and developed its own niche to an extent that it was able to take over from B.O.A.C. the operations in respect of London-Nairobi-Dar-se-Salaam route.[29]

1.4.2 The East African Common Services Organisation (EACSO)

Defects in the operations of the High Commission during the first few years of its existence soon decame glaring. These defect could be summarised briefly as follows:

(i) Bills of legislation generally required prior scrutiny by individual territorial governments taking into account their respective territorial interests, thus resulting in the final product lacking in any East African orientation in content.

(ii) There was no pari passu adjustment in the rate of constitutional advancement granted to the territories in relation to that of the High Commission which

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[28] S.R.&.O. 1945/1370.

[29] John Stroud, *Annals of British and Commonwealth Air Transport* (Putnam 1962) at 458-460.

remained static. For example, while elected territorial Ministers were gradually assuming responsibility for the funactions formerly vested in the Governors in the territories, the attendance of the Governors as representatives of the territorial governments in the High Commission beamce rather Anomalous.

(iii) The Central Legislative Assembly had no definite life time, its life having been extended from time to time by Order in Council.[30]

(iv) Financial administration of the "self contained" and "non-self contained" services remained an unsatisfactory arrangement.

With these defects in view, in July 1960 the Rt. Hon. Ian Macleod, Secretary of State for the Colonies appointed a Commission under the chairmanship of Sir Jeremy Raisman to enquire into the economic and fiscal aspects of the East Africa High Commission.[31] The final report of the Commission made a number of recommendations. For the purposes of this dissertation, the recommendation that they dealt specifically with aviation was that concerning the financial contributions of the territorial governments to the Directorate of Civil Aviation and Meteorological Department.[32] Following a conference between Her Majesty's Government in the United Kingdom and representation of the Governments of Tanganyika, Kenya and Uganda, it was agreed that a new

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[30] See for example, sect. 2 of the *East African (High Commission) (Amendement) Order in Council, 1951*, 1951 No. 2126. *The Laws of the High Commission Revised Edition 1951* at 328.

[31] For the text of the terms of reference, see *East Africa Report of the Economic and Fiscal Commission* (London HMSO) Cmnd. 1279 at 1.

[32] *Ibid.* at 74.

organisation should be created to take over the functions formerly exercised by the High Commission. By Agreement between the governments of Tanganyika, Kenya and Uganda, (Tanganyika having become independent by that time) the East African Common Services Organisation was created in December 1961.[33]

It is not easy to determine with exactness the legal status of either EACSO or the instrument under which it was created before the independence of the three territories. The character of the parties to the agreement creating the new organisation varied juridically at different point in time. By December 9, 1961 Tanganyika was a state in international law; whereas Kenya and Uganda were still dependent territories. One would have thought that the United Kingdom, as the state responsible for the conduct of the international relations of both Kenya and Uganda would have signed the agreement on their behalf. Had that been the case, the agreement would have had the status of an international agreement or treaty properly so-called in international law.

While we recognise that an international legal person could legitimately enter into a legal relationship with a non-international legal person, never-the-less, we submit that prudence and strict legality demands that there should have been executed a prior instrument between United Kingdom Government and the Government of Tanganyika in which the United Kingdom government would have first contracted on behalf of Kenya

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[33] The winding up operations of the High Commission was effected by Order in Council which provided for (i) the revocation of certain imperial Orders in Council, listed in the Schedule to the Order, (ii) transitional provisions in respect of the effect of *The East Africa (High Commission) Order in Council, 1947* in relation to Tanganyika, (iii) transfer of assets and liabilities of the High Commission to the East African Common Services Authority, (iv) transfer of offices and officers to EACSO, and (v) adaptation of the laws of the High Commission to enable effect to be given to the Agreement creating the new Organisation. Cf. *The East Africa (High Commission) (Revocation) Order in Council 1961*, S.I. 1961 No. 2315.

and Uganda before the tripartite agreement between the territories was executed: This procedure, however, might be a mere legal nicety which neither the United Kingdom not Tanganyika would have wished to belabour themselves with at that time considering the desire among the political leaders in the territories to create the new organisation and the determination of the United Kingdom Government to rid herself of her colonial possessions.

It follows from the above that EACSO was not at its inception an international organisation. It is a curious legal phenomenon to which we would ascribe the status of a *quasi*-international organisation. The instrument creating it we also characterize as a *quasi*-international agreement.

We shall not dwell at length here with the structure and administration of EACSO because they followed closely albeit with some modifications the structure and working of the High Commission discussed above.[34] It should be stated generally, however, that EACSO took over most of the Common Services run by the High Commission.[35] However, the following salient features are worth noting:

(i) The Agreement created a Common Services Authority composed of the three Presidents of the member States who together constituted the supreme organ of the Organisation.

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[34] Detailed description of the structure and administration of the EACSO is given in Collin Leys and P. Robson, eds., *Federation in East Africa: Opportunities and Problems* (Oxford: Oxford University Press, 1965) at 30-40; Cf: Ingrid di Delupis, *The East African Community and Common Market* (Longmans, 1970) at 42-50.

[35] These included certain departments directly connected with aviation, namely the Directorate of Civil Aviation, Meteorological Department, Customs and Excise Department and Income Tax Department.

(ii) Five ministerial Committees were created to assist the Authority. Membership of the Ministerial Committee was made up of one Minister from each member State with responsibility within his own government for the particular subject for which the EACSO Ministerial Committee was responsible.

(iii) Both the Secretary General and the Legal Secretary of the Organisation were allowed to sit in the Assembly as ex-officio members.

(iv) The central legislative Assembly's power over legislation was increased.[36]

(v) A court of Appeal was constituted for Eastern Africa.

The ultimate aim of East African political leaders was to secure a federation of their three territories, but that objective was not immediately attainable, it was decided that EACSO should be strengthened. Consequently, the treaty for East African Co-operation was signed on June 6, 1967, and the East African Community was inaugurated on December 1, 1967.

1.4.3 The East African Community Treaty

The Treaty for East African Co-operation was signed in Kampala by the Heads of State of Tanzania, Kenya and Uganda at Kampala on June 6, 1967. We shall examine this treaty only in the light of the civil aviation content. Article 3(1) of the Treaty provided for the institutions of the Community nine of which are spelt out and "such

[36] Its power to legislate over civil aviation was unimpaired while provision was made for the Headquarter's Secretariat of EACSO to continue to service the Directorate of Civil Aviation.

other *Corporations, bodies, departments and services*" as established or provided for by the treaty (emphasis mine). The establishment and detailed regulations of these institutions are provided for in Articles 30-89 of the treaty.

As far as aviation is concerned, the "Corporations, bodies, departments and services" of common interest to the community included:

(a) The East African Airways Corporation which was charged with providing services and facilities relating to East African and International air transport.

(b) The East African Posts and Telecommunications Corporation which had responsibility for Posts, Telecommunications and other associated services such as allocation and control of radio frequencies to aircraft operating in the territories of the partner states in accordance with the obligations assumed by each of the partner states under the International Telecommunications Union Convention[37]

(c) Departments mentioned in Annex IX as services to be administered either by the community or by the Corporations included:

(1) The East African Directorate of Civil Aviation,

(2) The East African Meteorological Department,

(3) The East African Customs and Excise Department, and

(4) The East African Community Service Commission.

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[37] For text of the Convention see A.J. Peaslei, *International Governmental Organisations*, vol. II (Deventer: Martinus, Nijhoff, 1956) at 1400-1435.

Finally, it should be mentioned that legislative power over civil aviation was granted to the East African Legislative Assembly by virtue of item 4 of Annex X of the Treaty.[38] In addition, the Assembly was granted power to legislate over civil aviation related subjects as mentioned in items 5, 6, 13, 15, 16, 17, 20, 23 and 27 of Annex X. We shall defer for examination in the subsequent chapters the procedure provisions, the control of the corporations and the decentralization measures concerning aviation.[39]

1.5 Summary

We have in this introductory chapter dealt in a nutshell with the historical evolution of the civil aviation system of British East Africa in the context of the introduction and development of civil aviation there. One unifying thread which runs through our foregoing presentation is that Great Britain introduced aviation in East Africa and pioneered its early development. When the time came for the national airlines of these territories to assume responsibility for the running of their individual airlines both regionally and internationally, Britain did not hesitate to terminate voluntarily here monopolistic operations on the East African routes eventhough those territories still constituted part of Her Majesty's colonial possessions.

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[38] See *supra* note 36.

[39] *Ibid.*, Annexes XI, XIII, and XIV.

CHAPTER TWO

AVIATION LAW AND HISTORY IN BRITISH EAST AFRICA

2.1 General

With the successful conclusion of the Treaty of Versailles[40] and the Paris Convention on Aerial Navigation (1919) at the end of the First World War, Great Britain as well as other allied powers realized that aviation which had played such a vital role in the war could also play a more useful role in peacetime. It should be recalled that by 1920, Britain possessed a vast colonial empire scattered all over the globe and traditionally, the only means of communication with this far-flung colonial empire was by sea. The emergence of aircraft as a medium of transportation altered the pattern of access to those widely scattered territories and proved advantageous in:

(i) providing a quicker means of transportation of passengers and cargo to the British empire than was hitherto the case with traditional sea routes;

(ii) providing an impetus for economic development and unification of the empire; and

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[40] *Treaties of Peace 1919-1925*, vol. 1 (published in two volumes by the Carnegie Endowment for International Peace, New York, 1924) Cf: T.S. Wosley, *The Provisions of the Treaty of Peace Disposing of German Rights and Interest Outside Europe*, vol. 13 (1919) A.J.I.L. 741-745 at 84; part of the settlement and price which Imperial German Government had to pay for her part in the first world war was her renunciation of her rights over the Territory of Tanganyika. Part IV, sec. 1, Art. 119 of the treaty provides as follows: "Germany renounces in favour of the principal allied and associated powers all her rights and titles over overseas possessions." Consequently, under the mandate system set up by the League of Nations, Tanganyika was placed under British mandate.

(iii) originating the development of a colonial air mail service.

Two instrumentalities of British government were directly responsible for these pioneering developments in aviation activity in East Africa. Firstly, there was the Royal Airforce which was responsible for route survey, charting of air lanes, establishment of flight paths and identification of landmarks useful for civil aviation. Another function of the Royal Airforce at this time was to test and certify the reliability of the equipment that would be used later for commercial flights. The second instrumentality of the British government of this era was the Imperial Airways (the predecessor of British Overseas Airways Corporation - hereinafter abbreviated as BOAC) which was responsible for commercial development of air transport between Britain and overseas colonial empire. In this connection an eastern route, *inter alia*, to Cairo was pioneered from where it made a detour through Sudan, over East Africa and terminated in Cape Town.[41] In order to assess the practicability of a Cairo-Cape Town air service, under the auspices of the Times of London, the inaugural flight to Cape Town took off from Weybridge on 24 January 1920. On leaving Cairo, the aircraft flew over the British Colonial territories of East Africa - Kisumu and Mwanza but unfortunately crashed at Tabora in Tanganyika on 27 February 1920.[42] The tragedy which befell this inaugural flight did not discourage Imperial Airways from opening and developing a regular trunk route service through East Africa to Cape Town. In addition, some local regional services were also commenced in East Africa. It is known that by 30 November 1926 air transport in British East Africa

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[41] John Pudney, *The Seven Skies* (Putnam, 1959) at 28.

[42] For full account see Reg Davies, *A History of World Airlines* (Oxford, 1967) at 182-195.

had reached a stage whereby regular services had been opened between Khartoum (Sudan) and Kisumu (Kenya) by sea plane; and early in 1929, a regular airmail service was opened between Kisumu, Lake Victoria, Khartoum and Cairo. Direct weekly services between England and East Africa were commenced by Imperial Airways on 28 February 1931.

Under the British Settlement Act 1887, the British government was vested with the power to legislate for Kenya because Kenya was a British settlement within the meaning of the Act and under the British Foreign Jurisdiction Act 1890, Britain had power to legislate for Uganda and Zanzibar as protectorates and Tanzania territory in respect of which she exercised a mandated authority of the League of Nations. By and large, the British administrators in Kenya had considerable latitude in making legislation subject of course to the consent of the home government through the colonial Governor. In general, however, aviation was outside the scope of their legislative competence mainly because the instruments appointing any colonial Governor preempted him from consenting to aviation legislation because of its supra-national character. Aviation therefore remained the exclusive preserve of Her Majesty's government.

2.1.1 Constitutional Processes of Enacting Aviation Legislations in the Colonies

By its very nature, civil aviation has from its very inception been the subject both of international and municipal regulations. The first public international law on aviation

to which the United Kingdom was a party, was the Paris Convention.[43] She was also a party to the first private international law on aviation held in Warsaw, in 1929.[44] These two early Conventions for instance contained provisions for the application of the Convention to the Colonial possessions and dependent territories of the High Contracting parties.[45]

In pursuance of and in implementation of these multilateral conventions, the United Kingdom Parliament enacted various municipal legislations on aviation which were made applicable to the colonies.

As posited in the preceding chapter, colonial territories, even those that possessed representative legislatures were, as a rule, constitutionally incompetent to legislate on aviation. The reason for this constitutional incapacity is that the constitutions of colonial territories being generally contained in the related documents, namely the letters patent

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[43] The United Kingdom gave effect municiapply to this Convention by enacting Air Navigation Act 1920 and 1936. See *Paris Convention, supra* note 17. These Acts were made applicable to the *Colonies by the Colonial Air Navigation (Application of Acts) October 1937* - Vide S.R.S.O. 1937/378.

[44] *Convention for Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 L.N.T. S. 11, 49 Stat. 3000, T.S. No. 86, ICAO Doc. 7838 [hereinafter *Warsaw Convention*].

[45] Article 40 of the Paris Convention provides as follows: "The British Dominions and India shall be deemed to be states for the purposes of the present Convention. The territories and national of Protectorate or of territories administered in the name of the League of Nations shall, for the purposes of the present Convention, be assimilated to the territory and Nations of the Protecting or Mandatory states". The United Kingdom English translation of the Warsaw Convention annexed as Schedule 1 to the *Carriage of Air Act 1932* provides in the Additional Protocol as follows:

> The High Contracting Parties reserves to themselves the right to declare at the time of ratification or of accession that the first paragraph of Article 2 of this Convention shall not apply to international carriage by air performed directly by the state, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority.

appointing a colonial Governor and providing for the government of a colonial territory and the royal instructions issued to a Governor[46] did not contain specific provision authorising a Governor or a colonial legislature to exercise any functions in respect of aviation. The reason for this, we venture to suggest, was *prima facie* to preclude a colonial governor or colonial legislature from exercising functions which could have extra-territorial implications.[47]

Enactment of aviation legislations in the colonies were therefore effected in three ways:

(i) by Orders in Council made by Her Majesty on the advice of the Privy Council;

(ii) by statutory instruments made by a United Kingdom Minister or one of Her Majesty's principal Secretaries of State extending to the colonies;

(iii) by sub-delegated legislation in the form of Regulations or Orders made by a Colonial Governor under powers conferred by a United Kingdom Statutory Instrument.[48]

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[46] E.C.S. Wade and A.W. Bradley, *Wade and Phillips Constituional Law*, 7th ed. (Longmans, 1965) at 417.

[47] For the literature on delegated legislation and sub-delegated legislation, see the following, C.K. Allen, *Law in the Making* (Oxford Paperback Editions, 1961) at 517-569; S.A. de Smith, *Sub-delegation and Circulars* (1949) 12 M.L.R. 37-43; A.E. Currie, *Delegated Legislation - Some Recent Developments*, (1949) 12 M.L.R. 297-318.

[48] *Ibid.*

(a) Orders in Council

These were peculiar but unique constitutional legislative devices of the United Kingdom Government by which the Crown, on the advice of the Privy Council, was able to legislate directly for the colonies either in exercise of a power granted by an Act of Parliament or in exercise of a Royal prerogative. For example, the Preamble to the Colonial Air Navigation Order, 1955[49] states as follows:

> Her Majesty, in pursuance of the powers conferred upon Her by the Civil Aviation Act, 1949,[50] and of all other powers enabling Her in that behalf, is pleased by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

Similarly, when the United Kingdom Parliament implemented domestically in the United Kingdom the international obligations assumed under the Warsaw Convention by enacting the Carriage by Air Act, 1932[51] provision was made for the extension of sections 1 and 2 of the Act to those colonial territories the foreign relations of which the United Kingdom was responsible. This extension was carried out by an Order in Council the Preamble of which provides:

> WHEREAS a Convention signed at Warsaw on the 12th day of October, 1929, is in force as regards the territories mentioned in the second schedule to this Order[52] AND WHEREAS it is expedient to extend the

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[49] *1955 No. 711* Series of Orders were issued under this name between 1955 and 1958 and are collectively referred to as "*The Colonial Air Navigation Orders 1955-2958*".

[50] 12; 13 and 14 Geo. 6, c. 67, sect. 66.

[51] 22 and 23, Geo 5, c. 36.

[52] The territories referred to in the second schedule included, *inter alia*, Kenya (Colony and Protectorate), Nigeria (a) Colony (b) Protectorate; Cameroons under United Kingdom trusteeship Tanganyika; Uganda protectorate and Zanzibar Protectorate.

> provisions of Sections 1 and 2 of the Carriage by Air Act, 1932[53] subject to certain adptations and modifications to such territories. Now, THEREFORE, Her Majesty, by virtue of and in exercise of the powers in this behalf by the Carriage by Air Act, 1932,[54] or otherwise in Her Majesty vested, is pleased by and with the advice of Her Privy Council, to order, and it is hereby ordered as follows:[55]

It is clear from the foregoing, that Orders in Council were generally resorted to as legislative tools for Colonial territories. The question therefore arises: What was the legal or juridical basis for an Order in Council in relation to those Colonial territories with which it had such close and intimate connection? Our answer to this concern is founded on the Crown's general powers over colonies based on either each, all or a combination of the following:

(i) the Royal prerogative - any legislative or official action based on this power is reminiscent of some of the ancient sovereign power of the Queen to legislate in her own right unfettered by any parliamentary control.

(ii) the Foreign Jurisdiction Act[56]

(iii) the British Settlement Act 1887[57] as amended by the British Settlement Act 1945.[58]

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[53] *Infra* note 55.

[54] *Ibid.*

[55] The Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, S.I. 1953/1474.

[56] 53 & 54 Vict. C. 37.

[57] 50 & 51 Vict. C. 54.

[58] 8 & 9 Geo. 6 C. 7.

The legality of exercising jurisdiction in Colonial territories by Orders in Council was confirmed in the case of *The King* v. *The East of Crowe Ex Parte Cekgome*[59] arising in Bachuanaland Protectorate, where the British High Commissioner had, by a proclamation, ordered the arrest and detention of one Sekgome, a native tribal chief. An application for the Writ of *habeas corpus* was filed in the Divisional Court challenging the validity of the proclamation authorising such arrest and detention. The Court of Appeal, affirming the decision of the Divisional Court, denied the application and held, that a protectorate is a foreign country within the meaning of the Foreign Jurisdiction Act, 1980, and that any act done in such protectorates by Her Majesty's representative under powers conferred by Orders in Council was valid.

The case of *Sobhuza II* v. *Miller and Ors*[60] which came before the judicial Committee of the Privy Council also centred on the question of validity of an Order in Council and a Proclamation made under it by which Her Majesty's High Commissioner in Swaziland had declared contrary to a convention and previous Orders in Council certain vacant lands, crown land. The following *dictum* of Viscount Haldane in delivering the judgement of the Court underlined the fundamental nature of an Order in Council. His Lordship observed:

> The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an act of state which cannot be questioned in a court of law. The Crown could not, excepting by Statute,

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[59] (1910) 2 K.B. 576-629 (C.A.).

[60] (1926) A.C. 518-529 (J.C.P.C.).

> deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders.[61]

It would appear, therefore, that in British Constitutional practice, Orders in Council were extensively used to achieve the legislative objectives of the executive, either in respect of the United Kingdom or any of the overseas colonial possessions.

We may therefore draw the following general conclusions concerning the nature of an Order in Council and as to the various occasions when resort to this mode of legislation was adopted by Her Majesty's Government in her relations with the Colonial empires. Orders in Council were chiefly used to accomplish the following:

(i) to enact, amend, suspend or revoke colonial aviation legislation;

(ii) to extend to the colonies municipal aviation legislation obtaining in the United Kingdom which would not otherwise have been applicable in British colonies abroad being outside the ambit of the definition of "statutes of general application";

(iii) to apply to British colonies abroad multilateral international air law conventions to which United Kingdom is a party and which contained provisions permitting any of the high contracting parties to extend all or parts of such conventions to any of their colonial dependencies;

(iv) that Orders in Council were valid and normal legislative instruments wherewith Her Majesty exercised sovereign governmental powers in crown colony, protectorates, mandated territories or trusteeships.

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[61] *Ibid.* at 528-529.

(b) Statutory Instruments

A second process of enacting aviation legislation in the colonies was by statutory instruments. What is a statutory instrument, and by whom is it exerciseable? Section 1 (1) of the Statutory Instruments Act, 1946[62] provides that:

> Where by this Act of any Act passed after the Commencement of this Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown. The, if the power is expressed -
>
> (a) in the case of a power conferred on His Majesty, to be exerciseable by Order in Council;
>
> (b) in the case of a power conferred on a Minister of the Crown, to be exercisable by Statutory Instrument,
>
> *any document* by which that power is exercised shall be known as "a Statutory Instrument" and the provisions of this Act shall apply thereto accordingly".

The Act then further provides that whereby "any Act passed before the commencement of this Act, power to make statutory rules within the meaning of the Rules Publication Act, 1893[63] was conferred on any rule - making authority within the meaning of that Act, *any document* by which that power is exercised after the Commencement of this Act shall, save as is otherwise provided by regultions made under this Act, shall be known as a "Statutory Instrument" and the provisions of this Act shall apply thereto accordingly."[64]

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[62] 9 and 10 Geo. 6.

[63] 56 and 57 Vict. c. 66.

[64] *Supra* note 62, sect. 1(2).

From the words "any document" which occur in the sections of the Act quoted above, it would appear that an indeterminate congeries of documents would fall within this definition.[65]

(c) The Sub-delegated Legislation

Within the framework of Colonial Civil Aviation, we may define a statutory Instrument as being a generic term used to describe multifarious law-making instruments, ranging from an Order in Council made by His Majesty pursuant to a power conferred by an Act of Parliament, to proclamations, regulations, orders and notices made by either the Minister with departmental responsibility for Civil Aviation in the United Kingdom or the Secretary of State for the Colonies. In practice, however, neither United Kingdom Ministers nor any of Her Majesty's principal Secretaries of State exercised directly powers under the Civil Aviation Act, 1949[66] in the colonial territories. The administrative procedure adopted was for these powers to be sub-delegated to the colonial governor in charge of the particular territory.[67] In the territories of East Africa, these

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[65] For an enumeration of the type of documents that fall within this definition, see The UK House of Common Select Committee Report on Delegated Legislation (1953) quoting from the earlier Report of the Committee on Ministers Powers (The Donoughmore Committe 1932) made the following observations at page vii of their Report:

> 21. The Donoughmore Committee in paragraph 7, page 28, of their report stated:-
>
> > There is no simple classification of the heterogeneous collection of regulations, rules and orders in force today, nor is it easy to formulate one which is either simple or satisfactory."

[66] 12, 13 and 14 Geo. 6, c. 67.

[67] See *The Colonial Civil Aviation (Application of Act) Order*, 1952, S.I. 1952/868; and as amended by subsequent Order. See particularly Schedule 1 of this Order which is an adaptation

powers were sub-delegated to the High Commission rather than individual territorial Governors.[68] In some cases however, regulations made by the High Commission required confirmation by the Secretary of State to have any effect.[69]

(b) Operational and Organizational Structure of Aviation in East Africa

This is an element that probably falls outside the scope of our study. Its mention here is only important in the establishment of local aviation authority in East Africa as a colonial territory to take over some functions which hitherto, or otherwise, would have to be performed directly by His Majesty's Government in the United Kingdom. It was thought that some of these aviation functions could best be discharged on the spot by colonial office administrators stationed in respective territories. It was believed also that post-war economic development of the territories would be accelerated by creating an infra-structure for local development civil aviation there. In pursuance of this policy, the four British East African Territories of Kenya, Tanganyika (as it was then known) uganda, and Zanzibar were designed to be joint participants in the new aviation institutions to be created. By the East African Territories (Air Transport) Order in Council, 1945[70] the operational and organizational structure of civil avition in British

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of Secs. 8, 9, 10, 11, 13, 14, 19, 27, 51, 62 of the *Civil Aviation Act, 1949* in which the Governor is given power to exercise these functions which in the United Kingdom would be exercisable by the Minister or a Secretary of State.

[68] *Ibid.*, sections 3, 4, 5.

[69] Sects. 13, 52(4)(a), 52(4)(b) and 52(4)(c) of the *Civil Aviation Act, 1949, infra* note 66.

[70] S.R.&.O. 1945/1370.

East Africa was thereby first established. The detailed discussions on the evolutionary processes emerge in the subsequent parts of this chapter and first parts of chapter three of the thesis.

2.1.2 Inherited Law: United Kingdom Statutes

We have posited in the preceding parts that the regime of law prevailing in the colonies was essentially a replica of the legislation pertaining at the metropolis. We have also examined the various constitutional processes that were resorted to and their juridical basis. Even to date, aviation statutes typically exemplify this practice in many independent African states. Britain imposed upon Kenya her law on aviation. It is thus essential to examine the content of some of the pertinent British Legislation that ensured this transposition, as a prelude to the actual process of importation of British law into Colonial Kenya.

The Carriage by Air Act, 1932[71]

This was an Act to give effect to a Convention for the unification of certain rules relating to international carriage by air, to make provision for applying the rules contained in the said convention, subject to exceptions, adaptations and modifications, to carriage by air which is not international carriage within the meaning of the

[71] 22 & 23 Geo 5. c. 36.

convention, and for purposes connected with the purposes aforesaid.[72] It came into force on 13 May 1933.

The essence of this legislation was to give effect to the provisions of Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on behalf of His Majesty on 12 October 1929[73] throughout Britain and in her colonies, protectorates etc. as the Act provided that His Majesty may by Order in Council direct that the provisions of the Act shall extend, subject however to such exceptions, adaptations and modifications, if any, to be specified in the order, to all or any of the territories. This Act signified the initial efforts to set out the rights and liabilities of carriers, passengers, consignors, consignees and other persons in relation to Carriage by Air in the United Kingdom to which the Convention applied irrespective of the nationality of the aircraft performing that carriage.

The Civil Aviation Act, 1949[74]

This Act consolidated the enactments relating to civil aviation, other than the Carriage by Air Act, 1932, and other than the enactments relating to the constitution and function of the Airways Corporations.[75] Apart from establishing the inner functionaries of the British Civil Aviation system for the organisation and development thereof, one

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[72] Preamble to the Act.

[73] Hereinafter referred to as the Warsaw Convention.

[74] 12 & 13 Geo. 6, c. 67.

[75] Preamble.

notable aspect of this Act was that it provided for giving effect to the Convention on International Civil Aviation[76] signed on behalf of His Majesty on 7 December 1944 for the regulation of air navigation. By this Act His Majesty may by Order in Council make provisions for carrying out the Chicago Convention, any Annex thereto relating to International Standards and Recommended Practices (being an Annex adopted in accordance with the Convention) and any amendment of the Convention or any such Annex made in accordance with the Convention and generally for regulating air navigation. Part IV of the Act also empowered the Making of provisions for giving effect to the "Rome Convention".[77] It is under this Act that agencies like the British Overseas Airways Corporation (BOAC) explained the legality of their actions in the colonies since they were now expressly defined in the Act as "Airways Corporations".

Part VII of the Act made it applicable to His Majesty's dominions, colonies and protectorates and any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Majesty *mutatis mutandi*.

The Air Corporations Act, 1949[78]

This Act consolidates the enactments relating to the constitution and functions of the BOAC, the British European Airways Corporation (BEAC) and the British South

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[76] *Chicago Convention, supra* note 10.

[77] *Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface*, 29 May 1933, *Shawcross and Beaumont, Air Law*, vol. 2, 4th ed. (London: Butterworths, 1983) A-73.

[78] 12, 13 & 14 Geo. 6, c. 91.

American Airways Corporation (BSAAC). Part I thereof provided for the Constitution of these Corporations as "Airways Corporations" and defined their functions to include, *inter alia*, provision of air transport services. As will be seen in the subsequent parts of this chapter, BOAC later used these powers extensively in the pioneering phases of the East African Airways Corporation (EAAC) to the extent of being appointed to the EAAC board of directors and participating in the equities thereof.

The Carriage by Air Act, 1961[79]

This Act came into force on 22 June 1961. It was an Act to give effect to the Convention Concerning International Carriage by Air known as "the Warsaw Convention as Amended at The Hague, 1955" to enable the rules contained in that convention to be applied, with or without modification, in other cases and, in particular to non-international carriage by air.[80] From the Preamble it is quickly discernible that this Act was a bid by the British legislature to keep abreast with the developments in the "Warsaw System" and the thrust of it was to incorporate the amendments to the Warsaw Convention at The Hague in 1955.

Section 9 thereof made the Act applicable, *inter alia*, to British possession, colonies and protectorates. This Act has, however, been amended by the Air and Road Act 1979 to take account of the revision of the Warsaw Convention as amended at the Hague 1955 made by certain protocols signed in Montreal on 25 September 1975.

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[79] 9 & 10 Eliz. 2, c. 27.

[80] Preamble.

In summary, we wish to point out that we have not discussed the outlined British enactments in depth because, firstly, it would certainly be beyond our province so to do; secondly, their relevant substantive provisions are discussed herein below in detail in so far as they provide the substance of the air law that was exported to Kenya. We have merely identified these enactments as constitutive of the "core" (the irreducible minima) of the British air law at the time relevant to colonization process. We have overlooked any legislation after 1961 because after 1963 Kenya was enjoying sovereign status and any enactment thereafter may not be termed as "inherited" in the traditional sense of the word. This is not to aver, however, that from independence Kenya stopped borrowing from the British experience. In fact, the converse has been true in practice.

2.1.3 Reception of English Air Law

2.1.3.1 General

The earliest reception of English law in Kenya took place under the East Africa Order in Council 1889 which stated that jurisdiction should "so far as circumstances permitted be exercised upon principles of, and in conformity with, the substance of the law for the time being in force in England". This was a remarkably broad provision for it nominally included all the statute law as well as the common law in force.[81] To

[81] *The Uganda Order in Council 1902* and the *East African Protectorate Order in Council* of the same year fogged the position badly by replacing the 1889 Order with a provision that granted the newly created High Courts jurisdictions to be exercised, so far as circumstances permitted, in conformity with the Indian civil procedure, criminal procedure, and the penal codes. Neither

remove the doubts, an amending Order was passed in 1911 in which the reception was now declared to be of the substance of the common law, doctrines of equity and statutes of general application as of a specified date.[82]

However, specifically the adoption of English law was by virtue of the Kenya Colony Order in Council 1921. The relevant portion of Article 4, para. (2) of the Order provided:

> Subject to other provisions of this Order, the jurisdiction of the Supreme Court and of subordinate courts shall, so far as circumstances admit, be exercised in conformity with the substance of the common law, doctrines of equity and the statutes of general application in England on 12 August 1897, save in so far as the said common law, doctrines of equity and the statutes of general application may at any time before the commencement of this Order have been or hereafter may be modified, amended or replaced by another provision in lieu thereof or under the authority of the of any order of His Majesty in council or by any ordinance or ordinances for the time being in force in the colony. Provided always that the said common law, doctrines of equity and the statutes of general application shall be in force in the colony so far only as the circumstances of the colony and its inhabitants permit and subject to such qualifications as the local circumstances rendered necessary.[83]

This general provision for reception of English law in Kenya has ever since been continued by saving clauses in one statute after another. The 1921 Order in Council was revoked in 1958 by the Kenya (constitutional) Order in council 1958 section 74 whereof read:

> Notwithstanding the revocation of the Kenya colony Order in Council 1921, the jurisdiction of the supreme court and courts subordinate thereto,

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of these 1902 Order said anything about the general application of English law.

[82] *East Africa Protectorate (amendment) Order in Council 1911*, art. 17(2).

[83] Identical provision obtained in the *East African Protectorate Order in Council 1902*, art. 15(2) as amended in 1911 art. 17(2).

> shall subject to the provisions of this Order, and until any law made under this order otherwise provides, be exercised in accordance with the provisions of paragraph (2) of article 4 of that Order as if those provisions extended to the protectorate as well as the colony and references therein to the colony were references to Kenya.

In 1963, the reception clause was contained in the Jurisdiction of courts and Pending Proceedings Regulations 1963[84] which was continued in effect by section 6(8) of legal notice no. 14 of 1965 and is presently contained in the Judicature Act 1967,[85] Section 3(1) thereof provides:

> The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:
> (a) the constitution,
> (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in part 1 of the schedule to this Act, modified in accordance with part II of that schedule,
> (c) subject thereto, and so far as those written laws do not extend, or apply, the substance of common law, the doctrines of equity and the statutes of general application in force in England on the 12 August 1897 and the procedure and practice observed in courts of justice in England at that date:
> but the common law, doctrines of equity and the statutes of general application shall apply so far as the circumstances of Kenya and its inhabitants permit subject to such qualifications as those circumstances may render necessary.

The reception statutes on their face included "the substance of common law, the doctrines of equity and statutes of general application" obtaining in England but they did not give any guidance as to what constituted these pleonastic concepts. It was left to the creative discretion of the colonial governors. The British authorities in the colonial office reflecting the hard-headed estimate of men of affairs tried to suggest that the courts under

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[84] *Legal notice no. 319.*

[85] *(No. 19 of 1984) Chapter 8, Laws of Kenya.*

the orders in council ought to approach the problem of the application of law in its new and exotic circumstances with great scope for discretion and creativity. This, we submit, resulted in the reception of a sharply truncated narrow version of English law in many instances as will be seen in the subsequent parts of the thesis.

2.1.3.2 Legislation - Process and Content

In this Section, we shall now proceed to examine for purposes of systematic analysis the detailed provisions of the Orders in Council that ensued during the periods subject of our study.

By virtue of the Air Navigation (colonies and protectorates) Order in Council 1922, the English Air Navigation Act 1920 was extended to apply with necessary modifications and qualifications, in the colony and protectorate of Kenya, the latter being a British possession within the meaning of section 4 of Act which permitted His Majesty the King to extend the Act.[86] In summary, this Order empowered the governor in section 7 thereof (as the officer for the time being administering the government of the colony) to:

(a) regulate and or prohibit the navigation of any aircraft over the colony or over the territorial waters adjacent thereto in time of war (whether actual or imminent) or in times of great national emergency. In exercise of this

[86] This Order in Council introduced the following sections of the 1920 Act; sections 7, 8(1), 9, 10, 11, 12 & 18.

power, the governor could sequester any aircraft, aerodrome or landing ground or any machinery for the purpose of His Majesty's naval, military or airforces;

(b) regulate or prohibit the use, erection, building, maintenance or establishment of any aerodrome, flying school or landing ground; and

(c) impose penalties to secure compliance, not exceeding six months imprisonment or a fine of 200 sterling pounds.

Under section 8 of the 1920 Act, the governor had powers to establish and maintain aerodromes and the concomitant infrastructure like roads, buildings, acquisition of land for kindred purposes, etc. Section 9 thereof provided for exemption from trespass actions in respect of any nuisance if the flight is at such a height as is reasonable, except where loss or injury accrued from landing, take-off or any person or thing falling off the aircraft, without any proof of negligence being necessary. This section also provided for regulation of manner of flights to safeguard against accidents and the conduct of investigations of accidents. Section 11 extended into the colony the law relating to wreck and salvage of life and property and the duty to render assistance to aircraft in distress just as it applies to vessels in the high seas. Section 18 exempted the Order in Council promulgated thereunder from applying to aircraft in the exclusive employ of the King thus introducing the concept of "state aircraft" for the first time in Kenya's jurisprudence.

Subsequent Orders in Council were promulgated to extend English legislation to Kenya and it is these legislations that later became models upon which the present law

on aviation was modeled. For instance, by virtue of the Air Navigation (colonies, protectorates and mandated territories) Order in Council 1927, certain provisions of the following English legislation were extended to apply in the colony and protectorate of Kenya:

Air Navigation (consolidation) Order 1923,

Air Navigation (amendment) Order 1925,

Air Navigation (amendment) Order 1927.

These legislations, as indicated in the introduction to this Part, were extended by virtue of section 4(2) of the Air Navigation Act 1920. However, the main purpose of the 1927 Order in Council which introduced these legislations was to, *inter alia*:

(a) prescribe how the nationality of an aircraft was to be determined;

(b) prescribe the kind of aircraft which would be subject to this order in council; and

(c) outline the general conditions for flying within the colony with reference to registration of aircraft, aerodromes, rights of inspection and access to aerodromes and repair facilities and safety conditions.

In 1931, the governor issued the Air Navigation Directions 1931 pursuant to Article 30 of the Air Navigation (colonies, protectorates and mandated territories) Order 1927 giving directions on registration, classification of flying machines, pre-flight inspections and after flight checks, fitting of wireless apparatus, licensing of personnel, etc. Further, a similar Air Navigation Directions (no. 2) 1931 was issued to compliment the earlier ones of the same year. It approved certain aerodromes as custom aerodromes

and made regulations on customs, made provisions for regulating exportation of goods among other things. It also established an Air Board consisting of:

- the colonial secretary
- the Attorney General
- Director of Public Works
- Officer Commanding troops
- Post master General
- representative of Aero club of East Africa
- representatives of incorporated companies engaged in commercial aviation.

The functions of this Board were spelt out to include: advise the governor on matters arising out of any order in council relating to civil aviation and on any directions issued thereunder and generally upon such matters appertaining to civil aviation in the colony and protectorate of Kenya as may be referred to it. The Directions (no. 2) also provided that the Board could co-opt for the purpose of discussions any association or company to offer technical advice on matters concerning aviation.

Perhaps it is opportune to note here that under the Air Navigation (colonies, protectorates and mandated territories) Order 1927, schedule 1 thereto empowered the colonial governor to establish in the colony a sub-registry of aircraft and to appoint an officer to act as the registrar of aircraft and which officer would serve as an agent of the British Secretary of state for air, and to be in charge of the registration process. Schedule II made provisions for the extension of the articles and effect of the Paris Convention for the regulation of aerial navigation dated 13 October 1919 and to enable it to apply to the

colony and protectorate of Kenya.[87] Air Navigation Directions (no. 3) 1931 were issued to complement the Air Navigation Regulations 1928, made by the colonial governor pursuant to the enabling provisions of Air Navigation (colonies, protectorates and mandated territories) Order 1922. The latter regulations related to the investigation of aircraft accidents occurring in Kenya or to any aircraft registered in Kenya.

From the foregoing account of the legislative processes so far invoked, one will note that there are about six substantive Orders in Council resting in that of 1927 and several regulations and directions made thereunder ostensibly to regulate a burgeoning strategic industry already in existence in real terms. Unfortunately, this was not the case in Kenya. As of 1928, there was still no significant tangible development in aviation infrastructure resulting from the British government's effort to warrant such a massive legislation in our view.[88] The colonial government's rationale in developing surface

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[87] *The Paris Convention, 1919* was signed and ratified on behalf of His Majesty the King in Paris as a multilateral agreement on certain rules respecting international air navigation. *Paris Convention, supra* note 17. This Convention was extended to Kenya under the UK *Air Navigation Act 1920* as read with Air Navigation Directions 1931.

[88] From 1929 to 1939 international air services in Kenya and the entire East Africa for that matter, was operated by Wilson Airways, a private limited liability company incorporated on 31 July 1929 by Mrs F.K. Wilson. By 1938, its fleet consisted of 8 twin-engined aircraft and 4 single-engined aircraft and in its last two years of operation, flew 1,000,500 miles carrying 4,794 passengers and 76 tons of mail. The services operated were:
(a) Kisumu-Nairobi-Moshi-Dodoma-Mbeya-Mpika-Lusaka (twice weekly)
(b) Nairobi-Mombasa-Tanga-Zanzibar-Dar-es-Salaam (twice weekly)
(c) Nairobi-Kisuma-Mara-Musoma-Mwanza-Geita (once weekly)
(d) Nairobi-Nyeri-Nanyuki-Nakuru-Eldoret-Kitale-Kakamega-Kisumu-Nairobi (twice weekly)
(e) Nairobi-Kisumu (once weekly)
(f) Dar-es-Salaam-Morogoro-Dodoma (once weekly)
(g) Dar-es-Salaam- Mafia-Kilma-Utele (once weekly) principally as a link with Imperial Airways flying boat services into East Africa. Imperial Airways began operations England-Central Africa in February 1921, terminating at Mwanza on Lake Victoria. Wilson Airways flew the connecting services.

transport in East Africa as a whole does not seem compatible with the decision to introduce air services after the first world war. To the contrary, air services between metropolitan centre and the East Africa in general were not established with the purpose of economic development of the territories as the principal objective, but rather in conformity with the policy of maintaining direct and efficient communication between the metropolis and different parts of the colonies. To our mind, emphasis was placed on building a strategic civil aviation infrastructure within the isolated parts of the dominion and colonies on political and security grounds bearing in mind the experience gained during the first world war on military and economic potential of aeronautical science.[89] Equally influencing the British as a colonial power during the inter-war period were the elements of prestige and industrial prowess upon which her imperial policy was geared, to enhance the constant presence and assertion of power and authority within the empire.

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[89] The British Secretary of State for air from 1922-1929 Sir Samuel Hoare remarked that "distance was the greatest enemy of imperial solidarity". "The role of the aeroplane was to make closer and more constant the unity of imperial thought, imperial intercourse and imperial ideals."

With regard to East Africa the Colonial Secretary Leopold Amery argued that from the point of view of establishing white civilization as a guiding influence over the whole of East Africa, it is very important that the region should be in close contact both with England one way and with the white civilization rooted in the native soil in the south". S. Hoare, *Aviation and British Empire (January 1929) Scottish Geographical Magazine XLV3*; Imperial Conference, 1926, Appendices to the summary of the proceedings Cmnd 2769, 215;: Cf: KUANDA - "*Regional Integration of Commercial Air Transport in Africa*" (Montreal: Institute of Air and Space Law, McGill University, PhD thesis, 1987) [unpublished] at 84.

2.1.3.3 From 1931 Onwards

The period after 1931 saw the establishment of the operational and organisational structures for civil aviation in Kenya in a marked way. The East African Territories (Air Transport) Order in Council 1945[90] was enacted to control and regulate aircraft navigation over East African territories which territories were deemed by the Order in Council to extend over the colony and protectorate of Kenya. This Order in Council established the "East African Air Transport Authority"[91] as the supreme aviation authority in the region vested with the power to make regulations for the issuance of air services licences for public air transport services and certain powers over the management of the "East African Airways", another statutory corporation created by the same order. The Authority's membership composed of:

- the officer administering the government of Uganda;
- the officer administering the government of Kenya;
- the officer administering the government of Tanzanyika territory; and
- the British resident - Zanzibar.

All the above members were to act jointly as a board or in Conference. Article 5 of the Order in Council empowered the Authority to Control Aircraft flying for hire or reward (unscheduled air services) by enacting regulations respecting:

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[90] *Statutory Order and Regulations 1945/1370.*

[91] Hereinafter referred to as the "Authority".

(a) securing that aircraft should not be used in East African territories by any person for flying while carrying passengers or goods for hire or reward or for any trade or business without prior authorization of the Authority;

(b) the manner in which applications for such authorization by way of licences could be made to whom; and

(c) outlined the circumstances of granting, refusing, revoking or suspending licenses and the conditions that may be attached thereto in respect of fares, freight, etc.

It is to be noted however, that all the outlined powers of the Authority were only exercisable with the approval of the Secretary of State for Air in the United Kingdom and no regulations so made by the Authority could take effect unless the Secretary of State's approval has been sought and obtained.

Section 6 of the Order in Council provided that in exercising the discretion as to whether to grant or refuse licences, the Authority was to be guided by the co-ordination and development of air services generally with the objective of ensuring the most effective service to the public while avoiding uneconomical overlapping and, generally, the interest of the public, including those of persons requiring services or likely to require facilities for air transport, as well as those of persons providing such facilities.

Section 7 established the "East African Airways"[92] to be a corporation with perpetual succession and a common seal capable of suing and being sued and of purchasing, or otherwise acquiring, holding and alienating property and performing any act that such a body may by law do and perform.

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[92] Hereinafter referred to as the "Corporation".

Section 10 specified functions of the Corporation as thus:

(a) it shall be the duty of the Corporation to secure the fullest development, consistent with economy of efficient air transport services within the East African territories and to ensure that such services are operated at reasonable charges;

(b) acquire aircraft parts, aircraft equipment, accessories and stores;

(c) to acquire, construct aerodromes, buildings, and repair shops;

(d) acquire lights, beacons, wireless installations and other plant equipment;

(e) to sell, let or otherwise dispose of any property belonging to them and not in the opinion of the Corporation required for its proper functions;

(f) to establish and maintain air transport services and, for that purpose, enter into arrangements or agreements with other persons;

(g) to act as agents for any other undertaking engaged in the provision of air transport services or in any other activity in which the Corporation has power to carry on; and

(h) to provide/undertake flights on charter terms, provide accommodation in hotels or otherwise for passengers and facilities for the transport of the passengers from and to aerodromes and for collection, delivery and storage of baggage and freight.

The Board of Members of the Co-operation consisted of:

(a) a chairman; and

(b) five (5) members (Three (3) of whom were to be drawn from the public service of the three East African countries).

All members were to serve at the pleasure of the Authority.

Under Section 21, the Corporation had power to make rules necessary or desirable for their proper working, management and control, so long as those rules were not inconsistent with the parent Order in Council or any other law for the time being in force in any of the East African Countries.

By virtue of these provisions Kenya, Uganda and Tanganyika and Zanzibar founded the East African Airways Corporation in January 1946. The initial capital raised for the airline was £50,000 sterling contributed by the four governments in the ration of 67.7% from Kenya, 22.6% from Uganda, 9% from Tanganyika and 0.7% from Zanzibar. The airline began operations in 1946 with a fleet of hired DeHaviland Dragon Rapide twin engine biplanes. Those aircraft operated twenty-one scheduled services a week most of which covered the East African coastal regions extending as far south as Lindi.[93]

With regard to issues of accountability, the East African Air Transport Authority was to lay a report dealing with their operations and that of the Corporation during the

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[93] At that time, there was a shortage of aircraft suited for passenger role and cargo freighting at economical rates. Nevertheless, despite the limited capacity of these aircraft, East African Airways carried 9,403 passengers and generated total revenue of £85,852 sterling during its first year.

In response to market conditions, Dominies were replaced with DeHavilland Dores and subsequently Lockheed Lodestars. These were gradually superseded by Douglas DC3 aircraft. By 1950, the annual revenue had shifted to £473,144 sterling and services were expanded to Mafia, Mombo, Tanga, Kongwa and other parts of Tanganyika.

In 1952, the Corporation purchased six additional Dakotas. In 1957, East African Airways entered the international routes as a result of acquiring three (3) four-engined pressurized Canadair aircraft. The Canadair flew scheduled services once a week to the United Kingdom, twice a week to Pakistan and India via Aden and weekly service to Rhodesia. The fleet was beefed up by two Comet jets which started operations in September 1960 covering 1,836,484 miles in the first year, carrying 27,000 passengers and earning £2,4 million sterling. A third Comet was acquired in May, 1962. Later four Fokker 27 Friendships were acquired for the regional and domestic networks: See East African Community - A Handbook, 1972.

year before each of the respective councils of the East African territories. Such a report would entail information on the proceedings and policy of the Corporation at the end of each financial year. The Corporation was placed under the supervision of the Authority.

The Air Navigation (Air Restrictions) (Revocation) Order, 1946 was passed. This revoked the Air Navigation (Air Restrictions) Order 1939. This revocation was done by the Colonial Governor under the powers conferred on him by Section 7 of the Air Navigation Act, 1920 as applied to the colony in conjunction with the Colonial Air Navigation (Application of Acts) Order 1937. Further directions were issued by the Governor, that is, the Air Navigations Directions 1946 issued under Article 30 of the Air Navigation (Colonies, Protectorate and Mandated Territories) 1927.

The Air Navigations Directions (No. 2) 1946 were again passed. All these were to be read together with the Air Navigation Directions 1931.

In 1946, the East African Air Transport Authority issued the Air Services (Licensing) Regulations 1946 under the powers conferred upon it by the East African Territories (Air Transport) Order in Council 1945. These regulations dealt with conditions for licensing air transport.

On the 7 December 1944 at the International Civil Aviation Conference held at Chicago, a convention was signed on behalf of the United Kingdom known as the "Chicago Convention on International Civil Aviation". This Convention was intended to supersede the Paris Convention of 1919. To keep the colony and protectorate of Kenya abreast with this new development, His Majesty extended the operations of Sections 1, 2, and 3 of the UK Air Navigation Act, 1947. This act had already incorporated this new

development) by enacting the Colonial Air Navigation (Application of Acts) (Amendments) Order 1947. This order was an Amendment to and enactment in conjunction with the Colonial Air Navigation (Application of Acts) 1937.

The Air Navigation (Civil Airfield Charges) Regulations 1945 was issued by the Colonial Governor under the powers conferred upon him by Article 30 of the Air Navigation (Colonies, Protectorates and Mandated Territories) Order 1927. It dealt with the rates and charges imposed on owners of aircraft.

Then came the East African (High Commission) Order in Council, 1947, passed in England by His Majesty to apply in the colony and protectorate of Kenya, the trust territory of Tanganyika and the protectorate of Uganda. This legislation was passed to provide the legal framework for co-ordination and participation in the newly created Aviation Common Services. At Section 4 thereof, the Order in Council created the East African High Commission[94] as a body corporate with perpetual succession under which the East African Legislative Assembly and the executive authority were set up.

Section 9 provided that the High Commission would have the following powers and duties, *inter alia*:

(a) Take over the Administration of services set out in the Schedule to the Order. Such services included:

(1) The East African Directorate of Civil Aviation

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[94] Hereinafter referred to as the High Commission.

(2) Services arising out of the function of the High Commission as East African Air Transport Authority[95]

(b) Take over the functions of, and replace the East African Air Transport Authority previously established by the East African Territories (Air Transport) Order in Council 1945. Whereupon any reference in the said order in Council to the East African (Air Transport) Authority was to be construed to refer to the High Commission. Key functions that were taken over by the Commission hereunder included those related to and arising out of its powers as the East Africa Air Transport Authority and matters pertaining to the Directorate of Civil Aviation, the East African Meteorological Department, East African Radio Communications Services and the East African Transport Policy Board.

Section 14 of the 1947 Order in Council also established the East Africa Central Legislative Assembly. This Assembly was to serve more or less as an appendage of the High Commission in practical terms since it was there to aid the latter to attain its objectives. It is also noteworthy that the colonial legislators' latitude to enact laws was conditional upon the governor's express approval. However, the competence to legislate on matters relating to civil aviation was altogether denied to them by the statutory instruments relating to the appointment of governors.[96] Notwithstanding the 1947 Order

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[95] It is to be noted however, that the East African Directorate of Civil Aviation was a department of the High Commission and was charged with the responsibility of advising the High Commission and East African territories on all civil aviation matters, and controlling the activities of aircraft operators in and over the East African territories. See *Annual Report of the East African Directorate of Civil Aviation for the Year 1948*, at 7.

[96] Great Britain, *The East African (Air Transport) (Amendment) Order in Council* - Statutory Regulations and Orders, 1955 / No. 1819.

in Council we observe that the colonial East African co-operative arrangements were not preceded by a formal legal framework. Prior to the enactment of the High Commission legislation, inter-territorial activities were done by the Governor's Conference on an ad hoc basis - a machinery which had no judicial or constitutional foundation. As an administratively formed body by a directive of the Secretary of State, this mechanism had neither public accountability nor the means by which to enlist public support. In practice, the governors made their own decisions on the basis of documentation available to them through normal official channels, taking into account their respective territorial interests, thus resulting in policy decisions lacking any "East African" orientation in content. A legal and administrative lacunae ensued but was later redressed by introducing identical ordinances in the three East African territories and proposals of the colonial office in 1947 to replace the Governors Conference with the East Africa High Commission.

In 1948, the Aerodromes (Control of Obstructions) Ordinance 1948, No. 22 was enacted with the purpose of providing for the control and removal of obstructions in land adjacent to and in the vicinity of aerodromes. This legislation was introduced by the governor of the Colony of Kenya with the advice and consent of the legislative council.

The Colonial Air Navigation (Amendment) Order, 1948 was passed, amending certain sections of the Colonial Air Navigation (Applications of Acts) (Amendments) Order 1947.

The Colonial Air Navigation Order, 1949 was enacted and extended to have force in the colony and protectorate of Kenya. It also applied to the other East African territories. This legislation made provision for the conditions of registration of aircraft,

air worthiness, inspections, etc. of the aircraft flying over the colony and also introduced conditions to licensing Aerodromes. It revoked the following orders:

(a) The Air Navigation (Colonies, Protectorate and Mandated Territories) Orders, 1927-1939;

(b) The Colonial Air Navigation (Amendment) Orders, 1948. However, in spite of the revocation of the foregoing two legislations, the Colonial Navigation Order, 1949 provided for the continuance of the operation of all the existing regulations and directions made under earlier Orders unless and until they were replaced or otherwise terminated. It is these kinds of provisions that confounded a complex labyrinth maze of regulations, orders and directions that plagued the East African aviation legal and institutional framework for well over a quarter of a century to follow.

The 1949 Order was enacted by the governor under the provisions and powers conferred on him by the Aerodromes (Control of Obstructions) Ordinance 1948, in which by virtue of Legal Notice No. 1149 of 1953, the Embakasi area within Nairobi was declared an aerodrome for the purposes of the ordinance.

The Colonial (Application of Act) (Amendment) Order, 1953, amended the principal Order so as to provide that the powers to make regulations for the licensing of air transport and commercial flying under Section 13 of the Civil Aviation Act, 1949 would not apply to the East African territories which included the colony and protectorate of Kenya. This exemption was effected because provision already existed in the East African Territories (Air Transport) Order in Council, 1945 for the making of such

regulations. It is, however, noted that the Colonial Civil Aviation (Application Acts) 1952, had extended certain provisions of the aforesaid Civil Aviation Act, 1949 to apply in the East African territories.

Under the Colonial Air Navigation Order, 1949, pursuant to the powers conferred upon him by articles 35 and 36 thereof, the Governor exempted the aircraft operated by the Kenya Police Reserve during the emergency period to enhance their operations in the maintenance of peace and order.

Later, the East African Territories (Air Transport) (Amendment) Order 1953 amended part of the principal Order which had conferred powers relating to licensing of air transport and commercial flying to the East African Air Transport Authority. This amendment made provision for the East African Air Transport Authority to delegate any of the powers conferred upon it and to provide for the establishment of an appeal tribunal to which decisions of the Director of Civil Aviation could be appealed from. Specifically the 1953 Order provided that the powers conferred on the Air Transport Authority (at that time already transferred to the High Commission) should be exercised by the Director of civil aviation, East Africa. To confound the confusion, the Air Services (Licensing)(Delegation of Powers) (Amendment) Order, 1959 provided that when the authority considers that the exercise of any power or the performance of any duty by the Director of Civil Aviation involves the coordination and development of air services generally in the East African territories, then it may, by notice to the Director of Civil Aviation direct that the Director of Civil Aviation shall not exercise such powers or perform such duty as specified in the notice; therefore, the powers shall be exercised and

the duty performed by the Authority. It is difficult to imagine a more complex maze of regulations, orders and delegations to establish a simple licensing system for air services operations. To get a clear picture of all the provisions (relevant to obtaining a licence to operate an air service) required reference to no less than eight inter-locking legal documents. Further, by virtue of the Colonial Air Navigation (Amendment) Order, 1953, the Colonial Air Navigation Order 1949 was amended.

This amendment related to, *inter alia*: loading instructions, aircraft operation manuals, compliance with minimum weather conditions by operations of public air transport, and the carriage of dangerous goods in the aircraft.

The Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order, 1953 was enacted to extend the application of sections 1(4) and (5) of the British Carriage by Air Act, 1932 and the first schedule to that Act subject to certain adaptations and modifications to the Carriage by Air in the East African territories. The most notable feature of this legislation is that it extended into the colony and protectorate of Kenya the provisions of the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air signed on 12 October 1929.

This legislation also replaced, consolidated and revoked the Carriage by Air (Colonies, Protectorates and Mandated Territories) Order 1934 and certain other related Orders made under the Carriage of Air Act, 1932.

The East African Air Navigation (Radio) Regulations, 1953 was enacted by the East Africa High Commission pursuant to its powers under Article 64 of the Colonial Air

Navigation 1949-1952. It made provision for the regulation of radio apparatus and operating personnel in aircraft.

The Colonial Civil Aviation (Application of Act) (Amendment) Order, 1955 and the Carriage by Air (Non-International Carriage) (Colonies, Protectorate and Trust Territories) (Amendment) Order was issued in 1955. Its effect was to amend the definition of the term "Governor" in each of the respective Orders at paragraph (1) of Article 2 of the principal Orders to mean, in relation to Zanzibar, the person for the time-being performing the functions of the British Resident, Zanzibar.

In 1955, the Colonial Air Navigation Order was enacted replacing the Colonial Air Navigation Order, 1949 and all subsequent amendments thereto. In exercise of the powers conferred by this legislation, the Minister for Commerce and Industry issued notice to the effect that the following aerodromes in Kenya were available for landing or departure by specified aircraft by 10 March 1958: Eldoret, Garissa, Isiolo, Kisumu, Kitale, Malindi, Mombasa, Mtito Andei, Nairobi, Nakuru, Nanyuki, Rumuruti, Wilson.

Other Regulations made during this period included:

1. The East African Air Navigation (General) Regulations, 1954, made by the High Commission under powers conferred upon it by article 64 of the Colonial Air Navigation 1949-1954. This regulation replaced, consolidated and revoked the existing subsidiary territorial legislations set out in the schedule thereto which was in force then, in the Colony of Kenya and elsewhere.
2. The Civil Aviation (Investigation of Accidents) Regulations 1954 made by the High Commission under powers conferred upon it by Articles 3 and 4 of the

Colonial Civil Aviation (Application of Acts) Order 1952. It replaced, consolidated and revoked the territorial regulations set out in regulation 14 thereof, which were at the time in force in Kenya.

3. The Civil Aviation (Investigation of Accidents) (Amendments) Regulations 1955 were passed and it amended the principal regulations by enabling the Director of Civil Aviation, East Africa to order the removal of an aircraft involved in an accident within the East African territories which, in his opinion, was likely to be a danger or an obstruction to the public or to air navigation or to other transport.

The Colonial Air Navigation Order, 1955 was also enacted. This legislation revoked, re-enacted, with certain amendments, the provisions of the Colonial Air Navigation Order 1949, and its amending Orders and it applied to the territories mentioned in the Schedule VI thereto, which included the colony and protectorate of Kenya. These provisions were similar to those contained in the UK Air Navigation Order 1954. These provisions were mainly in relation to the operation of aircraft and were largely the result of applying International Civil Aviation Organisation standards and recommended practices (SARPs) that were adopted by the UK government. This legislation also provided for the continuance in force of any instruments issued, made, or gained under the Colonial Air Navigation Order 1949, and its Amendments until otherwise superseded, revoked or otherwise terminated.

Then later came the East African Territories (Air Transport) (Amendment) Order in Council 1955 whose purpose was to clarify that the powers of the East African Airways included operating restaurants.

The East African Territories (Air Transport) (Amendment) No. 2 Order in Council 1955. This legislation empowered the East African Airways to operate air transport services outside the geographical limits of the East African territories.

The Colonial Air Navigation (Amendment) Order 1956, amended the Colonial Air Navigation Order, 1955-1957, permitted the use of a simplified document in place of the journey log book and in relation to the following issues:

- performance of flights for the purposes of experiment
- areas in which aerobatic flights and manoeuvres is prohibited
- the requirements governing flight along a line of landmarks, etc.

The Colonial Air Navigation (Amendment) Order, 1957 coming into operation same year amended the Colonial Air Navigation Order 1955. This Amendment dealt with smoking in aircrafts, carrying of persons in certain parts of the aircraft and aerodromes to be used by passenger carrying aircraft. It increased the minimum height at which aircraft may fly over a built up area, city, etc.

The Air Services (Licensing) Regulation, 1957 was enacted and it specified the requirements for the licensing of air services within the East African territories including the territory of Kenya.

The Colonial Air Navigation (Amendment) Order 1957 and the Colonial Air Navigation (Amendment) Order, 1958. These amendments dealt with the operating

conditions of aircraft crew with particular reference to crew fatigue and laid down permissible hours of duty.

By the Civil Aviation (Charges for Navigation Services) Act, 1957 the High Commissioner was for the first time permitted to raise revenue in respect of the safety and meteorological services provided to aircraft generally.

The East African Territories (Air Transport) (Amendment) Order in Council, 1958 was passed. This increased the board membership of the East African Airways Corporation from five (5) to six (6) basically incorporating British Overseas Airways on to the board of East African Airways Corporation in line with an earlier recommendation by the Committee on post-war local air services in East Africa.

Civil Aviation (Investigation of Accidents) (Amendment) Regulations 1958 and 1959 were passed by the East Africa High Commission under the powers conferred upon it by the Civil Aviation Act, 1949 as extended to the East African territories by articles 3 and 4 of the Colonial Civil Aviation (Application of Act) Order, 1952.

The effect of this legislation was to transfer powers and duties previously vesting on the Director of Civil Aviation, to the Commissioner for Transport and to the Administration by the 1959, legislation respectively.

The East African Air Advisory Council (Amendment) Order 1959 was passed by the East Africa High Commission, under the powers conferred to it by Section 9 of the East African High Commission Orders in Council 1947-1958. This legislation amended the principal Order by transferring the chairmanship of the East African Air Advisory Council from the Commissioner of Transport to the Administrator.

The Aerodromes Regulations Ordinance 1960 No. 39 of 1960. This Ordinance was passed to provide for the making of regulation for the Control of Aerodromes and for the enforcement of such regulations. It vested the power of making the regulations in the Minister for the time-being in charge of transport.

The East African Air Navigation (Radio) (Amendment) Regulations, 1960 was made by the East Africa High Commission Under Article 68 of the Colonial Air Navigation Orders, 1955-1959. This legislation introduced revised requirements in respect of the standards of medical fitness for various classes of flight radio telegraphy operator's licence - thereby conforming with the requirements of ICAO Standards and Recommended Practices.

The Colonial Air Navigation Order, 1961 enacted the same year revoked the Colonial Air Navigation Orders 1955-1959 following the same pattern in the UK Air Navigation Order 1960.

The East African Common Services Organisation Ordinance 1961 No. 26 of 1961 was an ordinance passed to provide for giving effect to certain provisions of the East African Common Services Organisation Agreement and for matters connected there with. The agreement was concerned with the control and administration of certain matters and services of common interest to the inhabitants of Tanganyika, Kenya and Uganda. It is useful to add here that by the late 1950's, the difficulties inherent in the East African Co-operation were not anything new nor were the attempts to resolve them. It became increasingly apparent that the benefits from the common services were accruing more to Kenya than here partner states and an attempt to find a more equitable formula became

imperative. This ordinance abolished the East African High Commission and the East African Central Legislative Assembly, all established by the East Africa (High Commission) Order in Council 1947. However, under Section of the Ordinance, the existing laws of the East Africa High Commission continued to apply in Kenya and were to be read and construed with such modifications and qualifications as were necessary to bring them into conformity with the agreement between the partner states as aforesaid. The agreement which was attached as a schedule to this Ordinance established the East African Common Services Organisation (hereinafter called "The Organisation").

The functions of the Organisation were delimited to include:

- To administer the services set out in the first schedule to the Constitution which included *inter alia*:

(a) The East African Directorate of Civil Aviation and

(b) Services arising out of the functions of the Authority as East African Air Authority and

(c) To take over from the East Africa High Commission such of those services as are in existence at the coming into effect of the Constitution of the Organisation.

(d) Provide machinery to facilitate the co-ordination of the activities of the governments of the territories on any matter of common interest.

By Article 3 of the constitution, the ordinance established the East African Common Services Authority and by Article 16, the Central Legislative Assembly for the Organisation was established. It is to be noted that the matters in relation to which acts of the Organisation could be enacted included civil aviation.

Now with the succession of the East Africa High Commission by the East African Common Services Organisation on 11 December 1961, various legislative and administrative reforms were effected and influenced by the very concept of a joint aviation enterprise and driven by the realization of the need for partnership and equal participation in the equities of the joint transport ventures by the three East African states.

Firstly, was passed the East African Civil Aviation Board Order 1961 made under Article 1 of the Constitution of the Organization. This Order made a provision for the establishment of the East African Civil Aviation Board which was to take over the functions of the Air Advisory Council and the Air Transport Licensing Advisory Board.

Secondly, the Air Services (Licensing) Regulations, 1961 extended the powers of the Authority i.e. The East African Common Services Authority to licence International air services operations which had been previously excluded.

Lastly, under the Air Services (Licensing) (Delegation of Powers and Appeals) Order, 1961, the powers and duties imposed on the authority by the above Act were delegated to and made exercisable by the Civil Aviation Board. This Order also made provision for appeals from the decisions of the Civil Aviation Board.

The Civil Aviation (Regulation of Rocket Firing) Act 1961 also was passed as a substantive legislation to regulate the firing of rockets and in 1962 Regulations of the same year were passed to control the firing of rockets in East Africa. This became necessary in the interest of air safety because of increasing concern in the use of the projectiles for rain inducement in the farming areas of the East African territories.

CHAPTER THREE

THE TRANSITIONAL PERIOD: 1960 ONWARDS

3.1 General Observations

As indicated in the abstract, the transitional period spanned the years immediately preceding and closely following the attainment of sovereign statehood by Kenya. Our aim in this chapter is to examine some of the repercussions of this transition of the civil aviation arrangements already existing expecially the multinational institutions serving the common interests and how the Partner states especially Kenya responded to these constitutional and political changes.

An examination of the East African Airways files and the East African High Commission papers discloses a considerable irritation and criticism of the cooperation in relation to the major policy decisions taken in the pre-independence period. It was suggested for example, that there was a greater need for the realisation on the part of the corporation of the effect of its programme and policy on the tax payer in East Africa. It was considered a weakness of the Order in Council as it stands that the duty of the corporation as stated therein appears to make the airline solely responsible for deciding whether its operations were consistent with economy. It was contended that the Board of the corporation was not aware and was unlikely to concern itself with all the financial implications of its own policies such as the costs of construction and maintenance of

aerodromes, meteorological and air traffic services, etc.[96] This criticism can be better understood against the background of what even then was one of the most sensitive of the Airways policies as far as territorial governments were concerned - The terminating of most of the Airways' routes in Nairobi. Tanganyika for example, complained in 1960 that the larger East African Airways planes operating on overseas routes generally terminated in Nairobi forcing passengers bound for other parts of East Africa and especially those bound for Dar-es-Salaam to transfer to slower local flights. This criticism actually went deeper than mere resentment felt by the political commissars at this "discriminating" policy. It was clear that the economic implications of those policies were very much at the forefront of these criticisms. The response by the Airways was to take a futile recourse of pouring economic balm on politically troubled waters. As one writer has aptly put it, "it was far less expensive, the accountants told the politicians, to feed passengers to and from the various parts of East Africa to a central staging post-Nairobi, for overseas flights than to disperse large planes to various parts of East Africa".[97]

The East African Airways' daunting task of balancing economic realities of its operations and regional political expectations was effectively pinpointed by the Raisman Report, which investigated the complaints and recommended a King Solomon-like formula that

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[96] *Nairobi Communication Conference (2 November, 1961)* Document No. CAV/Dept/Gen 1000 para 6.5.

[97] Thomas M. Frank, *East African Unity Through The Law* (Yale University Press, 1964) at 63-64.

> The objective of providing a fair service to all of East Africa can take precedence over maximising profits but the Corporation is entitled to be cautious when, in the pursuit of such fairness, its whole profit appears endangered.[98]

It is against this background that we witness the main thrust of the maiden attempts at restructuring the legal and institutional framework for the Airways aimed at securing a greater control of the Corporation by the respective East African governments.

It appears the general thinking at this time was focused at the control of the Board of Directors of the Airways, that the control of the appointments thereto would secure the requisite control of the Airways by the individual member countries. Consequently, when the East African Airways Act, 1963 was unveiled, its scope was highly circumscribed and little focus seems to have been made on the overall legal and institutional set up of the Corporation. The stated purpose of this legislation was "to change membership of the Board of the Corporation on a basis which is considered more suitable to meet the present day requirements."[99] It increased the membership of the board from six to eight in addition to the chairman and provided for a continued membership of British Overseas Airways Company (BOAC) nominee on the board of the Airways. The other notable amendment was the establishment of the East African Civil Aviation Board by Section 3(2) thereof as an inter-governmental agency to exercise regulatory functions. Otherwise in all other respects, the legislation remained basically as that contained in the Order in Council setting up the airways.

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[98] *Report of the Economic and Fiscal Commission (J. Raisman-Chairman) 1961* (London H.M.S.O.), Cmnd 1279 at 47.

[99] *Proceedings of the Central Legislative Assembly Debates*, 8 May 1963. Hon. Jamal Col at 321.

The East African Territories (Air Transport) (Amendment) Order in Council, 1963 removed from the East African territories (Air Transport) Order in Council, 1945 those provisions establishing and those relating to the functions of the Corporation known as the East African Airways.

The Civil Aviation (Charges for Air Navigation Services) (Amendment) Regulations, 1964 reduced the exemptions permitted to owners of aircraft and modified the basis of raising charges.

Another important legislation that was initiated during this period was the East African Civil Aviation Act, 1964 which established the Civil Aviation Board and the Civil Aviation Technical Committee. This Act also gave general powers to the East African Common Services Authority to make regulations and to give effect to the Chicago Convention on International Civil Aviation signed on 7 December 1944 and to generally regulate air navigation.

It provided for the establishment and maintenance of aerodromes liability damage caused by aircraft and detention of aircraft. Apart from the substantive provisions, the following were the subsidiary legislations made under this Act:

1. East African Air Navigation Regulations 1965
2. East African Licensing of Air Services Regulations
3. Civil Aviation (Regulation of Rocket Firing) Regulations 1965
4. Civil Aviation (Charges for Air Navigation Services) Regulations 1965
5. The East African Civil Aviation Technical Committee Resolutions 1965.

As noted earlier, the Raisman formula did not however solve the problems that had plagued the co-operative aviation endeavours for all times. A series of meetings in the early 1960's ensued and culminated in the "Kampala Agreement" of March 1964 which attempted to find a more equitable formula. This agreement, however, encountered considerable implementation hitches and in August 1965, the three heads of the East African States agreed to undertake a comprehensive and simultaneous review of all phases of economic co-operation in the region. This led to the appointment of the Phillips Commission with terms of reference that included:

> To examine existing arrangements in East Africa for co-operation between Kenya, Uganda and Tanzania on matters of mutual interest, and having due regard to the views of respective governments to make agreed recommendations on the matters considered.[100]

This commission is significant to our discussion herein because its terms of reference in effect brought matters affecting the affairs of the East African aviation within its ambit. Moreover, the recommendations of the Commission led to the 1967 Treaty for the East African Co-operation which set up a new framework for co-operation in the region. The treaty was signed at Kampala-Uganda on 6 June 1967 and was immediately ratified by all the three states and national legislation giving effect to it passed by the various governments. It came into force on 1 December 1967.[101] Article 3 of the treaty specified the institutions of the community to include such corporations, bodies and departments and services as are established by or provided for by the treaty. Chapter XI

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[100] Donald Rothchild (Ed), *Politics of Integration: An East African Documentary* (EAPH, 1968) at 245.

[101] *East African Community Mediation Agreement, Act No. 13 of 1967*, Chapter 4, Laws of Kenya.

of the treaty provided for the functions of the community and under Article 42(3) thereof, the East Africa Corporations were obliged on behalf of the partner states and in accordance with the treaty and laws of the Community, to administer the services specified in Part B of Annex IX to the Treaty. These services included the East African Airways. It is however, Article 71 of the Treaty which in effect established the East African Airways Corporation. Article 72 laid down the principles of operation for the corporations of the community and the provisions of this article were reproduced word for word in the East African Airways Corporation Act, 1967 especially Section 18(1) thereof. In Art. 73 of the Treaty, it was provided that the East African Airways Corporation, like other corporations would have a board of Directors responsible for the policy, control and management. This board of Directors would be comprised of a chairman appointed by the Authority, a Director General and eight other members. Appointment of such members was to be guided by the desirability of appointing persons with experience in commerce, industry, finance and administration or with technical experience. This treaty abrogated the East African Common Services Organisation Agreements, 1961-1966.[102]

As already pointed out, the East African Airways Corporation Act, 1967 was enacted immediately following the coming into effect of the Treaty and pursuant to the provisions of Article 71(1) thereof.

By this Act, the East Africa Airways Corporation was established as a body corporate and the intention of the three governments to operate the common services

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[102] Article 97 of the Treaty.

including aviation as self-sustaining and equitably rewarding concerns could not have been more clearly expressed. Under Section 4 of the Act, all the property of the East African Common Services Authority previously established by the East Africa Common Services Organisation Ordinance 1961, were vested upon the East Africa Community. The latter was established by the 1967 Act[103] and was a body corporate within Kenya having all the rights and subject to all liabilities to which the East African Common Services Authority had immediately before the commencement of this Act.

Under Section 6 of the Act, all "the existing laws" (emphasis added) were to continue in force and were to be read and construed with such modifications and qualifications as would be necessary to bring them to conformity with the Treaty. We should note that reference here to "existing laws" means all the enactments of the High Commission or the East African Common Services Organisation in force or having effect immediately before the commencement of this Act. It is our opinion that as germane as the expressed intentions in the 1967 Act were, they could not permutate into workable policy postulates for the simple reason that from the outset i.e. from clause 10(1) of the East African Air Transport Order in Council 1945 through to the 1967 Act, the East African Airways Principles of Operations were defined in a most frugal manner. In great part this was contributed to by the lack for a long time, of an effective inter-governmental agency to monitor its pursuits of economic (or more precisely, allocative) efficiency as a commercial venture. The member states policies and decisions were often influenced by the realization of partnership inequality to the extent that Kenya believed

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[103] *Supra* note 34.

her advancement in the service sector and burgeoning industrial base contributed more than a fair share to her partners while the others felt she was taking an undue advantage of their weak positions to exploit their domestic markets. These reasons coupled with transborder crises in the newly independent states made the more traditional objective of establishing air transport as a tool of national defence and prestige more real and this placed a severe strain on the very concept of a joint aviation enterprise. The provisions of the East African Civil Aviation Act and the concomitant regulations became increasingly difficult to enforce and rather superfluous in their effect, especially in situations of aggravated security and emergency, requiring swift and often unilateral action. Member states were, therefore, obliged to consider alternative arrangements in the air transport system amidst the mounting political tension and constant misunderstanding in the management of East African Airways. In 1977 Kenya drafted and adopted her own Civil Aviation Act - an Act of parliament to make provision for the control, regulation and orderly development of civil aviation in Kenya and for matters incidental thereto and connected therewith.[104] A detailed examination of this Act follows herein below. In the same year, Kenya announced the inauguration of her own airline - Kenya Airways.[105]

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[104] Preamble: *The Civil Aviation Act No. 22 of 1977* - Chapter 394 Laws of Kenya with commencement date of 16 December 1977.

[105] *Daily Nation*, Nairobi (4 February 1977) Kenya Airways Limited was incorporated as a private company on 22 January 1977 and commenced operations on 4 February 1977.

3.2 State Succession: Its Effects on Aviation

From our foregoing account of the problems that plagued the co-operative venture in civil aviation in East Africa, it became rather obvious that the eventual disintegration of the air transport system would be inevitable and the now independent states had to grapple with their own challenges of civil aviation in their separate development of air transport system. This disintegration also led to individual legislation on air law which in Kenya is primarily contained in the already cited Civil Aviation Act[106] and other legislation to be discussed herein below. Kenya's present Civil Aviation Act was picked almost word for word from the 1965 East African Civil Aviation Act and its discussion herein will not be so much that it was a new development in Kenyan air law but rather that it is useful in reflecting the present status of air law in Kenya.

Apart from the disintegration of the East African aviation enterprise another major aviation problem which loomed large during this period of transition concerned the extent to which Kenya was bound on her attainment of independence, by aviation commitments validly entered into by Her Majesty's government in the United Kingdom. We have seen in the preceding pages the process of constitutional reception of British air law in Kenya and how the British domestic air law and international aviation conventions to which UK was a party were extended thereto. The emergence of Kenya on the international plane as a sovereign and independent state meant therefore, that some definitive position had

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[106] *Supra* note 37.

to be taken concerning both the continued application of and/or the extent to which she was bound by:

(a) Domestic aviation legislations of the United Kingdom made applicable to her during the colonial era;

(b) Bilateral aviation agreements and related matters;

(c) Multilateral private air law conventions; and,

(d) Multilateral public air law conventions entered into by the UK and extended to her.[107]

We commence our analysis of this problem by first examining the doctrinal basis of the theory of state succession in international law.

The origin of the doctrine of state succession has been credited to Grotius, who was believed to be the first jurist to introduce this theory into international law. Based on natural law and Roman oriented jurisprudence of his time, Grotius, in his examination of the legal effect of, and termination of ownership and sovereignty, equated a state to an individual to private law. He argued that as "the person of the heir is considered the

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[107] For instance, the British *Carriage by Air Act, 1932* gives effect in the UK to the *Convention signed at Warsaw on 12 October 1929 for the Unification of Certain Rules Relating to international Carriage by Air*. By Section 1(2) thereof, Her Majesty may by order in Council from time to time certify, *inter alia*, who are the high contracting parties to the Convention and such an order in Council is a conclusive evidence of the matters so certified: Consequently, the *Carriage by Air (Parties to the Convention) Order 1965* made on 20 January 1965 ordered and certified that high contracting parties to the said Convention and the territories in respect of which they are respectively parties are as specified in Part I of the Schedule to the Order. Part 1 names "Republic of Kenya" as a contracting party to the Convention and gives 3 March 1935 as the date on which the Convention came into force in Kenya. The 1965 Order superseded The *Carriage by Air (parties to the Convention) Order 1962*, as amended which applied to Kenya as a colony and protectorate. It takes into account constitutional changes in Kenya and hence the description of Kenya as a "Republic".

same as the person of the deceased in all that concerns the continuation of ownership of both public and private property,[108] so was that of a state on a change or termination of sovereignty over a territory. This theory was endorsed by continental European jurists such as Pufendorf, Vattel, Despagnet and de Martens, who shared with Grotius the same legal background and juristic approach to legal problems.[109]

Fundamentally, the central theme of this doctrine was that the acquisition or loss of sovereignty by a state over a territory could occur either by annexation of territory by another by force of arms, by cessation of territory by one sovereign to another, by emancipation or grant of independence, by formation of a union or Federation of two or more sovereign states into one sovereignty, and by secession of part of a state into a separate sovereign state.[110] Arising from these changes, irrespective of the manner in which the changes occurred, were the attendant problems and their solutions concerning the rights and duties of the predecessor sovereign in the affected territories.

In formulating applicable rules for solution of these problems, due regard had to be had to the existence of some prior "grundnorm" or legal order in the world community into which new states were born and which have generally been recognised as clearly binding and mandatory if any meaningful social intercourse among states were

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[108] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, vol. II. Translation Book II at 319 (publications of the Carnegie Endowment for International Law, 1925)

[109] Cf D.P. O'Connell, *The Law of State Succession* (Cambridge University Press, 1956) at 7, note 1, where a list of authoritative sources on this subject are cited.

[110] D.P. O'Conell, *International Law*, vol. 1 (Stevens and Ocean Co, 1965) at 423-522. Cf: D.P. O'Connell, *State Succession in Municipal Law and International Law*, vols. I & II (Cambridge University Press, 1967).

to be conducted in an orderly manner. Inclusive in those grundnorms were customary international law,[111] *jus cogens*, the Charter of the United Nations and the various humanitarian law conventions such as the 1907 Hague Rules and the four 1949 Geneva Conventions on the Laws of the War.[112]

As O'Connell observed, "a new state is born into a world of law. Indeed it is a state, inasmuch as the term is meaningful to a lawyer, only because of a law that lays down the conditions for and attributes of statehood".[113]

Three theories have emerged from the practice of states and the teaching of publicists as being applicable solutions in those cases where the question of the succession of a new state to the obligations of its predecessor sovereign were to be determined. The first theory recognised a total succession to the rights and obligations of the former sovereign by the new state in the classical tradition as enunciated by Grotius. This has been termed the "Universal Succession Theory."

The second theory, which has been termed the "positivist or clean slate theory", maintained that on a change of sovereignty, the obligations of the previous sovereign were not inherited by the new sovereign. This theory was qualified only to the extent that

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[111] As to the reaction of new states to customary international law see e.g. S. Prakash Sinha, *Perspective of Newly Independent States on the Binding Quality of International Law (1965)*, vol. XIV ICLQ 122.

[112] See C.W. Jenks, *State Succession in Respect of Law Making Treaties* (1952) vol. XXIX B.Y.I.L. at 105-144. Cf. R.R. Wilson, ed., *International and Comparative Law of the Commonwealth* (Duke University Press, N.C., 1968).

[113] W.V. O'Brien, ed., *The New Nations in International Law and Diplomacy. The Yearbook of World Policy*, vol. II (Washington, D.C.. Praeger, 1965) at 12.

"dispositive treaties" or real treaties such as boundary agreements were binding on the new sovereign.[114]

The third theory, which has been christened "Nyerere Doctrine" postulated that a new state did not succeed *ipso facto* to the treaty obligations of its predecessor sovereign; but that such a new state should be free within a stated period (2 years) after its independence to pick and choose which of the treaty obligations of the predecessor sovereign would continue to bind the new state.

On the face of it, it may appear that on independence, Kenya as a matter of course inherited all the aviation bilaterals and multilaterals that were concluded by Britain on her behalf in accordance with the international law principle of "Universal Succession Theory" whereby there was a total succession to the rights and obligations of the former sovereign as enunciated by the proponents of this theory. This was however, not the case in Kenya after independence. A critical look at Kenya's treaty practice after independence portrays a move towards the "Positivist" or the so-called "clean slate" theory which maintains that on a change of sovereignty, the obligations of the previous sovereign were not inherited by the new sovereign. This theory is qualified only to the extent that "dispositive treaties" or real treaties such as boundary agreements were binding on new sovereign. Kenya's treaty practice on independence was a modified version of the clean slate theory contemporarily christened as the "Nyerere doctrine" which postulates that a new state does not succeed *ipso facto* to the treaty obligations of its predecessor

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[114] A.B. Keith, *Theory of State Succession with Special Reference to English and Colonial Law (1907)*; Cf. Lord McNair, *The Law of Treaties (1961)* at 654-655.

sovereign[115] but that such a new state should be free within a stated period (2 years in the original formulation of the doctrine) after its attainment of statehood to pick and choose which of the treaty obligations of the predecessor sovereign would continue to bind the new state. Thus, those treaty obligations which were not acknowledged as being binding on the new state after the expiration of the stated period would automatically be deemed to have lapsed. To explain this doctrine better we take liberty to quote in extenso the text of the letter written on behalf of Tanzania to the Secretary General of the United Nations explaining why she did not sign a devolution treaty and declaring her stand on pre-independence treaties. It reads in the relevant Part as follows:

> The Government of Tanganyika is mindful of the desirability of maintaining, to the fullest extent compatible with the emergence into full independence of the State of Tanganyika, legal continuity between Tanganyika and the several states with which, through the action of United Kingdom, the territory of Tanganyika was prior to independence in treaty relations. Accordingly, the Government of Tanganyika takes the present opportunity of making the following declaration: As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika, or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory, on the basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence (i.e. until December 8, 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treatises which could not by the applications of the rules of customary international law be regarded as otherwise surviving, as having terminated.[116]

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[115] This is subject to the limitation that "real" or "dispositive" treaties were not within the contemplation of "Nyerere doctrine".

[116] Full Text reproduced in W. Friedman, O.J. Lissitzyn and Richard C. Pugh, *International Law Cases and Material* (New York, West Publishing Company, 1969) at 435.

The full text of this declaration was sent to the UN for circulation among member states that upon Tanganyika becoming an independent sovereign on 9 December 1961, they ceased to have obligations or rights, which they had formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika. This formula was termed "Nyerere doctrine" because it was the then Prime Minister of Tanganyika, Mwalimu Julius Kabarage Nyerere who initially propounded this policy to the Tanganyika legislature. This formula had an infectious appeal to Kenya that when she attained independence, a modified version of it was adopted as indicative of her position on succession to the treaty rights and other obligations of the United Kingdom applicable to her. As regard bilaterals validly concluded by the UK on behalf of the territory of Kenya or validly applied or extended to her, the Government of Kenya was conscious that the Nyerere declaration applicable to bilaterals could not with equal facility be applied to multilateral treaties. The Kenya Government therefore proposed to review each of them individually and to indicate to the depository in each case what steps it wished to take in relation to each such instrument - whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which had prior to independence been applied or extended to Kenya could on basis of reciprocity, rely as against Kenya, on the terms of such treaty.

In real terms, the transformation from colonial status to independence did not manifest significant adverse effects on air law in Kenya. In fact, some categories of

aviation agreements survived the transformation unscathed and continue to apply today. These are:

(a) Air Services Agreements;

(b) Agreements on Personnel Licensing;[117]

(c) Agreements concerning prohibition of carriage of Dangerous Cargo in Aircraft; and

(d) Private Air Law Conventions.

A surgical examination of particular aviation treaties that Kenya is a party to is eminently beyond the scope of this thesis. Suffice it to say that currently, Kenya has exchanged more than seventy (70) bilateral air services agreements with various countries worldwide and the status of Kenya with regard to international (Multilateral) air law instruments is reflected in Appendix (A) hereto.

With independence, Kenya in the course of entering into diplomatic contacts with other states had to adopt treaty practices and procedures in accordance with her constitutional pattern, and in exercise of the right to conclude treaties with other states being one of the special attributes of her newly acquired sovereignty.

A few general remarks on aviation treaties: Treaties are generally classified as being either multilateral or bilateral. Multilaterals are those in which more than two High Contracting Parties regulate among themselves matters of either public or private international law nature and such treaties may be open to accession or adherence by

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[117] *US Department of State Publication No. 738. Executive Agreements Series No. 77*: Arrangement between the USA and Great Britain on Air Pilots Licences effected by exchange of notes signed on 28 March and 15 April 1935. This was applicable to Kenya, Uganda and Tanganyika and still subsists in Kenya.

either States.[118] Bilaterals, on the other hand, are agreements between two States on a matter of exclusively mutual interest between them.[119] Three varieties of bilateral treaties are employed by states in regulating civil aviation:

(a) Air transport or Air Services Agreements;

(b) Memorandum of Understanding; and

(c) Exchange of Notes.

An Air Transport or Air Services Agreement is a formal international engagement between the governments of two states regulating air services between and beyond their respective boundaries. When the parties to an air transport agreement are also parties to the Convention on International Civil Aviation, it is customary to recite in the preambular clause to such agreement that it is supplementary to the said Convention. Where, however, one of the parties is not a party to the Chicago Convention, such a recital is omitted. The effect of these two variations is that in the case of the former, it is intended that all the provisions of the Chicago Convention together with the Annexes and Recommended practices which the two states have accepted, apply as between the parties which in the case of the latter, these provisions do not apply. In such cases, therefore, specific provisions would have to be made in the Air Transport Agreement to cover vital elements of the Chicago Convention, the Annexes and the Recommended Practices.

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[118] Examples of such multilateral treaties are the UN Charter, the Chicago Convention, the Warsaw Convention, the Vienna Convention on the Law of the Sea, etc.

[119] Air Transport Agreements such as the Bermuda Agreements fall into this class.

The second variety of treaties which is a prominent regulatory tool of civil aviation in Kenya is the Memorandum of Understanding. This is described by Lord McNair as "an informal but nevertheless legal agreement between two or more states, particularly when that agreement forms a step in the process of tidying up a complicated situation.[120] States resort to the use of Memorandum of Understanding in recording and effecting those secret and confidential aspects of their bilateral air transport negotiations which are not intended to be communicated to third parties.

The third variety of aviation treaty making takes the from of Exchange of Notes. This is resorted to in amending or elucidating certain provisions of an Air Transport Agreement. It generally emanates from the Foreign or External Affairs Department of State or where the Ambassador has been given full instructions on the matter, it may emanate from the Ambassador or other duly accredited state official.

Under the East African Civil Aviation Act, 1965[121] and the Treaty for East African Co-operation[122] the East African Authority Comprising of the Presidents of Kenya, Uganda and Tanzania were responsible for the conduct of Bilateral Air Transport Agreements for the three partner states of the Community. In performing this function, the Authority was assisted by the East African Ministers. Negotiation of bilaterals was carried out by the Communications Council whose chairman was the Minister for Communications and Research. Although the Community negotiated bilaterals jointly as

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[120] Lord McNair, *The Law of Treaties* (Oxford, 1961) at 15.

[121] Act No. 22 of 1964.

[122] Printed on behalf of the East African Common Services Organisation by the Government Printer, Nairobi, Kenya, 1967.

a team in accordance with obligations assumed under the Treaty for East African Co-operation, the actual signature of a concluded agreement was the individual responsibility of particular partner states who then signed separate agreements, though in similar terms, with the particular foreign state.

In the independent Kenya today, the Minister for Transport and Communications who is a political appointee and a Member of the Cabinet is a permanent statutory member and Chairman of the negotiating team. While the Composition and procedure concerning the negotiation of bilaterals is regulated by an executive instrument, in reality it is largely based on practice and administrative convenience.

Registration of aviation treaties entered into by states is effected with the ICAO Secretariat which then arranges for publication in the UN Treaty Series. Kenya does not publish any individual treaty series of her own. Prior to this dissertation, to our knowledge, nothing has been written about Kenya's treaty practices and procedures. In this regard, we note and observe that the UN publication entitled "UN Legislative Series, Laws and Practices Concerning the Conclusion of Treaties: ST/LEG/SER B/3" contains a general description of the treaty practices and procedures of many states around the world: Given that this edition is very general and is not updated often enough to reflect the ever occurring treaty making process by the states, we suggest that it would be highly desirable if the respective Foreign Offices of Member countries could bring to the knowledge of the international community, their treaty practices and procedures, by making available to the UN Secretariat, materials and data for up-dating the UN publication referred to above.

Secondly, if conclusion of treaties is regarded as an integral aspect of international relations, the publication of such treaties, in a Treaty Series, we submit, is a complementary and vital aspect of that relationship. For this reason, it is suggested that Kenya should make immediate provisions in this regard, thus facilitating the dissemination of information as to the nature and variety of treaties entered into by it with a view of abandoning the current practice whereby treaties concluded, not being secret treaties, are not generally disseminated until they find their way into UNTS several years after such treaties were concluded.

3.2.1 Strains within the Overall East African Community Framework and Factors Leading to the Collapse of the Cooperative Aviation System

To make a sober analysis of the factors that led to the collapse of the East African civil aviation structure is a daunting task, partly because of the emotion charged circumstances in which it collapsed, but more so because of the difficulty in trying to discern facts from prejudiced political fancy. Notwithstanding, the student of the subject must, in the last analysis, be his own judge as to the nature of reality and illusion, and rational and irrational actions.

To a considerable extent, most of the problems that have been seen in the foregoing sections of this thesis were contributory and in this section attention is focused more on the principal precipitory factors that actually led to the collapse.

In the earlier sections, reference was made to the formation and successive transformation of the overall cooperative framework between the three East African countries from the days of the East African High Commission, through the East African Common Services Organization (EACSO) to the East African Community.[123] Behind all this, however, loomed the pervading question of federation of the East African States. After World War I, Britain had been keen to achieve closer political union in East Africa by way of Federation,[124] but relented in the face of stiff local opposition to the scheme and had to settle for the establishment of Governors Conference adverted to in the foregoing sections of the thesis. After World War II, the matter again surfaced, with the opposition to it persisting and instead the informal Governors Conference was formalised into East African High Commission as the basic framework for the co-operation in the region.

At the time of the independence, the prospect of political federation was very much in the air, and the environment appeared to augur well for it, and between 1963 and 1964 serious negotiations got underway for an East African federation. These were, however, fundamental divergencies in conception about the nature of the federation which contributed to the final collapse of the deliberations. As Colin Leys observed: "What Tanganyika wanted, what the Kenyans were willing and able to agree and what most

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[123] See chapter 1, part 1.4.

[124] See House of Commons Debates (United Kingdom) fifth series, vol. 172 (April 8, 1924), vols. 351-353; *Report of the East African Commission* (W.G. Ormsby-Gore, chairman) md 2387, 1925, pp. 7-9; *Report of the Commission on Closer Union of the Dependencies in East and Central Africa* (Sir Hilton Young, chairman) (md 3234, 1929).

people in those countries understood was not federal Government but "unification"."[125] For Tanganyikans and Kenyans, regional unity involved "the concept of a tightly constructed federation, but for Ugandans, federation inferred a loose plan of interterritorial co-ordination."[126] These differences ultimately proved irreconcilable, but everyone appreciated the advantages of regional co-operation. The transnational arrangement which emerged in the reaffirmation of the continuation of the East African Common Services Organisation, itself initially conceived as a watershed in the march to federation, was acceptable largely because it was looser than classical federalism in construction. In reaffirming their commitments to it, the three countries were fully cognizant of the prevalent lack of consensus, and they went ahead because of the concern to reduce integration load factors in an effort to preserve the most crucial benefits of the inter-unit co-ordination.

It is against this background that writers such as Rotchild suggest that movement from federalism to these other institutions (which he prefers to call neo-federalism) represents not a failure of will and purpose but was a logical adaptation to the political conditions and pressures of the post-colonial era. Neo-federalism represented the triumph of ingenuity and responsibility and so they forecasted a stable future for the organisation.

Whilst that may be so, the whole arrangement by the very compromise manner it was sanctioned admitted dysfunctional influences, and strains within it were inevitable.

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[125] "Recent Relations Between the States of East Africa" (1965) XX:4 International Journal 519.

[126] T.J. Mboya, "East African Labour Policy and Federation" in Colin Leys & Peter Robson, *Federation in East Africa: Opportunities and Problems* (Nairobi: Oxford University Press, 1965) at p. 103.

In assessing the benefits of inter-unit co-ordination of wide territorial integration, it is only to be expected that attention gets concentrated, statistically, upon existing situation with little need to potential growth. It did not take long for this to occur and in the ensuing months following the collapse of the federation negotiations, dissatisfaction with the unequal benefits derived from integration mounted and led to a series of consultations between the countries to seek their redress which led to the Kampala Agreement. As has already been noted, this Agreement was never implemented and the eventual solution was agreed upon by the 1967 Treaty for the East African Co-operation setting up the East African Community.

Although in law, the East African Community was a body corporate, it was quite obvious that in the concepts of the partner states, this organisation was far less than a "commissioned agent" and had no standing of its own which could initiate, evolve or otherwise cause to evolve any philosophy that was distinctly "East African". Nationalistic influences continued to override the "East African perspective". There were within the Community arrangement, institutions which were intended to cater for political consultations and political policy formulation. Amongst these, the East African authority, the Legislative Assembly, the East African Ministers and the various ministerial councils were in effect a forum for the exchange of views and consultation for the purpose of arriving at some consensus on issues affecting the services of the community.

One could as a result evaluate tendency towards a growth to East African unity of the basis of the activities and sentiments expressed in these organs of the community. However, looking at the proceedings of the East African authority and the deliberations

of the East African legislative Assembly and the Council of East African Ministers, after 1967, the picture is far from any orientation towards growth or evolution of any political unity based on the community operations.

A big part of this resulted from the nature of the decision-making processes within these bodies, particularly within the East African Ministers and the Councils responsible for community services: to achieve the community objectives required some form of neutral decision-making at executive levels for the community institutions and services. But as noted by the Report of the Select Committee on East African federation 1975, chaired by F.M. Bkoke Munanka:

> The partner States' Ministers who participate in these Councils appear to do so as a first and foremost principle, holding that they are the Community Councils to represent, maintain and defend national sovereignty. The principle of collective responsibility, although existing in each cabinet of the Partner States, and although strongly upheld by all Members of the Authority in the three Partner States, is however, not observed in the various Councils.[127]

Beyond these problems emanating from the structural deficiencies in the institutional framework for co-operation, there were far more serious strains imposed by the nature of bilateral relations between the Partner States.

The 1971 Coup in Uganda which ousted president Obote and brought in Major-General Idi Amin Dada as Uganda's new leader imposed a very great strain on the co-operative framework. Although the Kenya Government in effect got round to recognising the Amin regime arguing that it recognised "States" and not "regimes", Tanzania never

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[127] This Committee was appointed by the East African Legislative Assembly in November 1973 Meeting at Kampala, to study the proposal for an East African Federation (now), commend it to the public, assess the public support thereof and recommend procedures and organs for practical discussion and implementation.

made a secret of its extreme distaste for the Amin Government. Many writers have attributed this to the strong personal ties between the then Tanzania's president Julius Nyerere and the deposed Milton Abote. While there is no denying the truth in this, Tanzania's distaste was, within the framework of the community, grounded on a matter of principle. It was not sufficiently assuaging to Tanzania that it would be possible to continue co-operation with the Amin Government because of the economic advantages; to her, economic co-operation was necessarily complementary to political co-operation, and to emphasize on economic co-operation alone would have implied reducing to mercenary level all the struggles of her people for human dignity. As President Nyerere explained in a speech to the East African Legislative Assembly in 1972:

> Under our present community arrangements, cooperation in East Africa is organized by Governments and headed by those in control of Governments. In consequence, it is always insecure while the Governments of East Africa remain subject to violent overthrow...[128]

One great danger everyone saw in the uncompromising attitude was that it did greatly hinder the working of the community. An example of this is that the Authority which was the highest decision-making body was never able to meet as such from the time of the Coup to the collapse of the Community. President Nyerere, however, ever the idiologue, saw the issue differently. According to him, there was:

> ... a distinction between the responsibilities each Partner States has as a member of the Community and the political relations of the partners with one another. If we hold fast to this distinction and regardless of our bilateral disputes, work to strengthen the community when we can, then

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[128] President Nyerere's speech to the East African Legislative Assembly, Dar-es-Salaam, February 8, 1972.

> East African will come through this crisis stronger and better equipped to deal with the real problems of the development of its people.[129]

At an academic level, Nyerere's argument cannot be faulted. Political differences of ideology and practice should not necessarily affect the Community and its co-operations because the basis on which they operate was agreed upon in the 1967 treaty; their ownership and mechanisms of operations were laid down in the treaty for cooperation and in as much as the treaty was as much an international obligation for each of the member States as any other international agreements that they had hitherto signed, then all that was required was for the party State to honour their obligations under the co-operation treaty and give the same effect and respect to the community commitments as was the case in their involvement with other foreign nations.

Unfortunately, this was not quite the case. At an academic level, scholars have preferred many explanations for the failure of classical federalism in many African countries which could equally apply to the case of the community which in our view, was a neo-federalist institution. According to Rotchild, constitutionalism and legalism at the modern state level are broadly accepted as a means of reconciling interests in western liberal values. However, Africans frequently look upon them with widespread indifference, seeing them as "imports" dangerous to their countries modernisation. Legalism, therefore, and compromise that it tends to create operates against an alien and in hospitable background. The effect of these in our context is that it highlights the fruitlessness of the Nyerere's academic approach to the problem, that hardly removed the

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[129] *Ibid.*

undeniable strains that existed, especially to Uganda's military Government whose concept of law, contract and international obligation was somewhat different.

There is no doubt that widening political differences between the three Partner States greatly strained the overall co-operative framework. Perhaps the most telling crisis in the bilateral relations between the partners was the Kenya-Uganda relations which deteriorated rapidly from February 1976 when Uganda's Idi Amin laid claim to large areas of Kenya[130] and reached a state of near belligerence in July of the same year following the Israeli operation at Entebbe Airport to rescue hostages of a hijacked Air France airbus.[131] A late campaign that made no pretence at reasoned argument built up between the two countries, both in the press and in government statements. Kenya even imposed an economic blockade on Uganda with sever repercussions. Perhaps the most significant development for co-operation in the region was the unilateral decision by the Kenyan sector of the East African Railways Corporation on July 22 to restrict its rail services within Kenya alone.[132] At the end of July 1976 because of the fuel shortages resulting from the virtual economic blockade by Kenya, East African Airways announced the suspension of all domestic flights in Uganda as well as transit flights via Entebbe Airport.

The dispute between Kenya and Uganda eased after efforts to normalise relations had resulted in Ministerial talks at the beginning of August and the signing of a

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[130] Africa Research Bulletin July 15-August 14, 1976, 3958-60.

[131] *Ibid.*

[132] Daily Nation (Nairobi) August 9, 1976.

Memorandum of Understanding. There is no doubt that the dispute had greatly undermined the basis of the co-operation in the region and greatly speeded up the ultimate collapse and the resultant independent aviation patterns and structures within the three Partner States.

3.3 Present Legislative Machinery for Dealing with Aviation Problems

Among the many Colonial heritages bequeathed by Great Britain on Commonwealth Africa as a whole are a Parliamentary system of government, an efficient administrative service and a judicial system based on common law. These institutions have payed a major role in meeting some of the challenges and problems arising in the aviation field after the independence of the colonial territories.

Broadly speaking, the present legal system is based on the English common law. This means that the law and institutions of the legal system follow those of the common law closely. This is not to suggest that the two systems are identical. But many of the operating rules and assumptions of the common law apply. The general or territorial law of the country is the written law which is either enacted by the legislature in Kenya or applied from the United Kingdom or India. The latter is no longer important today except in a few cases. The Constitution is the supreme law[133] and subject thereto, parliament

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[133] The original *Constitution of Kenya* is a schedule in the *Kenya Independence Order in Council* 1963 (SI 1963, No. 1968: Kenya LN 718, 1963). The *Kenya Independence Act* is 11 & 12 Eliz 2 C. 54 and the *Kenya Republic Act* is 13 & 14 Eliz 2 C. 5.

can pass any law with binding effect throughout the country. There is therefore no question that parliament has sovereign legislative power.

At the time of independence in Kenya, all the law then existing was preserved, and while there has been a great deal of legislative activity since which has repealed or modified the colonial law, much of the latter is still intact.[134] The common law is important here because of the reception clause which says that where there is no written law on a matter, it is to be decided by reference to the "substance of Common law, doctrine of equity and statutes of general application in force in England on 12 August 1897. Pursuant to this provision, courts have frequently fallen back on the English law, often as interpreted by English courts in recent years. Even when there is written law in the country, it is often a reproduction of English law, and here too, the tendency of the courts is to look for interpretations in England. In addition, and perhaps most importantly, the rules and assumptions of interpretation that the Kenyan courts adopt are those of the common law, and its ethos. Thus the Kenyan legal system, besides embodying much of the Law of England, is still a significant carrier of values, assumptions and procedures - the ideology - of the common law.

Kenyan legislation is divided into principal and subsidiary legislation. Principal legislation included ordinances and Orders in Council until independence when the term

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[134] For instance, the *Civil Aviation Act of Kenya* - Cap 394 is mainly a rewording of the UK Civil Aviation Act as it was at independence. However, since then, British legislation has undergone considerable reforms in response to the changing circumstances. Britain has for example introduced: The Civil Aviation Policy of November 1969 (Cmnd 4213); The Civil Aviation Act, 1970; The Civil Aviation Authority Regulations, 1972; The Civil Aviation Policy Guidance, February 1972(Cmnd 4899); Civil Aviation Policy Guidance, February 1976 (Cmnd 6400); the Civil Aviation Act, 1980; etc.

"Ordinance" was abandoned in favour of the world "Act". all Kenya Ordinances have now been redesignated as Acts.[135] Volumes of Subsidiary legislation were named "Proclamations, Rules and Regulations" until 1957 when the name was changed to "Subsidiary Legislation".

Under the provisions of the Kenya Constitution, the overall legislative competence is vested in the Parliament. Even though the Constitution does not explicitly provide for the matters respecting civil aviation under the same Constitution, the parliament has full and exclusive powers to make laws concerning any matter referred to it by a competent government agency. The powers of Parliament over civil aviation is therefore implicit in this power.

In 1970, the Aircraft (Offences) Act[136] was enacted, making provision for the punishment of Crimes Committed on Aircraft and it also amended the extradition laws in respect to offences committed against civil aviation.

In the same year, the Air Passenger Tax Act, 1970[137] was enacted. It imposed tax on passengers departing by air from Kenya both by domestic and international flights. This Act was later amended in 1973 by Passenger Tax (Amendment) Act[138] whose purpose was *inter alia* to give a statutory definition of the term "passenger" under the Act.

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[135] Legal Notice No. 2 of 1964.

[136] Cap. 68, Laws of Kenya.

[137] Cap. 475, Laws of Kenya.

[138] Act No. 8 of 1973.

As already indicated in the preceding pages, by virtue of Act No. 22 of 1977, the present Civil Aviation Act, 1977 was passed. It is the most important piece of legislation that substantially regulates the civil aviation in Kenya and therefore a brief discussion of it would be opportune in picturing the substance of civil aviation law to date. In the preamble to the Act, it is intended to make provision for the control, regulation and the orderly development of civil aviation in Kenya.

At Section 3 thereof, is established the Civil Aviation Board whose functions include:

(a) Licensing of air services

(b) Advise the Minister for the time being in charge of civil aviation in relations to

  (i) Establishment of air services

  (ii) Civil aviation legislation and measures to give effect to any convention

  (iii) Measures to promote or support any airline designated by the government for the purposes of any international air services agreement.

  (iv) Fares and freight rates and related matters including any resolution of the International Air Transport Association or any body which succeeds that association;

  (v) The establishment, maintenance and development of aerodromes;

  (vi) Air navigation facilities and services;

  (vii) The cost of establishing and maintaining aerodromes and air navigation facilities and services and the policy to be adopted to recover such costs; and,

(viii) Such other matters affecting civil aviation as it considers desirable in the interests of civil aviation in Kenya.[139]

The membership of this Board includes:

(a) Chairman appointed by the Minister

(b) Permanent Secretary of the Ministry responsible for Civil Aviation

(c) Permanent Secretary of the Ministry responsible for Tourism

(d) Director of Civil Aviation

(e) Two persons appointed by the Minister being persons with knowledge and experience in civil aviation[140]

Section 6 of the Act establishes the office of the Director of Civil Aviation whose duties include responsibility for the administration of the Act.

The Minister responsible for Civil Aviation is empowered to make regulations to give effect to and for better carrying out of the objects of the Act, and to provide for regulations on air navigation and air transport and for carrying out and giving effect to any convention.[141] Pursuant to these powers, extensive subsidiary legislation has been passed encompassing every conceivable aspect of civil aviation in Kenya. In fact, about 98% of the civil Aviation Act is in the form of the Regulation under Sections 7. They are:

(a) The Civil Aviation (Regulation of Rocket Firing) Regulations

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[139] Section 4, cap. 394 Law of Kenya.

[140] Section 15, *ibid.*

[141] Section 7, *ibid.*

(b) The Civil Aviation (Charges for Air Navigation Services) Regulations

(c) The Civil Aviation (Investigation of Accidents) Regulations

(d) The Civil Aviation (Licensing of Air Services) Regulations

(e) The Air Navigation Regulations and its Schedules.

The Department of Civil Aviation created under Section 3 of the Act is perhaps the most important government agency in the organization of Civil Aviation in Kenya. It is a parastatal body attached to the Ministry of Transport and Communications. The Minister in charge of Transport and Communication portfolio is responsible to the parliament for the civil aviation policy of the Government. The execution of that policy and day-to-day administration of the department is however, carried out by the Director of Civil Aviation who is a civil servant.

In 1981, by virtue of the Aircraft (Offences) Amendment Act of the same year,[142] the Aircraft (Offences) Act was amended to accord with The Hague and Montreal Protocols. The purpose of the amendment was to incorporate the terms of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft; The Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

In 1987, the East African Community Mediation Agreement Act, of the same year was enacted[143] to give effect to certain provisions of the East African Community

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[142] Act. No. 11 of 1981.

[143] Chapter 4, Law of Kenya.

Mediation Agreement of 1984. The said agreement was for the purpose of dividing assets and liabilities of the defunct East African community. It was signed on behalf of Kenya, Uganda and Tanzania on 14 May 1984. The 1987 Mediation Act repealed the East African Cooperation Act.[144] This act is relevant to Kenya's aviation history in the sense that all the assets which were immediately before the commencement of the Act, vested in the defunct East African community under the terms of the Treaty for East African Co-operation (now repealed) and which were allocated to Kenya by the 1984 Agreement, were now vested officially and statutorily in the government of Kenya.[145] Aviation was one of the integral areas of East African Cooperation and the upshot of this legislation was to vest the East African Airways Corporation, among other assets and liabilities upon the government of Kenya.

Apart from the foregoing legislation, there are other statutory instruments which are auxiliary to the air law in Kenya as their application affects the organization and operation of civil aviation. A brief mention of them will suffice for purposes of our study.

The Armed Forces Act[146]

This Act establishes the Department of Defence under which the Kenya Air Force conducts its military aerial manoeuvres. Since the military forces in Kenya use the same

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[144] Section 10, *ibid.*

[145] Section 4, *ibid.*

[146] Chapter 199, Laws of Kenya.

airspace, aerodromes, airports and navigation facilities as the civil aviation, there is a great deal of consultation between the two departments of the government. Needless to say that it is the Kenya Air Force which is charged with the task of the defence of the Kenyan airspace and instructions issued to the air defence control unit, therefore, must per force be in conformity with the official government aviation policy co-ordinated through the two agencies. In the realm of search and air rescues, no other agency is reposed with the requisite human and material resources other than the Kenya Air Force and civil aviation has to rely on it to the fullest extent. On the other hand, the military aerial navigation depends on the civil aerodromes department for data on meteorology and general flight information and this has in effect put the two departments in some kind of symbiotic relationship. Like the Ministry of Foreign Affairs, the Department of Defence does not have an independent international air transport policy as such; they deal with air transport matters only as far as they touch upon the security and defense of the state of Kenya. However, since the prime policy objective is maintaining strategic air connections at all times, which comes under the defense's jurisdiction, it obviously becomes a useful policy maker. The presence and guidance of the defense authorities as policy maker are of great importance.

The Government Proceedings Act[147]

The department of civil aviation as already indicated, is wholly governmental and any judicial process or court proceedings respecting thereto must be conducted in

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[147] Chapter 40, Laws of Kenya.

accordance with the provisions of this Act. This Act regulates suits and judicial proceedings by or against the government and provides the focus for any litigation process concerning aviation authorities in Kenya whether civil or military.

Privilege and Immunities Act[148]

Kenya hosts a number of inter-governmental organisation and UN specialized agencies concerned with aviation worldwide. Chief amongst these are: The ICAO Eastern and Southern Africa Regional Offices; Regional World Meteorological Organization (WMO); Headquarters of African Airlines Association (AFRAA) and the Technical Regional Office of International Air Transport Association (IATA) all located in Nairobi. It is under this Act that the Ministry of Foreign Affairs in consultation with the appropriate government departments has been enabled to host and provide the proper working atmosphere and political hospitality to these international aviation organisations.

The Immigration Act[149]

This is basically concerned with the enforcement of regulations regarding entry into and exit from the territory of Kenya by air and other means. It is by virtue of this Act that issues concerning visas, deportation of illegal immigrants and general immigration issues are handled. Certain aspects of customs regulations also fall under this Act.

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[148] Chapter 179, Law of Kenya.

[149] Chapter 172, Law of Kenya.

The Public Health Act[150]

This Act is significant to civil aviation activity in so far as enforcing the provisions of international sanitary regulations both at the airports and on board aircraft is concerned. Public health and sanitation is a crucial concern of air travel and issues like general medical safety and quarantine procedures are addressed under the auspices of this Act.

3.4 Other Sources

World Bodies as Sources of Law and Policy Applicable to Civil Aviation in Kenya

Kenya, like many emergent states, is by and large, the fruition of the United Nation's role in the decolonization process. Conterminous with the task of decolonization was an even more difficult responsibility of bringing about economic and social advancement of these states. One world organisation that has been instrumental in formulating civil aviation policy and law is the International Civil Aviation Organization (ICAO). Although the International Air Transport Association (IATA) is not an inter-governmental body, the effect of its policies and regulations on Kenya cannot be disregarded.

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[150] Chapter 242, Laws of Kenya.

The International Civil Aviation Organization (ICAO)

The Convention on International Civil Aviation provides in Article 43 for the formation of ICAO. In Article 44, the aims of the Orgainsation are enumerated and for our purposes we will summarize them as "to promote generally the development of all aspects of International Civil Aeronautics". ICAO has thus established the basic principles and general policy for rendering its financial and technical assistance to contracting States.[151] The Organization, through its council, is the responsible international body to evaluate and formulate the adequacy of existing air transport facilities and services and ascertain the additional requirements for the operation of international air services, and to initiate expeditious action towards meeting those requirements.[152]

In addition to fulfilling her obligations under the Convention on International Civil Aviation as a contracting State[153] Kenya has made efforts to comply with and implement where necessary, ICAO Council resolutions and regulations relating to the provision of adequate air navigation facilities and services and in this context, the Annexes to the Chicago Convention became a source of law or civil aviation in Kenya. ICAO's efforts in promoting a multilateral agreement for the regulation of Commercial international air transport matters has witnessed its institution of limited initiatives on

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[151] *ICAO Res.* A1-65.

[152] Paras 3.1 and 3.2 of Annex to Res. A1-65.

[153] *Chicago Convention, supra* note 10, Art. 28.

certain matters pertinent to the regulation of international air transportation including the following:

- publication of guidance material for consideration by States in pursuing bilateral air transport relationships - these included the Handbooks on Administrative Clauses in Bilateral Air Transport Agreements[154] and one on capacity Clauses in Bilateral Air Transport Agreements[155]
- promotion of cooperation between ICAO and regional aviation organisations[156]
- the urging of compliance with Article 83 of the Chicago Convention requiring registration with ICAO Council of any agreements relating to international civil aviation between member States[157]
- the publication of an annual survey on fares and rates in international air transport
- undertaking of a study of existing bilateral tariff clauses culminating in the issuance of a recommended tariff clause for guidance to States when negotiating bilateral air transport agreements; and

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[154] *ICAO Circular 63-AT/6* - Handbook on Capacity Clauses in Bilateral Air Transport Agreements.

[155] *Repertory Guide to the Convention on International Civil Aviation, ICAO Doc. 8900/2*, Second ed. 1977.

[156] *ICAO Assembly Res. A12-18, ICAO Doc. 9440*, Policy and Guidance Material on International Air Transport Regulation and Tariffs, at 8.

[157] *ICAO Assembly Res. A16-32, ibid.* at 29.

- establishing a panel to examine the machinery for the establishment of international fares and rates.[158]

The International Air Transport Association (IATA)

The IATA is a trade association of the world's international airlines. Unlike the ICAO which is an intergovernmental organization whose members are states, IATA is a private international organization whose members are airline companies. Kenya Airways, the official carrier of Kenya is a member of IATA. IATA is a private organization with a difference, so much so that, it is referred to as a "quasi-public organization". The composition of its member airlines shows a "public" characteristic[159] in that more than one half of them are either entirely or more than fifty per cent state owned. The upshot of this is that those airlines which form a majority in IATA are, in fact, state controlled and when acting in the Association they can be regarded as acting under state supervision and control.[160]

In addition to normal trade activities, IATA has been delegated powers by governments to act on their behalf in the tariff coordination process for the establishment of international fares and rates.[161] This function of setting fares and rates, otherwise

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[158] *Ibid.*

[159] For IATA Membership, see Article IV of its articles of Association.

[160] For further discussion see P.P.C. Haanappel, *Ratemaking in International Air Transport* (Deventer, The Netherlands: Kluwer, 1984) at 2 ff.

[161] Notably most states stipulate in their bilaterals that fares and rates to be fixed by IATA subject to the approval of governments concerned.

referred to as "rate making", is the Association's most important and contentious function. It is carried out through traffic conferences established by the Association. Kenya falls under "Area 2" of the traffic conferences geographical delineation.

The Organization of African Unity (OAU)

The Organization has as its objectives, the promotion of unity and solidarity among African States, the coordination and intensification of cooperation and efforts to achieve a better life for the peoples of Africa; the defence of the sovereignty of the member States, their territorial integrity and independence. Other objectives are the eradication of all forms of colonialism in Africa and the promotion of International Cooperation, having due regard to the Charter of the United Nations.[162] Member States are required to coordinate and harmonize their general policies, particularly in the fields of political and diplomatic co-operation, economic co-operation including transport and communications, educational and cultural co-operation.[163]

"The Declaration of General Policy in the Field of Civil Aviation"

The Seventh Summit Meeting of heads of States and governments of the OAU, held in Freetown, Sierra Leone in 1980, approved a "Declaration of General Policy in the Field of Civil Aviation" which was to serve as a policy guideline throughout the entire African Continent. The Declaration, first presented for consideration by the

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[162] Article 2(1) *OAU Charter.*

[163] *Ibid.*, Article 2(2).

Council of Ministers in the Thirty-third Ordinary Session held in Monrovia, Liberia in 1979, was approved by the Thirty-fifth Session of the Council held in Freetown before the Summit.[164]

In a nutshell, the Declaration defines the basic principles of collective or individual action by African States in the field of civil aviation. In it, African governments undertake effectively to strengthen co-operation between African airline companies with a view to rationalizing the continent's air services, particularly regarding the harmonization of time-tables, setting up of rebated rates, exchange of traffic rights, standardization of aircraft, sharing of aircraft repair and maintenance facilities and joint organisation for research and personnel training.

The African Civil Aviation Commission (AFCAC)

The African Civil Aviation Commission is the specialized regional institution established by African States exclusively for Civil Aviation matters. For that reason, many important decisions affecting the development of Africa's civil aviation activity have issued from there mainly in the form of recommendations to member governments for implementation. AFCAC's membership is open to African States members of ECA or OAU.[165] Its objectives are to provide the civil aviation authorities in the member States with a framework within which to discuss and plan all the required measures of coordination and cooperation for all their civil aviation activities; and to promote

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[164] See generally, *African Air Transport*, Magazine, November/December 1980 at 7.

[165] Article 1 of *AFCAC Constitution*.

coordination, better utilization and orderly development of African air transport systems.[166] Kenya is a member of AFCAC.

AFCAC Declaration on General Policy on Civil Aviation

At the 23rd Bureau Meeting of the Commission held at Bamako, Mali from 17-19 May 1979, the text of a General Policy Declaration was approved since AFCAC has been granted the status of a specialized agency of the OAU,[167] the approved text was presented for adoption to the OAU Council of Ministers at its 33rd Session in Monrovia in July 1979.[168] After it had been adopted it was further approved in the 16th Conference of the OAU Heads of States that followed the Ministerial Conference.

The declaration is essentially a definition of the basic principles of collective or individual actions by African States in the broad field of civil aviation which covered personnel training, African airlines co-operation and integration, optimum development of air services, financing of aeronautical activities, aviation medicine, etc.

Even though the General Policy Declaration barely mentioned other issues like international air fares and bilateral agreements. Nevertheless, those issues and the development of non-scheduled services have been topics of intense and elaborate

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[166] *Ibid.*, Article III.

[167] The Council of Ministers of the OAU at its 25th Ordinary Session held at Kampala, Uganda, in July 1975, adopted a resolution granting AFCAC the status a specialized agency of the OAU. See also AFCAC recommendations s. 3-19 of 1975 and S4-1 of 1975; *OAU/AFCAC Agreement*, Article 1.

[168] This procedure is provided in Article VII of the *OAU/AFCAC Agreement*.

deliberations at all the Commission's sessions. Many recommendations have been made on these topics at the various sessions, an assemblage of them forms substantial policy guidelines in the areas.

CHAPTER FOUR

GENERAL CONCLUSION

4.1 Conclusion

> In [the] modern state, law must not only correspond to the general economic position and be its expression, but [it] must also be an expression which is *consistent in itself*, and which does not, owing to the inner contradictions, look glaringly inconsistent. And in order to achieve this, the faithful reflection of economic conditions is more and more infringed upon.[169]

This chapter is both a reflection of the main issues raised in the preceding chapters, and a projection into the future of the civil aviation law and policy in Kenya. A few general recommendations are also made.

4.2 General - The International Legal Framework

The world civil aviation system is presently undergoing a tremendous transformation. Air transport is virtually in the throes of a revolution. A process of

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[169] In H. Selsam and H. Martel, eds., *Reader in Marxist Philosophy* (New York: International Publishers) at 207.

change and adaptation has accelerated in recent years thereby heightening initiatives by many governments for reform. Countries are facing a combination of pressures and fundamental changes which are rapidly influencing their aviation policies. One of the most significant factors is the growing trend of deregulation, liberalisation and privatisation. After about 18 years of deregulation in the United States, the air transport industry in America has become more concentrated than ever before with small airlines disappearing and the handful of the so-called "mega-carriers" dominating the market. Gradual liberalization in Europe - "Europe without frontiers" is also leading to greater concentration whose consequences will be the survival of only the fittest.

Generally, civil aviation contributes to social and economic development of a region; a region's socio-economic conditions, laws and policies in turn affect the development of the civil aviation industry. Thus an exercise in the projection in the future of civil aviation in any given region must be based on existing considerations. For Kenya, these considerations include: the political economy, the will to modify old, and adopt new policies, the effectiveness of the countries institutions and better international cooperation. The development of civil aviation in Africa as a whole is to a great extent tied to the political economy of the region. So far that development has been impeded by two major factors viz: The region's infamous culture of poverty and instability. Poverty is not only responsible for the small air transport market, it has also starved the industry of capital investment. Political instability on the other hand retards national productivity, adversely affects international trade and scares away potential investors.

For a more effective and long-term impact on Kenya's political economy, international trade and commerce must be stimulated. To do that there have to be investments. Investment laws and policies must be attuned to attract foreign and private capital. While it is our thesis that the government must review its policies and programmes if its development objectives are to be met, we admit that policy reform is difficult and delicate. In all societies formidable obstacles prevent quick responses to even the most carefully reasoned calls for change. For this reason and others Kenya needs external assistance. The first step for the international community is a commitment to larger aid flow. The aid must be effective and project selection focused. On the Kenyan side, a complimentary step is to establish a new kind of social compact. The government should take firm action on factors that dilute the effective employment of aid and be more open to proposals to revise policies in light of experiences, and be willing to accept the proposition that without policy reform higher aid will be difficult to mobilize.

It has been necessary to raise these issues because many civil aviation projects have been earmarked for Africa as a whole and a number of these are already underway. The successful execution of those projects depends largely on external funding. It is posited in the subsequent parts of this chapter that Kenya hosts a number of crucial civil aviation institutions whose successful operation require enormous cooperation of the developed economies. A traditional form of cooperation has been the provision of civil aviation aid by the developed to the developing states. What is requested here is that such aid should be designed to have broader economic impact and enduring technical effects.

One positive form of cooperation between the developed and developing states in the field of civil aviation is manifest in the ICAO 24th Assembly Resolution 18/2 on the "practical measures to provide an enhanced opportunity for developing states with community of interest to operate international air transport services."[170] This was a very courageous resolution because although the Chicago Convention expressly recognizes the right of all contracting states to equal and fair opportunity to operate air services, the criterion traditionally recognized for a national carrier, has, in its strict application denied to many developing countries the realization of this right. The ICAO Resolution 18/2 is therefore designed to redress this situation as it calls upon the contracting states to recognize the concept of community interest within regional economic groupings as a valid basis for the designation by any one developing state within the same regional economic grouping. The Resolution can also be seen as a move to mitigate the vagaries of the "substantial ownership and effective control" test of national airlines. It has also provided a legal basis for some states which do not have national airlines to exploit the traffic rights in their bilateral agreements by assigning their routes to national carriers of neighbouring states. This Resolution is a formidable asset to any prospect for regional airline alliance.

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[170] See ICAO Doc. A24-WP/62-EC/137.

4.3 A Colonial Legacy

Before the advent of colonialism, there was a civil aviation vacuum not only in Kenya but in Africa as a continent. Civil aviation activity in Kenya as recounted in the preceding parts of this thesis, is therefore a legacy of the colonial administration. In some respects, one is tempted to judge the colonial policies too harshly, in some, however, one should be grateful. On objective reflection, there are some pre-independence aviation arrangements that should be re-introduced with necessary modifications. We single out regionalism as a priority in that category. Regionalism is discussed in depth in the following parts of this chapter. However, as a prologue thereto, we wish to make the following observation:

East Africa is part of the international civil aviation community which is regulated, to a large extent, by international law. Sovereignty is one of the principles of international law which has significant application in the field of civil aviation. The liberal and harmonious operation of international air services is brought about through the adherence to the provisions of certain international treaties such as the Chicago Convention, the Warsaw Convention, etc. While most African states are parties to the principal aviation treaties governing aspects of air transport services, in the area of civil aviation security some states have not ratified all the treaties and some have not ratified any of them. Looking through the list of states that are parties to the Tokyo, Hague and Montreal Conventions as at October 1995, we found that Tanzania and Algeria in Africa have not ratified any of the Conventions on aviation security. Their reluctance to ratify

these conventions may not be unconnected with their stance on the concept of international terrorism as exemplified in the arguments of some states, Tanzania amongst them, at the United Nations Ad Hoc Committee set to define the concept international terrorism in 1973.[171] These states argued that any definition of international terrorism should not constrain national liberation movements or impede struggle against "oppressive" regimes" and "foreign domination". They maintained that to eliminate international terrorism, its root causes must be eliminated first.

One sympathises with these views. It is an instance where ideology conflicts with law. While the system of ideology may be superior in several ways, it is difficult to operate especially in international relations. It depends on genuine understanding and internationalisation of the norms which are very difficult to achieve. There is often ambiguity in the ideology, and in concrete situations, there may be considerable doubt as to what is the correct line of action. The machinery for the resolution of particular controversial situations is not readily available and there may often be political reasons why ambiguities are best left as ambiguities. Legalistic as it may be, it is not an overstatement to remember that law appears to have a better mechanism for the resolution of conflicts even though it has often failed to safeguard human freedom. Law may be important to inculcate discipline, regularity of procedures and may be more efficient in the consolidation of social and economic gains.

Whilst it is true as Julius Nyerere, former President of Tanzania has argued that, the law about individual freedom cannot be effective without a national ethic (read

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[171] See UNGA Res. 3034 (XXVII) 1972.

ideology), it is also probably true that individual liberty may be seriously threatened without law. Arbitrariness can flourish under the guise of an ideological imperative and many cherished human values can be trampled upon and justified on the basis of ideological progress. The point we are stressing here is that law on such grave matters as aviation security should be viewed by all as institutional arrangements and device for organising the tasks of governments and governing in response to ideology, not in opposition to it. Although political terrorists have been responsible for the most spectacular civil aviation acts of sabotage, the threat to the security of civil aviation is not posed exclusively by them. The governments of Tanzania and Algeria for example, should reconsider their positions and ratify the relevant treaties on the subject. Unlawful interference with civil aviation may not be at the rate witnessed in the late sixties and seventies but it remains a singular major threat to the safety of international civil navigation. Accordingly, concerted efforts by all States towards its elimination is a necessity.

KENYA

I. A New Civil Aviation Policy Outlook

The common objectives of a national civil aviation policy can be broadly stated to include the following concepts:

(a) Respect for national sovereignty;

(b) Need to maintain safe and orderly operations;

(c) Expansion of trade (both internal and external) including enhancement of tourism and balance of payments;

(d) Adaptation of the civil aviation industry to the defence needs of the nation;

(e) Support for local industries;

(f) Increase employment opportunities for nationals;

(g) Improvement of the nation's diplomatic relations; and

(h) Need to satisfy public service requirements.

Generally speaking, one prominent contributing factor to the restricted intra-African network are the policies currently pursued by African States on the exchange of traffic rights. The policies are characterized by excessive protectionism pursued through predetermination method of capacity control with placement of emphasis on Third and Fourth Freedom traffic operations and the application of principle of reciprocity in bilateral relationships. Considerable limitations are placed on the grant of Fifth Freedom traffic rights including demand for compensation for the exercise of such rights. A grid system would be illusory without reasonable extension of Fifth Freedom traffic rights for rarely is there sufficient Third and Fourth Freedom traffic on trans-African routes to make such services economically viable.

Kenya's civil aviation policy, first formulated in 1979 after the break-up of the East African Community, has undergone a series of studies and refinements since then with the last recorded review in 1988. During the intervening years, as observed above, many changes with direct bearing on the civil aviation industry have taken place and it

is felt that a serous appraisal of the current policies is essential in order to develop a sound and competitive policy capable of steering the country through the coming years.

For charters originating from Kenya and for Fifth Freedom operations, a rather restrictive policy has been applied for all flights other than those of Kenya Airways. The rationale behind this policy has been the paramount need to give reasonable protection to the services of Kenya Airways. However, in view of the ongoing privatisation of Kenya Airways we are of the view that protection of Kenya Airways will no longer be a "paramount" consideration as the airline will now be self-sustaining and not reliant on public resources for its operations. It is felt that there should now be a fairly liberal approach to licensing of operations provided:

(a) they satisfy any stipulated statutory criteria as to competency;

(b) the operations are to points or on routes not adequately served by Kenya Airways; and

(c) the operations are in the public interest.

It is recognized that the success or otherwise of the concept of bilateralism as a means of regulating international air transport services pre-supposes that the level of competition permissible should be determined taking into account the attitude of the parties to the agreement. As indicated in Chapter III of this thesis, Kenya's bilateral arrangements are based on the principles of equal opportunity, prior determination and reciprocity, it is felt that it would be unwise at this stage of our development to accept the trend prevalent elsewhere for total deregulation of the air transport industry. The realist approach should be to ensure that provision of air services between Kenya and

other states is governed by a policy of controlled competition which essentially should take account of the broad objectives of the nation for a viable air transport system and in accordance with the recommendations of the AFCAC on the grant of air traffic rights especially to member States. In order to ensure the success of such a policy, it is suggested that any unnecessary constraints to the growth of the industry should be removed. These constraints have been identified as onerous taxes on fuel and spares, over-control of charter activities, excessive user charges, aerodrome deficiencies and burdensome import licensing procedures.

Infrastructure

Airports and kindred infrastructure play a pivotal role for air transportation particularly in matters involving aircraft operations and flight safety. In the areas of facilitations, a major irritant are delays to passengers linked to excessive documentation at airports. Cargo dwell time too is a source of concern to commercial activities using the same. This is largely attributed to lack of warehousing facilities and complex clearance procedures.

Presently, Kenya has a viable general aviation industry. This industry has a highly developed infrastructure and it provides a base for extensive aviation activities to neighbouring countries. There are five main government airports, namely Jomo Kenyatta International (Nairobi), Wilson, Mombasa, Kisumu and Malindi and Eldoret International Airport is still underway. Besides these, there are numerous other small airstrips scattered all over the country catering for general aviation needs. According to ICAO

Council Annual Report for the year 1993 for Passenger and Cargo Kilometres, Kenya ranks seventh in Africa and sixtieth among the ICAO contracting states. Nairobi Jomo Kuyatta International Airport is served by about forty (40) internationally scheduled airlines. Mombasa International Airport is served by more that sixteen charter flights which ferry excursion tourists into and out of the country. One of the local airports, Wilson Airport, is reserved for domestic flights only and is currently one of the busiest airports in the African region. Currently Kenya has exchanged more than seventy bilateral air service agreements with various countries worldwide. Considering that the expansion of the scheduled other airlines domestic operations by the national carrier would, to some extent, be dependent on the ability of airports and their infrastructure to accommodate particular airline and passenger needs and granted that many international airports have to maintain mandatory standards set by ICAO in Annex 14 to the Chicago Convention, it is proposed that the Airports' Authority (Directorate of Civil Aviation) should be made autonomous in order to make it self-sustaining. We say this because under the current bureaucracy, airports do not have free access to the revenues they generate to defray their expenses and this has reduced the morale of airport personnel making it harder for them to develop new revenue sources or increase income from existing ones. It is not unusual to find that services offered by government owned airports are below standards and are not commensurate with the rising fees charged to the users. An airport offering sub-standard facilities would lose airlines that would have operated into and out of it because they would seek more efficient airports elsewhere. It is our argument therefore, that an autonomous airport authority could freely look into

possibilities of offering better services to its users, passengers and airlines. However, before an airport is privatised, it would be imperative for governments to outline safeguards that would protect the highly dependent users from the exploitation of the monopolistic set up of the airport. Such safeguards would ensure that users are not overcharged and that revenues generated are used to improve the services that are paid for. Simplification of customs forms and improvement of warehousing including availability of regular staff to ensure the expedited release of goods to the consignees are, however, some of the short term infrastructural adjustments that could be initiated.

Coordination of Civil and Military Aviation

Another aspect of policy reform that the writer is compelled to address granted his background is the need for coordination of civil and military aviation. It is observed that civil and military aircraft use the same airspace and there is now immense concentration of military flights especially around such big airports as Jomo Kenyatta International (Nairobi) because of concentrated Air Force activities in and about the city. It is necessary to establish and maintain a permanent coordination between the Directorate of Civil Aviation and Department of Defence. The current practice of ad-hoc committees being appointed just to study specific issues and then disbanded afterwards is not satisfactory. Kenya is a signatory to Article 3*bis* of the Chicago Convention and if it is committed to the spirit of that instrument, this important committee should be established as soon as possible to deal with questions of air safety in Kenya. This measure is not a strange phenomenon in Kenya's aviation history since during the time

of East African Community a Civil/Military Coordination Committee existed to coordinate air safety matters but regrettably this committee ceased to exist with the break up of that Organisation

Use of Space Technology in the Field of Air Navigation

The studies now being carried out by ICAO and the African Civil Aviation Commission (AFCAC) on the above subject have not yielded positive results to enable definite policy decisions to be made thereon. However, it is recognized that the aim of the study is to determine the operational and technical requirements for an international satellite system for air navigation, air traffic control, communications and weather forecasting, and to attempt to formulate the relevant standards and recommended practices. Realising the complexity of this subject and the formidable revolution it portends in the Air Navigation System, it is felt that the best method of developing a national policy on the use of space technology in air navigation is to keep abreast with international developments to ensure that Kenya does not lag behind in respect of this important technological break through.

Aviation Meteorology

The provision of meteorological services to general aviation is governed by the Chicago Convention. Annex 3 to the Convention recommends the designation of a meteorological authority by every contracting state. The Kenya Government has designated the Meteorological Department as its meteorological authority in accordance

with the convention. It is also noted that Kenya is a member of ICAO and the World Meteorological Organisation (WMO) and it hosts in Nairobi four international centres connected with these two UN specialized agencies viz:

(a) The WMO Regional Meteorological Centre with responsibilities for weather forecasting for the whole of Eastern and Central Africa;

(b) The ICAO Area Forecasting Centre with responsibilities for weather forecasting along air routes in Africa and surrounding ocean areas;

(c) The WMO Regional Telecommunications Hub with responsibilities for collection and dissemination of Meteorological data in Africa; and

(d) The WMO Regional Training Centre with responsibilities for training meteorological personnel from English speaking Africa.

Despite this magnanimous role in aviation meteorological services, Kenya has no domestic legislation on meteorological services. It is felt that it would be necessary to enact such a legislation to regulate the provision of meteorological services not only to aviation sector but also to other sectors of the economy.

Environmental Control Requirements: Aircraft Noise, Sonic Boom and Engine Emissions

There is increasing concerns worldwide with regard to the effect of aircraft noise, sonic boom and engine emission on the environment. Problems of pollution of the earth's waters and atmosphere. It is generally acknowledged that one of the demanding environmental concerns in Kenya relates to excessive aircraft noise especially in the

vicinity of airports. After an examination of all environmental problems, it is considered that apart from conforming with the recommendations of ICAO on that respect, a need for comprehensive legislated environmental policy is urgent. This legislation should adequately protect the victims of environmental hazards associated with aviation. A study of the present Civil Aviation Act[172] discloses overwhelming inclination to protect the civil aviation from its potential threats without any significant recognition that aviation itself is a potent source of serious hazards and has the entire country's population as its victims in waiting.

Aviation Liability and Insurance

Kenya has already acceded to the original Warsaw Convention of 1929 and the Protocol to Amend the Warsaw Convention of 1929, The Hague, 28/9/55 but it has not yet ratified subsequent instruments revising this convention. The last such revisions are embodied in the four Montreal Protocols of 1975. It is observed that absence of ratification of aviation liability convention does not relieve Kenyan Airlines from third party liability for damage caused on ground in other countries. The airline would be liable in accordance with the national laws of the countries concerned. The object of international convention on aviation liability is to achieve uniformity and avoid multiplicity of jurisdictions. There is a universal recognition that today's liability limits are very much out of date and countries are now moving to respond to the need of the travelling public and give them greater confidence and security in air travel. On the

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[172] Cap 394 Laws, of Kenya, Sec. 73 and rules thereunder.

whole it is observed that the limits of the Warsaw System are too low and that Kenya should introduce more realistic limits taking into account the general trend elsewhere but more particularly in the wake of recent IATA inter-carriers agreement Kuala Lumpur of 30 October 1995. Which, when put into effect, will result in the waiver by signatory IATA carriers of which Kenya Airways is one, of the limitation on recoverable damages for passenger injury or death provided by the 1929 Warsaw Convention, the 1955 Hague Protocol and the 1966 Montreal Agreement (applicable only to transportation involving a point to, from or through the United States). The long-awaited ratification and the coming into force of the 1975 Montreal Additional Protocol No. 3 (MAP3) will now become a moot issue, since MAP3 would have perpetuated the Warsaw Convention principle of limitation of liability of the air carrier for passenger injury and death. The 1995 IATA Intercarrier Agreement (ICA) also waives all treaty limitations on recoverable damages for passenger injury and death. The successful implementation of this new Intercarrier Agreement is envisioned to prevent governments from being forced to take unilateral action to provide higher liability limits for their nationals. It is our belief that the agreement will modernize and update the liability regime in a manner likely to survive into the next century; there is no need for any carrier to delay implementation of the ICA. It is our strong proposal that Kenya Airways does the same and we are optimistic in that regard granted that KLM Royal Dutch Airlines, one of initial signatory carriers to ICA has recently acquired a 26 percent stake in Kenya Airways.[173]

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[173] The Weekly Review, 5 January 199- "A Success Story; KLM and Kenya Airways Sealed the Deal of Year".

Regionalism

Decolonization involves political self-determination and nation-building by peoples who had depended heavily in the past on the political and economic will of foreign powers. In this thesis, some programmes and institutions designed principally to promote collective self-reliance in the field of civil aviation and economic development in East Africa were mentioned. The implementation of the outstanding programme on East African Co-operation will no doubt boost civil aviation since an efficient transportation system is both a condition for and a result of economic development and integration. No lesser persons than the three regions heads of States have recognized the need to coordinate efforts towards increased economic co-operation. This was illustrated by the formal launch of the Arusha based permanent tripartite Commission (PTC) as a Coordinating Organ in a bid to revive the now-defunct East Africa Community (EAC) or, failing that, some politico-economic structure resembling it.[174]

From our brief recount of the problems that plagued the management of the East African Airways, we hasten to observe that the preponderance of the analysis so far outweighs against the establishment of a multi-national airline in the likeness of East African Airways again in the region. East Africa's situation, however, would compel her to be influenced by few successful cases elsewhere than by the many unsuccessful ones including her own. It is our opinion that any new plan to form a single East African Airline again is less practical. The lessons from East Africa's cooperative history and politics do not favour such a move. And, even assuming the formation of a single East

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[174] See The Weekly Review, 15 March 1996.

African airline were feasible, would such a single airline serve the bast interests of the consumers and the three East African states?

It is demonstrable that national airlines which operate on domestic routes without competition from supplemental carriers tend to perform poorly, to the chagrin of the travelling and shipping public. A national carrier enjoying the zealous protection of one government is barely tolerable; a single East African airline enjoying the unfettered and combine protection of all the three governments may be too monstrous for the public. As pointed out earlier, there may be problems for the carrier itself too. Petty differences by nationals and government of the member states in respect of distribution of positions and facilities could be severe enough to seriously affect the management and operations of the airline. Reconciliation of the wide range of national ideologies and philosophies which would inexorably be imposed on such an airline would be unfathomable.

An option which seems more prudent, practical and safe for regionalism at this juncture is to establish regional (East African) international air carriers in the form of a consortium, with the national or domestic carriers, rather than the governments holding shares therein. The exclusion of direct government participation will minimize undue political and generally, bureaucratic rigmaroles in what should be entirely a commercial outfit. Such a carrier should concentrate on international operations while the supplemental carriers act as feeders and back-up operators by carrying domestic and non-scheduled traffic. The establishment of such an airline should be an evolutionary rather than a revolutionary process. It should not be carried out by one stroke of the pen in a diplomatic conference of political leaders. We venture to opine that the beginning point

should be that the sister states and their entire populace should be exposed to effective psychological and political re-orientation and preparation through seminars and symposia in order to neutralize such inherent constraints as the glamour that individual states have so far attached to their national carrier and their reluctance to concede even the semblance of sovereignty.

Granted the initial East African Co-operation debacle, some consider the quest for a greater economic and political co-operation between the three neighbouring countries outlandish, the majority of the East Africans, including the writer however, have long recognized that regional integration is redrawing the economic map of the world, with countries that fail to embrace regionalism risking marginalisation. In the face of very limited resources, there is an important requirement in East Africa now for national, prudent and broad-based planning in the establishment of civil aviation facilities and operation of air transport system to maximize the economic benefits derivable therefrom. To this end, the establishment of a regional airline has been strongly favoured. The gradual formation of airlines consortium is recommended as a practical and conducive arrangement is the successful operation of the grid system envisaged by AFRAA and attuning various regional aviation policies. More positive traits of regionalism could be imaged from EEC practice and directives on regional aviation policies. These, however, are not necessarily to be adopted wholesale, but as an example of the versatile attitudes of governments in other regions. Now is the time for the East African States too, to re-examine some of their long existing civil aviation policies and arrangements with all their complexities and vain memories, in a bold drive towards new horizons.

Finally, the novelist, V.S. Naipul, was quoted by Professor Richard Sandbrook as saying that Africa has no future.[175] It necessarily follows that civil aviation in East African region has no future. But one would prefer not to think so. The region may be cheerless today, but it is certainly far from being hopeless. However, hope should be based on some practical indicators, otherwise it could be a delusion. Unless the region can come up, as early as possible, with a purposeful, single-minded, selfless and development oriented leadership that can engineer the development of the region's economy, then we are afraid Naipul may be proved right.

The future prospect of civil aviation in East Africa in general is bright if only the policy makers in the partner states would borrow a leaf from experiences in other regions of the world and adopt these experiences to suit local circumstances.

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[175] See International Perspectives, January/February 1983 at 6.

APPENDIX (A)

STATUS OF KENYA
WITH REGARD TO INTERNATIONAL AIR LAW INSTRUMENTS
(as at 25 October 1995)

		DATE OF SIGNATURE	DATE OF RATIFICATION OR ACCESSION	EFFECTIVE DATE
1.	Convention on International Civil Aviation Chicago, 7/12/44		1/5/64	31/5/64
2.	International Air Services Transit Agreement Chicago, 7/12/44	–	–	–
3.	International Air Services Transport Agreement Chicago, 7/12/44	–	–	–
4.	Protocol on the Authentic Trilingual Text of the Convention on International Civil Aviation Buenos Aires, 24/9/68	–	–	–
*5.	Protocol on the Authentic Quadrilingual Text of the Convention on International Civil Aviation Montreal, 30/9/77	pending U.S.	information Government	from
6.	Article 93bis Montreal, 27/5/47		31/5/64	31/5/64
7.	Article 45 Montreal, 27/5/54		31/5/64	31/5/64
8.	Articles 48(a), 49(e) and 61 Montreal, 14/6/54		31/5/64	31/5/64
9.	Article 50(1) Montreal, 21/6/61		31/5/64	31/5/64
10.	Article 48(a) Rome, 15/9/62		22/7/64	11/9/75
11.	Article 50(1) New York, 12/3/71		10/2/72	16/1/73
12.	Article 56 Vienna, 7/7/71		10/2/72	19/12/74
13.	Article 50(2) Montreal, 16/10/74		11/2/77	15/2/80
*14.	Protocol of Amendment (Final Clause) Montreal, 30/9/77		–	–
*15.	Article 83bis Montreal, 6/10/80		13/10/82	–
*16.	Article 3bis Montreal, 10/5/84	5/10/95	–	–

		DATE OF SIGNATURE	DATE OF RATIFICATION OR ACCESSION	EFFECTIVE DATE
*17.	Article 56 Montreal, 6/10/89		–	–
*18.	Article 50(a) Montreal, 26/10/90		30/10/91	–
19.	Convention on the International Recognition of Rights in Aircraft Geneva, 19/6/48	–	–	–
20.	Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Rome, 7/10/52	–	–	–
*21.	Protocol to Amend the Rome Convention of 1952 Montreal, 23/9/78	–	–	–
22.	Convention for the Unification of Certain Rules relating to International Carriage by Air Warsaw, 12/10/29	–	7/10/64	12/12/63[1]
23.	Protocol to Amend the Warsaw Convention of 1929 The Hague, 28/9/55	–	–	–
24.	Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier Guadalajara, 18/9/61	–	–	–
*25.	Protocol to Amend the Warsaw Convention of 1929 as Amended by The Hague Protocol of 1955 Guatemala City, 8/3/71	–	–	–
*26.	Additional Protocol No. 1 Montreal, 25/9/75	–	–	–
*27	Additional Protocol No. 2 Montreal, 25/9/75	–	–	–
*28.	Additional Protocol No. 3 Montreal, 25/9/75	–	–	–
*29.	Montreal Protocol No. 4 Montreal, 25/9/75	–	–	–
30.	Convention on Offences and Certain Other Acts Committed on Board Aircraft Tokyo, 14/9/75	–	–	–
31.	Convention for the Suppression of Unlawful Seizure of Aircraft Tokyo, 14/9/63		22/6/70	20/9/70
32.	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation Montreal, 23/9/71		11/1/77	10/2/77

		DATE OF SIGNATURE	DATE OF RATIFICATION OR ACCESSION	EFFECTIVE DATE
33.	Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23/9/71 Montreal, 24/2/88	–	5/10/95	4/11/95
*34.	Convention on the Marking of Plastic Explosives for the Purpose of Detection Montreal, 1/3!91	–	–	–
35.	Convention on the Privileges and Immunities of the Specialized Agencies 21/11/47		1/7/65	1/7/65

* Not in force

1 Kenya deposited its instrument of adherence on 7/10/64, with validity as from 12/12/63, on which date it became an independent State (before Kenya became independent, acceptance of the Convention was effected by the United Kingdom on 3/12/34).

Source: ICAO

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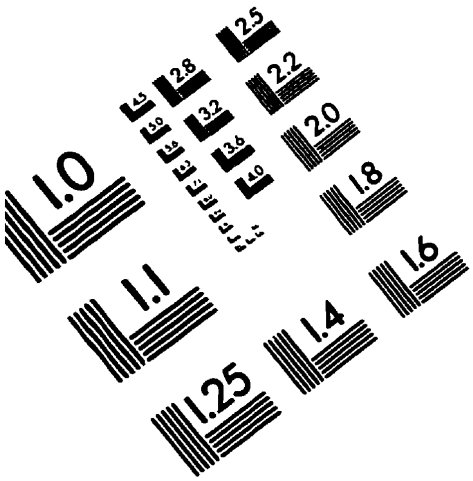

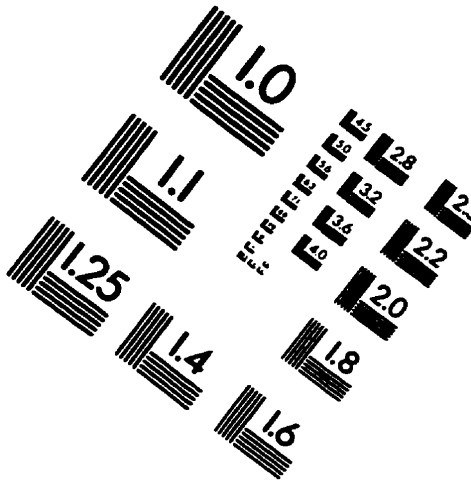

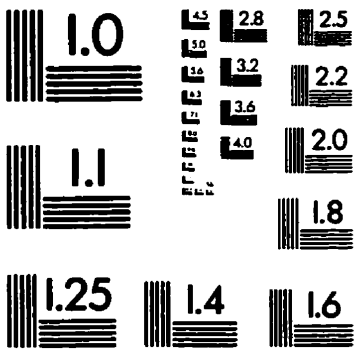

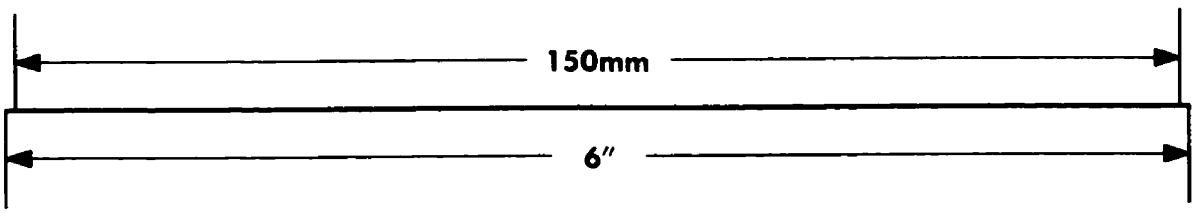

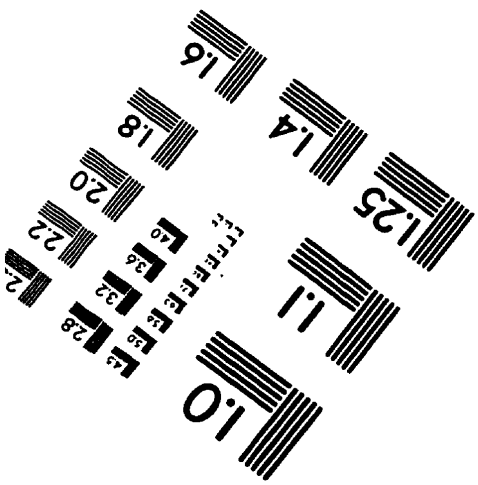

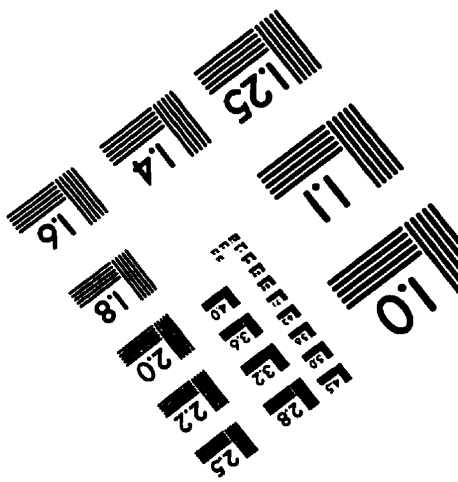

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