

CRIME, SOCIAL CONTROL AND SOCIAL ORGANISATION

A historically oriented analysis of crime and
social control with special reference to Kenya

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DECLARATION

I hereby declare that this thesis has
been compiled by me alone and that it
is my original work.

Florence Mutuli Muli

ABSTRACT

This thesis, taking Kenya as a specific example is an attempt to look at crime and social control in its historical specificity. The thesis takes social control as the point of departure in its explanation of crime. Underlying the analysis offered here is the contention that any meaningful explanation of crime must start with an appreciation of the relationship between crime and social control, especially the role law in general and criminal law in particular plays in the creation and development of specific social structures and its consequences for the general social fabric.

In Chapter One, we shall look at criminological thought in relation to the general nature of crime and social control. In Chapter Two, we shall look at crime within a "traditional" social structure, in particular the system of social control in a "Stateless" society.

In Chapter Three, we shall look at crime and social control within a colonial agrarian capitalist social structure. In Chapter Four, we shall examine crime and social control in a neo-colonial capitalist social structure.

In Chapter Five, we shall look at the "political" uses of mundane criminal patterns within the context of colonial and neo-colonial capitalist social control.

Chapter Six is a summary of the main conclusions and their implications on modern criminological thinking with special reference to the "third world".

GENERAL INTRODUCTION

During the recent past, attempts have been made to look at crime, social control and social organisation. The results of these attempts have been varied and have in most cases involved some significant differences in approach, especially in the area of control and its consequences for crime. However, such endeavours as Clinard and Abbott (1973) point out, have been more or less restricted to an analysis of crime and control in "developed" capitalist society. Consequently, there is an astonishing paucity of such analyses on patterns and trends of social control and hence of crime in "developing" countries. In this thesis, we have attempted to contribute to such attempts through an analysis of crime, social control and social organisation with special reference to Kenya.

In Kenya - as is the case with most of the third world - economic development, political and social organisation are often viewed as conceptually separate entities. However, jointly unfolding as an overall complex of social growth process, they are significant in their occurrence and impact. Part of this occurrence has been the rapid introduction of the Western capitalist mode of production and its inevitable corollary of capitalist socio-economic and political institutions. A significant aspect of these institutions has been the introduction of Western capitalist law, especially criminal law and its implied notion of the State. This has entailed the introduction of a rational-legal system of social control. With reference to this, the aim of this study can be said to be an analysis of the consequences of socio-economic, political

organisation and social change on the system of social control and hence of crime in Kenya and by extension the "third World". Having set our task as the study of social control and its consequences for crime in the wider context of social organisation and social change, we would like to record here that our task was at various stages hampered by some methodological problems. As a result, our method can be said to be more or less deductive in the sense that we have started from certain general conceptions and have proceeded to apply these to the available information.

Methodology

Since the beginning of colonialism in Kenya, the most remarkable phenomenon which confronts any student of Kenyan historical development is both the dearth and the volume of available information. The political changes which have taken place since independence in 1963 have meant that it is now possible to have access to a lot of comparative material on both the colonial and post-colonial periods. In this connection most material on general socio-economic and political development is available from official sources, especially the relevant departments of the government of Kenya.

However, due to the acrimonious political developments which took place during the "Emergency" period 1952-1960, a great deal of the source material dealing with political and socio-legal control appears to have disappeared. As Zwanenberg (1975) observes, most, but not all, of the information concerning the control of "Natives", especially those records kept by the "Native" Commissioner and the Chief Secretary appear to have been burnt except for those records that happened to be elsewhere just before the "Emergency" was lifted.

This also seems to have been the case with police records and to a certain extent prison records. The absence of this material did hamper our analysis of social control and hence of crime during the colonial agrarian capitalist period. We were especially limited in the area of socio-political control and its consequences for the African social fabric. Material dealing with Emergency and pre-Emergency control in the African tribal areas, in particular the Administration of criminal justice appears to have been selectively destroyed, thus making it impossible for us to provide an indepth analysis of this aspect of colonial "political" control. To a certain extent this did affect the analysis of "mundane" criminal control since most official documents appear to have been burnt. Thus an analysis of colonial capitalist control in Kenya based on source material was limited by methodological problems - hence our deductive method of starting from the general concepts and examining these on the basis of available information.

In spite of these methodological problems, there is still a great deal of information available which is extremely useful to a study of this nature. The Prison's department and the Attorney General's office and to quite a large extent the Kenya Archives provide a wealth of material except for some minor limitations. In some instances, the "imposition" of the thirty year rule on official records limits the availability of some of this material. In some other instances, as Zwanenberg (1975) notes, the general government tendency to destroy records indiscriminately for what in Kenya has often been referred to as "Security" reasons, leaves a lot of the records available incomplete - hence limiting their usefulness as

sources of research data¹. This limitation significantly hampered our analysis of both the colonial and neo-colonial capitalist control systems. This was particularly so in relation to colonial land and labour control and political and socio-economic control during the transition from colonialism to neo-colonialism. This limitation hampered our analysis of the official records of the crime phenomenon in Kenya immediately after independence. We thus had to use a deductive method in our analysis of the trends and patterns of the recorded number of offenders. According to popular opinion at the time of independence, the recorded number of offenders was expected to decrease. However, at independence and after, the opposite happened. It is important to note here that the effects of the "thirty year rule" became more conspicuous during our analysis of neo-colonial political and economic control especially during the Kenya People's Union period. It was particularly difficult to obtain case records dealing with political control especially those records which had ideological overtones. This to a certain extent limited our analysis of the type of political and socio-legal control exercised through the Provincial Administration and its consequences for crime during both the colonial and neo-colonial periods. Despite these limitations, we found a great deal of records still available.

¹See R.M.A. van Zwanenberg; Colonial Capitalism and Labour in Kenya 1919-1939. East African Literature Bureau, 1975, p.294.

For example, our analysis of economic, political and socio-legal control during both the colonial and neo-colonial periods would have been impossible without parliamentary and legislative records such as the Constitution of Kenya and the various Acts we have examined in this thesis; land and labour records were provided by the Ministry of Agriculture and the Ministry of Finance and Economic Development. Armed with such information from the above sources and from such other sources as the Attorney General's office and the Ministry of Home Affairs (especially the Prison's department), we were, while not ignoring its limitations, able to undertake an analysis of crime and social control in the wider context of social organisation and social change.

In Chapter One, we have attempted an examination of criminological thinking in relation to the general nature of crime and social control in the context of the wider social structure. In Chapter Two, we have examined the phenomenon of crime within a "traditional" social structure. Here we have focussed our attention on the system of social control within a "Stateless" society and its consequences for crime.

In Chapter Three, we have attempted as it were, a synthesis of colonial agrarian capitalist control, especially socio-legal control in the context of the wider social organisation and social change. Here, we have endeavoured to bring out the consequences of social control, especially law on the general social fabric, crime included. In Chapter Four we have examined social control and hence crime in the context of neo-colonial social organisation and social change. We have here focussed our attention on the consequences of

rapid social change on general social organisation and by extension its consequences for crime.

In Chapter Five, we have attempted a synthesis of official rates and patterns of "crime" within the context of colonial and neo-colonial social control. In Chapter Six we have endeavoured to summarise our main conclusions in the context of comparative criminology, with special reference to the "third World".

CHAPTER ONE

CRIME, SOCIAL CONTROL AND SOCIAL ORGANISATION

THEORETICAL BACKGROUND

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INTRODUCTION

This thesis, taking Kenya as a specific example is an attempt to look at crime and social control in its historical specificity. The thesis takes social control as the point of departure in its explanation of crime. Underlying the analysis offered here is the contention that any meaningful explanation of crime must start with an appreciation of the relationship between crime and social control, especially the role law in general and criminal law in particular plays in the creation and development of specific social structures and its consequences for the general social fabric. Implied in our approach is a radical departure from the traditional emphasis on crime, in particular the etiological approach to the explanation of crime as though it were empirically isolated from the general nature of social control especially law.

In our attempt to look at crime in its historical specificity, we shall place greater emphasis or rather attention on the system of social control within a specific social structure. In this context, we shall examine the uses of law in capitalistic society, especially the particularistic uses of law in given capitalistic social structures. Taking Kenya as a specific example, we shall look at crime and social control in a traditional (stateless) social structure, an agrarian capitalist social structure and in a neo-colonial capitalist social structure in our attempt to demonstrate that crime is a specific social phenomenon rather than a general social phenomenon. In this sense we shall seek to demonstrate that it is not every system of social control that produces crime, but specific systems, especially those where law in general and criminal

law in particular plays an important role in the maintenance of a given social order. However, we start with a discussion on what is meant by crime and social control.

THE NATURE OF CRIME AND SOCIAL CONTROL

Guenther (1970) argues that crime is generally accepted as an act or omission prohibited by law and punishable by the State. Kennedy (1976) contends that crime is a violation, by act or omission of any criminal law, a specific conduct leading to a harm and an act construed as a harm¹ against the State. Implied here is that an act is criminal only if it has been proscribed and detailed as such by a law which is created and recognised by the State as a bonafide part of its legal order, a law that describes the proscribed act as a harm against the State and prescribes a "punishment" for it. In other words an act is criminal if it is a violation of a specific law which has what Kennedy refers to as politicality and penal sanction as its chief characteristics. This implies that the elements of politicality and penal sanction are as crucial to the legal definition of behaviour as there are commonly propounded dimensions of criminal versus not criminal². Moreover, since politicality and penal sanction imply the State, it follows that crime as defined by criminal law cannot be empirically isolated from criminal law as a social phenomenon since they are both created through a range of elaborate social processes within the political and legal institutions of the "rational-State".

¹Kennedy's notion of harm is different from ordinary harm and refers specifically to legitimated harm.

²See generally M. Kennedy; "Beyond Incrimination" some neglected facets in the theory of punishment. In W.J. Chambliss and M. Mankoff: *Whose Law, What Order*, Wiley, New York, 1976.

This leads to our contention that crime is a unique and specific social behaviour and not simply a deviation from social norms and values that are not criminal law. An implication of this position is the proposition that crime is absent in societies without the State since the basic characteristics of criminal law - politicality and penal sanction - are absent. This entails the argument that "crime" as opposed to deviance cannot be found in any situation where social norms rather than criminal law exist as guides for social action e.g. in tribal society³. This is significant to the study of crime because it touches upon the most basic nature of crime; that it is not a universal social phenomenon but rather it is a unique form of intended "harm" which is limited to specific countries and to a definite period in history⁴.

The history of crime thus inextricably rests upon the nature of social control, especially criminal law which as Smith and Fried (1974) point out in turn is not only the history of those practices which are intended to separate the criminal from the "normal" but is itself subject to contingency and political processes. This involves a recognition of the creation of criminal law as a process of political conflict and compromise. Further, this implies that the penal system is also an instant of the socio-legal processes of the State. Consequently the legal definition of what is criminal cannot be separated from the political workings of the State. Hence the reactions to crime and the criminal, as they are

³See later discussion in Chapter 2

⁴M. Kennedy; "Beyond Incrimination". op.cit.

represented in the system of social control - law in particular - depends on the way law is used in specific social structures.

This leaves law, especially an explanation of the origin and enforcement of criminal law as the most viable basis for the structural explanation of crime.

We cannot therefore accept Durkheim's contention that crime is present in all societies at all times. An acceptance of his position would imply, on our part, an acceptance that social control, law in particular, is found in all societies and that it is a response or rather a consequence of crime. Our contention is that we can only meaningfully explain crime by putting emphasis on the historical specificity of social control. From this position we can examine the historically and culturally contingent manner in which crime is dependent on law and how law is used within specific socio-political and economic systems.

Traditional criminology using the assumption that crime and social control can be empirically isolated has mainly focused the bulk of its attention on the etiology of crime in its attempts to provide an analysis of criminal behaviour. The system of social control and law in particular together with the way it is used has, when not ignored, been given a secondary position and its significance to the explanation of the behaviour we refer to as crime has been seriously underestimated. Social control, especially law has been treated as though it existed in a distant and irrelevant world and its inter-relatedness with crime, particularly as an agent for defining and also we could argue for legitimising criminal behaviour has received little if any attention. In the following discussion,

we shall try to redress this imbalance by looking at the central tenants of traditional criminology with special reference to why it has failed to provide a comprehensive and structural analysis of crime. In relation to this, we shall not indulge in any detailed analysis of particular traditional theories about crime but shall restrict ourselves to what is central to most of them - the radical differentiation of crime and the criminal from the system of social control, law in particular.

TRADITIONAL CRIMINOLOGY

Throughout the history of traditional criminology, since the classical views of Becarria, cutting right across the whole traditional criminological board, starting with the early positivist views of Enrico Ferri and Garofalo, the social positivism of Quetelet, Guerry and Bonger, the biological positivism of Lombroso up to the biological positivism of Eysenck and Trasler including the early sociology of crime e.g. that of Robert Merton, Cloward and Ohlin, Albert Cohen, Sutherland and Cressery, the central concern has been the location of the causes of crime⁵. Underlying this approach has been a rather simplistic view of society as a behavioural scale with normal behaviour as it is represented by what is legal on the one hand and crime as the abnormal (pathological) on the other. Included in this has been the general assumption that something can

⁵See for example H. Mannheim; Comparative Criminology Vols. I and II. Routledge and Kegan Paul, London, 1965, N. Walker; "A Century of Causal Theory" in H. Klare and D. Haxby (eds.) Frontiers in Criminology, Pergamon Press, London, 1967.

be done about crime, that is, it can be treated or prevented⁶. Armed with this belief, traditional criminology has over a long time sought to explain crime in terms of either individual characteristics or determinate social factors (involving multiple factors)⁷, hence its pre-occupation with the etiology of crime based on the primacy of the criminal actor as the major point of departure rather than the criminal law⁸.

To seek to explain crime in this way implies an acceptance of criminal law as the "normal" which leads to the treatment of crime and criminal law as independent variables empirically isolated from each other. Thus treating as irrelevant to the explanation of crime the social processes by which law (criminal law) is made or changed and the values on which it rests and their distribution in society including the process by which law is maintained and enforced⁹. Implied here is that traditional criminology rests on an

⁶H. Mannheim; *Comparative Criminology*, op.cit. especially p.20
See also N. Walker; "A Century of Causal Theory", op.cit. p.17

⁷See for example the positions adopted by the multiple-factor theorists in G. Vold; *Theoretical Criminology*, Oxford University Press, New York 1958, D. Gibson; *Society, Crime and Criminal Careers - An Introduction to Criminology*, Prentice Hall, Eaglewood Cliffs, N.J. 1968, E.H. Sutherland and D.R. Cressey; *Criminology*, Lippincott, New York, 1970 and A.L. Guenther; *Criminal Behaviour and Social Systems*, Rand McNatty and Co., Chicago, 1970.

⁸See generally B. Matza; *Delinquency and Drift*, Wiley, New York, 1964.

⁹M. Phillipson; *Sociological Aspects of Crime and Delinquency*. Routledge and Kegan Paul, London, 1971, pp. 6-7.

implicit acceptance of the social "status quo" which means that despite the emphasis traditional criminology places on the effects of social factors e.g. economic status, ethnic affiliation and the family, its emphasis is still on the criminal. The sense in which crime is a peculiar reaction to legal institutions gets little if any attention at all¹⁰. Crime is treated as though it were the decisive factor implying that the social reactions against crime, however much they seem to vary historically and culturally remain at the level of an uninvestigated mysterious automatic response¹¹. Thus the structure of power, wealth and morality which patterns the reaction against crime and sustains the authority of existing social arrangements is given a tacit stamp of approval¹².

To the extent that traditional criminology accepts the existing official definitions and practices as its defining criteria, "it becomes little more than a covert tool of social policy and a conservative force in society"¹³. Implied here, as Phillipson (1971) points out is an acceptance of criminal law as a given, which leads to its ideological endorsement. In the realm of the social structure and its associated cultural elements, the position adopted by traditional criminology narrows its field and the only factor left to explain argues Taylor, Walton and Young (1973) is the behaviour that deviates from the legal. The major pursuit of traditional criminology then becomes the radical differentiation of the crime and criminal from the normal and conventional (as it

¹⁰D. Matza; *Delinquency and Drift*. op.cit. p. 64.

¹¹I. Taylor, P. Walton and J. Young; *The New Criminology*, Routledge and Kegan Paul, London, 1973.

¹²Ibid especially p.29

¹³M. Phillipson; *Sociological Aspects of Crime and Delinquency*, op.cit. p. 12.

is represented in law)¹⁴. In this context, law (criminal law in particular) and its administration are deemed secondary or irrelevant. In those cases where it is recognised, talking about crime e.g. in the nation State is seen as rule violation only in the limited sense that it involves violating the rules of relatively large minorities or majorities who are powerful, well organised and highly fearful of individuals or loosely organised small groups who lack power¹⁵.

The role of sovereign power and by extension "instituted authority" is hardly considered in traditional criminology implying that the process of becoming an ordinary criminal is unrelated to the political process of the State. Thus traditional criminology succeeds in doing the impossible; "the separation of the study of crime from the workings and the theory of the State"¹⁶. Hence traditional criminology lacks any systematic theoretical attempt to link the phenomenon of crime and the process of becoming criminal to the central features of the State, especially the way law in general and criminal law in particular is used to maintain and consolidate specific social structures. In other words the system of social control in particular the criminal law as a force in defining and perpetuating crime is not conceived as part of the reality of the crime problem¹⁷. As long as traditional criminology continues to ignore the significance of social control, any shift within it, for instance from the biological position of Lombroso to its modern

¹⁴D. Matza; *Delinquency and Drift*. op.cit. pp.11-12

¹⁵J. Lofland; *Deviance and Identity*, Prentice Hall, Eaglewood Clifts, M.J. 1969.

¹⁶D. Matza; *Becoming Deviant*, Prentice Hall, New York 1969, pp.143-144

¹⁷R. Quinney; *The Social Reality of Crime*, Little Brown and Company Boston Mass. 1970, p.310.

bio-psychological explanations e.g. Eysenck, is not significant since it is not a shift of emphasis from the criminal actor to the system of social control¹⁸.

In the following discussion, we shall examine alternative approaches to the explanation of crime, identify where these have made a contribution to our approach with special reference to why we still find them insufficient explanations of crime structurally.

DURKHEIM ON CRIME AND SOCIAL CONTROL

Durkheim (1964a) argues that crime is not only a "normal social fact" but that it is

"present not only in the majority of societies of one particular species but in all societies of all types

Its form changes, acts thus characterised are not the same everywhere, but anywhere and always, there has been men who have behaved in such a way as to draw upon themselves penal repression"¹⁹.

This implies that Durkheim saw crime as an inevitable feature of group life and that it cannot be completely eradicated. For crime to disappear, he argues that it would depend on the unanimity of feeling among all societal members, but even then, he claims crime would not disappear but simply change its form²⁰.

¹⁸A. Cohen; *Delinquent Boys*. Free Press, Chicago, 1955, pp. 28, 35, 67 and 129-131.

¹⁹E. Durkheim; *The Rules of Sociological Method*. Free Press, New York, 1964(a), pp.65-66.

²⁰*Ibid.* p.67

Taken within the context of the historical period in which Durkheim made his utterances, his ideas are significant and mark a major shift from traditional criminology's standpoint to locating crime within the social structure. Taken as a whole and in general terms, Durkheim recognised that there is no such thing as "natural crime" and that there are no crimes that are always crimes in themselves irrespective of cultural definitions. To Durkheim, crime was not due to the motivational factors of individuals, but a factor in "public health" implying that it is an integral part of society²¹. As far as he was concerned, crime marked the boundaries of society meaning that it was bound up with the "collective conscience" or rather the social structure itself²². Hence his contention that crime is functionally dependent on the general social order. In this sense, Durkheim was informed by his awareness that crime was linked to social control²³. In this sense, he saw crime as an aspect of human phenomenon that is defined as illegitimate within the existing "collective conscience". In short, he sees crime within the totality of society i.e. as a product of the relationship between man as an individual and a society structured into different divisions of labour²⁴. Consequently crime can better be understood within the context of the tensions that arise under the forced

²¹ Ibid

²² See generally E. Durkheim; *The Division of Labour in Society*. Free Press, New York, 1964 (b). Vol. 2.

²³ E. Durkheim; *The Division of Labour in Society*. op.cit. See also E. Durkheim; *Two Laws of Penal Evolution*. *Economy and Society*, 1973, pp.285-307.

²⁴ See generally E. Durkheim; *The Division of Labour in Society*. op.cit.

division of labour, for instance, when social arrangements are out of accord with man's nature and needs²⁵. Thus Durkheim, unlike traditional criminologists, links the analysis of crime with the political sociology of production and the State²⁶. In fact Durkheim does not only bring in the issue of politics and social control in his analysis of crime, he goes much further and talks about a specific system of control, law in general and penal law in particular²⁷.

In the Division of Labour, Durkheim (1964b) sees law as the visible symbol of social solidarity. Here, he argues that law symbolises social organisation and that we can find reflected in law the essential varieties of social life²⁸. However, Durkheim attempts to demonstrate that law is not universal by arguing that law reproduces the principle forms of social solidarity as opposed to custom which represents social relations which convey diffuse regulation²⁹.

Durkheim's most significant contribution to our approach however is to be found in his definition of crime and the way he links this to law, in particular repressive law which he maintains forms the bulk of Penal Law³⁰. Based on his contention that law is the

²⁵Ibid. pp. 374-375.

²⁶See generally E. Durkheim; The Division of Labour in Society.

²⁷Ibid. See also E. Durkheim; Two Laws of Penal Evolution. op.cit.

²⁸E. Durkheim; The Division of Labour in Society. op.cit. pp.65.

²⁹Ibid. p. 68.

³⁰Ibid. pp. 68-69.

visible symbol of social solidarity, Durkheim argues that an act is criminal when it offends strong and defined states of the "collective conscience"

"In other words, we must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it"³¹.

Implied here is that an act is not criminal unless it is an infringement of a rule or breach of sanctioned conduct as it is represented in law.

Although Durkheim does not go into a detailed discussion of law and the State, he does demonstrate his awareness of their relationship, especially as it affects crime, when he links the State with the creation of criminality in his argument that "constituted authority" has sufficient force to attach penal sanction spontaneously to certain rules of conduct. He further claims that it (constituted authority) is capable of "creating certain delicts or of increasing the criminological value of certain others". In this sense, Durkheim makes a significant link between crime and penal sanction (implying constituted authority) which in itself implies that crime is impossible without penal sanction ("punishment")³².

Thus Durkheim rejects determinism as it is used in traditional criminology and argues that the nature of collective sentiments

³¹Ibid. pp. 80-81

³²Ibid. pp. 83, 85

(organised or diffuse) accounts for "punishment" and consequently for crime since for Durkheim crime was impossible without "punishment". Durkheim was then able to state that the analysis of "punishment" would provide a more meaningful explanation of crime. In his *Two Laws of Penal Evolution*, he goes on to link the evolution of punishment with criminal behaviour and maintains that a structural understanding of crime would be impossible without an understanding of the nature and evolution of punishment in particular penal sanctions³³. Durkheim breaks further away from traditional criminology in his analysis of punishment and the absolute power structure in the context of social change³⁴. Informed by his awareness that absolute power is more of an aberration of the division of labour rather than an independent social factor, Durkheim directly links punishment with social organisation. In the context of social solidarity as Durkheim sees it, absolute power is not a representation of "public health". To Durkheim, it represents a pathological division of labour hence the reason why he directly links it with severe and primitive punishment. This view is underlined by his supposition that "the intensity of punishment is greater the more societies approximate to a less developed type and the more the central power assumes an absolute character"³⁵.

In the context of absolute power and social change, for example, the change from "primitive" social organisation to what Durkheim refers to as "developed types", he argues that the nature of

³³E. Durkheim; *Two Laws of Penal Evolution*. op.cit.

³⁴Ibid.

³⁵Ibid. p. 285.

punishment, for instance, its severity, intensity and form cannot be separated from the nature of social organisation, especially the power structure. This he maintains is indispensable to a proper understanding of the various changes in penal sanctions³⁶. To Durkheim the qualitative changes of punishment can better be understood within an understanding of the quantitative changes in social organisation and power. Thus Durkheim, demonstrating a remarkable sense of historicity rarely found in his time, recognised the importance of general social change and specific social changes in the explanation of criminal behaviour and deviance in general.

However, in relation to crime as it is defined in this thesis, some aspects of Durkheim's analysis do raise some questions. For example in the Division of Labour, Durkheim claims rightly that the State or rather "constituted authority" does create crime through its use of law. He then goes on to say that the power of reaction which is proper to the State ought then to be the same sort as that which is diffused throughout society. In relation to social control, he argues that the power of reaction which is given over to government organisations is only an emanation of that which has been diffuse in society since its inception³⁷. As we shall show in later discussion³⁸, within specific social structures and at particular times in history, State reaction does not simply necessarily emanate that which has been diffuse in society since its inception. For example,

³⁶Ibid. pp. 294-306.

³⁷E. Durkheim; *The Division of Labour in Society*. op.cit. pp. 83, 105.

³⁸See Chapters 2, 3 and 4.

colonial agrarian capitalism and social control³⁹ demonstrates that the power of State reaction or "constituted authority" is relatively autonomous and that it is capable of ignoring whole specific societies and taking into account aspects of social action which are foreign to that society. In this sense, "crime" can have very little to do with those acts which directly manifest violent dissemblance between the agent and the collective type and instead have everything to do in Durkheim's terms, with those acts that offend the organ of the common conscience as it is perceived by that organ, i.e. the State through the law.

Durkheim's application of law, in particular repressive law (implying penal sanctions) to society raises some questions. In the Division of Labour, and later in the Two Laws of Penal Evolution, Durkheim claims that in "primitive society" law is wholly repressive. Durkheim here is acting on the assumption that "penal law" is universal i.e. it can be found in all societies. However, as we shall show in later discussion⁴⁰ and as Spitzer (1975) also points out, penal law as it is defined in this thesis is historically specific and therefore cannot be generalised to all societies.

For the moment our aim is to note that Durkheim made a remarkable and significant effort to locate the study of crime within the social structure. He was pre-occupied, not with the aetiology of crime and the individual criminal, but with the system of social control and its consequences for individual human action within particular social arrangements. In this sense, it was impossible

³⁹See Chapter 3.

⁴⁰See Chapter 2.

for him to conceive of crime outside a general analysis of social organisation in specific societies.

We are however aware that others besides Durkheim have attempted to explain crime taking social control as the main point of departure. We shall examine briefly some of them in the following discussion. We shall restrict our attention to their general implications with special reference to the historical specificity of crime and social control.

THE INTERACTIONIST PERSPECTIVE ON CRIME AND SOCIAL CONTROL

The Interactionist perspective, commonly associated with Lemert, Becker, Kitsuse and Schur among others was born out of a general sociological and criminological reaction against traditional criminology. In contrast to the traditional approach, the Interactionists chose social control and its consequences for deviance as the main point of emphasis.

"This was a large turnaway from older sociology which tended to rest heavily upon the idea that deviance leads to social control. I have come to believe that the reverse idea i.e. social control leads to deviance is equally tenable and the potentially richer premise for studying deviance in modern society"⁴¹.

As Schur (1971) points out, the interactionists see deviance, not as a separate entity, but as a continuously shaped and reshaped outcome of the dynamic processes of social interaction. Implied here

⁴¹ See E. Lemert; Human Deviance, Social Problems and Social Control. Prentice Hall, Eaglewood Cliffs, 1967. P.V.

is that deviance is not a single quality present in some kinds of behaviour and/or individuals and absent in others, but rather it is a product of a process which involves a response of others to that behaviour and/or individual⁴². According to the interactionists, for an act to be deviant then several factors must be present, (a) the act must be a violation of a rule and (b) there must be a response from others⁴³. Implied here is a process (active and on-going) involving an audience which eventually determines whether any class of episodes becomes deviant or not⁴⁴. Involved here is an awareness by the interactionists that the crucial variable in the explanation of deviance is the social rules and the labels or social reaction aimed at individuals who contravene such rules - hence the emphasis on social control. Lemert (1967) underlines the importance of social control to the interactionist approach in his contention that social control should be taken as an independent variable worthy of study in itself rather than something derived from the fact of deviance. In this sense, he claims that social control becomes a "cause" rather than an effect of the magnitude and variable forms of deviation⁴⁵.

⁴²See generally H. Becker; *Outsiders - Studies in the Sociology of Deviance*. Free Press, New York, 1963.

⁴³*Ibid.* p. 14.

⁴⁴See generally K.T. Erickson; "Notes on the sociology of Deviance" in H. Becker; *The Other Side*, Free Press, New York, 1964, pp. 9-21.

⁴⁵E. Lemert; *Human Deviance, Social Problems and Social Control*. *Op.cit.* p. 18.

Lemert informed by his awareness that one cannot talk about "abstract" delinquency due to the variability of social control argues for an examination of social control, involving an analysis of social change in general. Thus Lemert, and by implication the interactionist perspective in general calls for an examination of social control, not as an end in itself, but as an integral part of a broader analysis of social change and its implications for deviance. As Lemert puts it,

"The most pretentious claim for our point of view is that it opens the way to subsume deviation in a theory of social change. Even more important it gives a proper place to social control as a dynamic factor or "cause" of deviation"⁴⁶.

Lemert's claim is significant in that it moves the interactionist perspective away from the deterministic approach of traditional criminology while at the same time it demonstrates the inherent tension within the interactionist perspective, in particular the way in which the interactionists go about explaining deviance in the broader context of social control and social change. The way in which Lemert himself and the interactionist perspective in general discuss deviance and social control, in particular their etiological concern of how an individual becomes a deviant makes the most crucial claim of the approach - that it places the study of deviance in a general theory of social change mainly pretentious.

For example Lemert (1967) argues that deviation should be seen as a consequence of the extent and form of social control. In this

⁴⁶Ibid. p. 26.

sense he puts the emphasis on social control and maintains that social control must be taken as an independent variable rather than a constant or merely reciprocal societal reaction to deviation. However, Lemert in his own analysis of passive and active social control in relation to primary and secondary deviation, especially in his insistence that the distinction between primary and secondary deviation is indispensable to a complete understanding of deviance in society⁴⁷ fails to transcend the influences of traditional criminology. As a result, Lemert deals more with what happens to an individual once the deviant label is applied to him rather than the process by which certain types of behaviour come to be created as deviant labels. In this sense, there appears to be an inherent reluctance on the part of Lemert, and by implication the interactionist perspective in general to shed off the influences of traditional criminology, in particular its concern with aetiology. This seriously limits the applicability of the approaches claim to place the study of deviance in a general theory of social change. In relation to crime as it is defined in this thesis, the above shortcoming is even more significant.

For example, Becker (1963) argues that social groups create deviance by creating rules whose infractions constitute deviance and by applying those rules to particular people and labelling them as outsiders⁴⁸. Becker however does not provide us with an explanation of the process by which the rules he refers to are made and

⁴⁷Ibid. pp. 17-18.

⁴⁸H. Becker; Outsiders. op.cit. p. 9.

the effects of that process on deviance. Such an explanation would inevitably involve an analysis of social change. Instead, Becker is preoccupied with the issue of the transactions which take place between some social group i.e. the moral entrepreneurs⁴⁹ - and one that is viewed by that group as a rule breaker without being specific as to where these fit in the larger social order.

Although deviance, as Kitsuse (1962) maintains, may be conceived as the process by which society interprets acts as deviant and defines those who so act as deviant and accords them the treatment that the society (at that particular point in time) considers appropriate, in the context of social change, one has to be more definite and explicit. The way in which deviance is a normal product of stable institutions; an important resource which is guarded and preserved by forces found in all human organisations as Erickson (1964) contends must be clearly spelled out i.e. the historical specificity of the social processes involved must be stated categorically. This holds, whether we are talking about labelling, social reaction or primary and secondary deviation.

As Scot and Douglas (1972) point out, talking about deviance as a "property" or label that is conferred upon individuals does not tell us why that "property" exists at all and neither does it tell us what role that "property" or label plays in the larger social order. An almost exclusive concentration on social reaction to deviation as it affects the persons to whom the reaction is directed without any detailed analysis of the role that reaction plays in the

⁴⁹H. Becker; *Outsiders*. op.cit. pp. 147-163.

definition of behaviour as deviant or not is an insufficient explanation of deviance in the broader context of social control and social change. Without it Lemert and the social interactionists in general remain wrapped up within the traditional concern with aetiology and fail to lay open the structural inequalities in power and interest which underpin the process whereby laws (rules) are created and enforced⁵⁰. As a result, they leave untouched the way in which authority and interests enforce and maintain sets of laws, rules and norms which in themselves are part and parcel of the creation of deviance and/or crime.

Thus the social interactionists fail to expose fully the way social control, especially law is used in the maintenance of specific social structures and its consequences for the general social fabric, deviance and crime included. Therefore, an examination of the problematics of societal reaction is by itself an inadequate explanation of deviance, crime in particular without reference to the way deviance and indeed crime is shaped by society's larger structure of power and institutions, especially the way these affect the shape of law and social reactions to it⁵¹. Hence the interactionists do not answer the question as to why some laws are adopted or rejected in a given situation and to what extent its development is determined by the basic social relations i.e. the productive relations. They also do not adequately explore the causal relationships between social control, law in particular and the organisation

⁵⁰ I. Taylor, P. Walton and J. Young; *The New Criminology*. op.cit. pp. 168-169.

⁵¹ Ibid.

of society and its consequences for crime and/or deviance.

To meaningfully answer the above questions, it is important to recognise that any meaningful analysis of crime and/or deviance cannot be separated from the social processes within which laws or rules are formed which require or prohibit people to behave in certain ways. A meaningful and comprehensive analysis of deviance, must of necessity shed off the influences of traditional criminology and take into account the historical, political and socio-economic environment in which social control finds its expression and legitimacy. Without this, it is impossible to explain crime and social control in the wider context of social change in specific social structures. A meaningful and structural analysis of deviance, requires a conscious and deliberate move towards what we may here refer to as the political economy of crime.

Radical criminology, claiming to use historical materialism as its theoretical foundation has made some references to the necessity of such an approach. However, rather than it being a significant criticism of existing criminological approaches, radical criminology does not provide us with any substantially different explanation of its own. In the final analysis, radical criminology explains crime in a manner that reveals a tacit interest in the classic criminological question of why people commit crimes, thereby restricting itself to being a shift of interest within existing criminology rather than a total break from it.

For example, the New Criminology⁵², purporting to draw its

⁵²See generally I. Taylor, P. Walton and J. Young. The New Criminology. op.cit.

argument mainly from the marxist materialistic interpretation of law has argued that the processes involved in crime creation are bound up with the material basis of contemporary society (capitalist society in particular) and its structures of law. In this context, the New Criminology maintains that it is possible via social transformation to create social and productive arrangements that would abolish crime⁵³. However, the New Criminology does not provide us with any analytical explanation of contemporary structures nor does it tell us how these affect crime and how they can be transformed with the view to abolishing crime. Instead the New Criminology leaves us with a formal model which is so general as to fit any situation without necessarily being specific⁵⁴. The New Criminology's model speaks more of a perspective in search of why certain people commit crimes, i.e. its declaration that

"an adequate social theory of deviance would need to be able to explain the relationship between beliefs and action, between the optimum "rationality" that men have and the behaviours that they actually carry through"⁵⁵.

rather than a perspective that is

"concerned with the social arrangements that have obstructed and the social contradictions that enhance man's chances of achieving full sociality - a state of freedom from material necessity, and (therefore) of material incentive, a release from the constraints of forced production, an abolition of

⁵³Ibid. p. 282.

⁵⁴Ibid. Chapter 9. pp. 268-282

⁵⁵Ibid. p. 271.

the forced division of labour and a set of social arrangements, therefore, in which there would be no politically, economically and socially-induced need to criminalise deviance"⁵⁶.

Thus radical criminology i.e. Quinney, Hindess, Althusser and others like Taylor, Walton and Young, fails to provide us with a radical brand of criminology that locates the study of crime and/or deviance in the wider social structure, in particular the prevailing social arrangements within the context of their historical specificity. Radical criminology needs to shift its emphasis from simply advocating for such an approach to the provision of one. In this sense, radical criminology needs to transcend its theoretical debate and shift from being merely an assertion of radical diversity to what Taylor, Walton and Young (1975) refer to as the study of the specificity of legal relations (and hence of crime) in the wider context of social organisation and social change. This would inevitably involve an analysis of what radical criminologists such as Taylor, Walton and Young consider as crucial to a criminology founded on marxist materialist radicalism; namely the establishment of the "role of law in affecting production and via production, the whole life-style and culture of a given society"⁵⁷.

NON-CRIMINOLOGICAL PERSPECTIVES ON CRIME AND SOCIAL CONTROL

In the following discussion, we shall review a small body of work which deals mainly with social control, social organisation

⁵⁶Ibid. p. 270.

⁵⁷I. Taylor, P. Walton and J. Young; Critical Criminology. Routledge and Kegan Paul, London, 1975, p. 52.

and punishment as the centre of their analyses. This body of work has not come out of any particular reaction against traditional criminology, but is a direct result of a genuine interest in the changing patterns of the systems of social control, punishment in particular.

We would like to note at this point that the body of work we shall review here has quite considerably influenced our work. The way this body of work deals with social control in the wider context of social organisation and social change has been of great significance to us. It is mainly this aspect of the work that we shall seek to draw out.

First we shall examine the work of Rusche and Kercheimer (1939) who drawing mainly from a marxist analysis of western economic arrangements adopt an economist interpretation of social control, in particular the system of punishment in western society. Rusche and Kercheimer's analysis, as we show later, is rather reductionist in the sense that it is preoccupied with economic power and does not consider in any depth the power of political and social forms of institutional arrangements and their consequences for crime and social control.

Secondly we shall look at two slightly different versions of an analysis that adopts the autonomy of political power systems as the main emphasis in their respective explanations of social control and crime. Smith and Fried (1974) deal mainly with ideological aspects of political power while Makela (1974) attempts to offer a similar, but slightly different view of the State as a relatively autonomous institution in spite of its ideological links with certain

social classes. Finally we shall examine the work of Kennedy (1976) which adopts a marxist view of the State's emergence, but endeavours to combine it with Weber's analysis of political power in his analysis of social control and crime.

1. Economism and Control

Rusche and Kercheimer (1939), in their attempt to locate the analysis of punishment within the social structure start with the premise that

"punishment is neither a simple consequence of crime, nor the reverse side of crime, nor a mere means which is determined by the end to be achieved"⁵⁸.

In their awareness of the implications of the above assertion, Rusche and Kercheimer touch on two aspects of social organisation, the political and the economic (as it is implied in class distinctions) that are crucial to any structurally based analysis of punishment. However, Rusche and Kercheimer, influenced more by the marxist economic analysis of law, adopt an analysis of social control which emphasises the changes in economic arrangements and their consequences for punishment and ignore (deliberately or otherwise) the political and social arrangements as distinct institutions (rather than mere responses to economic arrangements) capable of affecting the system of punishment.

According to Rusche and Kercheimer, every system of production tends to create punishments which correspond to their relationships.

⁵⁸G. Rusche and O. Kercheimer; Punishment and Social Structure. Columbia University Press, New York, 1939, p. 5.

In this sense, as they say, "punishment as such does not exist; only concrete systems of punishment and specific criminal practices exist"⁵⁹, which in themselves are meaningless unless examined in their specific and historical manifestations. Thus they bring in the historical e.g. the development of the capitalist market system, as a crucial factor in the explanation of punishment. In this sense they maintain that the investigation of the origin and fate of penal practices as they are determined by existing social forces, in particular the economic ones is of crucial importance to the explanation of punishment and by implication of crime. Hence their emphasis on the relationship between different penal systems and their variations and phases in economic development. This position is defended by a historical, but basically economist review of social events in the European middle ages.

For example, to Rusche and Kercheimer (1939) the development from private criminal law to public law⁶⁰ did not occur as a result of crime, but was rather influenced by changes in economic circumstances. The chief economic characteristic of this period was the transition from traditional agrarian production to capitalist forms of production. The accumulation of wealth (associated with power) became the main social feature which inevitably brought about changes in criminal law⁶¹. Private criminal law became undesirable since the social relations which it mirrored were no longer desirable so criminal law changed in line with the values associated with the new economic arrangements.

⁵⁹Ibid. p. 5.

⁶⁰Ibid. p. 8.

⁶¹Ibid. pp. 13-14.

Throughout their analysis of punishment in specific historical periods in Europe, Rusche and Kercheimer demonstrate a direct relationship between changes in criminal law and punishment and the socio-economic arrangements of those periods in particular the Labour Market. The historical changes, from the feudal middle ages, through the capitalist development of the latter middle ages right up to the capitalist industrial period are accompanied by significant changes in the system of social control, criminal law in particular, with a strong bias in the law in favour of changes in the mode of production⁶².

For example Rusche and Kercheimer trace the rise of imprisonment as a system of punishment to the capitalist institutions of the mercantile period⁶³. They argue that it was not until this period when the economic links between the State as a constituted central administration and certain economic classes, in particular the Merchants, began to be reflected in law, in particular criminal law. The prevailing economic conditions i.e. shortage of labour, high labour costs and the demand on the central administration (by the dominant economic classes) to intervene in the market and regulate wages and provide working capital for the propertied class, resulted in changes in the law, especially the criminal law, characterised by restrictions on individual liberty. This revealed the potential value (economic of course) of a mass of human material at the disposal of the administration - hence the emergence of imprisonment⁶⁴,

⁶²Ibid. pp. 15, 20, 26-52.

⁶³Ibid. p. 24.

⁶⁴Ibid.

which marked the beginnings of criminal law as public law and its implied notion of the State as a separated legal authority.

However, although Rusche and Kercheimer show in subsequent historical periods how further changes in the capitalist economic relations lead to changes in the fiscal forces of the State, especially in the way law was used⁶⁵, they remain preoccupied with material changes and fail to consider the consequences of changes in the emergent political and social institutions, especially the State as an institution, on social control, punishment in particular. Although the emergence of the State is directly associated with the development of the capitalist economic institutions, as a legally constituted separated authority, its impact on social control cannot be adequately dealt with by implication as Rusche and Kercheimer tends to do. Since criminal law (as public law) implies the State, the role of the State, in particular its power as a political entity needs to be made specific. Without this, Rusche and Kercheimer's analysis becomes somewhat reductionist and their conclusion that the penal system of any given society as it is represented in law is not an isolated phenomenon subject only to its own laws, but rather it is an integral part of the whole social system and shares its aspirations and defects is somewhat weakened.

2. The State, Politics and Punishment

Smith and Fried (1974) in their analysis of the uses of the American Prison adopt an analysis of punishment which singles out the autonomy of political power systems for emphasis. According to Smith and Fried, the notion of crime makes reference to certain

⁶⁵Ibid. pp. 206-207.

behaviour; the proscribed and prescribed, and at the same time makes reference to claims of State authority. This implies that the absence of the State as it is implied in criminal law would render that behaviour non-criminal⁶⁶. To Smith and Fried, it is not the "wrongness" of any behaviour that makes it criminal, but the notions of what kind of "wrongness" the State should and can act upon. Hence, the State as an ideological power system is crucial to their analysis of punishment since, according to Smith and Fried, what constitutes crime cannot be separated from the State's notion of criminality⁶⁷.

Citing the historical development of criminal law and penal sanctions⁶⁸ and their relationships with the formally "rational-state"⁶⁹ Smith and Fried argue that crime as an offence against the State involves a definite conception of the State and its legitimate role. However, in the way they go about interpreting the uses of the American Prison⁷⁰, in the above context, Smith and Fried fail to demonstrate any systematic notion of historicity and instead reduce politics to people thereby failing to grasp the nature of the political as an institution. As a result, their claim that crime should be understood as an inseparable aspect of a legal system that is consistent with the productive organisation of the whole community⁷¹ finds itself without any strong analytical base in their own work.

⁶⁶ J. Smith and W. Fried; *The Uses of the American Prison - Political theory and Penal practice*. Lexington Massachusetts, 1974, p. iv.

⁶⁷ *Ibid.* p. 2.

⁶⁸ *Ibid.* Chapter I pp. 1-25.

⁶⁹ See generally M. Kennedy; "Beyond Incrimination". *op.cit.*

⁷⁰ See generally J. Smith and W. Fried; *The Uses of the American Prison*. *op.cit.*

⁷¹ *Ibid.* p. 17.

Makela (1974), in an apparent reaction against the limitations of marxist materialistic interpretations of law and the State, argues that recognising criminality as a historical phenomenon is not in itself sufficient unless it is accompanied by an examination of the interplay between control machinery and criminality, the varying forms of criminality in history, the class structure of control policies and the tasks of penal law in the maintenance of the prevailing mode of production⁷². Although Makela does recognise the immediate tasks of criminal policy in relation to crime, he argues that in the final analysis it is its task of promoting solidarity that possesses a more central significance. This he claims cannot be adequately analysed if it is left unrelated to the class structure of capitalist society⁷³.

In his analysis, Makela (1974) informed by his awareness of the State as an institution argues against the overpoliticisation of the State. In this effort, although he does recognise and indeed point out that the State does not stand above societal conflicts and that the capitalist State is to quite a large extent a representation of the political interests of the dominant economic classes, Makela argues that the modern capitalist State is not a ready to hand instrument for the short term political and economic interests of the dominant classes. He sees the foremost task of the State as the guaranteeing of the continued existence of the mode of production itself and the sorting out of disputes that arise out

⁷²K. Makela; "The Societal Tasks of the System of Penal Law". Scandinavian Studies in Criminology, Vol. 5. 1974, p. 48

⁷³Ibid. p. 57.

of the antagonistic class interests and conflicts of capitalist society⁷⁴. Thus Makela recognises the ideological as well as the institutional character of the State which he treats as essential to any interpretation of the societal tasks of penal law.

To Makela, the development of capitalism has changed the tasks of the State and in view of this, he maintains that the immediate repressive tasks of the State as a compulsive apparatus at the service of the ruling classes has passed into obscurity and that the State's task of regulating economic life and as an ideological apparatus for legitimising the existing mode of production has become the most dominant⁷⁵. This means, according to Makela, that during relatively calm periods in the capitalist society, the function of traditional penal law is primarily of socio-technical nature⁷⁶. Makela is however careful to note that the socio-technical nature of penal law is to a certain extent influenced by the class structure of capitalist society. In this respect, he points out that the application of penal law can discriminate against subordinate classes, that legislation can adjust class relevant interests in a discriminatory way and that it may be written with the intention of regulating the types of conflicts within the ruling classes

⁷⁴See the case of the Neo-colonial Capitalist State Chapter 4. The effort of the State to control foreign capital through legislation demonstrates that the capitalist State is not always a ready to hand tool of dominant classes but rather its interest lies in regulating the mode of production itself.

⁷⁵K. Makela; "The Societal Tasks of the System of Penal Law". op.cit. p. 56.

⁷⁶Ibid. p.64.

without taking into account the types of situations that normally arise within subordinate classes⁷⁷.

The strength of Makela's analysis however is in his elevation of the State from the purely ideological to the institutional. In this context, he is able to argue that penal law and the principle of guilt associated with it has, as its special task, the official distribution of moral responsibility and guilt in Society - hence his reference to penal law as an instrument for the optimal allocation of Society's resources. For the purposes of moral condemnation, a means for distributing guilt and responsibility for what occurs⁷⁸.

3. Politico-Economism and Control

Kennedy (1976) basing his argument on the marxist view of the State's emergence combined with a synthesis of Weber's views on political power and ideology adopts an ideological and economist view of crime and social control, in particular the historical specificity of criminal law. Kennedy's central theme is that crime's general characteristics are derived from the emergence and continuation of the State as a separate legal authority, whereas its special characteristics (with reference to what specific acts are proscribed and prescribed) derive directly from the kind of institutions i.e. socialist or capitalist, which the State supports.

⁷⁷Ibid. p. 59. See also later discussion - Chapters 3 and 4.

⁷⁸K. Makela; "The Societal Tasks of the System of Penal Law". op.cit. pp. 60-64.

To support his position, Kennedy singles out for special emphasis, his concept of criminal law as a norm recognised by its peculiar characteristics of uniformity, specificity, politicality and penal sanction by maintaining that these characteristics form the basic criteria for the legal classification of an act as criminal versus not criminal⁷⁹. With this at the centre of his analysis, Kennedy attempts to locate the study of crime and social control in the wider context of the social structure including social change through a review of the historical emergence and development of capitalist law, criminal law in particular and its implied notion of the State.

Kennedy's analysis of social control has two basic strengths; (a) it recognises the importance of the State as a legally constituted authority implying abstract institutional power and its consequences for social control⁸⁰; (b) it recognises the influence of changes in economic arrangements i.e. the institutionalisation of private property, entrepreneurship and the market on the State as an ideological apparatus of capitalist institutions and its consequences for social control, law in particular and by extension its consequences for crime⁸¹. Kennedy combines the two in his analysis of social control and thereby endeavours through a synthesis of Weber's views on ideology, authority and economic arrangements to marry economism and ideology in a structural analysis of crime and social control⁸². Within this context, Kennedy is then able to

⁷⁹M. Kennedy; "Beyond Incrimination". op.cit. p.37.

⁸⁰Ibid. especially pp. 40, 43.

⁸¹Ibid. pp. 42-46.

⁸²See generally M. Kennedy; "Beyond Incrimination". op.cit.

describe crime as a historically specific and political phenomenon since what is defined as criminal is a result of a political and historical process within which laws (rules) are formed which require people to behave in certain ways. He thus tries to locate the study of crime within the social structure, especially within the political, social and economic environment in which the doctrines of crime and punishment are expounded and within which penal practices evolve.

CONCLUSION

In this thesis, we have taken as our primary task, an attempt to look at crime and social control in its historical specificity with special reference to Kenya. In this chapter, we have attempted as our central issue, an analysis of the historical specificity of social control and its relationship with crime in the wider context of social organisation. Through a synthesis of the criminological perspectives adopted by traditional criminology, Durkheim, the interactionist perspective and the non-criminological perspectives of Rusche and Kercheimer, Smith and Fried, Makela and Kennedy, we have attempted to demonstrate the historicity and specificity of social control and its consequences for crime. In this sense, we have attempted to examine the relationship between crime and social control within the social structure. Our aim here was to draw out the significance of social control in any meaningful and structurally based analysis of crime.

Looking first at the criminological perspectives we have in our discussion tried to identify their respective limitations. However, taken as a whole and we may also argue individually, their

most significant limitation is that they do not expound an adequate analysis of control and its consequences for crime in the wider context of social organisation and social change. In this sense, they are limited in their analysis of the link between crime and social control and its historical specificity. Consequently, they have failed to grasp the significance of the evolution and development of particular social institutions, for instance, the State, to social control and hence to crime. This limitation in turn limits the applicability of these perspectives, especially in cross-cultural situations.

Turning now to the non-criminological perspectives of Rusche and Kercheimer, Smith and Fried, Makela, and Kennedy, their significance and therefore their basic contribution to our work is found first in their focus on control and secondly in their notion of historical specificity. It is these aspects of their work that have influenced quite considerably the way we go about explaining crime and social control in Kenya.

In their analysis of crime, these perspectives start on the premise that crime is dependent on social control which in turn is dependent on contingency political and economic processes. In their analysis of social control and its consequences for crime, these perspectives, bring in the notion of historical specificity - hence their argument that crime is a historically specific phenomenon.

However, with reference to Kenya, these perspectives do have their own limitations the most basic being their lack of comparative analysis. These perspectives deal mainly with social control

in Western capitalist society and bear little if any reference to non-Western, Stateless societies or non-Western "developing" capitalist States. This in itself is not significant, but what makes it significant is the underlying assumption about the evolvement and development of the capitalist State and its system of social control. They all tend to imply that capitalist structures evolve and develop in the same way as they did in Western society and that control would necessarily take similar forms. This entails the assumption that capitalist States replicate themselves, hence the tendency to generalise Western capitalist control systems to all capitalist structures. As we shall show in the Kenyan case, this is not simply the case. For example, Kenya did not become a capitalist State structure through the evolution of the indigenous traditional society like feudalistic Stateless societies in Europe did. On the contrary, capitalism was imposed through the use of force - colonial conquest. Under such circumstances the form and nature of control could not possibly have replicated that which transpired in feudal Europe. Hence to imply that social control in capitalist States takes the same form is simplistic and entails an understatement of capitalist development in the colonial and neo-colonial world.

In our analysis of crime and social control in Kenya, we shall attempt to transcend this limitation through an application of the notion of the historical specificity of social control in the wider context of social organisation and social change. We shall in this respect, adopt some of the notions found in the reviewed work, especially Kennedy's notion of criminal law with its peculiar characteristics of specificity, politicality and penal sanction

and Makela's notion of the State as a social institution in spite of its ideological leanings as our organising theme. In this sense, we shall attempt to demonstrate a perspective that recognises the institutional as well as the historical significance of economism and ideology to a structurally based analysis of crime.

CHAPTER TWO

TRADITIONAL SOCIETY, CRIME AND SOCIAL CONTROL

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INTRODUCTION

In our previous discussion (Chapter One), we argued that an act is criminal only if it is a violation by act or omission of any criminal law. That it is a "harm" construed as a "harm" against the State which is punishable by the State. This being the case, we concur with Kennedy (1976) that the law involved here is unique in that it must in the first place be specific. Secondly, it must be a law, created and recognised by the State as a bonafide part of its legal order and must define the conduct proscribed as a "harm" against the State (implying politicality). Finally, it must prescribe a punishment for the act (penal sanction). Thus for an act to be criminal, it must violate a law that has as its chief characteristics: specificity, politicality and penal sanction.

With the above type of law, it follows that we have a specific and unique form of "punishment". Like the behaviour proscribed, Hart (1970) argues that the punishment (or sanction) is unique in that it must be for an offence against legal rules, imposed on an actual or supposed offender for his offence and administered by an authority constituted by a legal system. Punishment of this nature, as Makela (1974) points out is a ramification of the State. From this then we can infer that any society, which has no such unique law and punishment has no crime. This being the case, we cannot accept Durkheim's contention that:

"crime is present, not only in the majority of societies of one particular species, but in all societies of all types. There is no society that is not confronted with the problem of criminalitya society

exempt from it is utterly impossible"¹.

In our view, as long as Durkheim's contention is restricted to breaches of regularised norms and values of social behaviour (legal or otherwise) in all societies, we have no disagreement with him. However, immediately his proposition is applied to criminal behaviour as it is defined in this thesis, then our disagreement with him begins. What we mean here is that breaches of norms and values of social behaviour (deviance) are found in all societies of all types. However, in the strict sense, "crime" as we know it today is meaningless without the concept of criminal law as we find it in the "rational" state. This makes crime a historically specific phenomenon irredeemably dependent on social control, especially criminal law whose emergence and development is intricately linked with the evolution and development of the "rational" state and its laws. To substantiate this, we shall in this chapter look at crime and social control in a "traditional" social structure or within what we here refer to as a society without the State. By a society without the State (Stateless) we mean a society which Fortes and Evans-Pritchard (1940) describe as having no separated, continuous political community having any judicial, law making or executive capacity either to govern the members of the society as citizens or to be solely in charge of relations with outside societies in peace or war. This means that stateless societies have no "government" implying a centralised authority, administrative machinery and constituted judicial institutions. In Stateless society, the lineage

¹E. Durkheim: *The Rules of Sociological Method*. Free Press, New York, 1964a pp. 65 and 67.

and/or the age-set structure is the framework of the political system, there being a precise co-ordination between the two so that they are consistent with each other, although each may remain distinct and autonomous².

Furthermore, in Stateless society there are no territorial units defined by an administrative system. The territorial units are local communities the extent of which corresponds to the range of a particular set of lineage ties and the bonds of direct co-operation³. Hence political office does not carry with it judicial rights over a particular defined stretch of territory and its inhabitants⁴. Through genealogical ties (real or fictional), individuals acquire membership of the local community and the rights and duties that go with it. In practical terms, the lineage principle takes the place of political allegiance and the interrelations of territorial segments are directly co-ordinated with the interrelations of lineage segments and/or age-sets⁵. Political relations therefore are not simply a reflection of territorial relations, rather the lineage and/or age-set structure as a political system in its own right incorporates territorial relations and invests them with the particular kind of political significance that they have. This in turn influences the culture and economic activity of the people involved and leads to a situation where there are no marked

²M. Fortes and E.E. Evans-Pritchard (ed.); African Political Systems. Oxford University Press, London, 1940 p.7.

³Ibid pp. 10-11.

⁴Ibid p. 9.

⁵See later discussion

cultural and economic divergencies as we shall show later.

In relation to power, in Stateless society, we find no association, class or segment which has a dominant place in the political structure through the command of greater organised force than is at the disposal of any of its congeners. In such a situation, force from one segment is met with equal force from another segment and this leads to a condition where there is no group or individual in which sovereignty can be said to rest⁶. Thus stability is maintained by an equilibrium at every point of divergent interests in the social structure, while balance is sustained by a distribution of like, but competitive interests amongst the homologous segments of the society. Therefore, social control exercised through a constituted judicial machinery dependent on the use of organised force or state coercion is unnecessary. Jural institutions instead rest on the right of "self-help"; a procedure whereby the injured party takes the initiative in seeking redress whenever breaches of customary law occur. Stated initially, and therefore rather simply, we seek to show in this chapter how in cases of a more or less serious breach of the norms of social behaviour in a Stateless society the people involved attempt to solve and control that behaviour. In other words we seek to demonstrate how disruptive behaviour (deviance) is perceived and how law and order is maintained in situations where there is no constituted authority for such a

⁶ See generally Mr. Fortes and E.E. Evans-Pritchard (ed.); African Political Systems op.cit., P. Bohannan; Law and Warfare. Studies in the Anthropology of Conflict, Natural History Press, New York, 1967 and J. Maquet; Power and Society in Africa, Weidenfield and Nicolson, London, 1971.

purpose and its consequences for the general social fabric.

In any society, as Gulliver (1963) argues, there must of necessity be a means or procedure for dealing with deviant behaviour and the injuries that it causes. There must be by definition a regularised means establishing that a breach of norm (values) has actually occurred. There also must be a means for assessing the damage and for dealing with the breach including a procedure for implementing the decision taken in relation to the offence.

In present day society, as we shall show in later chapters, the principle means to this end is contained in the complex of political institutions established in law and exercised through State government. In a Stateless society, both the State and "law" are absent. Therefore deviance and social control, as part of the wider social structure is to be found only through an examination of more general roles, relationships and group activities. In other words

"when one person is alleged to have committed an injury against another - when therefore, the two persons come into dispute - the significant jural factors are not only the kind of injury involved, but the social relationship between the two persons and the position of each in the structure of his society. By position here I mean primarily the social status of each person and the various groups to which he belongs"⁷.

⁷P.H. Gulliver; Social Control in an African Society - A Study of the Arusha agricultural Masai of Northern Tanganyika. Routledge and Kegan Paul, London, 1963, p. 1.



In order to understand social control in the above context; that is in a social structure where offences are harms against persons rather than "harms" construed as harms against a legally constituted authority i.e. the State, it is necessary to understand the more general structure and processes which comprise such social structures.

Taking traditional societies of Africa as specific examples, we shall try to demonstrate that "crime" and social control as it is defined in this thesis is only found in particular social structures, especially those where law (criminal law in particular) and its implied notion of the State as a legally constituted authority is in evidence. However we commence with a brief discussion on what is meant by authority.

AUTHORITY, CRIME AND SOCIAL CONTROL

"Crime is not simply the disruption of serious interests; it is an offence against authority" declared Durkheim (1964b)⁸. Kennedy (1976) in a more specific form argues that crime is a "harm" construed as a harm against a definite form of authority - that of the State. Implied here is the contention that where the State and its laws are absent in a specific form crime is absent since any other law lacks politicality and penal sanction and hence becomes insufficient criteria for identifying crime. This being the case, it follows that we cannot meaningfully talk about crime and social control in any society without some specific reference to authority and its consequences for both crime and social control.

⁸E. Durkheim; *The Division of Labour in Society*. Free Press, New York, 1964b p. 85.

1. Authority

In his theory of social and economic organisation, Weber (1964) distinguishes (among others), two basic types of authority; rational-legal and traditional authority. According to Weber (1968), rational-legal authority rests on a belief in the legality of normative rules and the right of those elevated to authority under such rules to issue commands. Under this type of authority we have law in the strict sense. Consequently, we find ourselves with a unique form of control that can be recognised by its special kind of punishment or rather penal sanction. This penal sanction, Kennedy (1976) describes as a "State-specified punishment fixed in law to a conduct specifically proscribed by any law which has politicality"⁹. Under this type of punishment, we get the unique behaviour we refer to as crime. However, since politicality and penal sanction imply the State which in turn is the most obvious symbol of rational-legal authority, we concur with Kennedy (1976) that penal sanction is a rule of State law.

Traditional authority according to Weber (1968) rests on an established belief in the sanctity of immemorial traditions and the legitimacy of the status (not right) of those exercising authority under them. Implied here, as Bohannan (1967) contends, is the absence of a unicentric power system constituted in law. This in relation to crime means that there are no offences against legal rules since such rules themselves do not exist. This in turn means that penal sanction as a punishment does not exist - hence crime

⁹M. Kennedy; "Beyond Incrimination". in W.J. Chambliss and M. Mankoff; *Whose law, What Order*. Wiley, New York, 1976, p.49.

as the specific conduct to which penal sanction is fixed is also absent. We find instead what Malinowski (1926) refers to as law and custom under which breaches of customary law are not "crime", but mainly deviance. Thus "punishment without penal sanction is a rule of custom".¹⁰

2. Social Control

Durkheim (1964b) talks about social control in terms of social solidarity based on the division of labour. In his analysis, he identifies two types of laws; repressive law and restitutive law. Repressive law consists essentially in suffering or at least some kind of harm inflicted on the offender. Repressive law is then divided into two parts - diffuse, referring to rules which are purely morals or those based on common morality without judicial sanctions and organised, referring to rules which have judicial sanctions i.e. penal sanction.

Restitutive law as Durkheim (1964b) sees it, is that law which does not necessarily imply suffering for the offender but consists mainly of the return of things as they were. This refers to the establishment of troubled relations to their normal state irrespective of the method used to restore the balance.

In relation to society, Durkheim (1964b) claims that in "primitive"¹¹ society we mainly find repressive law. To support this view he maintains that crime in "primitive" society consists mostly

¹⁰Ibid.

¹¹"Primitive" here is used to refer to archaic or acephalous societies - Stateless societies.

of not performing cult practices and violation of ritual prohibitions which inadvertently result in repressive sanctions due to the religious nature of the law they violate. To support his application of repressive law in the above manner he makes some rather blatant claims that "primitive" people punish for the sake of punishing and that the chief purpose of punishment is to make the culprit suffer for the sake of suffering. In the belief that his ideas are conclusive, Durkheim (1973) goes on to generalise the application of "punishment" on the basis that "punishment" is the greater the more society approximates to a less developed type.

Durkheim's argument inevitably tends to lead to one basic conclusion, that "primitive" society has no notion of restitutive law and that "punishment" is not only repressive and severe, but that it is haphazardly applied by a religious authority that must be unquestionably obeyed. In other words what Durkheim has done is to equate "primitive" society with primitive and blatant social control. However, as we shall show in the following discussion, the opposite seems to be the case.

Under "traditional" authority, we find what Bohannan (1967) refers to as primitive law - meaning a systematised way of dealing with disputes and retaliative sanctions backed by authority based on tradition and custom¹². Hence deviance is not an offence ("harm") against authority in the sense that "crime" is construed as a harm against the State. Deviance is more or less seen as bringing ritual

¹²See generally S. Wagner; The Political Organisation of the Bantu of Kavirondo, in M. Fortes and E.E. Evans-Pritchard, African Political Systems op.cit.

uncleanliness to both the offender and his group. This does not call for a repressive law as Durkheim (1964b) maintains, but instead calls for lustration or expiation rather than punishment or even compensation for the injured party. Wagner (1940) and Calston (1968) point out that contrary to Durkheim's view, the chief aim of the restoration of law and order is the settlement of claims and the reparation of damages rather than "punishment". Consequently, whatever compensation is paid and the collective responsibility involved in the payment is not intended as a fine in the sense of a penal sanction, but rather as a restoration of a broken relationship. However it is important to note here that in some cases, the way the compensation is imposed may give the impression of a fine as a penal sanction. For example, among the Swun and Kgalagari some fines are set aside as punishment especially in relation to the jural consequences of marriage. For example, Bisana - which is a "fine" which may be imposed for unsatisfactory conduct on the part of a husband towards his wife¹³. Nevertheless, even under these circumstances the aim is to restore a troubled relationship rather than to punish in the penal law sense. This method of handling disputes tends to negate Durkheim's application of repressive law to "primitive" society. Instead it denotes a situation which speaks more of restitutive law and lenient rather than severe and repressive social control. In the following discussion we shall examine the implications of this by looking at the way disruptive behaviour is perceived and dealt with in a "traditional" stateless situation

¹³A. Kuper; The Kgalagari and the jural consequences of marriage. Man Vol. 5 No. 3 September 1970, pp. 47--471.

in the wider context of traditional social organisation. In this section, although we may use examples from other African societies, we shall focus our attention mainly on Kenyan pre-colonial social organisation. We shall however not engage ourselves with a detailed historical and anthropological exposition of each tribal organisation, but shall restrict ourselves to the general and broad issues of tribal organisation or rather "traditional government".

KENYA - GENERAL BACKGROUND

Geographically, Kenya lies in the eastern part of Africa, bordering the Indian Ocean. The country covers an approximate area of 250,000 square miles. Kenya lies within the equatorial belt, but due to her altitude, the climate varies quite considerably. It ranges from hot and wet at the coastal and lake regions, cool and wet in the highlands and rather dry in the remaining parts of the country. According to the 1979 Population Census, the population was put at 15,000,000 (million) with 20% of this population concentrated in the major towns and cities while the remaining 80% lives in the rural areas. Kenya is a multi-racial society with people of the African origin forming the bulk of the population. The main occupation is agriculture.

The history of Kenya, like that of the rest of Africa can be broken up into three distinct sections; the traditional (pre-colonial), the colonial and the independent. As Maquet (1971) points out the traditional period can be said to have begun when agricultural techniques of production became widespread. The colonial period dates from mid 19th century when the conquest and

partition of Africa among European powers began and the independent can be dated from 1960, when the first sizeable number of African States became independent.

According to Munro (1975), looking at Kenya from the eye of the conventional historian, her history begins from the early 19th century when European influence on the eastern coast of Africa began. From this level historical accounts of Kenya deal mainly with European exploration, settlement and colonial rule. References to the pre-colonial era are scant if ever available and as Muriuki (1974) argues, these tend to portray the foreigner as a catalyst in a sea of hitherto docile and dormant recipient communities. However, there is another history of Kenya which emerges from the level of the anthropologist. From this level, we come into contact with historical and anthropological accounts of indigenous Kenyan societies, with their own distinct economic and social organisation which thrived prior to and later side by side with the so called European exploration and discovery. We shall focus our attention on this traditional society, especially its social structure with reference to crime and social control. It is however important to note here that the material we shall use is based on fieldwork done in the 1930's. This may bear some reference to colonial influence on the traditional structures. This is mainly so due to the method of writing used in anthropological studies. Anthropologists tend to write in the present tense while referring to early periods - a method usefully referred to as the "ethnographic" present. This includes what is there at that moment and more often than not, it is not considered necessary to update everything which results in

the kind of influence we have referred to above.

TRADITIONAL SOCIAL ORGANISATION

Kenya's traditional society is made up of different units of people, often referred to as tribes who are linked together (loosely or otherwise) by a common language and territorial habitation. The 1969 Kenya population census identified four major groups among Kenyan tribes; the Bantu, the Nilotic, the Nilo-hamitic and the Hamitic. Before colonialism, the main occupation was determined by ecological conditions which led to some being either agriculturists, pastoralists or both.

According to Service (1962), Stateless societies fall into two main groupings; bands and tribes. Bands are those simply organised societies whose lifestyle is centred on hunting and the collection of wild products whereas tribes are of the order of a large collection of bands with a more settled existence and more systematic social organisation¹⁴. What differentiates bands from tribes is the nature of authority. In bands authority is very limited and often rests on the senior members of the groups. Among tribes the social structure is much more complex and is organised either in Kinship terms or in an age-set system. Kinship organisation is found in those societies which are made up of separate village communities or what Maquet (1971) refers to as global societies. These communities are related to one another by various

¹⁴E. Service; Primitive Social Organisation - An Evolutionary Perspective. Random House, New York, 1962. pp. 59-142.

economic and kinship ties with internal administration exercised through elders' councils. Societies organised by the age-set system are those in which political control and general control is conceived in terms of an age-set. This type of social organisation is in most cases found together with kinship organisation. The basis for organisation by age is the division of the population in groups depending on tasks to be performed. Hence age-sets serve more as a means for the division of labour in the whole tribe whereas kinship ties are limited to organisation within clans (or smaller groupings). Organisation by kinship and age-set was quite predominant among Kenyan pre-colonial tribes and it is these we shall examine here.

1. Kinship Organisation

In all societies there is some kind of kinship bond based either on blood relations or on marriage. This implies that all those men and women who can trace their ancestry back to the same ancestor by either male or female ties are considered to be kin. This aspect of kinship is recognised in all societies. However, in tribal society, kinship terminology and usage goes much deeper than the above. In the absence of a political authority for maintaining social order, kinship ties shed off their nominal value and acquire political values that are absent in a state set up. In other words:

"The kinship bond is not as it has become in contemporary Europe, largely nominal. It creates a network of relationships in which the actors have very well defined roles.

There is firstly the common role of kinsmen towards all

others, then there are specific roles according to the place one occupies in the network (older brother vis-a-vis young brother, grandson vis-a-vis grandfather etc.)"¹⁵

In practice, the whole society is divided up in lineage networks made up of all those who can trace their descent to a common ancestor. Through these lineages, as Mair (1962) argues, descent becomes the functional means for providing the basis of social groupings and for maintaining effective relationships. Where this is the case as among the Luhya of Western Kenya, the lineage organisation is co-existent with the whole society and almost all inter-group and intra-group relationships (economic and social) are conceived in terms of it. The lineage then provides the principle upon which corporate property owning local groups are established. It also provides the idiom through which inter-tribal relations and intergroup relations operate¹⁶. Within such an inter-dependent system of relationships (corporate as opposed to individualistic) solidarity and collective responsibility becomes the common role of kinsmen while mutual obligations and reciprocity becomes an important aspect of their lifestyle¹⁷. Hence kinship networks fulfil those functions which in the "rational" State are a function of political institutions i.e. the resolution of conflicts internal to society, control of land (economic) rights and making

¹⁵J. Maquet; Power and Society in Africa. op.cit. p. 42.

¹⁶See generally J. Beattie; Other Cultures. Cohen and West, London, 1964.

¹⁷See generally J. Maquet; Power and Society in Africa. op.cit. and B. Malinowski; Crime and Custom in Savage Society. Routledge and Kegan Paul. London, 1926.

decisions in matters concerning the society as a whole. Thus kinship organisation is crucial to the structure of tribal stateless society, without which "traditional" social control cannot be effected.

2. The Age-Set System

Among a large number of Kenyan tribes, particularly among the Hamitic tribes i.e. the Masai and their Bantu-speaking neighbours for example, the Kikuyu, social organisation based on kinship was in most cases augmented by organisation through the age-set system. Whenever this occurred, the age-set system transcended the kinship ties and covered a much wider area bringing together the clans organised in kinship terms into one tribal unit. Muriuki (1974) points out that the age-set system provided a principle for social organisation that could exist side by side with ties based on kinship solidarity but which nevertheless cut across kinship ties and embraced the whole tribe.

In the age-set structure, Kenyatta (1963) and Muriuki (1974) contend that men (and in most cases women) born within a certain set of years are accepted in one set. Once individuals are accepted in the set through the ceremony of initiation¹⁸ they become permanent members of their set. They now become subject to the rules, regulations and responsibilities of their particular set. At this point individuals cease to act as individuals and instead begin to act as members of a particular group¹⁹. Muriuki (1974) underlines

¹⁸ See later discussion

¹⁹ See generally J. Kenyatta; Facing Mount Kenya. Secker and Wormburg, London, 1938 and S. Sabarwal; The Traditional Political System of the Embu of Central Kenya. East African Publishing House (EAPH) Kampala, 1970.

the importance of these coeval institutions by noting that it is this aspect of the society that contributed most to the bond that linked up all the members of the society and made them feel like a single people which further underlines the corporate nature of tribal society.

The importance of the age-set system, like that of kinship was not in the principles on which it was based, for example, age, but on its social functions. First it provided a means for social organisation which brings together different clans. Secondly it provided a criteria for the division of labour and responsibility by providing groups which performed certain jobs at particular grades. In this respect, as Kenyatta (1963) and Muriuki (1974) point out among the Kikuyu, the system provides a much superior method for the division of labour than that offered by kinship since it allows participation on a tribal basis and is not limited by lineage segmentation. Thirdly, by guaranteeing permanent groups via age-set membership, the system acts as a sustainer of the collective way of life. Age-sets move through the various grades as complete units implying that groups of people rather than individuals change their social status and hence their roles and responsibilities at the same time. This provides a means for the exercise of some form of political authority which is done through the senior age-sets whose members constitute more or less a council of elders who play a vital role in decision making in matters concerning the whole tribe and who as a collective body act as overseers for the maintenance of law and custom²⁰.

²⁰J. Beattie; *Other Cultures op.cit.*

3. The Economic Structure

In present day urban and industrialised societies, all goods circulate and nearly all circulate through formally institutionalised economic networks. In tribal society however, goods did not circulate in the above sense but were in most cases consumed by the unit that produced them - "auto-consumption" as Maquet (1971) describes it. This implies a subsistence economy characterised by a rudimentary differentiation of productive labour with no machinery for the accumulation of wealth in the form of commercial or industrial capital²¹. Under these circumstances, as Gluckman (1968) argues, it was impossible for anyone to use property to enhance his status or social influence, implying the absence of economically differentiated classes. Thus in tribal or Stateless society, the significance of property is determined by the role it plays in a nexus of specific relationships. Hence property law defines not so much rights of persons over things, but obligations owed between persons in respect of things. There is a parallel here with the "jus in personam" and the "jus in rem" of Roman Law²². As long as the emphasis is on obligation rather than rights (in the strict legal sense), this sets limits on the economic divergencies which can be established between "classes" (social groups) and between "ruler" and "subjects". Hence ownership is not absolute as in the rational-legal sense and therefore cannot be said to rest on any particular individual. This leads to collective ownership

²¹ M. Fortes and E.E. Evans-Pritchard; African Political Systems op.cit. p. 8.

²² A.R. Radcliffe-Brown, Structure and Function in Primitive Society. Free Press, New York, 1965 (1st Hardcover Production 1952) pp.32-33.

augmented by widespread sharing and reciprocity.

Thus the economic structure in traditional society is solidly integrated into the social organisation and cannot be discussed as though it were tied, by separate law to a state structure. Where organisation was by kinship and/or age-set system, lineages had corporate rights in property which made nonsense of ownership in the rational-legal concept. Therefore like the rest of the social organisation, economic rights found their legitimacy not in law but in collectivism and reciprocity with a patrilineal and/or matrilineal succession²³.

4. Law and Custom

In lineage and/or kinship based societies, as we have already seen there is no structure as distinct from the kinship and/or age-set system. This means that there is no constituted authority that wields legislative powers in the society. Customary law therefore, although it makes tribal culture is not an inventory of rules of conduct as criminal law implies. It is rather a coherent system of relationships between individuals and groups²⁴. This implies that traditional customary law is a ramification of the existing socio-economic relationships in the sense that law in the "rational-legal" sense is a ramification of the State²⁵. Like the relationships, at least in theory, customary law is unchangable. This

²³Ibid Chapter 2.

²⁴G. Wagner; The Political Organisation of the Bantu of Kavirondo op.cit.

²⁵See generally K. Makela; The Societal Tasks of the System of Penal Law. Scandinavian Studies in Criminology, Vol. 5 1974 pp. 47-65.

means that the degree to which an action or claim or obligation is in line with age-honoured tradition is the only criteria of its merits²⁶. This implies that customary law is not created through administrative action, but rather comes about with the evolvement of corporate relationships within the society. Its legitimacy therefore rests not so much on an absolute authority, but on the collective and reciprocal structure of the society. This means that the authority of elders in the maintenance of customary law is not structured²⁷. Rather their authority is diffuse and mainly dependent on corporate consensus. Hence the only sanction available to them through tradition is that of collective reprobation²⁸. This stands in sharp contrast to the specificity of state authority. In the absence of such specific powers, the maintenance of customary law becomes equivalent to the maintenance of effective relationships. Consequently it is these relationships that serve to maintain law and order. This entails the argument that customary law is part and parcel of integrated social action and that its legitimacy is found in the collective and reciprocal institutions that form the basis on which all social relationships are held together in a meaningful whole²⁹. Within such a situation, in order to meaningfully understand social control in stateless society,

²⁶G. Wagner; *The Political Organisation of the Bantu of Kavirondo* op.cit.

²⁷See later discussion

²⁸See generally, J. Middleton and D. Tait; *Tribes without Rulers. Studies in African Segmentary systems.* Routledge and Kegan Paul, London, 1958.

²⁹B. Malinowski; *Crime and Custom in Savage Society.* op.cit.

especially how customary law is maintained, it becomes necessary for one to understand first how social relationships are maintained. This is crucial to the explanation of deviance and social control in tribal structures.

5. Reciprocity

In tribal society, due to the corporate nature of the social organisation, mutual co-operation is an essential condition for survival. Therefore, mutual obligation (involving both a right and a duty) is an essential aspect of all social and economic relationships. This means that every transaction, be it social, economic or political is linked into a chain of mutual services, every one of them having to be repaid at some later time. This embodies the principle of give and take or what social anthropology describes as reciprocity.

The first classic article on reciprocity is found in Mauss' "The Gift"³⁰. Informed mainly by his awareness of the totality of social phenomenon, Mauss attempted a comparative study of the forms and functions of exchange in "primitive" societies. Drawing mainly from North American and Melanesian societies, he in "The Gift" engages in a historically specific analysis of reciprocity. He argues that underlying the principle of "gift" exchange (reciprocity) are presentations which in theory are voluntary, but which in practice are obligatory. Mauss influenced by Durkheim's concept of social solidarity contends that in "primitive" society reciprocity is the basis for social contract and the division of labour.

³⁰M. Mauss; *The Gift - Forms and Functions of exchange in archaic societies*. Routledge and Kegan Paul, London, 1970. (Translated from the French version "Essai sur le don" 1925).

In this sense, he maintains that reciprocity (the gift) stands for something more than a utility for the circulation of goods. To him, it was central to the whole social structure in the sense that

"Class, age-groups and sexes, in view of the many relationships ensuing from contacts between them, are in a state of perpetual economic effervescence which has little about it that is materialistic"³¹.

Hence he recognised reciprocity as the social force that "binds" clans together and keeps them separate, which divides their labour and constrains them to exchange³².

In economic anthropology, Sahlins in *Stone Age Economics*³³ distinguishes three types of reciprocity: generalised, balanced and negative. Generalised reciprocity refers to transactions that are putatively altruistic touching on areas of assistance among close kinsmen. What Malinowski (1926) refers to as the "pure gift". Obligation in relation to generalised reciprocity is very weak and in most cases no returns are made or expected. Balanced reciprocity refers mainly to simultaneous exchange and is applied to all forms of "Gift-exchange", payments and to what is ethnographically referred to as "trade". Negative reciprocity refers to the attempt to get something for nothing. In ethnographic terms this covers areas like "haggling" and "barter".

³¹Ibid p. 70

³²Ibid p. 71

³³M. Sahlins; *Stone Age Economics*. Tavistock Publications Ltd., London, 1972. pp. 191-220.

In application to tribal society, generalised reciprocity is limited to close family circles, e.g. close kinsmen. Negative reciprocity is found mainly outside tribal boundaries and is usually associated with inter-tribal transaction. However it is balanced reciprocity that is important and crucial to the whole social organisation. It cuts across the whole tribal structure forming the mainstay of the social organisation. Through reciprocal gifts, visits and services each area of life is made more binding since reciprocal exchange makes it part and parcel of the whole system of mutualities. Non-compliance in a situation where inter-dependence is the normal lifestyle places the offender outside the social and economic system of his group and tribe, making survival difficult. As Wagner (1940) and Kenyatta (1963) observe among the Luhya and Kikuyu respectively, in Kenyan tribal societies and by extension stateless society in general, reciprocity (balanced) acts as a safeguard for the continuity of mutual obligations and services. In this sense, it underlies all social interaction and forms the basis for both economic and socio-political co-operation. Thus it acts as the principle through which social solidarity including the division of labour is realised.

With reference to customary law, it follows that it (customary law) as an integrated social action cannot be maintained by a psychological motive or through force sanctioned by an abstract authority. On the contrary, it is maintained by a definite social machinery of binding force, based on mutual dependence and realised in equivalent arrangements of reciprocal services. The public nature of these reciprocal services, serves to maintain the feeling of

solidarity within the tribe and this helps to cement the bonds that exist within it³⁴. This makes reciprocity, rather than authority the chief backbone and sustainer of customary law. The significance of this is clearly demonstrated by the way in which order and dispute settlement is handled. We shall however leave that for a later discussion while we examine first how law and custom is transmitted in a stateless situation where there are no legally constituted institutions for that purpose.

6. Initiation

In every society, some degree of order and regularity must be assured if social life in any community is to be sustained. At the same time, in order to ensure continuity of the society, there must be a system for the transmission of the basic principles of social life. In our previous discussion in this chapter, we have attempted to explain how order and regularity is maintained. In this section, we shall consider what kind of institutional arrangement is responsible for the transmission of tribal laws and customs.

In tribal society, with specific reference to Kenyan tribes, the most important institution for the transmission of law and custom was that of Initiation. Initiation e.g. "Nzaiko" among the Kamba, "Irua" among the Kikuyu generally means circumcision. The significance of the custom however is not found in the physical operation of circumcision, but is found in the role it plays in the nexus of social relationships. The ceremony of circumcision, for

³⁴See J. Wagner; *The Political Organisation of the Bantu of Kavirondo* op.cit. and J. Kenyatta; *Facing Mount Kenya* op.cit. For an example of Luhya and Kikuyu gift exchanges respectively.

instance the dances, the rituals and the gifts exchanged are mainly used as a platform for restating tribal moral and political values and very often mark the beginning of the participation of the new initiates in the various governing groups in the tribal organisation. In fact in almost all the recorded cases in Kenya³⁵, the real age-sets usually began on the initiation day. Muriuki (1974) points out that initiation is organised in a tribal basis and in most cases is organised on an age-grading system even among those societies whose basic organisation is kinship rather than age-sets, for example, the Luhya. Taken on its face value, the initiation ceremony appears as though its main social purpose is to mark the beginning of adulthood. However, a closer look at the process of initiation, especially the "rites de passage" reveals that it serves to accept the individual into an existing group or relationship pattern and to bind him to the obligations and standards of behaviour which membership of the group or participation in the group entail³⁶. This is true for both sexes and the ceremony was always held in public.

The Ceremony

Initiation ceremonies among Kenyan tribes were elaborate and complex. Here we shall outline the broad features of the ceremony and concentrate more on their social significance.

³⁵ See generally Lucy Mair; *Primitive Government*. Hazell Watson and Viney Ltd., London, 1962.

³⁶ See for example Luhya initiation in G. Wagner; *The Political Organisation of the Bantu of North Kavirondo* op.cit. and Kikuyu initiation in J. Kenyatta; *Facing Mount Kenya*, op.cit.

Usually and in most cases, several days before the actual circumcision a lot of preparations were made. These involved preparation of food and drink for the ceremonial dance and the preparation of the initiates. This involved moral and social education about the significance of the initiation and its consequences for the traditional social fabric³⁷. Then comes the actual ceremony and the order of events generally involved the following stages (a) a mutual ceremonial utterance which signified that a particular relationship or membership of a group has been established, (b) in a pantomimic performance, the behaviour which characterises the new status in the group or the nature of the relationship is acted out, (c) gifts are exchanged among those who have entered a mutual relationship, (d) commandments which involve instructions in the standards of conduct are given, usually by a paternal or maternal relative to each initiate (this may at times involve definite rules of ritual, such as the spitting of beer on the face of the initiate) and (e) in relation to the gift exchange, there is a general religious performance which may take the form of offerings to ancestors for goodwill.³⁸

Thus through initiation rites, customary law is re-stated and transmitted to the next generation. Hence initiation provides a means through which different social groups and relationship patterns continue themselves by handing down their own system of values and

³⁷ See for example the Kikuyu initiation ceremony. J. Kenyatta; Facing Mount Kenya. op.cit. Chapter 6.

³⁸ See for example Luhya "rites de passage" in J. Wagner; The Political Organisation of the Bantu of Kavirondo. op.cit. pp. 213-215.

standards through the formal initiation of members into them. However, the different social groups do not exist in isolation. On the contrary, these groups overlap at various respects, criss-crossing through the whole society via kinship, age-sets and marriage. This overlapping, especially in personnel acts as a force that maintains and promotes the homogeneity of law and custom. On the surface this tends to give the impression of absolute harmony, but on closer examination, this is not so. Contrary to Durkheim's conclusion about "primitive" Society, there is no blind observance of law and custom. Malinowski (1926) and Beattie (1964) both argue that customary laws are broken and that there is a regularised method for handling disputes. This is what Bohannan (1967) refers to as a primitive anticipation of legal procedure - meaning that there is a conventionalised way in which an injured party may strike back to the injurer or claim compensation for the injury. In the following discussion, we shall examine how tribal conflicts are perceived and dealt with.

DISPUTE SETTLEMENT

Roberts, in *Order and Dispute*³⁹ distinguishes three types of disputes in tribal society; inter-group disputes, intra-group disputes and general disputes; those involving constant law breaking by a member of a particular group which once they pass the initial stage become general disputes involving the whole clan or tribe. In relation to dispute settlement, Bahannan (1967) maintains

³⁹S. Roberts; *Order and Dispute*. An introduction to legal anthropology. Penguin Books. London. Chapter 4.

that there are basically two forms of conflict resolution in tribal society; administering rules or open fighting or warfare. In the following discussion, we shall examine the dispute settlement system with reference to the above distinctions.

Procedure

(a) Inter-group disputes

Kenyatta (1963) argues that when a breach of law occurs in tribal society, the initial step is for the injured party to take the matter in their own hands and go to the offender's party to seek redress. For example, if a murder occurred, the first step was that the family group of the murdered man took up arms and invaded the murderer's homestead with the object of killing him or one of his close relatives. This act or "self-help"⁴⁰ was a notice to the murderer's group that the dead man had a group that could inflict retribution on behalf of its members. This act of "self-help" was allowed under custom and was usually the first step taken towards the resolution of the problem between the two parties concerned. This was possible because offences were harms against persons rather than acts construed as harms against a legally constituted authority such as the State. However, due to the corporate nature of the Society, where mutual alliance and interdependence was a necessary condition for survival, the use of "self-help" was rather inhibited. As a result "self-help" functioned not so

⁴⁰ See generally J. Kenyatta; Facing Mount Kenya. op.cit. and K.S. Carlston; Social Theory and African Tribal Organisation - The Development of socio-legal theory. University of Illinois Press, Urbana, 1968.

much as a method for solving disputes, but rather as a means for identifying that a breach of law has actually occurred and hence served to bring the formal machinery of dispute settlement into action⁴¹.

Immediately after the initial step was taken, attempts are then made through the elders' council to intervene in the dispute in order to halt widespread feuding and social disruption⁴². In relation to the elders' functions, it is important to note that those elders who sat to arbitrate in disputes were not permanent members of the elders' council⁴³. In each case, the composition of the judicial body and to a large extent the outcome of its deliberations was determined by the nature of the offence rather than the authority structure of the elders' council, in particular, the extent and nature of common interests which are affected by the dispute or the damage done⁴⁴. After hearing the pros and cons of the case, the elders would then refer to other previous disputes that bore relevance to the present dispute and restate the decisions given in respect of those previous disputes. They would then announce their judgement and state the amount of compensation to be paid while at the same time giving reasons for their decisions.

⁴¹ See generally J. Middleton and D. Tait; Tribes without Rulers. op.cit.

⁴² See generally L. Mair; Primitive Government op.cit. and J. Kenyatta; Facing Mount Kenya. op.cit.

⁴³ See for example the Luhya - J. Wagner; The Political Organisation of the Bantu of Kavirondo. op.cit.

⁴⁴ Ibid.

In traditional society, the above procedure has some significant implications. Although dealing with a present breach of norm, it serves as an occasion for recalling the judicial traditions of the tribe and thus makes known the body of traditional law⁴⁵. Secondly, it serves to uphold the aim of the elder's court which is to get compensation for the injured party rather than to punish the offender in the "rational-legal" sense⁴⁶. This negates Durkheim's (1964b) claim that "primitive" people punish for the sake of punishing. It in fact attributes to "primitive" social control, aspects of deviance handling which are found in the restitutive law which Durkheim so readily denies them. Dispute settlement was thus by compromise and the elders did not consider their role as that of imposing "punishment" in the penal sense. They rather saw their role as that of ending strife and restoring social harmony without which the collective and reciprocal life of the community would not continue⁴⁷.

Once the decisions of the elders' council were made known, their function had more or less come to an end since they could not use force to enforce their decisions. As Schapera (1956) points out, the use of organised force to enforce any decision was not the monopoly of any particular person, class or group. Unlike in the

⁴⁵Ibid.

⁴⁶See J. Kenyatta; Facing Mount Kenya. op.cit.

⁴⁷See generally, L. Mair; Primitive Government. op.cit., P. Bohannan; Law and Warfare. op.cit. and K.S. Carlston; Social Theory and African Tribal Organisation. op.cit.

"rational" state, where the courts can rely in the legitimate coercion of the State to enforce their decisions, the elders, although their role in settling disputes was vital, they did not have any "power", inherent in their council as a judicial body to enforce their decisions. As a result, the enforcement of their decisions was left to the parties involved in the dispute. Here the elders' authority seems only to have gone as far as drawing a framework for co-operation which depended on the goodwill of those involved⁴⁸. In this case we concur with Bohannan (1967) that systematic and explicitly formulated rules of conduct and a formal procedure for the enforcement of these rules by an impersonal authority play a relatively minor part in traditional society. The prototype of law (in the strict sense) is only to be found in large part in the procedures and standards by which custom regulates disputes between groups and assures the composition of these disputes in the interests of public peace. Instead of implementing decisions or imposing punishment, the parties in dispute are made to accept the principle of compromise, a procedure that is made possible by the collective nature of responsibility in tribal society.

(b) Responsibility

According to Kennedy (1976), in modern day society, the concept of law and its machinery for dispute settlement presumes an ethic that we have so far failed to find in tribal society; that the individual is responsible for his own conduct. Individual responsibility as this implies means that there must be an economic and

⁴⁸ See generally M. Gluckman; *Politics, Law and Ritual in Tribal Society*. Oxford University Press. London. 1965.

socio-political structure based on the same principle⁴⁹. However as we have already noted, in traditional society, all social and economic institutions are based on the principle of collectivism and reciprocity. What does this entail for dispute settlement?

Earlier in this chapter, we established that each individual in traditional society is a member of a corporate group. As a member of such a group, each individual ceases to function as an individual as regards his social rights and duties. Since dispute settlement is part and parcel of the whole network of social relationships, the same principle also holds. As Mair (1962) points out, lineage (corporate) groups consider themselves injured as a body if one of their members is injured and they support him on his search for redress. On the other side, the injurer relies on his group for support, implying collective responsibility.

In this respect, collective responsibility in dispute processing implies a certain view of breaches of law which is absent where authority is absolute and specific as we find it in the "rational" state. This is that all breaches of law or offences are conceived as harms against a particular person or group and not as offences conceived as harms against the State⁵⁰. This significantly influences the way breaches of law are dealt with. Unlike in the "rational-legal" situation, it is not the question of the individual against an impersonal authority, but rather, a question of two groups of more or less equal status against each other⁵¹. This

⁴⁹M. Kennedy; "Beyond Incrimination". op.cit.

⁵⁰See G. Wagner; The Political Organisation of the Bantu of Kavirondo. op.cit.

⁵¹See P. Bohannan; Law and Warfare. op.cit.

abrogates the need for a judicial authority in the rational-legal sense. Justice and not penal sanction is administered by and between those groups affected by the offence. In addition to this as Wagner (1940) contends, property is not individually owned, hence the question of the individual paying compensation on his own behalf becomes meaningless. Since most property is owned and inherited by virtue of membership to a group, it is the group that becomes responsible. By accepting responsibility for a member's behaviour, the group in effect stands ready to defend its members against any outside attempt to "punish". Under such circumstances, no authority can impose "punishment" on an individual without becoming under custom the object of collective vendetta⁵². Thus the creation and maintenance of common or mutual interests within groups is the most important factor to any individual immediately affected by a breach of the law since it is through these, and not through a legally constituted institution, where support to meet his claims and reparations for damages can be found.

(c) Intra-group disputes

As we have already seen, where breaches of law and custom involve two different groups, the injured party and not an instituted legal authority takes the initiative to bring the matter to public notice. If no such steps are taken the matter is left to rest. This kind of dispute settlement is however only possible where deviant acts are offences against groups and not against legally constituted laws. What happens then when breaches of customary

⁵²M. Kennedy, "Beyond Incrimination" op.cit. p. 41.

law are within the same corporate group where the dispute affects those interests that are specific to the group? Does collective responsibility still hold?

In intra-group disputes, settlement by paying compensation or even "self-help" within the same group would inevitably involve a split up and hence a dissolution of the social relationships involved⁵³. Since the indivisibility of the common bonds and interests of the group makes dispute settlement within the group through the payment of compensation undesirable, a ritual ceremony is preferred. As Beattie (1964) and Carlston (1968) argue, purification through ritual frees the offender from his ritual impurities (brought about by his deviance) and makes it safe for the group members to resume social relationships with him⁵⁴. This procedure is applied to all intra-group disputes and offences and is not limited to offences against ritual practices.

This stands out in great contrast to the "rational-legal" situation, where the concept of individual responsibility for ones offences and the concept that offences are harms against the State, makes it possible for a constituted authority to intervene and impose sanctions irrespective of the social relationships involved. Again we note here that "punishment" in the sense that Durkheim's application implies is non-existent. The chief aim of social control here is to restore a broken relationship which cannot be done

⁵³G. Wagner; *The Political Organisation of the Bantu of Kavirondo* op.cit.

⁵⁴See generally both, J. Kenyatta; *Facing Mount Kenya*. op.cit. and P. Bohannan; *Law and Warfare*. op.cit.

either by imposing repressive law or the severity of punishment, since these would lead to further broken relationships as their application by any particular group would be interpreted as a harm by opposing groups. Moreover, this would lead to constant feuding which would eventually destroy the principles of collectivism and reciprocity upon which the society is based.

(d) General disputes - Habitual offences

According to Kenyatta's (1963) observations among the Kikuyu, habitual offenders, for example if a person is a constant thief or is constantly involved in witchcraft or black magic⁵⁵, the offender was dealt with by being expelled from the group⁵⁶. At this juncture, the offender's actions were perceived as a threat to the whole group or society and collective action, in most cases banishment, was used in order to protect the society from social disruption. This was done through institutions provided for such purposes e.g. the "Kingole"⁵⁷ among the Kamba. Sanctions imposed on any offender through the "Kingole" were usually a last resort when all other means of dissuading the offender from his actions had failed. In such a situation, responsibility for the sanction was shared by the whole tribe and not by any one group. It is important to note here that the purpose of such sanction as Kenyatta (1963) points out was not intended as a "punishment" as is implied in penal sanction.

⁵⁵Black magic was considered harmful to the collective nature of the society while white magic was not.

⁵⁶See generally K.S. Carlston; Social Theory and African Tribal Organisation. op.cit.

⁵⁷"Kingole" was a general council of the whole tribe which only met to deal with those breaches of law and custom that were perceived as dangerous to the whole tribal structure which could not respond to ordinary councils "nzama sya atumia".

The aim was to restore communal harmony or rather community balance without which social communitarianism would not take place⁵⁸.

In societies where sanctions against breaches of law are not intended as a "punishment", but are seen as attempts to restore broken relationships, we come to the conclusion that social control, or in the most general sense law can only be understood within an analysis of the relationships under sanction. In the absence of the State in a specific legal form, the specificity, politically and penal sanction of law⁵⁹ is absent and so is crime. In this sense, traditional customary law possesses no norms which bear any similarity to civil and criminal law of "rational-legal" states. Hence crime, as an act or omission of any criminal law, and as a harm construed as a harm against the State is meaningless in a situation where offences are against particular persons or groups.

Therefore, crime as we know it today is not a factor uniform to all societies at all times; neither is it a universal phenomenon comparable to "primitive" and "civilised" societies.

As societies move from "traditional" and Stateless where authority is not specific to "rational-legal" States where the specificity of State authority is evidenced in law, the type of behaviour sanctioned may remain the same, but the nature of the sanction and the way law is used to distribute responsibility for the behaviour drastically alters the implications involved. Whereas under traditional society that behaviour is simply deviance, under the

⁵⁸See generally J. Beattie; *Other Cultures*. op.cit.

⁵⁹See generally M. Kennedy; *"Beyond Incrimination"*. op.cit.

"rational-legal" authority of the State, that same behaviour becomes specific and hence criminal - meaning that crime is a historically specific phenomenon. Crime therefore cannot be found in all social structures, but is found in those societies where law plays a crucial role in consolidating the social structure itself - implying that crime is a product of particular social structures.

In the following chapters, taking Kenya's colonial and neo-colonial capitalist structures as specific examples, we shall look at crime and social control, especially the general as well as the particular uses of law in an attempt to demonstrate that "crime" exists only under certain historical situations, especially in those situations where the State's authority is made specific in law.

CHAPTER THREE

COLONIAL AGRARIAN CAPITALISM, CRIME AND
SOCIAL CONTROL 1895-1960

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INTRODUCTION

In Chapter Two, through a synthesis of crime and social control in a "Stateless" society, we argued that prior to the advent of the modern State and its criminal law, there were no offences against legal rules. Harms were visited against persons and not against a superior outside authority to which aggrieved parties could appeal for justice. Compensation, realised through collective responsibility, for such harms rather than "punishment" was exercised. Criminal law which defines crime and prescribes "punishment" for it was absent and with it the abstract State as a supposedly neutral agent whose role is to enforce the presumed morality of the people. However, as we have argued elsewhere, as society began to shift from a "traditional" one to a complex market system, the growth of the "rational-legal" State became the main focus point. Instead of the traditional machinery for dispute settlement, the scene became dominated by the legal machinery of the State. Instead of resolving conflict, the focus shifted to "punishment" and the stage was thus set for a "punishment" oriented system of social control.

This shift brought about various views concerning the role of the State vis-a-vis crime. On the one hand, the State was portrayed as a neutral force whose chief purpose was to arbitrate between the various groups in society. According to this view, acts became criminal because they were offensive to the moral standards of the vast majority of the people (Durkheim 1964b). On the other hand, the State was seen as not at any one time standing as a truly neutral force, but was seen as an expression of the powerful interest groups in society. From this standpoint, crime was perceived as

those acts that run counter to the interests of the powerful groups within the society. This implied that criminal law (which defines crime) is an expression of these same interests (Chambliss and Mankoff 1976). Kennedy (1976), follows this argument further and notes that criminal law emerged at the same time with the modern State's institutions of the capitalist mode of production. In Kennedy's (1976) treatment of the division of criminal and civil law and the use of the legal system to ensure the division of labour between entrepreneurs and property-less labourers, he argues that the State in capitalist society has tended to represent the interests of the politically and economically powerful as opposed to the majority in society. By implication, penal law becomes a reflection of the basic socio-political and economic relationships inherent in a capitalist social structure. This further implies two basic factors; (a) that crime is those acts which run counter to those relationships and (b) that criminal law as well as being a response to already existing behaviour is also a basic tool in the creation and development of the capitalist mode of production and a major factor in social stratification. Since the existence of criminal law logically entails that of the State, the above implication is carried even further and demonstrates that the State, as represented in the legal system cannot be neutral. Moreover, this means that what constitutes criminal behaviour is determined by the way law in general and criminal law in particular is used to create and maintain a particular social structure, making crime as defined here, a historically specific phenomenon. In the following discussion we shall expand the above view by examining how law is utilised in this manner in the creation of a specific form of social

structure - the creation of a colonial, agrarian, capitalist structure in Kenya. We shall pay special attention to how law was used to create a colonial agrarian, capitalist administrative State. In this context we shall examine how law was used to (a) obtain land for a settler capitalist class and (b) obtain and structure labour for such a class. We shall then examine the consequences of such a particularistic use of law on the indigenous social fabric with special reference to crime and social control. However, as a precursor to this discussion, it is necessary first to examine briefly what is meant by colonialism.

COLONIALISM

In the recent past, and particularly at the beginning of the era of formal independence in colonial Africa, a lot of attention has been directed to the subject of colonialism. In this thesis, however we do not intend to go into a detailed analysis of this debate but shall restrict ourselves to a brief look at the general tenets of colonialism in East Africa and Kenya in particular. Following Brett (1973), we shall define colonialism as a system of rule which assumes the right of one people to impose their will upon another, resulting in a situation of dominance and dependence which systematically subordinates those governed by it to the imported culture in social, economic and political life. Necessarily included in this definition is a basic assumption of colonialism; namely that colonised peoples were not capable of governing themselves under the strenuous conditions of the "imported" world and that the relationship between the coloniser and the colonised was

essentially reciprocal and creative rather than exploitative . Brett (1973) and Zwanenberg (1975) both argue that the above assumption was used in the case of Kenya, to provide the basis under which the conditions for the exercise of political, economic and social domination and control were set.

In most debates on colonialism in Kenya, the main focus of discussion tends to be the historical analysis of the basic economic and political factors within colonialism. In spite of the attention paid to colonial socio-economic and political structures, there seems to be a notable absence of any meaningful discussion on the centrality of law in the various aspects of colonialism that are discussed. Emphasis is placed on the historical development of colonialism, while law, as the variable that legitimates the very existence of the colonial social structure gets very little attention if any. While not ignoring the contribution already made, we shall here look at colonialism in relation to the role law plays in its creation, development and maintenance. In Kenya, law served to legitimise several basic structures; (a) a political system in which authority was monopolised by the coloniser, (b) an economic system which confined the colonised people's participation to a limited range of subordinate tasks and (c) a social system, stratified by race which assumed the inherent superiority of the imported culture over all indigenous forms. Brett (1973) notes that this was the rule structure that formed the backbone of colonialism in Kenya. Furthermore, to put such a colonial structure into operation, it was imperative for the coloniser to create institutions necessary for the maintenance of his authority in both the socio-economic and political areas of life in the colony. It was in this process of

consolidating and maintaining colonial rule that law played a crucial role.

For example, in the political field, the coloniser had the task of setting up an administrative structure which could maintain law and order, collect taxes and service the economy. As we shall see below, law was used to create such a colonial administrative State. In the economic field, the coloniser needed to construct an economic system that was able both to generate a productive capacity sufficient to maintain a minimal administrative and military presence and foreign control, while at the same time encouraging the growth of those forms of local economic activity which were most likely to make the most direct contribution to the dominant economy. As we shall see later, law was used in these processes. Finally, the coloniser needed new social institutions for regulating interaction between the expatriates and the indigenous communities, but which could also equip the indigenous communities with selected skills required for the honest and efficient performance of the subordinate tasks which the colonial system created. In this area too the coloniser again utilised law.

In view of our observations in Chapter 2, on the existing socio-economic and political conditions found in the colonial world, it was obvious that the basic tenet of colonialism was the creation of a new social order, which would take priority in terms of legitimacy and power over the existing traditional one. Therefore, colonial dominance needed the continued use of law (criminal law in particular) for the maintenance and development of the colonial State. Implied here is a particularistic use of law for the creation

and development of a particular mode of production (capitalism in Kenya) and the development of the socio-political and economic structures that go with it and the consequences that those entail for the indigenous social fabric - crime and social control in particular.

In East Africa, Brett (1973) distinguishes two basic types of colonial social structures. First there is the type where agriculture (land being the basic unit of production) came to be based on an expatriate (settler, capitalist) class. Secondly, there was the type where agriculture was left in the hands of the indigenous people. In the first case, the system required access to a cheap labour force which could only be supplied by the indigenous people, meaning that unlike the second case, the colonised could only enter into the colonial system as labourers rather than producers; an aspect that led to fundamental differences in the two types of colonial social structures. Both structures were agrarian capitalist and yet in Kenya colonial dominance leaned towards settler production while in Tanzania and Uganda it leaned towards peasant production. What accounts for such fundamental differences lies mainly in the way law was used during the colonising process. A particularistic use of law in Kenya led to the development of an agrarian capitalist structure characterised by a settler class. In this case, law was used to obtain land for a capitalistic class and also to obtain and structure labour for this class. In Tanzania and Uganda, a particularistic use of law led to the development of a colonial agrarian capitalist structure, characterised by peasant production. This implies that a particularistic use of law is not

only necessary, but crucial to the formation of particular social structures. In the following discussion, we shall try to substantiate the above propositions by looking at colonial agrarian capitalism in Kenya. We shall examine how the use of law led to the development of an agrarian capitalist social structure. We shall also examine the consequences of such a particularistic use of law on the indigenous social fabric plus its consequences for crime.

STATE LAW AND COLONIAL AGRARIAN CAPITALIST SOCIAL CONTROL

1. Economic Base

At the very beginning of European rule in Kenya, European immigration was favoured as the best method for economic development. The basic assumption at this point was that the prosperity and development of the area lay in the extension of British capitalism into an area hitherto characterised by little if any economic differentiation. As Brett (1973) argues, there was no accumulated capital to take over and there were no extensive markets and institutions necessary for capitalist development. The existing African agriculture was pre-capitalist in the sense that the bulk of production was mainly for subsistence rather than for the market, and that the means of production, especially land and labour were not exchanged in the market for sale. In spite of this however, the colonial and imperial authorities had by 1919 decided to develop export crops (implying agricultural capitalist development) through European owned farms and plantations rather than through African

production. This decision implied economic dualism¹ involving a money economy organised and financed by Europeans and dependent on external trade and investment and an African subsistence economy, all operating side by side - an aspect that was bound to cause conflict since the two economies depended on the same resources i.e. land and labour.

Initially and according to colonial reasoning it did not require the total transformation of the African environment in order to bring him into the money economy since it was only necessary to integrate a sufficient portion of his production into the new system while leaving the rest to cater for African subsistence needs. This implied that the African would still own his land and produce for his needs without necessarily having to purchase or sell in the newly formed market. This reasoning however came into direct conflict with the needs of the new capitalist economy for one basic reason; if the African was to be allowed to keep his own land and produce for himself, it meant that he was entering the new economic relationship as an independent producer rather than a labourer - an aspect that negated the development of an immigrant based capitalist economy. As long as the African had an independence over his own land and labour, he would not have to work for the settler, but would continue to produce on his own account and on his own terms. According to

¹ See generally W.J. Barber; *The Economy of British Central Africa: A case study of Economic Development in a Dualistic society.* Oxford University Press, London, 1961 for a discussion on the social structures of dual societies in Africa. For an analysis of dual power and dual legal structures, see generally B. De Souza Santos; *The Law of the Oppressed: The Construction and Reproduction of Legality in Parsargada.* *Law and Society Review*, Vol. 12, Number 1, Fall 1977, 6-126.

Brett (1973) in order for colonial (settler) agrarian capitalism to succeed, the African had to be made to enter the world of money as a labourer rather than an independent producer. This simply meant that independent African production and capitalistic settler production existed as sharply antagonistic modes and that an effective development of one necessarily precluded an equivalent development of the other. As Zwanenberg (1975) points out, an export settler controlled productive system required that some substantial part of the old African production had to be diverted to the world market. This meant that it was not sufficient to leave the African to control resources which had sufficed during the pre-colonial period². Hence the colonial State's decision to encourage European settlement and agriculture. This implied a State commitment to favoured treatment for the European managed economy which entailed that the African peasant economy would take secondary position. Ghai and Mcauslan (1970) point out that law was used to subordinate African production to settler production.

Through the use of law, for example, the 1897 Land regulations, the 1901 East African Lands Order, the 1902 Crown Lands Ordinance and the 1915 Crown Lands Ordinance³ which legally set aside large areas of African land for European use as private property, the legal basis and the initial conditions for the pre-industrial capitalist mode of production was thus set. For the purposes of what Zwanenberg (1975) refers to as "primitive colonial accumulation",

²See generally R.M.A. van Zwanenberg; Colonial Capitalism and Labour in Kenya 1919-1939. East African Literature Bureau, Nairobi, 1975.

³See later discussion. See also M.P.K. Sorrenson; Origins of European Settlement in Kenya. Oxford University Press, Nairobi, 1968.

a large proportion of the existing resources; land and labour in particular, were to be extracted from the indigenous community and transferred to the immigrant Europeans. The State as Munro (1975) argues would use its mobilising agencies (especially law) in the African areas as a vehicle for such re-allocation of resources.

In the following discussion, we shall examine how, through direct State action, a Stateless society was transformed into a colonial capitalist structure where reciprocal relationships between groups⁴ were supplanted by individual market relationships within a colonial agrarian capitalist framework. We shall examine especially how State law made it impossible for the Africans to participate in government and how the State systematically organised the economy favourably to settler interests by assuming direct control of the basic means of production e.g. land and labour. In other words we shall examine how Kenya became a settler country, especially how the State organised a command economy⁵ and its consequences for crime and social control.

2. The State and Administrative Control

In Kenya, colonialism found a traditional system of control operating through the kinship and/or age-grade system backed by an economic system based on collectivism⁶. Traditional social control could not however meet colonial requirements for the following reasons: (a) it was essentially an equilibrating mechanism -

⁴See discussion in Chapter 2

⁵R.B. Seidman; *The State Law and Development*. Groom Helm, London 1978 Chapter 5, pp. 80-95.

⁶See discussion in Chapter 2

resolving conflict rather than initiating change and furthermore the system was not meant to transmit and effect change or initiatives from outside the traditional network; (b) the colonial agrarian capitalist economy chosen for Kenya implied the problem of different races and the existence of conflicting ideas and policies that would need to be applied in the colonial state. A system based on reciprocity and economic communitarianism was therefore not well prepared to deal with the above problem. Out of necessity, the colonialists needed a system of social control that would be able to meet their requirements. A colonial authority, implying an administrative structure and a government was hence created for that purpose. Law was involved in its creation as the British followed the usual colonial practice of establishing a centralised administrative machinery which owed its legitimacy to imperial law and authority rather than to pre-existing traditional structures. Thus law was not only used to create an administrative structure, but also to subordinate the traditional system to State control.

For example, in 1897 and 1899 Orders (laws)⁷ were passed in the British Parliament specifically bringing the local inhabitants under the Queen's jurisdiction. In 1902, another Order⁸ with much more significant implications for the independence of the local indigenous structure was enacted. By this Act, legal authority was transferred to the protectorate authorities empowering the commissioner to make laws (ordinances) for the peace and good government of all

⁷See for example the East African Order in Council, 1899, No. 757.

⁸East African Order in Council 1902 - (Letters in Council, Letters and Patent and Royal Instruction 1/9/1927).

persons in the protectorate. This, as Ghai and Mcauslan (1970) contend, marked the establishment of English constitutional law in East Africa implying that law was crucial to the very establishment of the colonial state. Following the establishment of the State with full legal authority, its machinery of government - a centralised administrative structure constituted in law and the judicial machinery of courts were established with full civil and criminal jurisdiction over all matters and persons in the area⁹. Central government control was then consolidated by legislation. For example, the 1902 village headmen¹⁰ legislation provided for the establishment of local government through the appointment of chiefs and headmen (in a hitherto chiefless society). These chiefs and headmen did not owe their legitimacy to the traditional system, but instead owed it to the impersonal authority of the State. This led to the subordination of the traditional system to the central political control of the State. This is obvious when we examine the legislation which was aimed at subordinating the traditional structure to State control, for instance, Public order legislation.

For example, the 1900 Vagrancy Regulations empowered the police to arrest without warrant any "Vagrant"¹¹. The 1900 Native Passes Regulations introduced a "pass system" basically for the control of native (African) movement¹². The 1900 Preservation of Order

⁹See the East African Order in Council 1899. op.cit.

¹⁰Regulations No. 22 of 1902 on Village Headmen.

¹¹"Vagrant" was a term generally used to define Africans found in areas designated for European use unless of course they were under European employment. See Vagrancy Regulations No. 3 of 1900.

¹²Native Passes Regulations No. 12 of 1900

Regulations forbade communal activities such as dances and ceremonies without special licence from administrative officers¹³. The 1900 Native Liquor Regulations forbade the sale of local liquor without licence¹⁴ and the 1900 Order in council provided the commissioner with power to declare any part of any district "a closed district" thereby making movement by Africans to and from illegal¹⁵. Thus the consolidation and extension of State control by legislation effectively weakened the traditional structure and made it subordinate to the colonial one. This juxtaposition of a political structure of a modern "rational State" on a stateless system was facilitated by the legitimising role of law in the colonising process.

After the period 1897-1920, the colonial authority in Kenya came under increasing pressure to finance itself. Imperial aid to Kenya was being curtailed due to one basic reason: the end of the war and the post war economic depression in Europe. The strains created by the reconstruction of the imperial economy after the war and the socio-economic problems brought about by this such as unemployment, meant that funds formerly available for aid to the colonies was diverted to meet the more urgent problems at home. At the same time the depression meant that private funds for investment in the colonies could not be raised since these required a government guarantee which the imperial government was unwilling to

¹³The Preservation of Order by Night Regulations. No. 32 of 1900.

¹⁴Sale of Native (African) Liquor Regulations No. 32 of 1900

¹⁵The 1899 Order in Council had given the Commissioner power to divide the country into administrative areas (later districts). By 1902 these powers were usually applied to African districts and were almost always aimed at controlling the movement of Africans especially in relation to labour control. See generally the "Outlying Districts" Regulations No. 31 of 1900 (later 25 of 1902).

provide at that time¹⁶. This, coupled with an active European settlement policy initiated in 1903 meant that the colonial authority had to find the necessary resources within the colony. Law was used to satisfy those conditions. As we shall show later in the case of land and tax legislation, law seriously undermined the legitimacy of the traditional network. It made the colonial administrative infrastructure and its rational-legal authority too powerful for the traditional network. Except for political developments in the settler sector which endeavoured to establish legislation in favour of the subordination of the system to colonial rule, the traditional system had no alternative other than wait for its own demise.

3. Settlership and Administrative Control

In the early 1900's the most significant political activity in colonial Kenya was the campaign by settlers for responsible government under white rule (implying a politically serious break with imperial colonial control). Although this idea was rejected by the imperial authority it did not fully constitute a political setback for the settlers. On the contrary it gave them an opportunity to manipulate the colonial authority (especially the legislative process) to their advantage.

For example the 1905 Order set up two councils in Kenya; one legislative and the other executive. Ghai and Mcauslan (1970) see the establishment of these two councils as an important constitutional development in that they took over the legislative and executive

¹⁶See E.A. Brett; Colonialism and Underdevelopment in East Africa. op.cit. Chapter 4.

functions formerly enjoyed by the Commissioner and later Governor of the colony and protectorate. This transfer of power and functions marked a move away from dictatorship by the Governor to unofficial representation. The most significant feature of the change was that the indigenous people were not represented in the councils meaning that they were not in a position to influence let alone determine legislation. By 1920 (when Kenya was declared a colony and protectorate), the settlers were (by virtue of their representation in the two councils) in a superior position in relation to the Africans and were hence able to influence the way legislation was used in the colony. For example their influence won them some significant legal rights for example, European elective representation with the franchise not extended to Africans and Asians¹⁷. The result was the development of a dual policy concerned with the maintenance of separate and unequal systems of administration - the African existing to serve in subordinate capacity the European one. Thus a state of unequals, as Munro (1975) and Seidman (1978) see it, was established by legislation.

In political terms, this established the settlers in a position of immense political power giving them direct and unparalleled influence on the institutions of government and socio-political control. They could therefore influence all forms of civil and criminal legislation and by extension the form and direction of colonial capitalist development and control. This is evidenced by the way

¹⁷European elective representation was sanctioned by the East African Order in Council 1919 and later provided for by the Legislative Council Ordinance No. 22 of 1919.

the settler class influenced and manoeuvred their way into economic dominance through legislation. In this sense, as we shall demonstrate later, State law made institutionalised inequality and the domination of the African by the settler in economic and political terms possible. This entails the assumption that in the colonial capitalist environment (and in capitalistic structures in general), those classes which are able to exert the greatest influence in the institutions of government and socio-political control will by so doing increase their ability to influence the structure of production and vice versa, while those who cannot find their influence progressively reduced. This implies that there is a definite correlation between the form of law and its administration and both wielders of political power and the politics that they adopt in the law. This in turn implies that law has no inherent values, but reflects both in value and form the predilections of the dominant political and economic groups in society. In colonial Kenya, as we shall try to demonstrate, settler economic dominance tends to confirm this view.

STATE LAW AND SETTLER CAPITALIST DEVELOPMENT

1. The Law of Land

After the declaration of a protectorate and the extension of British legal authority in Kenya, the 1894 Indian Land Acquisition Act was extended to the area. This Act empowered the colonial authority to acquire land compulsorily for public works. A few years later, through the 1897 Land Regulations¹⁸, the powers of

¹⁸ See generally Land Regulations No. 26 of 1897 Vol. I p.85. Those regulations were repeated by the Crown Lands Ordinance. No. 21 of 1902, which increased the Commissioner's powers.

the colonial authority in relation to land were broadened and the colonial State could now acquire land for European settlement. The 1901 East African Lands Order¹⁹ increased these powers by giving all rights of land in Kenya to the Crown. Immediately afterwards, the 1902 Crown Lands Ordinance²⁰ provided for outright sales of the so called Crown Land to the settlers.

Initially, the acquisition and sale of land was limited to where there was no physical occupation by the indigenous people. However, the 1915 Crown Lands Ordinance²¹ changed that policy and all land owned under custom by the indigenous people was effectively taken over by the colonial State - thus seriously undermining African land rights. For example under the 1915 Ordinance, African rights to alienate any land ceased to exist resulting in the disinheritance of the African from his land. Besides, the same Ordinance (1915) gave the colonial authority power to create African reserves, where the African was to be contained while his acquisitioned land was turned over to settler use. For instance, the 1939 Highlands Order²² consolidated settler ownership of Kenya by reserving the Kenyan Highlands exclusively for white immigrants. African land rights in those areas thus became extinct making law the main tool in Kenya for legitimising colonial settler economic dominance. The legislation denying the African any legal rights over land set the pattern for colonial agrarian capitalist development. As Seidman

¹⁹See letters in Council, Letters and Patent and Royal Instruction 1/9/1927.

²⁰Ordinances and Regulations Vol. IV 1902. (No. 21 of 1902).

²¹East African Protectorate Ordinances and Regulations Vol. XVII 1915 (No. 12 of 1915).

²²Kenya (Highlands) Order in Council 1939

(1978) points out. The State, by intervention through law and not market forces turned Kenya into a settler country²³. The whites (settlers) dominated the economy by taking land in the so called "White Highlands" for commercial farming while the government (as we shall discuss here below) coerced Africans to work for white employers.

Land Legislation and the Labour Market

Given the conditions of the times, i.e. the absence of an accumulated financial capital to back the newly established settler capitalist economy and the inadequacy of banking facilities as credit institutions for capitalist development²⁴, the settlers needed plenty of cheap labour to maintain a viable agricultural production. Since they did not hold a monopoly on African labour, they had to use their privileged political position to get the State to transform the African into a labour force. As Zwanenberg (1975) argues, this made the relations of capital and labour the central characteristic of Kenyan colonial agrarian capitalism. Since the basic settler need, after land, was cheap and accessible labour, the driving force behind all major colonial legislation affecting the African (his land or his labour) was the need to supply such cheap labour to the settler controlled capitalist economy. Colonial

²³See generally Y.P. Ghai and J.P.W.B. Mcauslan; Public Law and Political Change in Kenya. Oxford University Press, Nairobi, 1970, S. and K. Aaranovitch; Crisis in Kenya. Lawrence and Wishart, London, 1947; Lord Hailey; African Survey Revised 1950. Oxford University Press, London 1957 and E. Huxley and M. Perham; Race and Politics in Kenya, Faber and Faber. London, 1944.

²⁴See generally Van Zwanenberg; Colonial Capitalism and Labour in Kenya. op.cit.

land legislation or any other legislation was thus meant to structure choice for the African away from subsistence agriculture into wage labour.

Moreover, the herding of the African people into African reserves made conditions for surviving through subsistence farming extremely difficult. For example in South Nyeri and Butere in 1944, the African population density stood at 542 and 1,200 persons per square mile respectively as compared to 16 persons per square mile in the settler areas²⁵. Taking domestic animals into account, there was hardly any land to live in leave alone to cultivate in the African reserves. Land legislations' aim was to offer the African an alternative for earning his living - wage employment in the settler agricultural sector.

For example, shortage of land in the African reserves and the settler demand for cheap labour led to a situation whereby a labourer was permitted to use land belonging to his settler employer in return for his labour. This capitalistic relationship or "squattering"²⁶ as it was known in Kenya, was given the force of law under the 1918 Resident Natives Ordinance²⁷. However, by 1937, the settlers needed their land for mixed farming which resulted in the amendment of the 1918 Ordinance to allow for forceful movement of

²⁵R.B. Seidman; *The State Law and Development*. op.cit. p. 86.

²⁶See generally Ross Macgregor; *Kenya from Within*. George Allen and Unwin Ltd. London 1927 and C.C. Wrigley, "Kenya: The Patterns of Economic Life" in V.T. Harlow and E.M. Chiver (eds.) *History of East Africa*. Vol. II Clarendon Press, Oxford, 1965. p. 243.

²⁷Resident Natives Ordinance No. 33 of 1918.

"squatters" out of settler land²⁸. The basic conflict here was that between African stock and settler stock. The State by amending the 1918 Ordinance, thus making "squattering" penally sanctionable simply re-stated in law the supremacy of the settler class regarding the control of the basic means of production. In this sense the racial bias involved in the law and its administration becomes more than obvious.

However, it is important to note here that racial bias was not restricted to Africans only, but included all non-white residents e.g. the Indians. Ghai and Mcauslan (1970) argue that colonial administrative restrictions in relation to the granting of land to Indians were introduced as early as 1902. However, it was not until 1908 when discrimination against Indians in matters of land was included in land legislation²⁹. This provision prohibited the acquisition of land in the "White Highlands" by Indians. It also prohibited the transfer of land leases by Europeans (whites) to non-whites without the consent of the governor in council and also prohibited Europeans from allowing non-white managers to occupy or be in control of the land. The excuse given for such blatant racial bias was administrative convenience. In reality however, this was

²⁸ See Resident Labourers Ordinance No. 30 of 1937. Under this Ordinance, the criminal law application of the Master and Servants (amendment) Ordinance, 1924, especially on desertion could be applied on resident labourers or squatters - this was absent in the 1918 Resident Natives Ordinance.

²⁹ See Colonial 4117 (1908). Correspondence relating to the Tenure of land in the East African Protectorate p. 33

just another example of the use of colonial agricultural law and its administration primarily for the protection of settler interests.

The 1904 Coffee Ordinance³⁰ had already paved the way for this particularistic use of law by prohibiting the importation of certain coffee plantings. The aim was supposedly to prevent coffee leaf disease, but the real reason was the restriction of Africans and Asians from having any access to the coffee industry. The 1904 Coffee Ordinance brought the coffee industry under public control (colonial state control). This was supplemented by the 1918 Coffee Plantations and Coffee Dealers Ordinance³¹ which restricted coffee growing to Europeans through licensing. Under this Ordinance, coffee growers and dealers were registered and issued with certificates and licences with none issued to Africans or Indians (Asians). The end result of such biased legislation was the creation of a racially segregated society and a dual system of law and administration that helped to sustain it.

2. The Law of Labour

(a) Taxation

During the colonial period, the very mention of taxation was often accompanied by conflicting but heated arguments all attempting to answer the question of African taxation in Kenya. According to the colonial authority, the system was necessary since, as we have already noted imperial aid to the colony had been curtailed despite

³⁰Coffee Leaf Disease Ordinance 1904.

³¹The Registration of Coffee Plantations and Coffee Dealers Ordinance No. 10 of 1918.

the colony's financial requirements. However, this official view is plausible only to a certain point. A closer examination of the taxation system in its historical specificity, especially an examination of who paid the taxes, how much and how the tax revenue was used, reveals that African taxation, as well as raising revenue for the colonial administration was like land legislation, another step in the process of the re-allocation of resources from the African to the settler. In this sense, the system of colonial taxation in Kenya can only be meaningfully understood in the context of colonial settler agrarian capitalist production.

Direct African taxation was first imposed in 1901³². The taxes were raised on each African hut hence the name - Hut Tax. By 1910, a Poll Tax on all African males over the age of sixteen was added. Leys (1931) argues that the total African burden - both the Hut and Poll Tax was approximately 30s. (K. sh.) per person per year³³. In relation to the Hut Tax, both men and women can be said to have paid the tax since it was levied on each hut irrespective of the occupant. In addition to the Hut and Poll Tax, a cess or rate was also levied by the tribal councils on the same Africans who paid the Hut and Poll taxes. This was meant for use by the tribal councils for the maintenance of public works e.g. roads in the African reserves. Although no figures are available for individual rates the total sum collected appears quite substantial. For example, in 1930, the average cess collected from Africans amounted to £42,000³⁴.

³²Hut Tax Regulations No. 18 of 1901.

³³N. Leys; A Last Chance in Kenya. Hogarth Press, London, 1931, pp24-25

³⁴Ibid. p. 32.

According to Ross Macgregor (1927), Indian and Arab taxation was introduced by the 1912 Non-Native Poll Tax Ordinance. The rate was £1 per year. It was not until 1920³⁵, when European direct taxation was introduced. This was soon to be abolished by the 1922 Income Tax Ordinance which also introduced indirect taxation such as import duty with 30% of this attached to basic goods consumed by Africans, e.g. hoes and blankets. According to Leys (1931) the indirect tax paid by Europeans was approximately £3 per head. The Africans paid an indirect tax of approximately 11s. per head, and this in addition to Hut tax, Poll tax and cess which the non-Africans did not pay.

With reference to income distribution, the distribution of taxation becomes rather interesting. The 1929 Labour commission estimated African income in the reserves at £3 10s. per year and that in the wage earning sector at £10 15s. The estimate for European earnings was £600 per year³⁶. An examination of the various income levels and the distribution of taxation reveals that there was no correlation between the income earned and the tax paid. For example during the period 1920-21, out of the total tax revenue of £1,018,320, the Africans paid £656,070 in direct taxation and £341,250 in indirect taxation, whereas non-Africans paid only £21,000 (total taxation)³⁷. Macgregor Ross (1927) citing the above figures argues that the tax burden fell most heavily on the Africans.

³⁵Income Tax Ordinance. No. 23 of 1920.

³⁶N. Leys; A Last Chance in Kenya. op.cit. p.20. See also Ghai, D.; Some aspects of Income Distribution in East Africa. Nairobi: Makerere University (cyclostyle) 1962.

³⁷Ross Macgregor; Kenya from Within. op.cit. p. 154

Moreover, the bulk of the revenue collected from African taxation, amounting to for example half of total government revenue in 1923, was as Zwanenberg (1975) points out, diverted to shore up the settler economy. For example, among the Kamba of Kitui between the years 1923 and 1935, the total aggregate revenue collected by the Administration amounted to K sh. 9,561,611. Ironically, the total expenditure by the administration in the district for the same period was K shillings 991,333; approximately 10% of the total revenue collected. According to Zwanenberg (1975) the 10% expenditure was not spent on development in the area, but on salaries for white colonial personnel and their subordinates; who according to Leys (1931) spent most of their time collecting taxes. Thus the way tax revenue was used and the fact that the highest beneficiaries were barely taxed raises doubts about official proclamations that taxation was solely for the purpose of raising revenue.

It points to the contention that besides raising revenue, tax legislation, like land legislation was aimed at pressurising the African to move out of subsistence into wage-employment. Since income from the wages offered by the settlers e.g. an average of 15s. per month in 1944³⁸ (30 day month and often 180 days per year) were too low to induce a massive African migration³⁹ into the European

³⁸S. and K. Aaranovitch; Crisis in Kenya; op.cit. p. 112

³⁹For a discussion on the effects of taxation and Pass laws on African response and attitude to settler wage employment see N. Leys; A Last Chance in Kenya. op.cit., M.R. Dilley; British Policy in Kenya Colony. Frank Cass and Co. Ltd., London, 1966, W. Ross Macgregor; Kenya from Within, op.cit.

wage sector, taxation was used as a lever for achieving the same purpose. The amendment of tax legislation to provide for capitalist penal sanctions for tax evasion⁴⁰ lends some weight to this view. In the wider context of colonial agrarian settler capitalism, the criminalisation of tax evasion was no more than a link in a wider movement, away from general legislation to specific criminal legislation as a means of State intervention in the market, especially in structuring labour relations with a bias in favour of the settlers.

(b) Criminal and/or Contract Law

In colonial Kenya, almost all labour relations were governed by contract law introduced in 1918. In theory, contract law as Seidman (1978) argues, does not prescribe any behaviour although it requires the State machinery of courts to levy a sanction if a party breaks an agreement - hence the view that contract law operates only in a facilitative form implying that the role occupant is free from the coercion of State power.

However, in practice, contract law (as facilitative law) permits the parties to a transaction to determine their interchange and provides State machinery to enforce them. This as Cohen (1964) argues makes contract law a body of rules, according to which the sovereign power of the State is exercised in accordance to norms agreed upon between the parties to a more or less voluntary transaction. This implies the ideal that all parties involved in the transaction have equal rights before the law. However, in a society of unequals as Seidman (1978) points out, facilitative law transfers sovereign power to make and enforce law to the economically powerful.

⁴⁰Ibid.

To give unequals equal rights against each other ensures domination by the stronger. Colonial Kenya was a society of unequals. So long as the settlers and the Africans were differently placed, any law must advantage one more than the other. Contract law was therefore bound to advantage the settlers against the Africans implying that contract law is an instrument for facilitating State intervention in the market through criminal law.

For example, in 1919, the Native Registration Ordinance (later to be known as the Registration of Persons Act)⁴¹ was enacted. This legislation, enforced through pass law became the keystone for the status of the African in relation to the colonial labour control system⁴². The basic aim of registration was to ensure that contract labourers (notwithstanding that there was no other type of employment in the country), were brought under criminal law legislation by making breaches of labour contracts enforceable under criminal law⁴³. Registration (enforced through pass law which empowered the colonial administration to make rules for controlling the movement of "natives" (Africans), travelling into, out of and/or within the limits of the protectorate) individualised the process of dealing with the African which made possible the legitimate use of capitalist penal sanctions in labour control. The shift in favour of penal sanctions did not only strengthen the settlers' bargaining position over labour, but also served to demonstrate

⁴¹ Kenya: The Native Registration Ordinance, 1919

⁴² See generally Ross Macgregor; Kenya from Within. op.cit.

⁴³ Through an amendment of the Master and Servants Ordinance 1906, a direct use of criminal law to control and regulate labour became more open, e.g. under this Ordinance (as amended) it became a criminal offence for a servant to leave his master.

the legal status of the labourer in relation to his employer. In colonial Kenyan terms, it served to identify who was at the receiving end of the colonial social control system.

In order to ensure that Africans worked for settlers, the State went beyond ordinary contract remedies and enacted various criminal ordinances that helped consolidate the African's subordinate position. For example, leaving employment without the permission of the employer became a crime, being intoxicated during working hours became a crime, neglecting to perform any work, which was the duty of a servant to have performed or "carelessly" or "improperly" performing any work which from its nature was the duty of the servant to have performed became a crime⁴⁴. Criminal law legislation was extended to cover almost all employer/employee day to day interactions. For example, using abusive or insulting language, refusing to obey any command of his employer or of any person lawfully placed by his employer in authority over him, which command it was his duty to obey became a crime⁴⁵.

In practice almost all African social and economic behaviour became subject to criminal law regulation. Thus African traditional behaviour became subject to proscription. For example, the 1930 rules made under the Native Authority Act⁴⁶ made formerly acceptable behaviour such as asking a relative for financial support to help

⁴⁴Kenya: Employment of Servants Ordinance 1937. See also Employment of Natives Ordinance. Cap. 139 (1926 ed)

⁴⁵Kenya: Employment of Servants Ordinance 1939. See also Native Passes Regulations No. 12 of 1900. It is important to note here that all registration certificates carried by Africans had an endorsement concerning past and present employment which helped the authorities to keep track of the African population in relation to labour distribution.

⁴⁶The Native Authority Act 1930

with payment (exchange) of dowry for a wife, raising legal fees, building schools collectively illegal and penally sanctionable. In effect, under colonial capitalist criminal law, all forms of traditional reciprocity which formed the basis of socio-economic and political relationships⁴⁷ were proscribed and became penally sanctionable. The State was thus engaged in the process of reducing all institutions in the indigenous community based on collective responsibility to those based on the ethic of individual responsibility. This, as Kennedy (1976) argues, allows for the legitimate use of capitalist penal sanctions.

Under the colonial economic order dominated by the settlers through the State's use of criminal law, it becomes apparent that the use of law is both repressive and more open than is found in already "developed" capitalist situations. Makela (1974) points out that in "developed" capitalist situations law is used in a more technical manner. Colonial capitalist use of law also demonstrates that the stark and repressive use of law, especially criminal law, is more likely to occur in those areas where there is rapid social change. This is much more so in those areas where economic conflict forms a substantial part of the social change.

For example, in Kenya, in order to effectively shut out the Africans from the market economy in all aspects except as labourers the State organised every branch of the capitalist economy through an industry board. Essential commodities such as tea, coffee, sisal, pyrethrum, pigs, maize and cotton were all organised through an industry board. These boards, with exclusive settler representation,

⁴⁷ See discussion on reciprocity in Chapter 2

were given broad powers to determine how and by whom agricultural industries should operate. Law was then used to enforce the mandate of the boards.

For example, the Tea Board was granted power to licence tea growers, factories and to regulate the control and improvement of tea cultivation and export. Following the general colonial pattern the 1960 Tea Acts Licensing powers⁴⁸ made it an offence for any person to grow or manufacture tea without a licence. Since only the settlers were represented in the Boards it was not surprising that the Boards restricted all agricultural licences (including growing, manufacturing and marketing) to the settlers, effectively shutting out the Africans from the new socio-economic order except in a subordinate capacity. Law was openly used to consolidate the system. For instance, it became an offence for any person (meaning African) to be found in the possession of meat, hide, skin or any part of any stock, milk, eggs, fruit, tea, maize, coffee beans, coffee berries and any other article (described as produce) in any form or within the vicinity of any farm (notwithstanding that all farms were settler controlled)⁴⁹. As Leys (1931) argues, it was only necessary to be in possession for the offence to have occurred unless one could prove that the possession was lawful. This meant that even the burden of proof was an African problem.

⁴⁸ See Tea Board of Kenya: Tea Act, Cap 343 Laws of Kenya. See also the Kenya Tea Ordinance 1960.

⁴⁹ See for example Ordinance No. 10 of 1928 under the Employment of Natives' Ordinance Cap 139 (1926 ed.)

Since State law created this situation, Seidman's (1978) argument that the law (in colonial Kenya) delegated to various government officials and industry boards power to structure choice for Africans in ways favourable to settler economic interests is validated. By implication, the law delegated power to the economically powerful who exercised it by limiting the choices of the weak. In Kenya, the State evoked the legal order to lodge control with the settlers. This particularistic use of law, as Kennedy (1976) contends, implies that law (especially criminal law) was established primarily for the protection and development of the institutions of capitalism meaning that penal sanctions directly control the manner in which the capitalist social structure develops. As the Kenyan case demonstrates, it is penal sanctions which had direct bearing in determining the organisation and division of labour and the structure of its control. Thus criminal law strangled the ability of the lower classes (in this case the Africans) to possess tools, capital goods or raw materials and on pain of heavy penal sanction forbade any other association (other than that stipulated in law) between the higher and lower classes⁵⁰. Penal sanctions guaranteed by the State ensured a continuous labour force and created two classes of people one (the African) bound by criminal law and the other (the settler) by non-punitive civil law⁵¹. Thus criminal law became an instrument for the optimal allocation

⁵⁰ See M. Kennedy; "Beyond Incrimination" - some neglected facets in the theory of Punishment in W.J. Chambliss and M. Mankoff; *Whose Law, What Order? A conflict approach to criminology.* Wiley. New York, 1976 pp. 45-46.

⁵¹ Ibid.

of the colony's resources for the purpose of moral condemnation - a means for distributing guilt and responsibility for what occurred.

Through the direct act of the State, a Stateless society was transformed into a colonial agrarian capitalist structure where social relations based on reciprocity and mutual interdependence were supplanted by capitalist market relations based on law. State law made it impossible for the Africans to participate in government and the State systematically organised the economy favourably to settler interests. Thus by State intervention, through the use of law, Kenya became a settler country. The settlers dominated the economy by taking up land for commercial farming while the Africans were herded into reserves from where they played a vital, but subordinate role as a cheap source of labour. In short, as Seidman (1978) maintains, a host of State laws organised a command economy - an aspect that is bound to have significant implications for crime and social control.

CONCLUSION

In the foregoing discussion, we have been looking at a social situation where social change was imposed from outside the indigenous social fabric. We have examined how, through a particularistic use of law (imperial law), a colonial agrarian capitalist social structure was juxtaposed upon a traditional Stateless social structure, creating a situation of dominance and dependence in all aspects of social life with the colonial structure assuming the dominant role. In this context, we examined how law in general and criminal law in particular was used in a particularistic manner to

obtain land and to obtain and structure labour for a colonial agrarian capitalist class and its consequences for the indigenous social fabric. In other words, we attempted to demonstrate how on the one hand law, especially criminal law, was influenced by the conditions prevailing under the colonial agrarian capitalist mode of production and how on the other hand law, especially criminal law, contributed towards the maintenance of the colonial agrarian capitalist mode of production. In relation to crime and social control, what does this imply?

Starting from the most general, colonial agrarian capitalist control demonstrates that customs, as they are represented in the system of social control, are not necessarily a reflection of the collective conscience and neither is the power of reaction that is given to "constituted" authority the same as that which is diffuse throughout the society. Rather, customs are a reflection of the existing socio-economic and political realities in existence. Hence it is these realities that are mirrored in the system of social control, especially in law.

Colonial Kenya was an evolving capitalist society that was characterised by fundamental divisions based on class (racial), the most basic being that between the economically powerful settlers who ruled and the economically weak Africans who were ruled. It was a society divided into those who owned the means of production and a subordinate group that was expected to work for wages. In such a situation, conflict was inevitable, the most prominent conflict being the competition for control of the means of production. As the conflict developed and became manifest, the State, acting

in the interests of the dominant mode of production and by extension in the interests of those who controlled the means of production, passed laws that were designed to control through the application of State sanctioned force those acts of the subordinated African group that ran counter to the interests of the powerful settlers. As colonial agrarian capitalism developed and the conflicts between the Africans and settlers intensified, it followed that more acts of the less privileged African group began to be defined as criminal. In this sense, the function of social control was to define those acts that ran counter to the established social, political and economic order as criminal in order to maintain and protect the colonial agrarian capitalist mode of production. Crime was therefore a product of the existing economic and socio-political system.

For example, in the context of colonial agrarian capitalist production, labour was the most crucial factor. Since this could only be obtained from the subordinated African class, the exploitation of labour power became the most decisive factor as far as social control was concerned. Consequently, the division of labour in this case became directly associated with the rise and development of penal sanctions. Since as we observed in Chapter 2 penal sanctions did not exist, prior to the evolution of the colonial agrarian capitalist structure, their emergence could only have come about as the colonial agrarian capitalist mode of production chose the type of control system that was suitable for its development. In this sense, penal sanctions, as they were represented by colonial criminal law could not have been a reflection of the agreed upon

values and customs of the whole society. Rather, they were a set of rules, laid down by the State primarily to protect and regulate economic behaviour. By extension, these rules tended to reflect the interests of those who controlled and owned the means of production. Consequently, criminal behaviour was no more than the behaviour of those groups who were exploited by the existing economic relations. This behaviour may not have been essentially criminal, for instance, "squatting" but was made criminal by the coercive power of the State in enforcing the dominant colonial capitalist interests. In terms of the colonial "rational-legal" system, legitimate coercion was thus justified and the coerced Africans became criminals.

In this sense, crime cannot be explained by psychological motivations of individual offenders, but can only be explained in terms of a particular socio-political and economic system seeking to extract obedience to itself. Thus what constitutes an offence and the person who would indulge in it becomes the function of the existing conceptions of legitimate authority. Moreover, as the colonial agrarian capitalist situation demonstrates, penal sanctions are linked to the formal laws of the capitalist State and to the civil institutions supported by it. In this sense the meaning of crime cannot be found outside these same institutional patterns, especially the economic ones. Thus the State's social control system and its chief function of maintaining the dominant capitalist mode of production through the use of law features rather prominently in the creation of crime. In this context, crime is bound up with the fundamental conditions of capitalistic social life

because those conditions of which it is a part are themselves indispensable to the normal evolution of the capitalist State's morality and law.

In the next Chapter, we shall attempt an application of the observations we have made here by looking at crime and social control in a neo-colonial capitalist social structure.

CHAPTER FOUR

NEO-COLONIAL CAPITALISM, CRIME AND SOCIAL CONTROL

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INTRODUCTION

In Chapter Three, we examined how, by means of a particularistic use of law, a colonial administrative state, characterised by an agrarian capitalist mode of production and a government dominated by an immigrant settler capitalist class was set up and maintained. In this context we examined how the colonial state, through the use of law made it impossible for the Africans to participate in government. We also examined how through the same means the state organised the economy favourably to settler interests. Here we specifically paid attention to how, by the means of a law, the state did not only obtain land and labour for the settler capitalist class but also structured labour for such a class with significant implications for what constituted criminal behaviour.

Makela (1974) argues that the foremost task of the state is to guarantee the continued existence of the mode of production itself and to try and settle the disputes that arise from the antagonistic class conflicts of capitalistic society. Implied here is the view that the state is both a regulator of economic life as well as an ideological apparatus intended to legitimise the prevailing mode of production. Viewed in the context of a 'developed' capitalist society, where social change is less rapid and where law is used in a more or less technical manner as Makela argues, the State's role does appear to represent a neutral force. However, viewed in the context of a 'developing' capitalist society where social change is rapid and continuous, the neutrality of the state begins to disappear and the state no longer appears to stand above societal conflicts.

For example, in the context of colonial agrarian capitalist development as the Kenyan case demonstrates, the state cannot be said to have represented a fully neutral force which made decisions and judgements in accordance with the public interest as a whole. On the contrary, the way the state used the legal system to obtain and structure labour for the capitalist settlers shows a specific bias in favour of the capitalist class. The colonial state used criminal sanctions to force compliance with colonial (settler) economic interests. This illustrates how dominant groups can institute and shape laws to coincide with their changing needs. The way law was used in colonial Kenya and the State's role in its use tends to support Kennedy's (1976) view that the state in capitalistic society has represented the interests of the capitalist class as opposed to the needs of the vast majority of citizens. This implies that law (criminal law in particular) is not merely a response to already existing behaviour, but is also a basic tool in the development of the capitalist mode of production and a major factor in social stratification. Moreover this entails that crime, as a violation by act or omission of any criminal law and as a harm against the State cannot be a universal phenomenon comparable to 'primitive' and 'civilised' societies as Durkheim (1973) maintains. Rather crime has unique characteristics depending on its historical period - meaning that crime is functionally dependent on a given social order.

In this chapter, taking post-colonial Kenya as a specific example, we shall continue the above discussion by looking at the way law is used in the establishment of a neo-colonial capitalist social structure, characterised by foreign and indigenous capitalism.

In this context, we shall on the one hand examine how law is used to protect foreign capitalism and develop indigenous capitalism characterised by two basic classes - the peasantry and the emergent indigenous capitalist class. On the other hand, we shall examine how law is used to criminalise political activity especially labour agitation and socialist politics in the process of consolidating neo-colonial capitalism. We shall then examine the consequences of such a particularistic use of law on crime and social control. However, we commence with an examination of what is meant by neo-colonialism.

NEO-COLONIALISM

To Nkrumah (1965), neo-colonialism was the last stage of imperialism. Before him however, Lenin (1940) contended that imperialism (the basic tenant of neo-colonialism) was the highest form of capitalism. According to Lenin (1940) "Finance Capital" is such a great and decisive force in all economic and international relations that it is capable of subordinating to itself even states enjoying complete political independence. The all Africa conference held in Cairo in 1960 defined neo-colonialism as the survival of the colonial system in spite of the formal recognition of political independence in emerging countries which become victims of an indirect and subtle form of domination by political, economic, social, military and/or technical means¹. Neo-colonialism as Woddis (1967) argues has become the dominant form of exploitation since the retreat of direct colonial rule after 1945.

¹See generally Kwame Nkrumah, Neo-Colonialism, the last stage of Imperialism. Nelson, London, 1965.

According to Woddis (1961), the essential feature of neo-colonialism is to keep new states from going socialist, by pushing them along a capitalist path and to openly encourage and foster new capitalist forces which would assist imperialism, but which would not be too powerful to end their dependence on it. Therefore, the central core of neo-colonialism is primarily the formation of classes and strata within a colony, which are closely allied to and dependent on foreign capital and which form the real basis of support for the regime which succeeds the colonial administration. Implied here is what Woddis (1967) sees as the development of an indigenous capitalist class, involving the accumulation of sufficient local capital for use by such a class resulting in an alliance between external and indigenous capitalism. Neo-colonialism then becomes a characteristic form of political, economic and social life in certain ex-colonies or rather what Leys (1975) and Sandbrook (1975) refer to as "dependent capitalism". Thus neo-colonialism consists of two basic aims: (a) to serve the economic, political and social interests of external powers and (b) to create internal conditions in the "developing" world which would assist the retention of power in the hands of those social strata which are prepared to co-operate with imperialism and which are best suited to carry through this collaboration. Thus the "grand strategy" of neo-colonialism is to help retain the neo-colonial countries as producers of raw materials; providing minerals, industrial crops, and foodstuffs for imperialist industry and to serve as markets for neo-colonialist manufactured goods - a strategy that keeps the neo-colony economically weak and dependent.

According to Nkrumah (1965), neo-colonialism was given its base by the principle of breaking up former colonial territories into small non-viable States which are incapable of independent development without socio-economic and political support from former colonial or new imperialist powers. Leys (1975) and Woddis (1967) argue that constitutionalism (a process that involved the former colonialists in the drawing up of constitutions (involving economic commitments) for independence) was the major factor in the legitimisation of neo-colonial capitalist development. This implies the possible uses of law in cementing the neo-colonial process. However, neither Leys nor Woddis goes into any detailed discussion on how law in general was used to consolidate neo-colonialism. This follows the general trend found in most theories on neo-colonialism. These theories, either underrate or ignore altogether the way law is used in consolidating neo-colonial development.

With reference to neo-colonial capitalist development in Kenya, we shall (while taking into account the contributions made by general theories on neo-colonialism) attempt an examination of the way law is used in legitimising and consolidating neo-colonial capitalist development. In this context, we shall try to demonstrate how law, taken in the constitutional sense, was used not only to maintain and protect neo-colonial capitalist development, but also to determine the nature and extent of its consolidation. In this sense we shall pay special attention to (a) how constitutionalism was used to establish licensing with penal sanctions, not just for economic control and regulation as it is often the case in developed capitalist systems, but also for political and trade

union control; (b) how constitutionalism is used to structure the economy for indigenous capitalist development i.e. in creating parastatals for that purpose and (c) how administrative law is used to establish easy access to capitalist production for the indigenous capitalist class. We shall then examine the consequences of such a particularistic use of law on crime and social control. However, we begin with an examination of Kenya's post-independence social structure, in particular the economy, the politics and social stratification. In view of our observations in Chapter Three, we consider this necessary and useful to a meaningful explanation of crime and social control in its historical specificity.

THE NEO-COLONIAL CAPITALIST ECONOMY

1. Economic Base

In December, 1963, Kenya attained her formal independence from Britain. In December 1964, a republic with an executive president was established in the belief that the monarchical arrangement inherited from Britain at independence was insufficient and out of touch with the political needs of the new independent state. The move to republicanism was viewed as the first step towards complete political and economic independence. However, Kenya had inherited at independence a capitalistic economy characterised by a unique monopoly which Leys (1975) describes as having a significant degree of control over economic resources i.e. land and labour. This, as Gertzel (1970), Ghai and Mcauslan (1970) and Odinga (1967) argue was to influence greatly the manner in which Kenya was to handle her post-independence problems, especially the way she set

about creating a new economic order.

Following the trend in most post-colonial Africa, Kenya adopted a public commitment to socialism as her economic base. However, Kenyan socialism as expressed in Sessional Paper No. 10 (1965)² on "African Socialism and its application to planning in Kenya", turned out to be essentially capitalistic. The paper conceived development as maximising production with social equality and justice a necessary corollary. Sandbrook (1975) points out that such a conception of development is based on the premise that development can be best achieved through the profit motive and the associated institution of private property, a considerable reliance on foreign capital and an official encouragement of indigenous entrepreneurship, both urban and rural. This basically explains why "African Socialism" in Kenya as defined in Sessional Paper No. 10 (1965) does not describe a socialist mode of production.

On the contrary, the paper concerns itself mainly with the profit motive - involving a substantial input of foreign capital - although social welfare and justice are mentioned. The paper gives priority to production in the belief that social justice can only be achieved by sharing wealth and not poverty. The centrality of the goals of equality and justice, although re-affirmed³, is nevertheless overshadowed by the precedence given to maximisation of growth regardless of its consequences to social equality.

²Sessional Paper No. 10 (1965) has since its inception become the basic "blue-print" for Kenya's socio-political and economic development policy.

³See Chapters 1, 2 and 5 of Sessional Paper No. 10 (1965) Government Printer, Nairobi.

For example the paper commits the State to uphold the right of individuals to accumulate property and wealth in the name of human dignity and freedom⁴, but the same statement declares growth as the first concern of development, hence the declaration that the bulk of government expenditure and planning would be channelled into directly productive activities in order to establish a foundation for increased and extended welfare services in the future⁵. As Marris (1967) argues, Kenyan African socialism becomes economic growth in spite of social justice and human dignity.

2. Foreign Capital

Given the prevailing socio-economic conditions at independence, it was perhaps inevitable for Kenya to rely so heavily on foreign capital since growth would have been inconceivable without it. The decision to rely on foreign capital thus marked the initial step towards neo-colonial capitalist development. Colonial settler economic dominance was thus replaced by neo-colonial capitalism with foreign investors and aid-donors taking over from the settlers, but continuing the same process of "dependent" capitalism.

For example, in agriculture, foreign control of the big tea, coffee, sisal and fruit estates continued despite the settlement of "some" Africans in former European land. In the non-agricultural sector, foreign dominance became pronounced in the modern capital intensive and technologically sophisticated industrial sector. The National Christian Council of Churches (1968), the International Labour Organisation (1972) and Seidman (1972) all note that foreign

⁴Ibid p. 12

⁵Ibid p. 52

dominance became very pronounced in industry mainly devoted to the processing of local raw materials i.e. coffee, tea, sisal and fruits for export. For example Brooke Bond Liebig Ltd. had until 1980, a monopoly on tea processing⁶. In the import-substitute manufacturers e.g. textiles, footwear, clothing, paper products and pharmaceuticals, most of which depend on the import of parts and materials, foreign control has a near monopoly⁷. The International Labour Organisation (1972) points out that the 1967, 1968 development estimates show that projects involving foreign investment accounted for 60% of total manufacturing investment. In 1967, enterprise with foreign equity accounted for 57% of gross production of manufacturing firms (employing fifty workers) and accounted for 60% of total profits. The 1970-74 Development Plan projected inflow of foreign capital was put at K£140 million for the plan period, far ahead of the actual 1969 foreign investment of £13 million indicating that foreign capital investment was on the increase.

Foreign capital in aid form i.e. grants, loans and technical assistance accounted for just over half of total aid in 1970. Aid percentage of government expenditure was relatively high and constant after the 1964-65 peak period (mainly due to British government aid for the buying out of settler farmers). For example, aid percentage of total expenditure stood at 39% in 1969-70, and 37%

⁶ See Nicola Swainson, *The Development of Corporate Capitalism in Kenya 1918-1977*, Heineman, London 1978, pp. 250-264, for a detailed analysis of the extent of collaboration and competition between local and foreign capital e.g. Brooke Bond Liebig and the tea industry in Kenya.

⁷ See "Who Controls Industry in Kenya", Report of a Working Party, National Christian Council of Churches, East African Publishing House (EAPH), Nairobi, 1968, for a breakdown of industrial development including a breakdown of industry and ownership i.e. foreign, indigenous or both.

in 1971-72 (International Labour Organisation, 1972). The reliance on aid and the degree of such reliance is manifested in the 1970-74 Development Plan projections which put development aid projected inflow at £95 million, equal to over half of projected official development expenditure⁸.

Kenya's dependence on foreign investment and aid was not made any better by her manpower requirements. As Gavin (1967) argues, the colonial legacy, mainly the colonial practice of keeping Africans at the bottom of the scale while reserving skilled jobs for Europeans and/or Asians had left a vacuum as far as African expertise was concerned. Therefore, although Sessional Paper No. 10 (1965) had advocated Africanisation of personnel and ownership throughout the economy, the government set on negotiating with various capitalist governments, individuals and institutions for technical assistance. The result was an increase of "expatriate" personnel, for example from 2,700 advisory, operational and voluntary in mid 1968 to 3,700 in mid 1971. In African terms, this dependence was rather unusual, since by 1970, as Nellis (1973) points out Kenya depended on expatriate labour more than eight African countries including Nigeria for which information is available. In fact in 1969, Nellis (1973) had already noted that 20% of high level posts i.e. economically significant posts in relation to policy formulation, were manned by expatriates. For example, in 1971, of the 2,800 expatriates employed by the central government, a significant 78 were employed in key industries; 33 in finance and planning; 24 in legal and judicial posts, 15 in commerce and

⁸ See Table I for a more detailed view of foreign capital inflow for the first seven years of independence.

industry and 6 in the office of the President. Their influence, both in key policy decisions and perhaps more so in the shaping of attitudes (towards a capitalist rather than socialist outlook) is relatively substantial. Technical assistance of this magnitude thus becomes "functional" to the maintenance of the neo-colonial capitalist political and socio-economic system since their presence undermines Kenya's confidence and perpetrates dependence. Leys (1975) argues that their presence is significant in that they help harmonise foreign capitalist interests with local capitalist interests.

Thus Kenya was significantly dependent on foreign capital (investment, aid and technical assistance) to a setting where the government was more or less dependent on the willingness of the foreign capitalists to invest in development. Under such conditions the superiority of the foreign capitalists, both in capital and expertise and the manner in which it was deployed was much more likely to influence the state's decision either for or against capitalist control. Kenya's dependence on foreign capital was such that the state decided in favour of protection rather than control of foreign capital investment.

For example, the 1964 Foreign Investment Act more or less constitutes a Bill of Rights for foreign investors. Act. No. 35 of (1964) guarantees (a) freedom of repatriation of profits in proportion to the foreign equity, (b) interest and repayments on foreign loan capital, (c) abjuring of expropriation without cause (after all Sessional Paper No. 10 (1965) argues against expropriation of foreign concerns as foolhardy - hence the promise to nationalise assets only with full compensation) and (d) tax

allowance of 20% based on depreciation, market protection in the form of tariffs and quotas on imports and special permission for duty free capital goods and materials unavailable in Kenya⁹. The International Labour Organisation (1972) commented that foreign capital protection of the above magnitude goes a long way in serving the economic and political interests of external powers - hence fulfilling one of the basic aims of neo-colonialism. Odinga, then vice-president of Kenya observed that such legitimisation of foreign capital made a mockery of "African Socialism" and was based on the false assumption that there can be a harmony of interests between private capital and the government as the representative of the people.

The State's use of law to consolidate foreign capitalist investment echoes similar measures undertaken by the colonial State (Chapter Three). In the latter case, the State through the use of law intervened to create certain economic conditions favourable to colonial settler economic dominance rather than allow the market to create conditions for her intervention. A similar use of law by the neo-colonial State to consolidate foreign capitalist investment strengthens Kennedy's (1976) view that in capitalistic societies law is mainly used in the protection of the dominant capitalist interests. In Kenya this general use of capitalist law becomes much more evident in the development of indigenous capitalism.

⁹See Act No. 35 of 1964, Government Printer, Nairobi 1-4. See also discussion by Cherry Gertzel, Maurice Goldschmidt and Donald Rothchild; Government and Politics in Kenya. EAPH Nairobi, 1972.

3. Indigenous Capitalism

At independence, Kenya had an option either to model her economy on traditional African collectivism or to pursue the capitalistic model already laid down by the colonialists, but as we have already seen, Kenya chose to pursue a capitalistic mode of development. However, Sessional Paper No. 10 (1965) did not commit the government to rely solely on foreign capital. It committed the government to establish Africans in the monetary sector (previously a European and Asian enclave), by ensuring that a share of the planned expansion was African owned and managed. African collectivism was thus discarded while a vital element - the development of an indigenous capitalist class, was added to the neo-colonial capitalist strategy. The problem was how to develop African capitalism in an area already dominated by foreign capital, which by 1970, through the re-investment of profits and fresh inflow of capital had achieved a growth rate (in real terms) of approximately 66%, accounting for 47% of the monetary economy as is noted by the Kenya Statistical Abstract (1971).

In order to develop a viable indigenous capitalist structure, Kenya had to penetrate the monopolistic infrastructure of the post-colonial capitalist economy. To do so she had two options (a) dismantle the monopolistic infrastructure altogether or (b) extend it to the Africans. To dismantle the post-colonial infrastructure proved impossible due to Kenya's dependence on foreign capital. Moreover, it was the State which had intervened through the use of law to legitimise and consolidate foreign capital. The only option the State could take without appearing to contradict her intentions

was to establish and develop African capitalism via an extension of the existing monopoly infrastructure. To do so, the government undertook to (a) provide aspirant African businessmen with various technical training schemes, (b) provide technical advice once commercial or industrial activities were started and (c) make capital available through the Commercial Development Corporation established in 1965 and (d) provide other inducements e.g. the restriction of trading licences for certain types of trade with a bias in favour of African applicants¹⁰. This amounted to an extension of quasi-monopolies to African businessmen which in turn implied the use of law and general administrative action for the purpose of creating and fostering an indigenous capitalist class. You will recall how the colonial state used law and general administrative action to consolidate settler economic dominance. The neo-colonial State took its cues from that to create what Fanon (1967) refers to as a floating bourgeoisie which owes its legitimacy and survival to state protection in the form of monopolies. Thus through direct State action, rather than market conditions, an indigenous capitalist class became part and parcel of official economic policy including its extension to the 80% of the population still in the rural areas where African collectivism, although seriously undermined was still in practice.

¹⁰ See C. Gertzel, M. Goldschmidt and D. Rothchild; *Government and Politics in Kenya*, EAPH, Nairobi, 1972, pp. 522-524, for a brief review on Government policy on reconciling Africanisation with economic growth.

4. Rural Capitalism

According to Sessional Paper No. 10 (1965) rural development on a communitarian (traditional) basis had been rejected on the grounds that it could not be carried over "indiscriminately" to a modern monetary economy. Rural development was thus not to be based on communal land ownership and production, but was to be based on individual enterprise with the co-operative element mainly for marketing. Therefore, peasant participation on the previously settler controlled agricultural exports, e.g. tea, sisal and coffee growing was established on an individual basis. As Sandbrook (1975) points out, land registration and consolidation was introduced (or rather carried over from the colonial system) and land ownership was made definite and explicit in order to bring it into line with capitalist thinking and development.

For example, the "Swynerton Plan"¹¹ was extended to the whole country. The consequences of this capitalistic land reform was twofold: (a) it served to validate the larger African landholders while leaving scores of peasants landless, as Sorrenson (1967) argues and (b) it helped defuse rural unrest, while creating conditions by which a "middle class" of Africans would obtain rights and interests in the large farm sector to politically and economically ensure its continued functioning as Wasserman (1973) contends.

¹¹The Swynerton Plan was instituted in Central Province at the height of the "Mau Mau" rebellion with the aim of creating a conservative African landed middle class. See M.P.K. Sorrenson "Land Reform in the Kikuyu Country" Oxford University Press, Nairobi, 1967.

To ensure the success of capitalist rural development, the State as Leys (1975), Sandbrook (1975) and Seidman (1978) argue, intervened and created Industrial Parastatals¹², e.g. the Kenya Tea Development authority and the Agricultural Development Corporation to help foster rural capitalism by encouraging African involvement in export crop growing. The basic aim of the Parastatals was to provide credit at low interest rates and expand extension services to provide advice to African farmers. This brought together the interests of the State and those of the social strata she was trying to develop creating what Leys (1975) refers to as economic nationalism. In both economic and political nationalism, neo-colonial capitalism found its base and legitimacy.

For example, the government, in its bid to facilitate the growth of indigenous capitalism began stringent Africanisation measures (including the Africanisation of personnel in foreign companies¹³) in order to establish Africans in the commercial sector of the economy. Large scale extension of state credit facilities (the Parastatals) i.e. the Agricultural Finance Corporation formed in 1963¹⁴ was undertaken in order to provide credit and the necessary capital for African involvement in business and industry. Of all the measures undertaken to develop indigenous

¹²Parastatals are quasi-government institutions implying a large measure of government control.

¹³See the Republic of Kenya, "Kenyanisation of Personnel in the Private Sector", Government Printer, Nairobi, 1967. pp. 1-4.

¹⁴See the Agricultural Credit Act 1963, Chapter 323 of the Laws of Kenya, Government Printer, Nairobi. The Government also initiated controls on land - see the Land Control Act. Republic of Kenya Gazette Supplement No. 103 (Acts No. 14) Act No. 34 of 1967.

capitalism, State coercion through Licensing was the most widely used. The 1967 Trade Licensing Act,¹⁵ enforceable under criminal law¹⁶ forbade trading by non-citizens in rural areas and the non-central areas in cities and towns. Under this Act, all business conduct could only take place under a Current Licence terms, which made it possible for the government to establish African capitalists in certain areas of the economy i.e. trade, transport and the manufacturers.

For example, in 1975, Swainson (1980) recorded that the Ministry of Commerce and Industry issued 463 quit notices to non-citizen businesses in Nairobi. Protective legislation as both Swainson (1980) and Leys (1980) argue strengthened the foothold of the indigenous capitalist class to such an extent that it accumulated sufficient capital to enable it to stand as a distinct class independent of foreign capital. However, the dependence of this class on State protection, and the State's dependence on foreign capital as we have already noted, makes indigenous capitalism more of a part of the neo-colonial capitalist strategy rather than a complete independent variable.

Kenya therefore pursued a neo-capitalist mode of development with emphasis placed on the Africanisation of the existing resources rather than their transformation. Foreign capital helped to expand production at the impressive rate of 6.3% up to the mid 70's. However, as the International Labour Organisation (1972) noted, economic growth continued on the same lines as those set by

¹⁵ Republic of Kenya, Kenya Gazette Supplement No. 103 (Acts No. 14) Act No. 33 of 1967.

¹⁶ See C. Gertzel, M. Goldschmidt and D. Rothchild; Government and Politics in Kenya, EAPH, Nairobi 1972, p. 534.

the colonialists. This meant that the colonial capitalist structures that had led to and had sustained inequality still remained, implying that the benefits of economic growth were still unequitably distributed - further implying that independent Kenya is a neo-colonial capitalist society characterised by economic classes and class conflict the most basic being the struggles within the indigenous capitalist class to take control of the political machinery of the neo-colonial structure.

In Chapter Three, through our examination of how the State used law to establish the settler capitalist class, and how this class manoeuvred and took control of the political machinery of the colonial state, we came to the proposition that in capitalist society, dominant groups can institute and shape laws to coincide with their economic needs. In the foregoing discussion, we have already noted how the neo-colonial State used law to set up an indigenous capitalist system. However, in order to understand how the indigenous capitalist class uses law in its struggle to control the political machinery of the neo-colonial capitalist structure, it is necessary to understand the indigenous social structure as this is crucial to the way the indigenous capitalist class uses law. Of special significance is an understanding of how the indigenous society was stratified, especially how political parties evolved. Until we understand this, we cannot adequately understand the uses of law, both the general and the specific.

In the following discussion, we shall examine the pattern of neo-colonial social stratification and political organisation - mainly the way political parties evolved. We shall then examine

how the government consolidated its position, especially how law was used to sustain the neo-colonial capitalist mode of development and to prevent any settled opposition to it.

NEO-COLONIAL SOCIAL ORGANISATION

1. Social Stratification

Taking into account Kenya's neo-colonial capitalist development and considering the effects of the colonial policy on African Reserves, the 1969 population census shows that 80% of the population still lives in the rural areas. This means that the economy, in spite of developments in the monetary sector and rural capitalist development, is still essentially peasant. Sandbrook (1975) argues that nine out of ten of the population is in the rural areas. The bulk of this population is still composed of peasants i.e. smallholders who rely primarily on family labour and simple technology to produce goods mainly for their own consumption, but also for the market. As Leys (1975) contends, irrespective of the replacement of foreign controlled farms by medium to high density African settlement, and irrespective of the legal definition of ownership, a typical pattern of a peasant economy emerges with some differentiation ranging from the landless or nearly landless agricultural labourers at the bottom to emergent capitalist farmers at the top. This implies a neo-colonial capitalist society characterised by two basic classes; the peasantry and the indigenous capitalist class.

In Kenyan terms, the peasantry includes the unemployed and unproductively employed urban poor who can usefully be considered

as an extension of peasant society since there is an extensive interchange of goods and personnel between the urban immigrants and the rural dwellers. As Leys (1975) contends, the peasants and urban poor (i.e. the 12 to 13% potential workforce in Nairobi) are like in colonial times still subjected to the power of capital (both foreign and indigenous). Hence the prospect of hard unproductive labour coupled with growing inequality.

At the top of the social scale is the indigenous capitalist class. According to Leys (1975), this class is composed of the "ruling group" whose major activity is to use the benefits of political power to redress their insecure position vis-a-vis foreign capital. For example, wealth and business contracts acquired through political office are used to acquire property in the form of land, houses, shares and interests in business enterprise which in turn enhance their political power and social status. Also found among the capitalist class are the urban bourgeoisie, the petty bourgeoisie and the capitalist farmers.

Since independence, the capitalist class, probably taking the cues from the activities of the colonial settler capitalist class, has tended to work for the accumulation of resources and functions by the State bureaucracy at the expense of all other systems i.e. the Party. As Odinga (1967) points out, the party in neo-colonial Kenya has not emerged as a sufficient counterweight, resulting in the absolute power of the State central bureaucracy as it is symbolised in the person of the President (as we shall show later). The most significant aspect of this power structure is the indigenous capitalists' control of the political apparatus of the State

and the way they have used it to consolidate their economic dominance in particular and neo-colonial capitalism in general.

In the following discussion, we shall try to demonstrate how the capitalist class, through the use of the political machinery of the State (law in particular), makes it impossible for the peasants to participate in government by subordinating political activity i.e. party political activity to the State bureaucracy. We shall then examine the consequences of such uses of law on crime and social control.

2. Party Politics and Administrative Control

During the colonial period, the existence of an immigrant, economically differentiated settler capitalist class to whom the government alienated land resulted in a situation whereby racial categories provided the most decisive political divisions in the colony. As we noted in Chapter Three, the settler capitalist class enjoyed the dominant political position. Government policies on land, labour and the distribution of general services favoured the settlers against the majority Africans. As Gertzel (1970) noted, this created acute social and economic grievances which led Africans as early as the 1920's to demand a share in political power as the only means of redressing these grievances. This led to the formation of an African Nationalist movement which since its inception had a strong economic base which eventually led to the "Mau Mau" movement, the outbreak of violence and the declaration of "Emergency" in 1952¹⁷.

¹⁷ See generally Carl Rosberg and John Nottingham, "The Myth of Mau Mau", Rapp Mall, London 1966 for a comprehensive analysis of the pre-independence African politics.

The African nationalist movement was up to 1952 rather fragmented and was characterised by party political organisation e.g. the Kenya African Union (KAU), formed in 1944 and spearheaded by the Kikuyu, which tended not to cross tribal lines. This was mainly so due to official discouragement and partly so because of the African Reserves policy which had grouped people of the same tribe or group of tribes together. After the "emergency" (during which KAU and other African political organisations were proscribed), African political activity emerged with a national outlook. This led to the formation of political parties, for example, the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU), both formed in 1960, which cut across tribal lines and brought together different tribes. However, like the "pre-emergency" parties, KANU and KADU came about because of tribal economic interests. KANU was composed mainly of the larger tribes, for instance, the Kikuyu, the Luo and the Kamba, whereas KADU came into being as a result of the fears prevailing among the smaller tribes concerning land. This led KADU to demand for a quasi-federal division of power which would leave a central African majority government omnipotent than its colonial predecessor.

Thus Kenya began her independence with a multi-party structure and a system of government considerably more decentralised than the colonial one. The 1963 independence constitution¹⁸ provided for a considerable devolution of power from the centre under a quasi-federal structure. Within a year after independence however, KANU

¹⁸The Independence Constitution, The Kenya Independence Order in Council (L.N. 718 of 1963).

and KADU merged into KANU bringing to a temporary end the multi-party system. The 1964 Republican Constitution abolished regionalism and established the post of executive president, both as head of state and head of government with constitutionally guaranteed powers¹⁹. Kenya therefore entered her republican period, a defacto one party state and a constitution that almost amounted to a resurrection of the colonial administrative structure. This however did not mean an end to party political activity.

Earlier on in this discussion, we mentioned that the African nationalist movement had a very strong economic base. The achievement of independence did not, as we have already noted, mean the immediate end of the social and economic grievances which spearhead the nationalist movement. These had been carried over into independence and had been briefly identified with KADU. The KANU, KADU merger did not dissolve these differences and in view of the strong economic base of Kenyan political activity, intra-party conflict was therefore inevitable.

Initially, party disagreement was mainly on allocation of resources within districts. Since the various districts represented people of different tribes, this disagreement had tribal overtones²⁰. However, underlying this, were differences of opinion on the basic assumptions of government policy on the economy, such as land,

¹⁹See generally the Constitution of Kenya, Republic of Kenya, Kenya Gazette Supplement No. 27 (Acts No. 3) 18th April, 1969.

²⁰See G. Bennet "Tribalism and Politics in East Africa" in P.H. Gulliver (ed.) Tradition and Transition in East Africa, University of California Press, Los Angeles, 1969.

nationalisation and foreign policy. This implied a difference of opinion on the government's economic strategy which was later to appear in Sessional Paper No. 10 (1965). This split KANU into two factions; (a) the conservative element in favour of government policy and (b) the radical element in favour of a structural change.

The radicals rejected the government's major economic policy on the grounds that it was aimed at assisting the outgoing settlers rather than a meaningful effort to redress the underprivileged and underdeveloped position of the poor and unemployed. For example, the spending of £26 million, as Gertzel (1970) notes, to settle only 30,000 families was seen by the radicals as an inducement to the settlers rather than a meaningful assistance of new African farmers and an alleviation of landlessness and unemployment. The radicals advocated for a co-operative farming approach rather than individual ownership which implied a basic structural change. In short they called for state and co-operative participation in order to ensure an egalitarian rather than a class society.

Briefly then, the KANU conflict boiled down to two development approaches, (a) a "Socialist" approach which saw the nationalisation of the means of production as the most viable method of ensuring the country's economic independence and the transfer of the economy to Africans and (b) a capitalist approach which advocated private enterprise and the stimulation of individual effort rather than public co-operative effort and enterprise. As Odinga (1967) points out, the KANU radicals were for the socialist approach while the conservatives favoured the capitalist approach advocated in Sessional Paper No. 10 of (1965). Predictably, the government response

to the KANU radical approach was in defence of capitalism²¹.

Initially, the aim of the government was to use the organisational structure of the party to root out the radicals and minimise their influence in the party and in parliament. To do so, first the government needed an ideological foothold to counter the radicals' growing socialist appeal. Sessional Paper No. 10 (1965) on "African Socialism" and its application to planning in Kenya, was basically a response to this need. While the "African Socialism" debate was on, Mr. Pio-Pinto, a specially elected M.P. and a close associate of the KANU radicals was murdered. His murder brought into sharp focus the struggles within the ruling elite to take control of the machinery of government. Pio-Pinto's murder led to one significant development in this struggle - on February 1966, Mr. Tom Mboya (Cabinet Minister, General Secretary of KANU and acknowledged spokesman of the Conservatives), tabled a motion in Parliament calling for loyalty to the President (then Mr. Kenyatta). This move added a new dimension to the conflict and as Leys (1975) argues, the government and the person of the president merged into one making it possible to interpret any criticism of government policy as a direct challenge to the person of the president. The move which had been calculated to squeeze out the radicals was augmented by the 1966 KANU delegates conference whose chief function

²¹ See Sessional Paper No. 10 (1965) for a summary of the Government Policy response to KANU radicalism. See also C. Gertzel, M. Goldschmidt and D. Rothchild "Government and Politics in Kenya" EAPH 1972, for a detailed analysis and review of government response to the KANU Radical Element. Special comment on pp. 138-139. C. Leys "Underdevelopment in Kenya - The Political Economy of Neo-colonialism", Heinemann, London 1975; has some interesting comments on the subject.

was to remove the radicals from any positions of influence within the party. This conference adopted a new KANU constitution which abolished the post of National Vice-President of KANU (a post which was up to that time occupied by Mr. Odinga, the national vice-president). Mr. Odinga had compromised his position by siding with the radical group. As Odinga (1967) points out, the government had hoped to use the structural changes to manipulate and control the party²². Immediately after the Limuru conference, Mr. Odinga resigned from both KANU and the government²³. He joined and took over the leadership of the newly formed Kenya People's Union (KPU) which had adopted a "socialist" approach to development similar to that advocated by the KANU radicals²⁴. Thus Kenya reverted back to the multi-party system giving the ongoing struggle within the ruling class to control the political machinery of the State an ideological base. The defection of key KANU leadership like Mr. Odinga, Mr. Kaggia and Mr. Oneko²⁵ to the newly formed KPU frustrated the capitalist government's efforts to control opposition through the manipulation of the party. This resulted in a change of emphasis from party political control to administrative control with KANU actively encouraging the government to subordinate political activity such as

²²For a discussion on the KANU delegates conference at Limuru and its implications for political control see C. Gertzel, M. Goldschmidt and D. Rothchild, *Government and Politics in Kenya*, EAPH Nairobi 1972 pp. 142-148.

²³*Ibid.* pp. 143-149. For Mr. Odinga's resignation statement and formation of the KPU.

²⁴*Ibid.* pp. 149-155. For the KPU Mainifesto and its implications for government policy and control.

²⁵*Ibid.* pp. 143-146

the party to the central state bureaucracy. To do so however, the government needed a strong central administrative structure (including a powerful executive). Law was unfortunately used to create one.

For example, the merger of KANU and KADU and the introduction of the republican constitution in 1964 had began the move towards a more centralised government structure. However, it took several amendments to the 1964 constitution. For instance, the 1965 and 1966 amendments²⁶ to eliminate any counterweights to central government control and establish a centralised administrative structure dominated by the executive arm of government (implying absolute authority)²⁷. For example Act No. 14 of 1965 amended the constitution and provided for a two thirds majority in Parliament as the only requirement to amendments to the constitution²⁸, which made it possible for the government to manipulate the constitution in order to create laws specifically suitable for the protection of its capitalist interests. For example, Act. No. 17 of 1966 (enacted at the inception of the KPU) required members of parliament (M.P.s) to resign from

²⁶The Independence Constitution - Schedule 2 of the Kenya Independence Order in Council (L.N. 718 of 1963) had been amended ten times by mid 1969. For details of the amendments see Acts 28 of 1964; 38 of 1964; 14 of 1965; 16 of 1966; 17 of 1966; 18 of 1966; 40 of 1966; 4 of 1967; 16 of 1968 and 3 of 1969. Any reference to the above amendments will be made by direct reference to the relevant Act.

²⁷See parallel in Durkheim's analysis of Absolute Authority in Emile Durkheim, "Two Laws of Penal Evolution", Economy and Society 1973.

²⁸See provision in the current constitution; Republic of Kenya, Kenya Gazette Supplement No. 27 (Acts No. 3) 18th April, 1969. Section 47 p. 24.

parliament if they resigned from the party that supported them at elections - aimed at discouraging any defections to the KPU Socialist camp. This meant that the government took the socialist threat to its capitalistic policy seriously²⁹.

The constitutional changes more or less secured the government parliamentary position. With this secured, the Kenyatta government proceeded to extend her newly acquired legitimacy and authority to the provinces and districts. As Gertzel (1970) argues, Kenyatta moved to deliberately re-establish the colonial administrative structure by restoring to the provincial administration her former colonial role as agent of the executive which effectively replaced the party which had up to independence acted as the major tool for mobilizing peasant political participation. A mass party however requires a programme for the masses and mass participation. Since the government wanted neither, the party was discarded implying direct opposition to any other party or organisation that called for mass participation in development.

In order to strengthen the provincial administration, the government restored to the provincial commissioners and district commissioners their former colonial role as chairmen of provincial and district intelligence committees thereby making them ultimately responsible for law and order. For example, the power to control and licence public meetings (including those held by M.P.s) was

²⁹ See government response to the KPU threat in "Where the Truth Lies - The dissidents have no mandate from the voters" (Authorless) The Printing and Packaging Corporation Limited, Nairobi, 1966 (The government emblem on its cover implies a government source).

transferred to the provincial administration³⁰. This consolidated the government administrative position by putting it in a more favourable position in relation to the control of political organisation and activity. It also marked a more popular move towards the use of general law and criminal law as the main tool in consolidating neo-colonial capitalist development. In the following discussion, we shall examine how the indigenous capitalist class used the state political machinery, law in particular to consolidate their dominant capitalist position and to prevent any settled opposition to neo-colonial capitalism either through organized political activity or worker protest action. We shall then examine its implications for crime and social control. We shall specifically look at general and criminal law in relation to the fundamental rights and freedoms guaranteed in the constitution. In our analysis we shall try to demonstrate our contention that capitalist law is used much more for the protection of the capitalist classes rather than in the public interest. This implies that the capitalist state as it is represented in law does not stand above societal conflicts but more than not intervenes in favour of the capitalist class interests.

³⁰ Republic of Kenya, Revised Development Plan, 1966-1967, Government Printer, Nairobi, 1966. See also C. Gertzel, "The Provincial Administration in Kenya" *Journal of Commonwealth Studies*, Vol. IV, No. 3, November, 1966, for an account of the development of the Provincial Administration since independence.

NEO-COLONIAL CAPITALIST LAW AND SOCIAL CONTROL

1. Fundamental Rights, Freedoms and Law

The constitution of Kenya³¹ guarantees (irrespective of ones race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex) three fundamental rights and freedoms; (a) freedom to life, security of the person and the protection of the law, (b) freedom of conscience, of expression and assembly and association and (c) protection of the privacy of his home and other property and from deprivation of property without compensation³². In relation to general social control, all three are important, but for the purposes of this thesis, we shall restrict ourselves to an examination of the provisions of the right and freedom of conscience, of expression and assembly and association in law with special reference to socio-political control.

Implied in the right and freedom of conscience, expression, assembly and association are three basic factors; (a) the freedom to hold opinions, receive ideas and information, communicate ideas and information (whether the communication be to the public generally or to any person or class of persons) and the freedom to correspondence without interference³³, (b) the freedom of assembly and association; meaning the right to assemble and associate with other persons freely i.e. form or belonging to trade unions or other

³¹The Constitution of Kenya, Republic of Kenya, Kenya Gazette Supplement No. 27 (Acts No. 3) 18th April, 1969.

³²Ibid Section 70 p. 33

³³Ibid Section 79 (1) p.42

associations³⁴, and (c) the freedom of movement, meaning the right to move freely throughout Kenya³⁵. Taken as they stand, these rights and freedoms become meaningful only when their guarantee in the constitution is given provision in general law and especially in criminal law. However in neo-colonial Kenya, as we shall demonstrate in the following discussion, the trend has been to subordinate the above rights and freedoms to administrative control through the use of general law and criminal law in particular, implying their subordination to neo-colonial capitalist interests. In order to understand the uses of law in this manner, we need not go further than the constitution itself.

Chapter V of the Constitution, although it devotes itself to the guarantee of the fundamental rights and freedoms, states that "nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of sections 79, 80 or 81 of this Constitution when Kenya is at war and nothing contained in or done under authority of any provision of Part III of the preservation of public security Act shall be held to be inconsistent with or in contravention of those sections of this constitution when and in so far as the provision is in operation by virtue of an order made under Section 85 of this Constitution"³⁶. Section 85³⁷ of the constitution refers to the powers of the president to bring into operation generally or

³⁴Ibid Section 80 (1) p. 42

³⁵Ibid Section 81 (1) p. 43

³⁶Ibid Section 83 (1) p. 46

³⁷Ibid Section 85 p. 48

in any part of Kenya, Part II of the preservation of Public Security Act or any of the provisions of that part of the Act. Part III of the Public Security Act refers to the powers given to the executive to detain any person for the preservation of public security³⁸. Thus by invoking the preservation of Public Security Act³⁹, the constitution sets the tone for the subordination of the constitutionally guaranteed fundamental rights of freedom of conscience, expression and association to general law. This implies that any activity, political or otherwise that requires the exercise of the above rights and freedoms is equally subject to control through the use of law, for example, the KPU case.

2. The KPU Case

The government intention to use law to control the KPU was signalled by the 1966 amendment to the constitution, in particular Act 17 of 1966 which required M.P.s to resign their parliamentary posts on resignation from KANU. The 1966-67 Revised Development Plan endorsed the transfer of licensing powers to the provincial administration which were effectively used to undermine the KPU, especially during the 1966 Little General Election⁴⁰. During this

³⁸ Republic of Kenya, Kenya Gazette Supplement No. 67 (Legislative Supplement No. 41) 25th July, 1966, pp. 331-333, and Republic of Kenya, Legal Notice No. 240-41, 1966.

³⁹ The Preservation of Public Security Act (Cap 57, Laws of Kenya). Republic of Kenya, Kenya Gazette Supplement No. 67, 25th July 1966.

⁴⁰ This election was a result of the implementation of Act 17 of 1966. See C. Gertzel; *The Politics of Independent Kenya, 1963-1968*, EAPH, Nairobi, 1970, pp. 73-94. See also C. Gertzel and Okumu J. "The Little General Election in Nyanza 1966" in C. Gertzel; *The Politics of Independent Kenya* op. cit. pp. 95-124.

election , as Odinga (1967) and Gertzel (1970) argue, the State, through the provincial administration used licensing powers to deny the KPU the right to hold political meetings in any other part of the country other than Nyanza Province. This effectively interfered with the KPU members' right and freedom of movement, expression, assembly and the right to communicate freely. This limited the mobilisation activities of the KPU by interfering with its right to communicate its point of view on a national platform. As a result, it was only in Nyanza, where the KPU was allowed to operate, where the Party secured some parliamentary representation. But since Nyanza was a predominantly Luo area, the government later used this to challenge the legitimacy of the KPU by labelling it as a tribal party.

Following this, in August 1966, Part III of the Preservation of Public Security Act⁴¹ Sections 4(1) and (2), (a) and (b) were brought into operation. Under this section of the Act, eight people were detained without any official explanation. Gertzel, Goldschmidt and Rothchild (1972) argue that all the detained persons were engaged in activities of political or trade union nature which was not in conformity with the official capitalist policy. For example, Mr. P.P. Ooko was the General Secretary of the Common Services African Civil Servants Union, Mr. O.O. Makanyengo was General Secretary of the Kenya Petroleum and Oil Workers' Union and Mr. Oluande K'oduol was Mr. Odinga's private Secretary⁴². In 1967,

⁴¹See the Preservation of Public Security Act op. cit.

⁴²See generally C. Gertzel, M. Goldschmidt and D. Rothchild; Government and Politics of Independent Kenya, EAPH, Nairobi 1972 p. 241.

the government took extra measures to muffle and control any open support for the KPU by extending Act No. 17 of 1966 on party affiliation to local government officials. Act No. 11 of 1967 required that any official who resigned from KANU must also resign from office. Thus by prescription and proscription, law was effectively used for the purpose of consolidating a particular political position. This implied that the government could use law to control any activity by an individual or group that it deemed a threat to its authority. For example, Mr. Kaggia⁴³ a senior member of the KPU executive was imprisoned on the grounds of holding an illegal meeting.

In 1969, the government finally invoked the Preservation of Public Security Act to deal with the so called KPU menace. The KPU was banned and all its leaders were put under indefinite detention under Part III of the said Act. Leys (1975) argues that the ban was a clear demonstration that the government was prepared to tolerate a certain degree of populist rhetoric, but not a settled opposition to neo-colonial capitalism or any determination to work against it. This made nonsense the constitutional guarantee of the right to security of the person and protection of the law⁴⁴. A test case, that of Ooko v. the Republic⁴⁵ established that his

⁴³Kaggia vs. the Republic, Criminal Appeals Nos. 582 and 583 of 1968 (Unreported).

⁴⁴The Constitution of Kenya, Republic of Kenya, Kenya Gazette Supplement No. 27 (Acts No. 3) 18th April 1969, Section 70(a) p. 33.

⁴⁵Mr. Ooko was detained under the Preservation of Public Security Act 1966. He appealed against detention basing his defence on the guarantees for fundamental rights and freedoms in the constitution - See Ooko v. the Republic, High Court Civil Case No. 1159 of 1966 (Unreported).

detention was not unlawful⁴⁶, thus establishing the legitimacy of the government's particularistic use of law rather than the legitimacy of the individual's protection of the law. The Court's failure to withhold the Supremacy of a right guaranteed by the constitution to general law implies a subordination of the constitution to general law rather than vice versa. This implies a near total subordination of fundamental rights and freedoms to the State's central bureaucracy. In the following discussion, we shall attempt to demonstrate the extent of such subordination by looking at the implications for the freedom of expression, assembly and association of two general laws; (a) the Societies Act⁴⁷ and (b) the Public Order Act⁴⁸. We shall pay special attention to the criminal law provisions of these Acts in our attempt to show how a particularistic use of such provisions empowers the government to exercise important powers of control over persons and their exercise of fundamental rights and freedoms. Implied here will be a demonstration of how a particularistic use of law (criminal law in particular) is crucial to the maintenance of the Kenyan capitalist social structure.

⁴⁶For a special comment on this point, see Y.P. Ghai and J.P.W.B. Mcauslan, *Public Law and Political Change in Kenya - a study of the legal framework of government from colonial times to the present*, Oxford University Press, Nairobi, 1970 pp. 437-440.

⁴⁷The Societies Act, Republic of Kenya, Kenya Gazette Supplement No. 16 (Acts No. 3) 16th February 1968, Act No. 4 of 1968.

⁴⁸The Public Order Act, Chapter 56, Laws of Kenya, Government Printer, Nairobi, 1968.

3. The Societies Act

As we have already noted, the constitution of Kenya guarantees the freedom of association and expression and assembly. However, in respect to the general law on association, assembly and expression (implying communication), important factors which stand in direct contradiction to the guaranteed rights and freedoms do become evident. For example, under the Societies Act, several factors, crucial to the exercise of the said rights and freedoms are brought under administrative control; (a) it is provided that every society in Kenya, before it can legally exist, must be approved by a state official i.e. a Minister or the Registrar of Societies, (b) in order for any society to legally exist (or be registered), it must conform to certain stated conditions, that is, it must not be prejudicial to or incompatible with the peace welfare or "good" government in Kenya (meaning that it must not be prejudicial to the capitalist order), (c) in addition, the Registrar is provided with extensive power over societies, for instance, he has to be kept informed of executive changes, changes or amendments of the constitution of particular societies as well as the power to scrutinise the accounts of registered associations/societies with authority to revoke registration or deprive from legal exemptions and (d) a Minister has under the same Act, power to ban any society by declaration if he thinks it is dangerous to the "good" government of the Republic⁴⁹. In practice, the Act imposes great restrictions on the freedom to form groups and associations. In particular, the wide powers given

⁴⁹See generally the Society's Act, 1968.

to the Minister and Registrar tilt the balance heavily in favour of administrative control. The failure of the Act to make provision for appeals to the Courts against administrative action in relation to the powers given in the Act implies a deliberate action on the part of the State to subordinate the rights and freedoms guaranteed in the constitution to state control - implying direct subordination of all other political activities to state capitalist development⁵⁰, for example the subordination of unionised labour.

4. The Trade Union Case

During the colonial period, the traditional demands of unionised labour, for example, higher wages and better working conditions were in direct contradiction with the colonial capitalist strategy of settler capital accumulation - hence the antagonism of the colonial state and the influential settler community against the development of unionised labour on the grounds that it would be used for political agitation. In spite of this however, Labour organisations did occur with the immediate aim of getting a better deal for their workers. The immediate response of the colonial state was to use law to control them, for example, the 1937 Trade Unions Ordinance which required the registration of all Unions. The basic aim of control as Amsden (1971) and Leys (1975) argue was to prevent the formation of a powerful Union with large funds, covering more than one industry and inclined to political action with the ultimate aim of subordinating the Unions to colonial capitalist policy.

⁵⁰ See Ghai and Mcauslan, Public Law and Political Change in Kenya, Oxford University Press, Nairobi, 1970, pp. 444-447.

By independence, in spite of the colonial governments control of workers (employed or otherwise) the Labour movement got deeply involved in the Nationalist movement. At the eve of independence, the Labour movement e.g. the Kenya Federation of Labour, stated its objectives. The basic tenet of these objectives as Sandbrook (1975) points out, was that trade unions had an important role to play and that they would not limit themselves to the terms and conditions of employment, but were to concern themselves with such other matters as human rights legislation, economic policy, housing policy, education and welfare. In other words, the Unions were to concern themselves with socio-political and economic development. This meant an interest in the governments socio-economic and political strategy.

After Independence, the Unions, mainly through the Kenya Federation of Labour (KFL) demanded that the government declare its plans for economic development. According to KFL as the International Labour Organisation (1972) noted, the government package should have included nationalisation of key industries and the creation of collective farms. The KFL's demands came into direct contradiction with government plans as expounded in Sessional Paper No. 10 (1965). In addition, and unfortunately for the trade unions, their demands were too similar to the KPU's to avoid government scrutiny.

Urged on by the indigenous capitalist class (through the Federation of Kenya Employers - a capitalist institution composed of foreign firms and government corporations) whose interests were threatened by the "socialist" demands of unionised labour, the government intervened to regulate the situation in favour of capitalist

demands. Through the use of law, mainly the 1965 Trade Union Act⁵¹ the government began to restrict the activities of the trade unions. For example, the government used the Act's licensing powers, in this case the power to cancel registration of a specific union or combination of unions⁵² to dissolve the Kenya Federation of Labour and the Kenya African Workers' Congress and replace it with the Central Organisation of Trade Unions (COTU). The government then hoped to use COTU, by making provision for its activities in both general and criminal law, not only to control the internal affairs of unions, but also to control and regulate the whole labour movement. For example, the 1965 trade disputes Act came into operation mainly to provide the government with a tool for controlling the internal affairs of unions and prohibit strikes⁵³. (After all Sessional Paper No. 10 (1965) had advocated for legislation providing for "Compulsory arbitration" of major issues and special legislation in sensitive industries in order to avoid worker stoppages). The Industrial Court was made a condition for all industrial disputes⁵⁴ which led to a tight control on worker protest action. It also became a criminal offence if COTU failed to sanction any strike action by a national union including a condition that COTU must

⁵¹The Trade Unions Act, Chapter 233 Laws of Kenya, 1965.

⁵²See generally the Trade Unions Act, op. cit.

⁵³See generally Livingstone, I. "The Government, the Worker and the Law in Kenya", East African Law Journal, 3 (1967), p. 282.

⁵⁴See generally the 1964, 1965, 1969 Trade Disputes Acts and the 1971 Trade Disputes Act. Government Printer, Nairobi.

approve any strike action for it to be legitimate.⁵⁵ The subordination of the Labour movement to state capitalist interests was thus made complete in law. As Leys (1975) contends, the application of the Preservation of Public Security Act to union activity and officials (as we mentioned earlier) was nothing more than a seal to an already finished contract - the subordination of labour to neo-colonial capitalist interests.

5. The Public Order Act

This Act, although its functions are similar to those of the Societies Act, covers a much wider area and is especially useful for controlling associations of a political nature which cannot be covered in the Societies Act. The Act deals specifically with associations aimed at usurping the functions of the police, or armed forces for political ends, the display of force to promote political ends and prohibits the wearing of uniforms associated with political organisations or objectives⁵⁶. It is however, the provisions of this Act in general and criminal law which is of significance to this thesis.

To begin with, the Public Order Act and its provision in the Police Act⁵⁷ interferes directly with the right and freedom of assembly and association. Under the Public Order Act, several things crucial to the right to assemble or hold a public meeting

⁵⁵For a more detailed analysis of the relationship between the State and Labour Unions, see generally R. Sandbrook, *Proletarians and African Capitalism, The Kenyan Case 1960-1972*. Cambridge University Press, Cambridge, 1975.

⁵⁶See generally the Public Order Act, Chapter 56, Laws of Kenya, Government Printer, Nairobi, 1968.

⁵⁷The Police Act, Chapter 84, Laws of Kenya, Government Printer, Nairobi, 1967 (Rev.).

are prohibited; (a) no "public meeting"⁵⁸ can be held without the prior permission of the district commissioner, who has authority to withhold such permission on the grounds of "public order and peace", (b) it is illegal to advertise any public meeting without prior permission from the district commissioner and (c) the police have the power to direct and control the conduct of any public meeting for which permission has been obtained including authority to cancel the holding of such meeting. Any meeting that does not meet the above criteria is unlawful which makes it an offence to hold or convene or take part in such a meeting⁵⁹. This basically directly controls through the licensing powers of the provincial administration, any expression in public of any opinions contrary to neo-colonial capitalism. In fact in the Kenyan case, it is a tool that the capitalist classes use to make it impossible for the peasants and the urban poor to take part in government and prevent them from throwing their weight behind socialist political activity.

Secondly, the Public Order Act extends its authority and control to the freedom of expression including any means of communicating any information. This is defined in general law. For example,

⁵⁸"Public meeting" means a public meeting, gathering, procession or concourse of ten or more persons in any public place, held for any purpose including any political purpose.

⁵⁹See Kaggia vs. the Republic. Criminal Appeals Nos. 582 and 583 of 1968 (Unreported). Kaggia was imprisoned for attending a meeting which had been rendered unlawful by means of a cancellation of the permit to hold the meeting while the meeting was actually in progress.

The Books and Newspapers Act⁶⁰ and the Films and Stage Plays Act⁶¹. Although these laws do exercise general control, the real instrument of control is found in certain provisions of these Acts in the penal code. For example, to print, publish, sell or offer for sale, distribute or reproduce any seditious publication or import such publication unless there is reason to believe that the material is not seditious is a criminal offence punishable by imprisonment. To possess such material is also seditious and hence criminal⁶². The law also provides for the banning of any publications (local or imported). The powers of control granted by this law⁶³ and the penal sanctions provided is serious enough to interfere greatly, if not completely bring to nothing the right and freedom of expression, particularly the expression and communication of political ideas. As Ghai and McAuslan (1970) point out, these powers are too wide and can be or have been used to prevent any expression of socialist politics.

For example in 1969, the suppression of the KPU coincided with the nationalisation (with the co-operation of the interests involved) of oil refining, power supply and the banks. You will recall that

⁶⁰The Books and Newspapers Act, Chapter III, Laws of Kenya, Government Printer, Nairobi, 1967 (Rev.).

⁶¹The Films and Stage Plays Act, No. 34 of 1962, now Chapter 222, Laws of Kenya Government Printer, Nairobi. This Act does not allow or provide for appeals to the Courts against censorship (1967 Rev.).

⁶²The Penal Code, Chapter 63, Laws of Kenya, Revised Edition, Government Printer, Nairobi, 1970. Sections 52, 53 and 54, pp. 34-56.

⁶³Ibid especially Sections 52 and 53, pp. 34-35.

nationalisation was one of the KPU's main planks. It was therefore no coincidence that the banning of the KPU coincided with the government's arranged nationalisation of some very conspicuous capitalist interests. The KPU was a response to the power of foreign capital and indigenous capitalist development. The government therefore intended to obliterate this effect and the laws controlling expression and communication were used to overplay the government's "stage managed" public participation while underplaying its deliberate ban of the KPU. State intervention here was in defence of long term capitalist interests rather than allow the development of a strong socialist political activity which would in the long run stand as a meaningful alternative to the capitalist ideology of the State.

To crown the government's reliance on the use of law to sustain its position the law of treason and the law of sedition were enacted to cater for any social activity that may not be fully represented in general law. Under the law of treason, it is treasonable for a Kenyan citizen, whether residing in Kenya or not to "compass, imagine, invent, devise or intend" the death, wounding or imprisonment of the president or the deposing of him or overthrow of the government by unlawful means so long as the intention is expressed in some overt manner, with a penal sanction of either death or imprisonment for life⁶⁴. The aim of this law is mainly to discourage any discourse, political or otherwise which may imply an alternative system of government, implying a new social order.

⁶⁴The Penal Code, op. cit. Sections 40, 42, 43 pp. 31-32.

The law on sedition, although it has less severe penal sanction is much more widely defined and hence more useful for general control. The law on sedition, Section 56 of the Penal Code, states that it is seditious for any person to do any act with a seditious intention or to print or publish or sell or offer to sell any seditious publication unless he had reason to believe that it was not seditious. Seditious intention is defined as any intention to (a) overthrow the government by unlawful means (notwithstanding that the various amendments to the constitution and the criminalisation of the fundamental rights and freedoms make virtually all available means of changing the government lawfully, unlawful), (b) bring hatred or contempt or excite disaffection against the person of the president or the government⁶⁵, (c) excite the inhabitants of Kenya to attempt to procure the alteration by unlawful means of any matter, or thing established by law and (d) any intention to bring into contempt or excite disaffection among the inhabitants or promote feelings of ill will or hostility between different sections of the population⁶⁶. The law on sedition covers the application of the Books and Newspapers Act (Cap III laws of Kenya) and provides for strict control of what can and cannot be published⁶⁷. In relation to the fundamental rights and freedoms, the law of sedition as it now stands covers any political activity that implies opposition to the capitalist mode of development including any criticism of the government

⁶⁵See 1981 trial of Mr. Kikuyu, M.P. for sedition under this part of the law. Weekly Review, April 17th, 1981, Nairobi.

⁶⁶The Penal Code op.cit. Section 56 pp. 36-37

⁶⁷The Penal Code op.cit. Section 57 pp. 38-39

(strictly seditious or not). Its provision, that it is not necessary to prove that any intention had any incitement to violence, or any effect at all makes it all the more interesting. It is enough if the intention is "likely" to have the effect⁶⁸ - an aspect that implies a deliberate act on the part of the government to criminalise all forms of political activity with the exception of those in favour of neo-colonial capitalism, which further implies the subordination of the fundamental rights and freedoms (as guaranteed by the constitution) to criminal law. Thus criminal law, as it is used here, acts as a legitimate tool, used by the state to redefine its position during changing economic and political circumstances. It also acts as a legitimate excuse, used by the state to justify and legitimise its use of coercion. This means that criminal law, as well as being an instrument for the optimal allocation of the society's resources, is also a means for distributing guilt and responsibility for what occurs.

6. General Implications

In this Chapter, we have been looking at a society that changed rapidly from a settler dominated colonial capitalist structure to a neo-colonial capitalist structure characterised by foreign and indigenous capitalism. We have in the wider context of social organisation and social change attempted to demonstrate how on the one hand law was influenced by the changing political and socio-economic circumstances. On the other hand we attempted to demonstrate

⁶⁸The Penal Code op.cit. Section 56(2) p. 37 See also Ghai and Mcauslan; Public Law and Political Change in Kenya, Oxford University Press, Nairobi, 1970 pp. 466-474, for a discussion on the uses of law for general political control.

how law contributed to the maintenance and development of the emergent neo-colonial capitalist mode of production. In relation to crime and social control, what does this entail?

In relation to general social control, the State's use of law as it is demonstrated by the way law was used in independent Kenya to develop and maintain a capitalist social structure characterised by foreign and indigenous capitalist classes demonstrates several basic aspects of social control in capitalistic society; (a) that the state in capitalistic society does not and cannot stand above societal conflicts, (b) that the uses of law in situations of intense and rapid social change, especially in "developing" capitalistic society, cannot function in a socio-technical nature and (c) that in capitalistic society, a particularistic use of law can discriminate against subordinate classes by adjusting class relevant interests in a discriminatory way, especially in situations where legislation is written with the special intention of regulating those types of conflicts that normally arise within the ruling classes without taking into account the types of conflicts that normally arise within the subordinate classes.

Independent Kenya was an emergent neo-colonial capitalist society characterised by rapid social change involving significant ideological differences. It was a society which had inherited from colonial capitalism fundamental divisions based on economic classes. Under such conditions, conflict was inevitable, the most prominent being the competition for the control of the means of production between the foreign capitalists and the emergent indigenous ruling class on the one hand and between various ideologically differing sections of the emergent ruling class on the other hand. The State,

acting in the interests of the dominant means of production passed laws designed to control through the application of state sanctioned force those acts of the conflicting groups that ran counter to the established mode of production. Thus state protection through the law for the various capitalist classes became a significant aspect of neo-colonial capitalist development in Kenya.

For example the protection of foreign investment through the 1964 Foreign Investment Act, the setting up of parastatals to finance indigenous capitalist development and the introduction of trade licensing were all aimed at guaranteeing the existence and maintenance of the neo-colonial capitalist mode of development. The role of the State not only in guaranteeing the existing mode of production but also in serving the interests of the dominant capitalist classes becomes open when we examine state intervention through the use of law to regulate intra-ruling class conflicts. The way the State used law to suppress the KPU and to control trade union activity of any political nature demonstrates the close relationship between the State, as the most obvious ideological symbol of the existing mode of production and the capitalist classes.

For example, the various amendments to the constitution, the preservation of public security laws, the public order laws, laws on treason and sedition, and the introduction of licensing for trade union and political activity were not only aimed at guaranteeing the mode of production itself, but had an additional aim of guaranteeing the existence of the indigenous capitalist class. All these laws and the particularistic way in which they were used demonstrates that the State in capitalistic society does not and cannot stand above societal conflicts. It also points to a more open

and severe use of law with a significant impact on the positions of the different social classes.

For example, in our discussion on social stratification in neo-colonial Kenya, we noted that the society is structured into two main classes; the peasantry and the indigenous capitalist class. An examination of the laws we have examined here reveals that nearly all, with the exception of those laws aimed at the establishment of rural capitalism, were aimed at controlling the types of conflicts that occurred within the indigenous ruling class with virtually no reference to the types of conflicts arising within the peasant class. The use of law in this sense amounts to discrimination against the subordinated peasant class. This demonstrates that the seeming neutrality of the State in capitalist society is an illusion which quickly disappears when tested against a "developing" capitalist background.

In relation to crime, the particularistic use of law in neo-colonial capitalist society demonstrates that the State's social control machinery (especially in the capitalist state) and its chief purpose of maintaining the dominant mode of production plays a crucial role in the creation of crime. The criminalisation of activities and acts that run counter to the interests of those who control the political machinery of the State is a clear demonstration that crime is functionally dependent on a given social order. In this sense crime becomes a historically specific phenomenon which cannot be meaningfully explained outside its historical specificity. Thus in capitalistic society, crime is a fundamental condition of capitalistic social life since those conditions of which it is a

part form the central core of capitalist society's morality and law.

In the next chapter, we shall examine mundane criminal control in Kenya in the context of colonial and neo-colonial capitalist development.

Table I Inflow of Foreign Capital (Government Grants, Loans and Direct Investment)

	1965/66 £ million	1966/67 £ million	1967/68 £ million	1968/69 £ million	1969/70 £ million	Total £ million
Central government (Through Development Budget)						
1. Committed Aid	4.8	3.0	1.0	0.2	-	9.1
2. Aid under negotiation	2.2	5.2	5.5	6.0	6.0	24.9
3. Probable Aid	0.8	2.8	5.7	8.0	9.7	27.0
Sub Total	7.9	11.1	12.2	14.2	15.7	61.0
4. Aid for Land Transfer etc. in farm scheduled Areas - Committed	4.2	3.7	2.8	1.8	1.8	14.4
Total Central Government	12.1	14.8	14.9	16.0	17.5	75.3
Other Public and Semi-Public Organisations						
1. Committed Aid	3.4	5.7	3.5	0.3	0.3	13.2
2. Aid under negotiation	0.3	1.4	2.2	3.9	4.8	12.5
3. Probable Aid	0.5	0.5	1.1	1.6	1.7	5.4
Total Other Public	4.2	7.6	6.7	5.9	6.7	31.1
Private Sector (Projected)						
1. Re-invested Capital	5.0	6.0	7.0	8.0	9.0	35.0
2. Direct Investment	2.0	3.7	4.5	4.5	6.8	21.5
3. Long Term Credits	2.5	5.0	3.5	3.5	3.5	18.0
Total Private	9.5	14.7	15.0	16.0	19.3	74.5
Grand Total	26.0	37.0	36.5	38.0	43.5	181.0

Source: C. Gertzel, M. Goldschmidt, D. Rothchild, Government and Politics in Kenya, EAPH, 1972, p. 589

CHAPTER FIVE

MUNDANE CRIMINAL CONTROL IN KENYA 1943-1977

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INTRODUCTION

In the foregoing Chapters, we attempted an historically specific analysis of crime and social control. Looking first at traditional social control, we argued that crime is a historically specific phenomenon which is inseparably dependent on social control, especially law and its implied notion of the State - hence its absence in "Stateless" society. In our analysis of crime and social control in colonial and neo-colonial developing capitalist structures in Kenya, we attempted to demonstrate how on the one hand law is influenced by development in the prevailing mode of production and how on the other hand law contributed to the maintenance and development of the capitalist mode of production. In this respect, we argued that crime is a consequence of social control, which in turn is subject to contingent political and socio-economic processes. In view of the stark and repressive nature of social control in the Kenyan situation, and by extension to "developing" capitalist structures in general, we came to the conclusion that any meaningful explanation of crime must of necessity take into account the relationship between crime and social control, especially the role law in general and criminal law in particular plays in the creation and maintenance of specific social structures and its consequences for the general social fabric. This, we argued, was indispensable to any analysis of crime in the wider context of social organisation and social change. Thus with special reference to Kenya, we attempted to establish that there is no behaviour that is in itself essentially criminal, but that crime is functionally dependent on a given social order. Taking into account our previous observation

that social control, especially law mirrors the political and socio-economic relationships in existence in particular social structures and considering the historical and specific nature of socio-legal control, we shall examine in this chapter the general rate of crime in Kenya. In the wider context of social organisation, we shall begin with the premise that official statistics of crime in Kenya are the end product of the existing capitalist system of social control and that as such, we cannot separate them from what entails criminal behaviour as it is defined in this thesis. In this sense, we shall examine them in terms of the conditions and instruments of their production. We would like to note here that ours is not a search for the amount of crime in Kenya. Our concern here is an attempt to reveal something of the nature of the rate of those persons who were differentiated as criminal at certain periods during the colonial and neo-colonial capitalist system of control. Ours, we may say, is a search for what particular systems of control actually do i.e. record rather than what they are supposed to do during particular historical periods.

CRIME STATISTICS

Starting from the most general, the uses of official statistics of deviance and the controversies associated with their use have been an ongoing debate for a relatively long time. Since Quetelet, Guerry and others wrote about them in the early nineteenth century, much has been written about their possible uses and the limitations associated with their use. However, since it is not possible within the scope of this thesis to consider in detail all the existing

material on the subject, we shall here focus our attention to what is central to most of them. The argument that official statistics of crime do not and cannot reflect the "actual" or "real" rate of criminal behaviour in any given situation and its associated assumption that official statistics of crime provide little of any theoretical value.

Underlying the long standing debate about the limitations of official statistics of crime are two basic arguments; an empirical argument dealing mainly with the production of rates and an ideological one dealing mainly with the interpretation of already existing rates and their relevance to sociological research. According to Hindess (1973) these arguments boil down to two concerns; the concern with the making and recording of observations and the concern with the processing and assembling of statistical materials out of observer's reports. In relation to these concerns it has been argued that official statistics of deviance "do not and cannot correspond to the structure of "real-world" objects and events and that they cannot be taken as a more or less reliable account of some real situation"¹. This has led to a tendency to shy away from official statistics of crime and its control on the grounds that they are unscientific or simply measures of highly diverse and complex social interaction². Hence the claim that official statistics of crime, as the most visible portion of the extent of crime does not reflect the true incidence of crime and is thus of little

¹B. Hindess; *The Use of Official Statistics in Sociology - A Critic of Positivism and Ethnomethodology*. The Macmillan Press Ltd., London, 1973, p. 14.

²I. Taylor, P. Walton and J. Young (ed.); *Critical Criminology*. Routledge and Kegan Paul, London, 1975, p.33.

or no value to the development of criminological theory³.

This basic limitation of crime statistics has been blamed on many factors, the most basic being that the beliefs held about the nature of deviance and its consequences for the way offences become known limits the applicability of what is recorded as an accurate indication of the extent of penally sanctionable behaviour⁴. In this sense it has been argued that these statistics are not based on a straight forward relationship between crime occurrence and public knowledge of it - hence hidden crime, variously referred to as "the Dark Figure"⁵ or the "iceberg phenomenon"⁶. Consequently, official statistics of deviance are rejected or dismissed as unreliable because they do not record the so called "actual" rate of deviant behaviour. By implication, their usefulness in the examination of what the system of criminal justice actually does in the wider context of social organisation and control is lost in the search for "hidden" crime based more often than not on the assumption that certain behaviour is always deviant independent of the social actions that define it as deviant. Thus the way in which official statistics of crime, especially in capitalist society, reveal the highly patterned and we may also argue the class nature of society and its law enforcement and also something of the patterned nature of the crimes committed becomes obliterated⁷.

³T. Morris; Deviance and Control - The Secular Heresy. Hutchinson and Co. (Publishers) Ltd., London, 1976, pp. 63, 75.

⁴Ibid. p. 61

⁵F.H. McClintock (undated) Report Presented at the Institute of Criminology, Cambridge, U.K.

⁶T. Morris; Deviance and Control. op.cit. p. 61

⁷I. Taylor, P. Walton and J. Young (eds.); Critical Criminology. op.cit. pp. 33, 34.

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According to Kitsuse and Cicourel (1963), the "rates of deviant behaviour are produced by the actions taken by persons in the social system which define, classify and record certain behaviours as deviant"⁸. This being the case, the examination of official statistics of crime cannot be separated from the question of how different forms of behaviour come to be defined as deviant. In this sense, the appropriateness of the statistics i.e. whether they are appropriately organised or not, does not arise since the purpose of using them would be to explain rates of crime as they are perceived within the social structure under investigation, rather than the forms of deviance behaviour. In this context, criminal statistics represent a record of the numbers of those who have been differentiated as variously deviant at different levels of control rather than a record of criminal behaviour per se. Hence the successive layers of error in the rate producing process, that pre-occupy most explanations of the limitations of these statistics do not necessarily make them unreliable, unless of course one assigns self-evident status to them⁹.

Thus crime statistics or official records of deviant behaviour should be seen as the product of the socially organised activities of particular social structures. In this sense as Kitsuse and Cicourel (1963) point out, rates of crime become more of an indice of organisational processes rather than an indice of the evidence of certain forms of behaviour. In this respect, criminal statistics cannot be examined as mere givens to be taken as they are

⁸J.I. Kitsuse and A.V. Cicourel; A Note on the Uses of Official Statistics. Social Problems, Vol. 11 No. 2, p.135, Fall, 1963.

⁹Ibid. p.136.

or else dismissed as inadequate. Instead, they should be examined or analysed as products of particular social systems. Hence like all social products, as Hindess (1973) points out, criminal statistics should be examined in terms of the conditions and instruments of their production rather than a more or less accurate representative of some "real" state of affairs. This would lead to the use of criminal statistics as "evidence of the underlying trends occurring in the wider social structure"¹⁰. Underlying this would be the assumption that recorded crime patterns should be understood as a reflection of existing society, rather than as indicators of the amount of crime in society. Thus the question to be asked in assessing the usefulness of criminal statistics is not to what extent these represent the "real" or "actual" crime situation, but rather to what extent they reveal "the class-organised practice of criminal and legal systems - in pointing to the disjunction between the imaginery (ideological) social order and the real social order - in the same way that expose criminology usefully demasks the moral front of the powerful controllers of such an order"¹¹.

In this sense, all crime, whether reported or not, prosecuted or not would become a real feature (rather than a limitation) of a society involved in what Taylor, Walton and Young (1975) describe as the struggle for property, wealth and economic aggrandisement. This would shift the emphasis traditionally placed on the limitations of official criminal statistics from the "mere collection of further empirical data to the construction of theories which make sense of

¹⁰ I. Taylor, P. Walton and J. Young (eds.) *Critical Criminology*.
op.cit. p. 35

¹¹ Ibid. p. 37.

the (measurable or not-so-easily measurable) changes in the structure of social control, law and crime"¹². This would inevitably involve an analysis of criminal statistics in any given situation in the wider context of social organisation and social change. With this in mind, we now turn to mundane criminal control in Kenya.

CRIME CONTROL IN KENYA

The administration of criminal justice in Kenya dates back to the introduction of colonial rule itself. It was in 1897, when the administration criminal justice was given the force of law by the 1897 East African Order in Council¹³. This marked the beginning of a legal system based on a tripartite division of subordinate courts; the Native (African), the Muslim and the colonial courts which were administered by administrative officers (as far as non-whites were concerned) and magistrates. This tripartite court system was augmented by a dual system of Superior Courts; Her Majesty's Court for East African (with provision for appeals to the privy council) and a Chief Native Court (with provision for appeals in a local High Court)¹⁴. In 1902, under the East African Regulations No. 12, the 1894 Indian Penal Code became effective in East Africa¹⁵. The introduction of the Indian penal code marked the beginning of custodial

¹²Ibid. p. 37.

¹³See the 1897 East African Order in Council No. 575. See also Native Courts Regulations 1897, E.A.P.G. Orders and Regulations Volume I p. 63.

¹⁴For further discussion on the historical development of the Administration of Justice in Kenya see Y. Ghai and J.P.W.B. Mcauslan, Public Law and Political Change in Kenya - A Study of The Legal Framework of Government from Colonial times to the present. Oxford University Press, Nairobi, 1970, Chapter IV.

¹⁵As far as Kenya was concerned, the 1894 Indian Penal Code was amended and repealed at various periods and now stands as the Penal Code, Chapter 63, Laws of Kenya. Revised Edition 1970 (1962). Government Printer, Nairobi.

treatment for offenders, thus introducing imprisonment (hitherto unknown) as a penal sanction¹⁶. The 1914 Prison's Ordinance No. 13¹⁷ provided for the establishment of custodial institutions and this to a large extent made imprisonment a central trunk in the administration of criminal justice in Kenya. From then on, imprisonment began to play an almost exclusive role.

This trend tends to find its support in the penal code. A general examination of the Kenyan Penal Code¹⁸ reveals that for almost all the stated offences, imprisonment is almost exclusively the prescribed punishment and that this is so despite the provision of alternative punishments in the same code¹⁹ which do not find any provision in the prescription of punishment. This is further supported by the introduction of confinement for young offenders²⁰. The continued use of Detention Camps, introduced in Kenya under the 1925 Detention Camps Ordinance No. XXV²¹ also strengthened this view. Although detention camps were associated with colonialism, especially during the Emergency years 1952-1958, their continued use after independence²² demonstrates the centrality of custodial treatment and

¹⁶See A. Milner (ed.) African Penal Systems. Routledge and Kegan Paul, London, 1969, pp. 102-118.

¹⁷See also Prison Ordinance No. 26 of 1918 and Nos. 31 of 1921 and 15 of 1922.

¹⁸See generally the Penal Code. op.cit.

¹⁹See the Penal Code op.cit. Sections 24, 25, 26a, 27, 28-35.

²⁰The Borstal Institutions Act, 1963. Chapter 92, Laws of Kenya (Revised 1967). Government Printer, Nairobi.

²¹The Detention Camps Ordinance No. XXV of 1925. Chapter 80 Laws of Kenya, 1948.

²²See the Detention Camps Act, Chapter 91. Laws of Kenya (Revised 1967). Government Printer, Nairobi.

also demonstrates a reluctance on the part of the neo-colonial administration, to break away from the colonial pattern of criminal justice administration. This is not surprising though when viewed in the wider context of colonial and neo-colonial social organisation. You will recall how through the use of law the colonial capitalist mode of development and control was transformed into a neo-colonial capitalist mode of development and control. You will also recall how Kenyatta²³ (the first President of Kenya) attempted to replicate the colonial administrative structure during the formative years of the neo-colonial capitalist State. Viewed in this context, the continuation of the colonial system of criminal justice into the neo-colonial situation does fit in with the new set of relationships found in the neo-colonial capitalist structure. Examined in the background of capitalist development in general, it tends to support Rusche and Kercheimer's (1939) contention that the deprivation of liberty is the main characteristic of penal sanctions in capitalistic society.

In the following discussion we shall attempt an examination of crime rates in Kenya from 1943-1977. The period 1943-1953 was characterised by intense colonial activity to consolidate settler colonial agrarian capitalism. As we noted in Chapter Three, social control, especially law was used in an open and stark manner to achieve this purpose. At the same time, this period saw the beginnings of intense and organised African agitation against settler economic and political dominance. However, the Africans could not

²³See discussion in Chapter Four.

express their demands and opinions openly due to State control of African political organisation. As a result, African opinion found its expression, not in the legislative council (Africans were not represented here), but in underground secret societies. The failure of the colonial constitutional system to recognise and accommodate African "legitimate" demands led to the outbreak of "Mau Mau" which brought about a State of Emergency in 1952²⁴.

The Emergency Period, which can be said to have lasted until 1960, with their consequences for the administration of criminal justice lingering on until about 1962, was characterised by the suspension of normal colonial constitutional activity with broad powers of control being invested on the Commissioner. Ghai and Mcauslan (1970) argue that this period saw the enactment of an overwhelming amount of repressive legislation, for instance, the setting up of emergency camps and villages, arrest without warrants and the suspension of the normal colonial law and procedure regulations, most of which affect the legal system and the administration of justice. This increase in repressive legislation saw an increase in military, police and Court activity which resulted in an increase in the number of those being arrested and/or convicted, and committed to prison, detention camps and Emergency camps. For example

²⁴"Mau Mau" was a secret African organisation or movement which advocated the use of force to achieve political and economic aims. For an example of the way the colonial administration dealt with Mau Mau suspects, see J.M. Kariuki; Mau Mau Detainee. Oxford University Press, London, 1963. See also C. Rosberg and J. Nottingham; The myth of Mau Mau. Pall Mall, London, 1966.

during the period 1953-1957, an annual average of 105,070 persons were committed to prisons, detention camps and emergency camps, an increase of 69,156 over the previous five year period. In spite of this however, African political agitation continued and led to significant political changes which eventually led to independence (nominal) in 1963. The period 1963-1977 mark the first fifteen years of neo-colonial capitalist development. It is within this context of colonial and neo-colonial capitalist development that we shall examine the rates of crime in Kenya. We shall restrict ourselves to an examination of existing official records of crime rates. It is important to note here that ours is not an examination of the amount of crime in colonial and neo-colonial Kenyan capitalist society. Ours is an examination of the rates of crime (official) in the wider context of colonial and neo-colonial capitalist social control. In view of the centrality of custodial treatment in the Kenyan criminal justice system, we shall in this thesis, restrict our analysis to the rates of those persons who were processed, convicted and sentenced to some form of custodial treatment. We shall examine these rates in the same classification as they occur in the official records. These fall mainly into five groupings; those dealing with general trends, those showing the age, sex and sentencing patterns and the recidivism rates.

CRIME RATES

1. General Trends

During the period 1943-1977, a total of 2,497,358 persons were arrested, convicted and sentenced to imprisonment for various

offences under the penal code and under city and municipal bye-laws. Out of this number, 54% were sentenced to detention camps and extra-mural penal employment and the remaining 46% were sentenced to imprisonment in other penal institutions - mainly prisons. The annual average population in custody during this period was 71,353. As Table 2 and Figure 1 demonstrate, the periods 1958-62 and 1968-72 accounted for the highest number of recorded offenders with an annual average population of 97,153 and 103,299 respectively. The reasons for this occurrence appear to be mainly political. The period 1958-62 mark the last years of the "Emergency" as well as the beginning of open African political activity. It was during this period when the most rapid constitutional changes (eventually culminating in independence in 1963) were taking place. It was also during this period when the most acrimonious discussions about the future role of the settlers in Kenya were taking place. Since the colonial government with its characteristic bias in favour of the settlers was still in control, its activities in mopping up the last pockets of "Mau Mau" resistance seem to have been mirrored in the records of those sentenced to imprisonment.

There is a parallel of the political activity during this period and that of 1968-72. During this period, the K.P.U. revolt was at its highest. Consequently, the high record of those sentenced to custody seems to reflect the activities of those in power to re-establish their appearance of authority and control rather than an increase in crime per se. Hence we may argue here that the various crime rates in Tables 2 and 3 and Figure 1 are more of a reflection of an authority struggling to present a semblance of power and

control during situations of rapid social change and threatening political circumstances.

In the context of Kenya's colonial and neo-colonial development, a closer examination of these rates tend to support the above argument in the sense that they do not show any significant differences between those rates produced during the colonial period 1943-62 and those produced during the neo-colonial period (Table 2 and Figure 1). Moreover, as Figure 1 demonstrates, the trend was towards an increase rather than decrease during both periods. This tends to support our argument in Chapters Three and Four about the role law in general and criminal law in particular played in the continuation and maintenance of the capitalist mode of development after independence. These rates also tend to demonstrate the centrality of a particularistic use of criminal law in the capitalist system of social control and much more so in situations of rapid social change involving intense social conflict. These rates also tend to reflect the structure of control in existence at particular historical periods.

For example, an examination of Table 3 and Figure 1 reveals that the emergency period, especially 1958-62, saw the highest concentration of convicted persons, in particular those sentenced to detention camps. During this period as we mentioned earlier, normal colonial constitutional activity was suspended and the containment of "Mau Mau" - hence political control was at its most intense. Detention camps proved the most convenient institutions for the control of "Mau Mau" suspects since they did not require elaborate

and time consuming legal procedures²⁵. The average population for those in detention camps during this period 1958-62 was 68,570 as compared to 28,583 for those in other penal institutions (prisons). However, it is important to note here that the trend changed after independence in 1963. In an effort to obliterate the colonial image without abandoning the colonial capitalist mode of development, the neo-colonial authority shifted the emphasis away from detention camps (without discarding their use)²⁶ in favour of prisons and extra-mural Penal Employment camps. As we have already noted, this shift appears most marked in 1968-72²⁷ and interestingly coincides with the banning of the K.P.U., the effective application of the Public Order legislation²⁸ and intense political activity on the part of the neo-colonial authority to establish a semblance of political control and authority through the exclusive use of custodial treatment²⁹ for mundane crime. The absence in the official records of any detailed information on the type of offences committed by those sentenced tends to lend weight to the proposition that the aim was not to control crime, but to portray a public order image.

²⁵ See generally the Detention Camps Ordinance No. XXV of 1925 op.cit.

²⁶ See Figure 1.

²⁷ Ibid

²⁸ See discussion in Chapter 4.

²⁹ See generally K. Ndeti; Differential Deprivation and the Patterns of Criminal Behaviour in Kenya. Seminar Paper. Department of Sociology, University of Nairobi, October, 1971. See also R.P. Abreo, (J.J. Wambua (ed.)). The Historical Review of the Kenya Prisons Service. Government Printer, Nairobi, 1972, p.29.

Muga (1975), taking a sample of 29,820 offenders out of the 46,039 convicted and sentenced to prison (not detention camps) in Kenya in 1970, points out that 50% had committed offences against property, 35% offences against the person and 15% other unspecified offences under the penal code. The urban areas accounted for 43% of this number whereas the rural areas accounted for 57%. However, considering that the urban areas account for only 20% of the total Kenyan population, the impression given here is that the urban areas account for most of the crime rates found in Kenya. Moreover, given the still traditional nature of control in the rural areas, the concentration of offender rates in the urban areas tends to support the assumption that the political semblance of authority is much more effective when demonstrated in the urban areas. This seems to be reflected in the differential application of mundane criminal control on women.

2. Sex Differentials

Out of a total of 1,141,543 persons convicted and committed to prisons (not detention camps), 85% were men and 15% women. As we note in Table 4, this difference was highly significant $P > 0.05$ (Chi test) implying that there was a general tendency (deliberate or otherwise) during the colonial and neo-colonial periods to arrest, convict and commit women into custody. This reflects the general capitalist tendency which can only be meaningfully understood within the context of capitalist social organisation.

For example in Kenya, during the colonial period and to a large extent during the neo-colonial period the chief characteristic of the "developing" capitalist social structure was the competition

for the control of the means of production. The most visible symbol of this competition was the control of both land and labour with the struggle for the control of labour being the most significant. The deliberate exclusion of women from control served to stabilise the regulation and cost of labour (especially during the colonial period) in that they ensured the continuation of the subsistence economy which was necessary for the development of the colonial and neo-colonial class structured economy. It is important to note here that in spite of the relatively minimal effects of the control system on women (with reference to criminal control), the rate of conviction for women, like that of men does show an upward trend. For a comparison between the two, see Table 4. The demonstrated increase in the rate of women offenders tends to reflect the greater integration of the female population into the capitalist mode of production. It also reflects a gradual but definite shift in favour of capitalist social stratification and a decline of the traditional system of control which tended to protect women against the consequences of the capitalist mode of social control. As we shall show in the following section, these consequences are most conspicuously reflected by the number of offenders in their early productive years.

3. Age Differentials

Out of a total of 1,143,543 persons convicted and sentenced to custody in prisons during 1943-1977, 48% were aged 15-25 years³⁰,

³⁰As classified by the Department of Prisons, Nairobi.

47% between 26-50 years and 5% over 50 years. According to these figures, 95% of those committed to prison were in their early productive years. Ndeti (1971) in his analysis of economic deprivation and its relationship with crime patterns during 1964-68 makes similar observations. In his analysis he points out that those sentenced to imprisonment during this period were mainly young adults - 42.9% falling between the ages of 15 and 25 years. This on its own may not be significant. However, its significance is revealed when we examine those trends in the context of the wider social control system. As Figure 2 demonstrates, during periods of rapid change and intense social conflict, the number of those arrested and sentenced to imprisonment tends to suddenly increase. The increase as the same Graph demonstrates tends to involve the mainly young and male members of the population.

For example during 1953-57, there is an obvious upward kick (Figure 2) in the number of offenders falling between 15-25 years and a similar kick in the category of those aged between 26-50 years. As we have mentioned elsewhere in this discussion, this period marks the first five years of the "Emergency". Hence there seems to be a direct correlation between the anti- "Mau Mau" control measures and the number of those processed and sentenced to imprisonment. Predictably the measures were directed against those most likely to join the "Mau Mau" - the young and mainly male members of the population.

A similar pattern appears during the 1973-77 period but for slightly different reasons. During the "Mau Mau" period political control was the chief characteristic of the control system. In

1973-77, economic and to a certain extent socio-political control became the chief characteristic. According to the ILO (1972), the early 70's were characterised by high unemployment, especially among the young school-leavers who according to the 1969 Population Census comprised the bulk of the 12 million population. This as Saikwa (1972a)³¹ observes, appears to coincide with a major administrative campaign on "Law and Order". The high representation of the young in the prison population (Table 5 and Figure 2) tend to reflect these socio-economic and political conditions. In this sense crime rates as such do not exist, but what exists is a product in the form of offender rates of the organised activities of the existing system of control. Outside this context, these rates become meaningless and hence lose their usefulness as analytical material in the study of crime in its historical specificity. This view seems to find support in the Kenyan sentencing pattern.

4. Sentencing Pattern

Earlier in this chapter, we made some reference to the centrality of custodial treatment for offenders in the Kenyan criminal justice system. Jackson (1978), commenting on the trend towards a completely exclusive use of custodial criminal control notes that the practice was becoming entrenched by legislative action in favour of statutory sentences. In his analysis of the sentencing system, he endeavours through a synthesis of the bias in favour of custodial treatment to draw attention to the "political" nature of its use. Saikwa (1976) commenting on the role of penal institutions

³¹ Saikwa was Commissioner of Prisons in Kenya 1964-78.

in crime control argues that the structure of crime control as it is demonstrated by the exclusive use of imprisonment for convicted persons, does not seem to bear any relevance to the nature of crime in any given Kenyan situation. Underlying these observations is the view that these rates are not indicators of either the nature or the amount of crime in Kenya. Rather, they are a reflection of the organised activities of the system of social control for the sole purpose of maintaining a semblance of law and order.

Moreover, the excessive use of such short sentences as the Kenyan case demonstrates in Tables 6, 7, 8 and Figure 3 speaks more of a system struggling for socio-economic and political control rather than an organised effort in dealing with the so called "crime problem".

For example, out of the 1,143,543 persons convicted and sentenced to custody in prisons, during the period 1943-77, 75% received sentences ranging from under one month to six months. Twenty percent were sentenced for just over six months to 36 months and only 5% received sentences exceeding 36 months. The pattern repeats itself when the categories for men and women are examined separately (Tables 7 and 8). As Figure 3 demonstrates, the excessive use of short sentences (under six months) raises great doubts as to its value as either an indicator of crime or its seriousness and calls more for an examination of its usefulness within the wider context of social organisation and control. In the context of colonial and neo-colonial social organisation and social change, the sentencing structure appears to be more of a reflection of administrative control and hence an indicator of the organised activities

of the overall control system. In this sense, it can only be understood as a part and parcel of the wider social structure.

For example, during the colonial period 1943-1962, rehabilitation and treatment was not so much a factor in the control of offenders. However, after Independence, the situation changed. As Saikwa (1972a) and (1972b) points out, rehabilitation and treatment (involving spiritual transformation) became a factor in the law and order campaign - hence the appearance of recidivist rates in 1965 (see Section 5 below). This demonstrates that we cannot examine official crime rates as though they are independent variables to be accepted or rejected on their own right. Consequently any analysis of these rates which does not take into account their relationship with the system of control is as barren as any analysis that takes crime as though it were a constant variable to be found in all societies at all times.

5. Recidivism

An examination of the available information on recidivism shows that the average rate of recidivism for serious offences³² is 3% and the rate for first offenders for serious offences is 4%. It is however not possible to calculate the general recidivism rate for all offences since the above percentage refers only to those arrested and convicted for the third and subsequent times. The available information does not give any separate category for those sentenced for the second time for serious offences neither does it provide a

³²A serious offence is interpreted as one for which the sentence imposed is two years or more. See Annual Report, Treatment of Offenders, 1970, p. 20. Republic of Kenya, Government Printer, Nairobi.

separate category for recidivism for minor offences and for those sentenced to Detention Camps and Extra Mural Penal employment.

Below is a comparison of the rate of recidivism for serious offences and the rate of first offenders for the period 1965-1977. There is no information available for the period 1943-1964.

Period	Total number	Serious offences - Recidivism. 3rd and subsequent times		Serious offences 1st offenders		Others	
		No.	% of total	No.	%	No.	%
1965	35,961	1,426	4	1,765	5	32,770	91
66	32,275	1,329	4	1,651	5	32,295	91
67	38,027	1,662	4	1,962	5	34,403	91
68	39,562	1,782	5	1,610	4	36,170	91
69	41,199	1,573	4	1,855	5	37,771	91
70	46,039	1,207	3	1,469	3	43,363	94
71	56,648	1,193	2	1,660	3	53,795	95
72	44,791	1,462	3	2,206	5	41,123	92
73	46,690	970	2	1,937	4	43,783	94
74	51,611	1,595	3	2,315	4	47,701	93
75	59,381	1,643	3	2,937	5	54,801	92
76	68,672	1,608	2	2,804	4	64,260	94
77	65,700	1,480	2	2,490	2	61,750	96

CONCLUSION

In the wider context of social organisation and social change, the Kenyan case demonstrates that official crime statistics, as the end product of the existing system of social control, do not and cannot represent an indice (adequate or otherwise) of the amount of crime in society. This being the case, they cannot be separated from what entails crime as it is defined in this thesis. This in itself may not be significant. However, viewed in the context of criminological theory and its application to the analysis of crime, especially in the "Third World", it does assume some significance. What we mean here is that official crime statistics or any other crime statistics for that matter do not and cannot stand as independent variables capable of analysis outside the social, political and economic environment in which they find their expression. Like crime, as it is defined in this thesis, crime statistics, be they official or non-official are intricately tied up with the society's social control structure. Consequently, viewed on their own without reference to their relationship with the social control system, they present little of any criminological value. However, viewed in the wider context of social organisation and social change, they become useful in the analysis of the society's social control structure and its consequences for the general social fabric.

In the following chapter, we shall examine the general implications of crime and social control (as we have seen it in this thesis) on criminological thinking especially its application to the "Third World".

Table 2 Convicted Persons in 1943-1977: General distribution.

Period	No. Convicted	Average (Annual)
1943-47	130,135	26,027
1948-52	179,572	35,914
1953-57	347,126	69,425
1958-62	485,766	97,153
1963-67	440,146	88,029
1968-72	516,493	103,299
1973-77	398,120	79,624
Total	<u>2,497,358</u>	<u>71,353</u>

Source - Records held at Prisons Headquarters, Nairobi,
1980

Table 3 Institutional Differences

Period	Detention Camps and Extra Mural Penal Employment Camps		Other Penal Institutions (Prisons)	
	No.	Annual Average	No.	Annual Average
1943-47	71,178	14,236	58,957	11,791
1948-52	92,493	18,499	87,079	17,416
1953-57	183,600	36,720	163,526	32,705
1958-62	342,851	68,570	142,915	28,583
1963-67	269,373	53,875	170,773	34,155
1968-72	288,254	57,651	228,239	45,648
1972-77	106,066	21,213	292,054	58,411
Total	<u>1,353,815</u>	<u>38,680</u>	<u>1,143,543</u>	<u>32,672</u>

Source: Records held at Prisons Headquarters, Nairobi, 1980.

Note: The differences between the two categories were highly significant at the 0.05 level of significance $\chi^2 = 200$,
D.F = 6

The method used to calculate the χ^2 was that devised by Snedecor and Irwin (1933).

Table 4 Sex differentials of convicted and committed to Prisons.

Period	Men		Women	
	No.	Average	No.	Average
1943-47	56,344	5,122	2,561	512
1948-52	81,773	16,355	5,236	1,047
1953-57	123,960	24,792	38,471	7,694
1958-62	121,480	24,296	21,088	4,218
1963-67	143,082	286,164	27,481	5,496
1968-72	192,281	384,562	35,910	7,182
1972-77	255,425	51,085	36,606	7,321
Total	<u>974,345</u>	<u>64,956</u>	<u>167,353</u>	<u>11,158</u>

Source: Records held at Prisons Headquarters, Nairobi, 1980.

Note: The differences between the men and women rates was highly significant at the 0.05 level of significance

$$\chi^2 = 46, D.F = 6$$

The method used to calculate the χ^2 was that devised by Snedecor and Irwin (1933).

Table 5 Age Differentials

Period	15-25 years	26-50 years	Over 50 years	Total
1943-47	18,408	39,880	669	58,957
1948-52	30,461	55,481	1,137	87,079
1953-57	115,721	43,953	3,852	163,526
1958-62	79,573	58,367	4,975	142,915
1963-67	73,081	89,651	8,041	170,773
1968-72	96,634	119,287	12,318	228,239
1973-77	140,551	132,502	18,991	292,054
Total	<u>554,439</u>	<u>539,121</u>	<u>49,983</u>	<u>1,143,543</u>
Average	<u><u>15,841</u></u>	<u><u>15,403</u></u>	<u><u>1,428</u></u>	<u><u>32,672</u></u>

Source: Records held at Prisons Headquarters, Nairobi, 1980.

Table 6 Sentencing Pattern

Period	0-6 months	6-36 months	Over 36 months	Total
1943-47	42,936	14,038	1,983	58,957
1948-52	63,658	20,184	3,237	87,079
1953-57	94,001	43,197	5,717	142,915
1958-62	114,598	46,378	9,797	170,773
1963-72	183,226	33,079	11,934	228,239
1973-77	239,947	38,935	13,172	292,054
Total	<u>856,679</u>	<u>224,502</u>	<u>62,362</u>	<u>1,143,543</u>
Average	<u><u>24,476</u></u>	<u><u>6,414</u></u>	<u><u>1,782</u></u>	<u><u>32,672</u></u>

Source: Records held at Prisons Headquarters, Nairobi, 1980.

Table 7 Sentencing Pattern - convicted men.

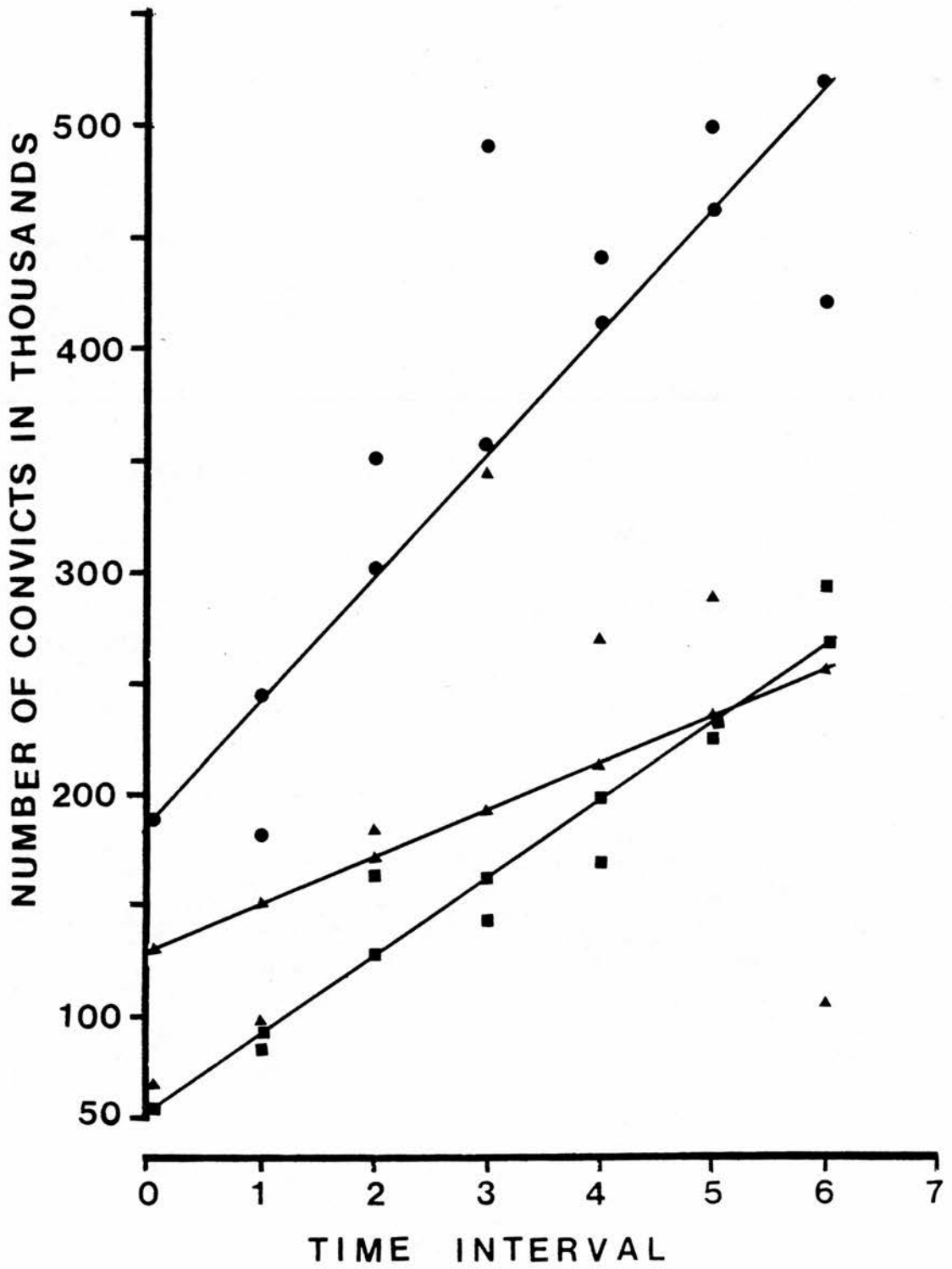
Period	0-6 months	6-36 months	Over 36 months	Total
1943-47	39,862	14,439	2,043	56,344
1948-52	58,820	19,780	3,173	81,773
1953-57	74,972	33,476	15,512	123,960
1958-62	73,957	41,934	5,589	121,480
1963-67	87,938	45,626	9,518	143,082
1968-72	148,299	32,202	11,780	192,281
1973-77	202,635	39,831	12,959	255,425
Total	<u>686,483</u>	<u>227,288</u>	<u>60,574</u>	<u>974,345</u>
Average	<u>19,614</u>	<u>6,494</u>	<u>1,730</u>	<u>27,838</u>

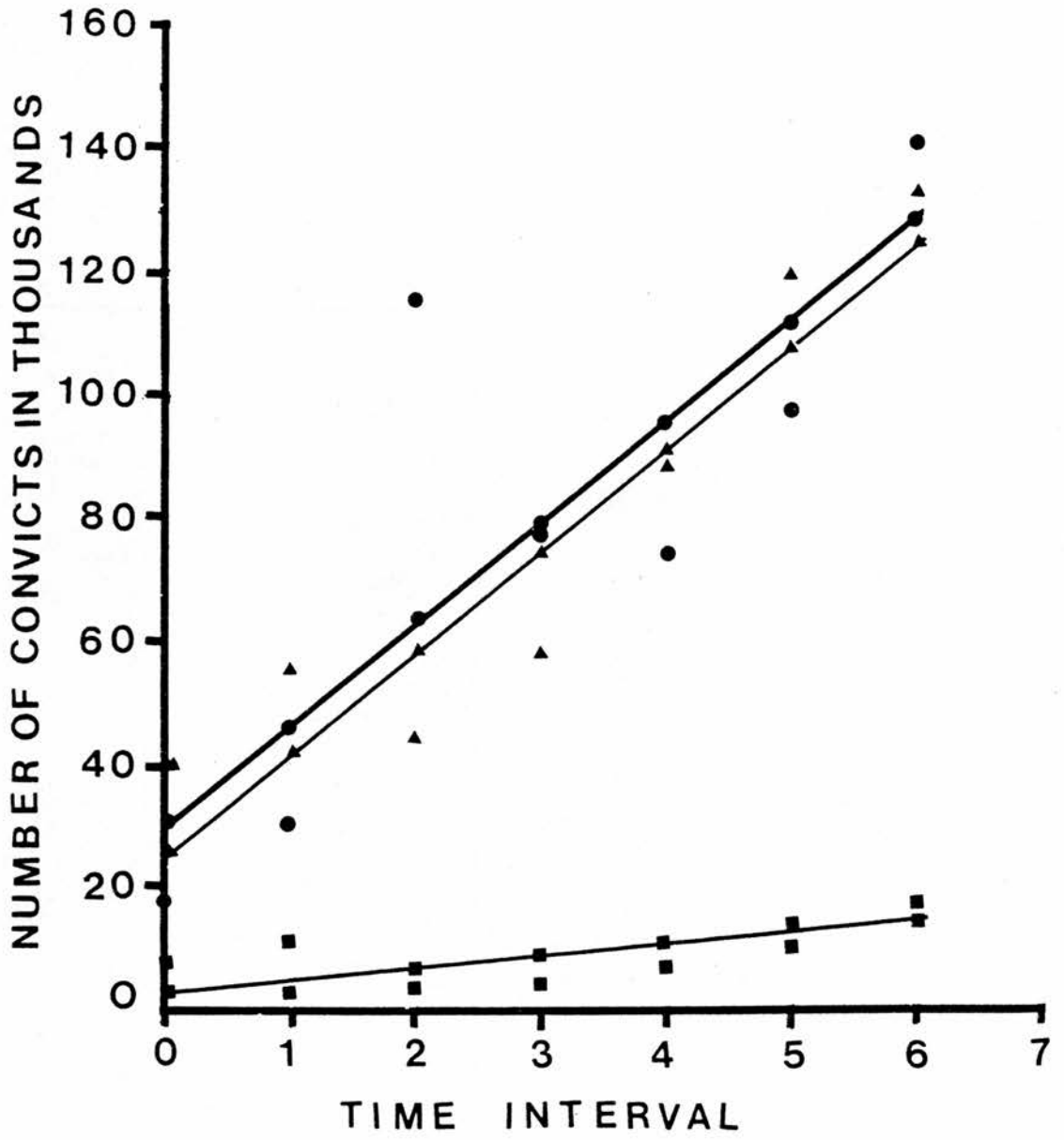
Source: Records held at Prison Headquarters, Nairobi, 1980.

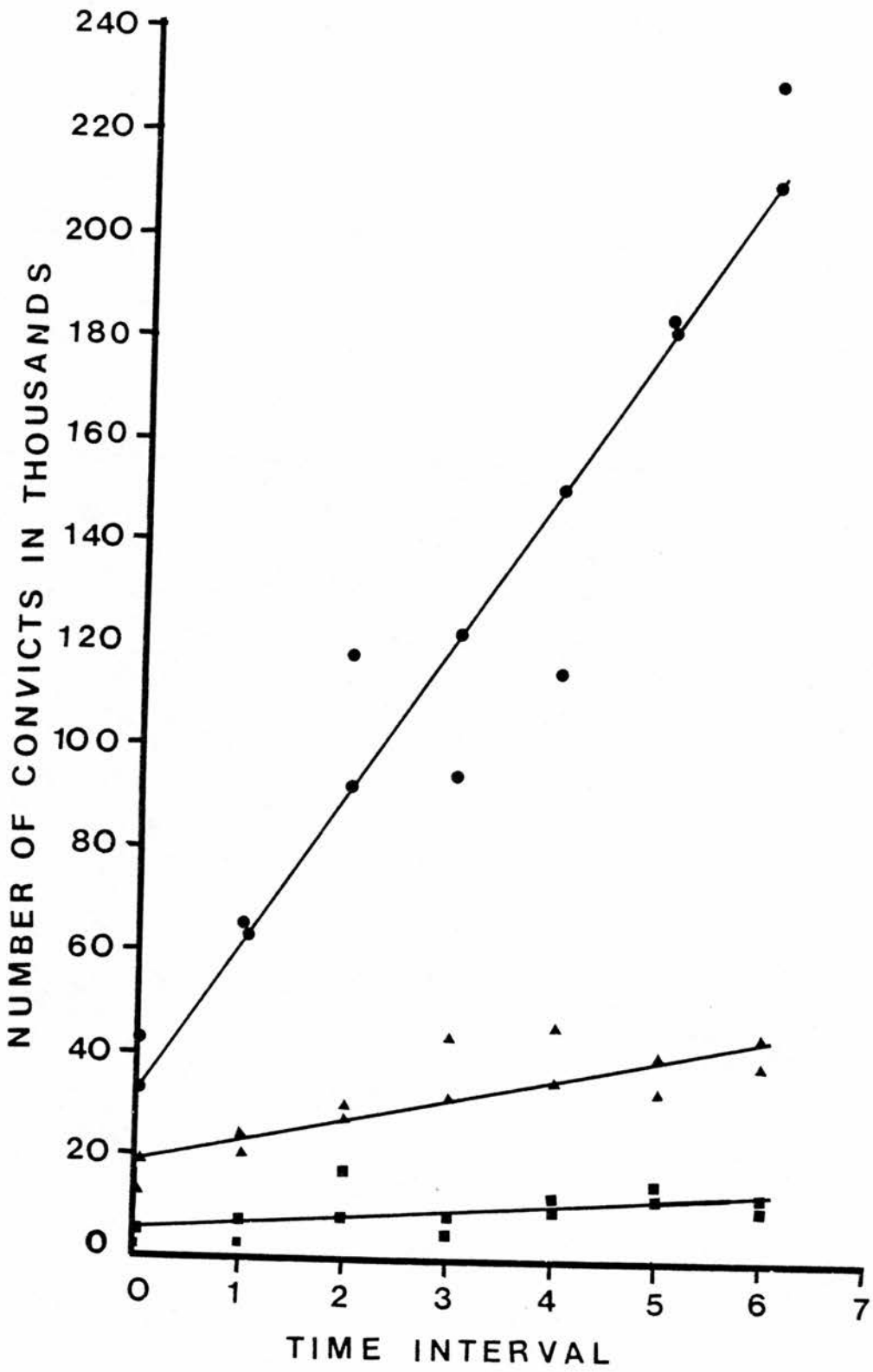
Table 8 Sentencing Pattern - convicted women

Period	0-6 months	6-36 months	Over 36 months	Total
1943-47	2,340	119	22	2,561
1948-52	4,819	389	28	5,236
1953-57	35,261	2,396	814	38,471
1958-62	19,827	1,170	91	21,088
1963-67	26,207	1,187	87	27,481
1968-72	34,989	766	155	35,910
1973-77	35,401	1,101	104	36,606
Total	<u>158,844</u>	<u>7,208</u>	<u>1,301</u>	<u>167,353</u>
Average	<u><u>4,538</u></u>	<u><u>206</u></u>	<u><u>37</u></u>	<u><u>4,781</u></u>

Source: Records held at Prison Headquarters, Nairobi, 1980.







CHAPTER SIX

GENERAL IMPLICATIONS

In this thesis, we have attempted as it were a synthesis of the historical specificity of social control and hence of crime in the wider context of social organisation and social change. Taking social control as our point of departure, and in our assumption that a meaningful explanation of crime is only possible within an appreciation of the relationship between crime and social control, especially the role law in general and criminal law in particular plays in the creation and development of specific social structures, we argued that crime is a historically specific phenomenon, inseparably dependent on social control. In this sense we attempted to demonstrate that crime is not a universal phenomenon comparable to "primitive" and "civilised" societies and neither is it comparable to "developed" and "developing" capitalist societies. Hence our contention that crime, as it is defined in this thesis, is functionally dependent on a given social order. This necessarily entails an examination of whether comparative analyses of crime are possible and if so, what kind of analytical models are capable of comparative application, especially with reference to the so called "Third World".

The question of comparative analysis in criminology is characterised by several different points of view. First there is the "total uniqueness" view which maintains that societies are "entities unto themselves" - hence they are incapable of cross-cultural analysis. Secondly there is the "objectivist" view which maintains that "every item in any given society has a parallel in other societies and that the items may be treated as if they were

the same in each comparative exercise"¹. Thirdly there is the middle range view - what Robertson and Taylor (1973) refer to as the comparative - analytic "benchmark" approach which maintains that it is possible to conduct comparative analysis by developing concepts and generalisations "at a level between what is true of all societies and what is true of one society at one point in time and space"². In this sense, and through a synthesis of the limitations of comparative analyses on deviance and social control, Robertson and Taylor (1973) endeavour to move away from the question of whether comparative analysis is possible or not to the more significant question of what type of models are capable of cross-cultural application.

Informed more by their awareness that social control, especially law is not a transcendent entity to which non-deviants orient in a unitary fashion, Robertson and Taylor (1973) reject as inadequate the use of models or approaches which treat crime as though it were a relatively constant phenomenon. Underlying their argument is the assumption that legal characteristics across cultures do not and cannot occur in a "Standard Sequential Order"³. In this context, they maintain that the location of examples of criminal behaviour in one society does not provide an automatic warrant for its juxtaposition with phenomena in different societies. Consequently

¹R. Robertson and L. Taylor; *Deviance, Crime and Socio-legal Control*. Martin Robertson and Company Ltd., London, 1973, p. 21.

²*Ibid.* p. 23.

³*Ibid.* p. 43.

they reject as inadequate the indiscriminate application of concepts or models derived from particular social situations on alien and different social situations⁴. Thus they reject, not the possibility of comparative analysis per se, but the use of "wrong" or irrelevant models in such analysis. Instead they advocate the use of an approach that emphasises the relationship between controllers and controlled and between those who sanction and those who deviate⁵.

However, having stated the primacy of social control in any meaningful comparative analysis of deviance and/or crime, Robertson and Taylor (1973) limit the application of their approach by the manner in which they go about explaining social control. In their analysis, they tend to reduce social control to social reactions in the form of control agencies⁶. In this sense their approach becomes reductionistic in that it fails to consider the historically specific nature of social control. Moreover, it fails to grasp the significance of the social organisation and social change, especially the political and socio-economic contingents and their consequences for social control and hence crime. Consequently, whether we are talking about the relationship between "controllers" and deviants or even the wider structure of social control, it is important that we recognise the broader processes that characterise social control in capitalist society in general as well as those that are specific

⁴Ibid. p. 39

⁵Ibid. p. 52

⁶Ibid. p. 57

to particular capitalist structures. This we consider inevitable to any comparative analyses of crime, especially those intended for application in the "Third World".

For example in our analysis of capitalist social control in Kenya, we demonstrated that the imposition of English capitalist law did not recreate Kenya in England's image, but instead exhibited a special sort of dualism. Thus Kenya, in spite of its English legal structure did not develop as England did. Implied here is that although Kenya developed into a capitalist structure (with characteristic capitalist social organisation and social stratification), this did not necessarily replicate that which developed in England. What this means is that social control, especially law is as Seidman (1978) points out, "non-transferable". By extension, crime as a social phenomenon, inseparably dependent on social control is also "non-transferable" - an aspect that has significant consequences for the study of crime in particular social structures, the most basic being the applicability of criminological theory in cross-cultural situations. This entails that we cannot study crime in different social structures as though these structures evolved in the same way and as though social control, especially law necessarily takes similar forms. As we noted elsewhere in this thesis, social structures do not and cannot replicate themselves. Consequently, we cannot go about explaining criminal behaviour in non-western "developing" capitalist society, through the application of criminological perspectives developed with special reference to western capitalist society, without any specific reference to structural differences and indeed without any reference to the

existing system of social control. Differences do exist and these must of necessity be taken into account in any cross-cultural analysis of social control and indeed of crime.

For example, Chambliss (1975), in his comparative analysis of crime and law enforcement in Nigeria and Seattle in the United States, did encounter significant differences in the law enforcement systems of the two countries. Since this was so in spite of the capitalist structures of the two countries, he was then able to explain the differences as well as the similarities found in the crime rates in the wider context of social organisation and social control - hence his conclusion that law-enforcement systems are not organised to reduce crime or enforce public morality or what Durkheim would call the collective conscience. Rather they are organised to "manage" crime. In this sense he was then able to place the emphasis on the system of control in his attempt to explain the phenomenon of crime in Seattle (USA) and Nigeria in the context of the social structures found in the two capitalist situations.

Saikwa (1972a), influenced more by his experience as Commissioner of Prisons in a rapidly changing environment, demonstrates a rare notion of historicity (rare in the "Third World" context) in his reaction against the hypothesis that there is more crime in "developing" countries than in the developed ones. In his argument Saikwa (1972a), although recognising that social change and its consequences for crime is a factor in all societies, in comparing crime rates across cultures, he maintains that these cannot be separated from the historical and indeed specific nature of social change. In this respect, he argues that any analysis of crime rates without special

reference to the differences in existence in the wider social structure is meaningless or rather erroneous. Thus Saikwa (1972a), although failing to expound any theory of crime and social change nevertheless recognises its significance in any cross-cultural analysis.

Mushanga (1976), purporting to write an introduction of criminology in East Africa begins by defining crime in terms of the State and its laws. In this context, he argues that crime is a product of the legislative (hence political) activity of the State⁷. However, the manner in which he goes about explaining crime in East Africa, speaks more of a perspective based on the traditional "universality" of law rather than a perspective based on an understanding of the problematics of social organisation in its historical set up. As a result, he fails to grasp the sense in which crime is functionally dependent on a given social order. We consider this inevitable, whether we are talking about crimes of violence against the person or crimes against property. Without this, we are left with nothing more than the often general and unsubstantiated claims that economic development and social change account for the various differences.

For example, Clinard and Abbot (1973), in their remarkable attempt to explain crime comparatively in "developing" countries e.g. India and Uganda (both capitalist) begin their exposition on the assumption that it is possible to ascertain whether "similar

⁷T.M. Mushanga; Crime and Deviance - An Introduction to Criminology. East African Literature Bureau, Nairobi, 1973, p. 1.

social processes account for crime in technologically developed and less developed societies"⁸. Underlying this assumption is the proposition that social structures in developed capitalist society e.g. Europe, replicates itself in "developing" society such as India and Uganda. Moreover, this assumes that social control, especially law is universal (hence transferable). Assuming this to be the case, Clinard and Abbot (1973) engage in what amounts to the juxtaposition of traditional criminological perspectives on "developing" capitalist structures as though these structures were simply replicas of western social structures. In this sense, they fail to recognise the historical specificity of these structures as well as the significance of social control and its consequences for crime. Thus they fail to grasp the significance of the manner in which the evolvment and development of specific social structures (as the Kenyan case demonstrates) affect the system of social control on the one hand, and how on the other hand the system of social control contributes to the maintenance and development of these same structures with significant consequences for crime.

For example India and Uganda are both ex-British colonies and both are characterised by "developing" capitalist social structures. However, by their own evidence and irrespective of the measurements they use, Clinard and Abbot (1973) argue that there are significant differences in the crime rates of both countries. They present India as a case of a slow increase of crime whereas Uganda is presented as

⁸ M.B. Clinard and D.J. Abbot; Crime in Developing Countries - A Comparative Perspective. John Wiley and Sons, New York, 1973, p. 1.

a case of a rapid increase of crime⁹. Confronted with such significant differences (by their explanation), Clinard and Abbot (1973) attempt to explain them by making reference to economic development without necessarily expounding the way this development fits in the wider social structure. In this sense, they fail to provide an analysis of crime in the wider context of social organisation and social change that is capable of cross-cultural application. Thus they fail to explain the socio-economic and political contingencies in which social control, especially law (hence crime) finds its expression and we may also argue its legitimacy.

What this demonstrates, and as we have also demonstrated in our analysis of colonial and neo-colonial capitalist control in Kenya is that a comparative analysis of crime is possible. However, in order for it to be meaningful, it must include as its primary task, a historically specific analysis of social control in the wider context of social organisation. In this sense, it would then be possible to examine meaningfully those aspects of social control and hence of crime that are true to capitalist society in general as well as those that are specific to India and Uganda. Hence in the Kenyan case, especially in our analysis of the specificity of colonial and neo-colonial capitalist political and economic control, we have attempted to demonstrate that any approach that does not recognise the centrality of social control in its analysis, whether this analysis be comparative or not, is as inadequate as any approach that perceives crime as a pathological entity that universally shocks the "collective conscience".

⁹Ibid. pp. 13-17.

Thus a synthesis of Kenyan social control in the wider context of social organisation and social change demonstrates that any meaningful analysis of crime, especially in the "Third World" will be determined by the extent in which it appreciates the historical specificity of social control, especially the role law in general and criminal law in particular plays in the creation and development of specific social structures and its consequences for the general social fabric.

REFERENCES

- AARANOVITCH, S. and AARANOVITCH, K. (1947) Crisis in Kenya. Lawrence and Wishart, London.
- ABREO, R.P. (1972) The Historical Review of the Kenya Prisons Service. Government Printer, Nairobi.
- AMSDEN, A. (1971) International Firms and Labour in Kenya, Cass, London.
- BARBER, W.J. (1961) The Economy of British Central Africa: A case study of economic development in a dualistic society. Oxford University Press, London.
- BEATTIE, J. (1964) Other Cultures. Cohen and West. London
- BECKER, H. (1963) Outsiders - Studies in the Sociology of Deviance. Free Press, New York.
- BENNET, G. (1969) Tribalism and Politics in East Africa in P.H. Gulliver (ed.). Tradition and Transition in East Africa. University of California Press, Los Angeles.
- BOHANNAN, P. (1967) Law and Warfare - Studies in the Anthropology of Conflict. Natural History Press, New York.
- BRETT, E.A. (1973) Colonialism and Underdevelopment in East Africa - The Politics of Economic Change 1919-39. Heinemann London.
- CARLSTON, K.S. (1968) Social Theory and African Tribal Organisation - The Development of Socio-legal Theory. University of Illinois Press, Urbana.
- CHAMBLISS, W.J. (1975) The Political economy of Crime - A Comparative Study of Nigeria and the USA in I. Taylor, P. Walton and J. Young; Critical Criminology. Routledge and Kegan Paul, London, 167-201.
- CHAMBLISS, J. and MANKOFF, M. (ed.) (1976) Whose Law, What Order? - A Conflict Approach to Criminology. John Wiley and Sons Inc., New York.
- CLINARD, M.V. and ABBOTT, D.J. (1973) Crime in Developing Countries - A comparative perspective. John Wiley and Sons Inc., New York.
- COHEN, A.K. (1955) Delinquent Boys - the culture of the gang. Free Press, Chicago.
- COHEN, M.R. (1964) Law and the Social Order. Yale University Press, New Haven.

- DILLEY, M.R. (1966) *British Policy in Kenya Colony*. Frank Cass and Co. Ltd., London.
- DURKHEIM, E. (1964a) *The Rules of Sociological Method*. Free Press, New York.
- DURKHEIM, E. (1964b) *The Division of Labour in Society*. Free Press, New York.
- DURKHEIM, E. (1973) *Two Laws of Penal Evolution*. *Economy and Society*. Vol. 2. 1973, 285-307. (1st Published in *Année Sociologique* Vol. 4, 1899-1900).
- ERICKSON, K. (1964) *Notes on the Sociology of Deviance in Baker, H. The Other Side*. Free Press, New York.
- FANON, F. (1963) *The Wretched of the Earth*. Penguin Books Ltd., Harmondsworth.
- FORTES, M. and EVANS-PRITCHARD, E.E. (ed.) (1940). *African Political Systems*. Oxford University Press, London.
- GAVIN, R. (1967) *Correcting Racial Imbalances in Employment in Kenya*. *International Labour Review*, XCV (Jan.-Feb.), 67.
- GERTZEL, C. (1966) *The Provicinal Administration in Kenya*. *Journal of Commonwealth Studies*. Vol. IV, No. 3, November.
- GERTZEL, C. (1970) *The Politics of Independent Kenya 1963-1968*. East African Publishing House, Nairobi.
- GERTZEL, C., GOLDSCHMIDT, M. and ROTHCHILD, D. (1972) *Government and Politics in Kenya*. East African Publishing House, Nairobi.
- GERTZEL, C. and OKUMU, J. (1970) "The Little General Election in Nyanza 1966" in Gertzel, C. (1976) *The Politics of Independent Kenya 1963-1968*. EAPH Nairobi.
- GHAI, D. (1962) *Some Aspects of Income Distribution in East Africa*. Nairobi: Makerere University (cyclostyle)
- GHAI, Y.P. and MCAUSLAN, J.P.W.B. (1970) *Public Law and Political Change in Kenya*. A study of the legal framework of government from colonial times to the present. Oxford University Press, Nairobi.
- GIBBSON, D. (1968) *Society, Crime and Criminal Careers*. An introduction to criminology. Prentice Hall, Eaglewood Cliffs, N.J.
- GLUCKMAN, M. (1965) *Politics, Law and Ritual in Tribal Society*. Oxford University Press, London.

- GUENTHER, A.L. (1970) *Criminal Behaviour and Social Systems*.
Rand McNatty and Co., Chicago.
- GULLIVER, P.H. (1963) *Social Control in an African Society - A Study of the Arusha Agricultural Masai of Northern Tanganyika*.
Routledge and Kegan Paul, London.
- HAMBURG, M. (1979) *Basic Statistics - A Modern Approach*. 2nd ed.
Harcourt Braie Jovanovich Inc., New York.
- HART, H.L.A. (1970) *Punishment and Responsibility - Essays in the Philosophy of Law*. Oxford University Press, Oxford.
- HINDESS, B. (1973) *The Use of Official Statistics in Sociology - A Critic of Positivism and Ethnomethodology*. The Macmillan Press Ltd., London.
- HUXLEY, E. and PERHAM, M. (1944) *Race and Politics in Kenya*.
Faber and Faber, London.
- I.L.O. (1972) *International Labour Office; Employment, Incomes, and Equality - A strategy for increasing productive employment in Kenya*. I.L.O. Publication, Geneva.
- JACKSON, T. (1976) *A paper on the Kenyan Sentencing System*.
First Conference of the Kenya Magistrates' Association.
Nairobi 29th October-1st November.
- KARIUKI, J.M. (1963) *Mau Mau Detainee*. Oxford University Press,
London.
- KENNEDY, M. (1976) "Beyond Incrimination" in Chambliss, W.J. and Mankoff, M. *Whose Law, What Order?* Wiley, New York.
- KENYATTA, J. (1938) *Facing Mount Kenya*. Secker and Warmburg,
London.
- KITSUSE, J. (1962) *Societal Reaction to Deviant Behaviour*.
Social Problems, Vol. 9, No. 3 (Winter, 1962).
- KITSUSE, J.I. and CICOUREL, A.V. (1963) *A note on the uses of official statistics*. *Social Problems*. Vol. 11 No. 2, 131
Fall.
- KUPER, A. (1970) *The Kgalagari and the rural consequences of marriage*. *Man*, Vol. 5 No. 3, September.
- LEMERT, E. (1967) *Human Deviance, Social Problems and Social Control*. Prentice Hall, Eaglewood Cliffs.
- LENIN, V.I. (1940) *Imperialism - The Highest Stage of Capitalism*. A Popular Outline. Lawrence and Wishart Ltd., London.
(Revised Translation).

- LEYS, C. (1975) Underdevelopment in Kenya - The Political Economy of Neo-colonialism. Heineman, London.
- LEYS, C. (1978) Capital Accumulation, Class formation and Dependency - The Significance of the Kenyan Case. The Socialist Register. The Merlin Press, London, pp. 241-261.
- LEYS, N. (1931) A Last Chance in Kenya. Hogarth Press, London.
- LIVINGSTONE, I. (1967) The Government, the Worker and the Law in Kenya. East African Law Journal, 3, 282.
- LOFLAND, J. (1969) Deviance and Identity. Prentice Hall, Eaglewood Cliffs, N.J.
- LORD HAILEY (1957) African Survey Revised, 1950. Oxford University Press, London.
- MAQUET, J. (1971) Power and Society in Africa. Weidenfield and Nicolson, London.
- MAIR, L. (1962) Primitive Government. Hazell Watson and Viney Ltd., London.
- MAKELA, M. (1974) The Societal Tasks of the System of Penal Law. Scandinavian Studies in Criminology, 5, 47-65.
- MALINOWSKI, B. (1926) Crime and Custom in Savage Society. Routledge and Kegan Paul, London.
- MANNHIEM, H. (1965) Comparative Criminology Vols. I and II. Routledge and Kegan Paul, London.
- MARRIS, P. (1967) Economics is not Enough. East African Journal, III, 14-15 (February).
- MAUSS, M. (1970) The Gift - Forms and Functions of exchange in archaic Societies. Routledge and Kegan Paul, London (Translated from the French version "Essai sur le don" 1925).
- McCLINTOCK, F.H. (undated) Report presented at the Institute of Criminology, Cambridge, U.K.
- MIDDLETON, J. and TAIT, D. (1958) Tribes without Rulers - Studies in African Segmentary Systems. Routledge and Kegan Paul, London.
- MILNER, A. (ed.) (1969) African Penal Systems. Routledge and Kegan Paul, London.
- MORRIS, T. (1976) Deviance and Control - The Secular Heresy. Hutchinson and Co. Ltd., London.
- MUGA, E. (1975) Crime and Delinquency in Kenya. East African Literature Bureau, Nairobi.

- MUNRO, J.F. (1975) Colonial Rule and the Akamba - Social Change in the Kenya Highlands 1889-1939. Clarendon Press, Oxford.
- MURIUKI, S. (1974) A History of the Kikuyu 1500-1900. Oxford University Press, Nairobi.
- MUSHANGA, T.M. (1976) Crime and Deviance - An Introduction to Criminology. East African Literature Bureau, Nairobi.
- MATZA, D. (1964) Delinquency and Drift. Wiley, New York.
- MATZA, D. (1969) Becoming Deviant. Prentice Hall, New York.
- N.C.C.C. (1968) Who controls industry in Kenya? National Christian Council of Churches; a report of a working party. East African Publishing House, Nairobi.
- NDETI, K. (1971) Differential Deprivation and Patterns of Criminal Behaviour in Kenya. Department of Sociology, Seminar Paper. University of Nairobi, October.
- NELLIS, J.R. (1973) "Expatriates in the Government of Kenya". Journal of Commonwealth Political Studies, Vol. XI, No. 3, 251-264.
- NKRUMAH, K. (1965) Neo-colonialism, The Last Stage of Imperialism. Nelson, London.
- ODINGA, O. (1967) Not Yet Uhuru. Heinemann, London.
- PHILLIPSON, M. (1971) Sociological Aspects of Crime and Delinquency. Routledge and Kegan Paul, London.
- QUINNEY, R. (1970) The Social Reality of Crime. Little Brown and Company, Boston, Massachusetts.
- RADCLIFFE-BROWN, A.R. (1965) Structure and Function in Primitive Society. Free Press, New York (1st Hardcover Production 1952).
- ROBERTS, S. (1979) Order and Dispute - An Introduction to Legal Anthropology. Penguin Books Ltd. Harmondsworth, Middlesex.
- ROBERTSON, R. and TAYLOR, L. (1973) Deviance, Crime and Sociological Control. Martin Robertson and Company Ltd., London.
- ROSBERG, C. and NOTTINGHAM, J. (1966) The Myth of Mau Mau. Pall Mall, London.
- ROSS MACGREGOR (1927) Kenya from Within. George Allen and Unwin Ltd., London.

- RUSCHE, G. and KERCHEIMER, O. (1939) Punishment and Social Structure. Columbia University Press, New York.
- SABARWAL, S. (1970) The Traditional Political System of the Embu of Central Kenya. East African Publishing House, Kampala.
- SAIKWA, A.K. (1972a) The Training and Rehabilitation of Prisoners. Address to the Kenya Press Club at the Penal Room, City Hall, Nairobi. October 10th.
- SAIKWA, A.K. (1972b) Prisons and Society. Journal for the Study of Consciousness, Vol. 5, No. 1, 10-19.
- SAIKWA, A.K. (1976) Paper on Penal Institutions. First Conference of the Kenya Magistrates' Association. Nairobi. 29th October-1st November.
- SAHLINS, M. (1972) Stone Age Economics. Tavistock Publications Ltd., London.
- SANDBROOK, R. (1975) Proletarians and African Capitalism, The Kenyan Case 1960-1972. Cambridge University Press, Cambridge.
- SANTOS, DE SOUZA, B. (1977) The Law of the Oppressed: The Construction and Reproduction of Legality in Parsargada. Law and Society Review, Vol. 12, No. 1, 6-126.
- SCHAPERA, I. (1956) Government and Politics in Tribal Societies. Watts, London.
- SCHUR, E. (1971) Labelling Deviant Behaviour. Its Sociological Implications. Harper and Row, New York.
- SCOT, R. and DOUGLAS, J. (1972) Theoretical Perspectives on Deviance, Basic Books Inc., New York.
- SEIDMAN, A. (1972) Comparative Development Strategies in East Africa. East African Publishing House, Nairobi.
- SEIDMAN, R.B. (1978) The State Law and Development. Groom Helm, London.
- SERVICE, E. (1962) Primitive Social Organisation - An Evolutionary Perspective. Random House, New York.
- SMITH, J. and FRIED, W. (1974) The Uses of the American Prison - Political Theory and Penal Practice. Lexington, Mass.
- SNEDECOR, G.W. and IRWIN, M.R. (1933) Iowa State College of Science, 8,75.
- SORRENSON, M.P.K. (1967) Land Reform in the Kikuyu Country. Oxford University Press, Nairobi.
- SORRENSON, M.P.K. (1968) Origins of European Settlement in Kenya. Oxford University Press, Nairobi.
- SPITZER, S. (1975) Punishment and Social Structure. Law and Society Review. Vol. 9, No. 4.

- SUTHERLAND, E.H. and CRESSEY, D.R. (1970) *Criminology*. Lippincott, New York.
- SWAINSON, N. (1978) *The Development of Corporate Capitalism in Kenya 1918-1977*. Heineman, London.
- TAYLOR, I., WALTON, P. and YOUNG, J. (1973) *The New Criminology*. Routledge and Kegan Paul, London.
- TAYLOR, I., WALTON, P. and YOUNG, J (eds.) (1975) *Critical Criminology*. Routledge and Kegan Paul, London.
- VOLD, G. (1958) *Theoretical Criminology*. Oxford University Press, New York.
- WAGNER, S. (1940) *The Political Organisation of the Bantu of North Kavirondo*. In Fortes, M. and Evans-Pritchard, E.E. *African Political Systems*, Oxford University Press, London.
- WALKER, N. (1967) "A Century of Causal Theory" in H. Klare and D. Haxby (eds.) *Frontiers in Criminology*. Pergamon Press, London.
- WASSERMAN, G. (1973) *Continuing and Counter Insurgency - The Role of Land Reform in De-colonising Kenya 1962-1970*. *Canadian Journal of African Studies*, VII, (1), 148.
- WEBER, M. (1964) *The Theory of Social and Economic Organisation*. (Translated by Henderson A.M. and Parsons T.) Free Press, New York.
- WEBER, M. (1968) *On Charisma and Institution Building*. University of Chicago Press, Chicago.
- WODDIS, J. (1961) *Africa, The Lion Awakes*. Lawrence and Wishart, London.
- WODDIS, J. (1967) *Introduction to Neo-colonialism*. Lawrence and Wishart, London.
- WRIGLEY, C.C. (1965) *Kenya: The Patterns of Economic Life*. In V.T. Harlow and E.M. Chiver (eds.) *History of East Africa*, Vol. 2. Clarendon Press, Oxford.
- ZWANENBERG, V.R.M.A. (1975) *Colonial Capitalism and Labour in Kenya 1919-1939*. East African Literature Bureau, Nairobi.

Official Publications:

- Land Regulations No. 26 of 1897 Vol. I. p. 85 (United Kingdom Legislation)
- East African Order in Council No. 757 of 1899 (United Kingdom Legislation)

- Vagrancy Regulations No. 3 of 1900. (Kenya Legislation).
- "Outlying Districts" Regulations No. 31 of 1900 (25 of 1902)
(Kenya Legislation).
- Sale of Native Liquor Regulations No. 32 of 1900 (Kenya Legislation).
- Native Passes Regulations No. 12 of 1900 (Kenya Legislation).
- The Preservation of Order by Night Regulations No. 32 of 1900
(Kenya Legislation).
- Hut Tax Regulations No. 18 of 1901 (Kenya Legislation).
- East African Order in Council, 1902. (United Kingdom Legislation).
- Regulations No. 22 of 1902 on Village Headmen (Kenya Legislation).
- Crown Lands Ordinance No. 21 of 1902 (United Kingdom Legislation).
- Ordinances and Regulations Vol. IV, No. 21 of 1902 (United Kingdom
Legislation).
- Coffee Leaf Disease Ordinance of 1904 (Kenya Legislation).
- Colonial 4117 (1908) Correspondence relating to the Tenure of
Land in the East African Protectorate p. 33.
- East African Protectorate Ordinances and Regulations, 1915 Vol.
XVII, No. 12 of 1915 (United Kingdom Legislation).
- The Registration of Coffee and Plantations and Dealers Ordinance
No. 10 of 1918 (Kenya Legislation).
- Resident Natives Ordinance No. 33 of 1918 (Kenya Legislation).
- The Legislative Council Ordinance No. 22 of 1919 (Kenya Legi-
slation).
- The Native Registration Ordinance, 1919 (Kenya Legislation).
- Income Tax Ordinance No. 23 of 1920 (Kenya Legislation).
- Master and Servants (Amendment) Ordinance 1924 (Kenya Legi-
slation).
- Employment of Natives Ordinance. Cap. 139 Laws of Kenya (Kenya
Legislation).
- Letters in Council. Letters and Patent and Royal Instructions
1/9/1927 (United Kingdom Legislation).
- The Native Authority Act, 1930 (Kenya Legislation).

- Resident Labourers Ordinance No. 30 of 1937 (Kenya Legislation).
- Employment of Servants Ordinance of 1937 (Kenya Legislation).
- Kenya (Highlands) Order in Council, 1939 (United Kingdom Legislation).
- The Detention Camps Ordinance No. XXV of 1925. Government Printer, Nairobi, 1948.
- The Kenya Tea Ordinance, 1960 (Kenya Legislation). Ministry of Agriculture.
- The Borstal Institutions Act. Republic of Kenya. Government Printer, Nairobi, 1963.
- Republic of Kenya. The Agricultural Credit Act 1963. Chapter 323 Laws of Kenya. Government Printer, Nairobi.
- The Independence Constitution 1963. The Kenya Independence Order in Council (L.N. 718). Government Printer, Nairobi.
- Republic of Kenya Act No. 35, 1964. Government Printer, Nairobi.
- Republic of Kenya Acts 28 and Acts 38 of 1964. Government Printer, Nairobi.
- Republic of Kenya. Trade Disputes Act, 1964. Government Printer, Nairobi.
- Republic of Kenya Act 14 of 1965. Government Printer, Nairobi.
- Republic of Kenya Sessional Paper No. 10, 1965 - African Socialism and its application to Planning in Kenya. Government Printer, Nairobi.
- Government of Kenya, Sessional Paper No. 10, 1965. Government Printer, Nairobi.
- Republic of Kenya. The Trade Unions Act, 1965, Chapter 323, Laws of Kenya. Government Printer, Nairobi.
- Republic of Kenya. Trade Disputes Act, 1965. Government Printer, Nairobi.
- Where the Truth Lies - The dissidents have no mandate from the voters. The Printing and Packaging Corporation Ltd., Nairobi, 1966.
- Republic of Kenya. Acts 16, 17, 18 and 40 of 1966. Government Printer, Nairobi.
- Republic of Kenya; Revised Development Plan, 1966-67. Government Printer, Nairobi. Ministry of Finance and Economic Planning.

- Republic of Kenya. Kenya Gazette Supplement No. 67 (Legislative Supplement No. 41) 1966. Government Printer, Nairobi.
- Republic of Kenya. Legal Notice No. 240-41, 1966. Government Printer, Nairobi.
- Republic of Kenya. Ooko v. The Republic, High Court Civil Case No. 1159 (unpublished) 1966. Kenya High Court Records.
- Republic of Kenya. The Preservation of Public Security Act 1966, (Cap. 57, Laws of Kenya), Kenya Gazette Supplement No. 67, Government Printer, Nairobi.
- Republic of Kenya. The Land Control Act 1967, Kenya Gazette Supplement No. 103 (Acts No. 14), Act No. 34. Government Printer, Nairobi.
- Republic of Kenya. Books and Newspaper Act, 1967. Laws of Kenya, Chapter III.
- Republic of Kenya. Gazette Supplement No. 103 (Acts No. 14) Act No. 33 of 1967. Government Printer, Nairobi.
- Republic of Kenya. Kenyanisation of Personnel in the Private Sector. Government Printer, Nairobi, 1967.
- Republic of Kenya. The Films and Stage Plays Act, 1967. Chapter 222, Laws of Kenya. Government Printer, Nairobi (Rev.).
- Republic of Kenya. The Police Act 1967, Chapter 84, Laws of Kenya. Government Printer, Nairobi (Rev. Ed.).
- The Land Control Act, 1967. Republic of Kenya, Gazette Supplement No. 103, (Acts No. 14) Acts No. 33 and 34. Ministry of Agriculture.
- The Detention Camps Act. Republic of Kenya. Government Printer, Nairobi, 1967.
- Republic of Kenya. The Books and Newspapers Act 1967, Chapter 111, Laws of Kenya. Government Printer, Nairobi (Rev.).
- Republic of Kenya. Act 4, 1967. Government Printer, Nairobi.
- Republic of Kenya. Kaggia vs. The Republic. Criminal Appeals Nos. 582 and 583 (unpublished), 1968. Kenya High Court Records
- Republic of Kenya. Act 16, 1968. Government Printer, Nairobi.
- Republic of Kenya. The Societies Act 1968, Kenya Gazette Supplement No. 16 (Acts No. 3) 16th February and Act No. 4.

- Republic of Kenya. The Public Order Act 1968, Chapter 56, Laws of Kenya. Government Printer, Nairobi.
- Republic of Kenya. The Constitution of Kenya, Gazette Supplement No. 27 (Acts No. 3) of 1969. Government Printer, Nairobi.
- Republic of Kenya. Act 3., 1969. Government Printer, Nairobi.
- Republic of Kenya. Trade Disputes Acts, 1969. Government Printer, Nairobi.
- Republic of Kenya; The Constitution of Kenya. Kenya Gazette Supplement No. 29. Government Printer, Nairobi, 1969.
- Republic of Kenya; Kenya Population Census, 1969. Vol. 1. Ministry of Finance and Economic Planning.
- The Penal Code. Republic of Kenya. Government Printer, Nairobi, 1970.
- Republic of Kenya. The Penal Code 1970, Chapter 63, Laws of Kenya. Government Printer, Nairobi.
- Republic of Kenya. Development Plan, 1970-74. Government Printer, Nairobi. Ministry of Finance and Economic Planning.
- Republic of Kenya. Trade Disputes Act, 1971. Government Printer, Nairobi.
- Kenya Statistical Abstract, 1971. Ministry of Finance and Economic Planning.
- Republic of Kenya; Kenya Population Census, 1979, Vol. I. Ministry of Finance and Economic Planning.
- Records on offender treatment kept at Prisons Headquarters, Nairobi, 1980.