THE LAW OF SEXUAL OFFENCES WITH PARTICULAR REFERENCE TO RAPE AND CHILD DEFILEMENT. A NEW MODEL?

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INTRODUCTION

The introduction of colonialism in Kenya, sought to create an outpost, from which raw materials could be exploited for the English home economy. Lord Lugard\(^{(1)}\) stressed the need to create a society, that would enable such exploitation of raw materials to proceed within maximum and profitable output. The entrenchment of the new system led therefore, to the introduction of a whole new series of value systems suitable for it's preservation. This was necessary for the new capitalist mode of production could not operate within the existing pre-capitalist modes of production, the dominant of which was the community mode of production, essentially based on agrarian subsistence production economy. This mode of production had attendant social structures and relations\(^{(2)}\).

The current Law of Sexual offences, in view of this, being part of the capitalist value system, it would appear, seeks to reinforce the moral-social positions of the 'natives', to precipitate on ideological-religious conception favourable to the capitalist relations of production.

Traditional pre-capitalist societies had their own conceptions of the control and regulation of sexual-moral behaviour. This were ideally based on the Ritual-ancestral and Deital manifestations within the societies. These Ritual-ancestral and Deital manifestations, were those that formed the core of social existence, conducive to their respective modes of productions. Gluckman\(^{(3)}\) and Bohannon\(^{(4)}\) have pointed out this differences, albeit in a manner that does not explain why these societies perceived the Ritual-ancestral and Deital manifestations differently. Thus social control in traditional society embodied what the particular society or the dominant mode
of production in that society, if there were a number of competing modes, regarded as essential for it's self preservation.

Any social control follows the trends in value systems upheld by the society, even though as an expression of dominance, usually the dominant class arrogates to itself the duty of shaping the values of the dominated sectors of society, as a consequence of not only furthering the dominance itself, but also the purposes for which that dominance is articulated. No doubt, it must be acceptable, that if any sort of social norms not rooted in society, i.e. not expressed as it's wishes and aspirations, are in force, then adherence to the same becomes very difficult. This is due to the fact that such value control acts from without. Such norms must, therefore of necessity be backed by coercion.

The Law of Sexual Offences, as it exists in the Penal Code Cap. 63 at Chapter XV, is basically a reflection of Victorian conceptualizations of chastity and social morality and values as existed at the inception of colonialism in Kenya. It's very basis is not Victorian. However. Secondly, the philosophical position of the Law, is the Fundamentalist concept of the function of Law as articulated by bourgeois scholars and philosophers like Sir Stephen.

The Fundamentalist approach as Friedmann has stated essentially is that criminal law is the defender and protector of moral values. It emphasises on guilt as the determining element of criminal behaviour, and with the retributiv theory of punishment, it seeks the, "... revenge of society on the behaviour of the criminal and the atonement, the expiation of the criminal for the Sins he has committed against society." The law is foreign, it seeks and has a purpose in colonial society and operates on a philosophy just right to justify, not only it's very application, but also the way it is applied coercively. It seeks to maintain a particular system of social relations by force.
Tigar (10) has said, "Legal change is the product of conflict between social classes seeking to turn the institutions of social control to their purposes, and to impose and maintain a specific system of social relations." (11)

T. O. Elias (12) in his eminent opinion stated that customary law and English law, in as far as intent and purpose are concerned, were diametrically opposite. Further that customary law perceives social, rather than personal (individual) liability in enforcement and the opposite is true of English law.

In the study of social tendencies one must distinguish between dogma and praxis, between the theoretical code of conduct on the one hand and the actual conduct on the other. As a rule, actual conduct as Wagner asserts, "... changes first and becomes only gradually sanctioned by an adjustment of the theoretical code as new standards of conduct are evolved." (13)

He continues to add that this does not apply to such norms of conduct as are imposed upon the community by a ruling power, in which case the process is exactly reversed, meaning that here, the theoretical code of conduct is used to adjust social conduct so as to align society with it.

The thesis - this dissertation seeks to show, is how the imposed English law of sexual offences as part of a theoretical code of conduct sought to adjust native social conduct. That theoretical code, as at its Victorian level, was in fact a culmination of social adjustment, at the praxis in England, resulting from the Reformation and the ideas of Puritanism, together which led to the emergence of Capitalism as we know it today. (14)

Between the theoretical code of conduct and actual conduct, Wagner asserts that, "While ... the two will never coincide, the discrepancy between them increases in periods of rapid change." (15)

This bears heavily on contemporary society in Kenya, where there is a difference between the theoretical code of conduct (Penal Code) and actual social conduct in regard to it. This it would appear is the direct consequence of
the imposition of a capitalist mode of production with all its superstructural features upon the existing pre-capitalist modes. It is the schema of confusion that results where a mode of production forcefully dominates a weaker mode. Okoth Owiro insists on referring to it as "the contradictions of articulation of modes of production."(16)

Chapter one will involve mainly a comparative look at the English law of sexual offences and the customary law positions, on their theoretical or ideological basis, and the institutions within them, that were used for social control and their purpose in society.

Chapter two will mainly deal with the imposition and what it sought to achieve, within the different society of 'natives' as part of the ultimate aim of the colonialists to transform Kenya into a capitalist society.

Chapter three will encompass the issue of articulation of modes of production and seek not to explain individual cases, but to throw light on the changes into the existence and incidence of sexual offences, involving the analysis of social and structural factors and their inter-relationships within the 'Schema of Confusion' resulting from the contradictions of articulation of the capitalist mode of production upon pre-capitalist modes in traditional societies in Kenya. The offences of Rape and Child Defilement will be used to show such changes and incidence as aforementioned. Essentially, the results of the imposition will be shown in that context.

Chapter four will suggest reforms, in the light of the whole discussion, and will also act as the conclusion.
CHAPTER ONE

THE GENESIS OF THE LAWS

Contents:

a) Relevant modes of Production
b) The Social Ethos: The Spirit of the laws
c) Their Purpose and Functions in Society
d) Techniques of Enforcement
e) Conclusions drawn

Comprising:

PART ONE: THE CUSTOMARY LAWS

PART TWO: THE ENGLISH LAWS
In 1890, F. Engels writing to Schmidt, wrote:

"All history must be studied afresh, the conditions of existence of the different formations of society must be examined individually before the attempt is made to deduce from them the political, civil-law, aesthetic, philosophic, religious etc. views corresponding to them."

In the discussion following, the writer has adopted this view in the examination of the historical basis and nature, that has given rise to the two comparative positions, in the law of sexual offences or sexual moral conduct, namely the customary law position and the English law position. The writer further contends, that, this is the proper way to analyse and understand any phenomenon and credits Engels with the truth of the above quoted assertion.

The Customary African position will be analysed first followed by the English position, which latter position is the embodiment of the existing Law of Sexual Offences Chapter XV of the Penal Code Cap 63 Laws of Kenya. Exactly how, this will be shown.

**PART ONE**

Thus, before the partition of the African continent into definite territorial states in the late 18th Century, by the forces of Imperialism, the greater number of African Societies, here confining ourselves to what is today known as Kenya, existed as ascepthalous units. These pre-capitalist formations (societies), survived within family, clan or tribal configurations. Indeed however, it is to be found, that family was the basic social unit. These societies had each their own manner of dealing with social conduct and interaction, through what has normally been referred to as custom law and its enforcement institutions. These unwritten codes of conduct and interaction existed in the social know, and the diversities which existed, were the result of variations, in the types of social set ups and production systems. They reflected the social consciousness.
Anyang Nyongo has stated that five basic modes of pre-capitalist production are discernable in African Societies. These five are,
a) Community mode of production, being basically agrarian and communal.
b) Petty commodity mode of production being a barter oriented exchange economy, both internal and external, to the group,
c) Slavery, where labour in the form of slaves (captured persons) is held by their owner. The prevalence of this mode in what is today Kenya, is doubtful. But it may well have existed in societies which captured and retained their enemies,
d) Feudal mode of production, whose existence in what is present day Kenya is also doubtful. Here a distinct personality held the basic means of production, the land, and the occupants worked it and shared the produce with him,
f) Tributary mode of production, which was based on obligation or a gratuitous grant. Persons who had been conquered, could sometimes be obliged to pay some form of homage to their conquerors in return for peace or/and security. Their production became a tributary of that of the conquerors, since it existed in a supplementary form to them. Likewise, the "Muthoi" of the Kikuyu tribe or the "Jadak" of the Luo are examples of the tributary mode of production.

Any social control, order and regulation, will flow from the social consciousness of a particular society, unless it is imposed by a stronger society or power. The social consciousness is the reflection of the ethos of that particular society: The ethos includes the social and production relations, and these are given forth by it's mode of production, to which such relations must conform. A variation in social control, order and regulation is a difference in social consciousness and ultimately can be
traced to the mode of production.

Since social cohesion and interaction in production, was the basis upon which production was undertaken in these pre-capitalist modes of production, conduct evolved that was seen as conducive in the social relations upon which the production relations rested. As a rule, therefore, actual conduct led to the formulation of a dogma, a theoretical code, albeit unwritten, which as actual conduct itself evolved to meet new influences, also adjusted. This theoretical code, is what we normally refer to as customary law.

It has been variously argued, that the aim of law, in traditional society, was to maintain social coherence. This is consonant with the fact that, the preservation of society revolved on social co-existence, to facilitate the type of pre-capitalist mode of production, prevailing. In the agrarian subsistence production, the family acted as the unit which worked the land and this being a communal job, the ability to do this, depended on good social relations in the family group.

This necessity was in effect translated, into the inter-family structure and further reinforced in the clan affiliations, for communalism was the basis of their production.

Transgressions upon the acceptable methods of interaction, were seen therefore, as interfering with the maintainance of the social based relationships of production. If production was the individual capitalist-accumulation type, there would be no talk, of socialized relations in production, since the relations would be individual to individual, as the basis of transaction and interaction. They would be a question of contract and not status.

Two theories on the role of customary law generally, have been advanced,²

a) The Equilibrium Theory, subscribing that every proscribed act, was viewed in the context of the consequences it had upon social relations. For this theory, customary law seeks to maintain social harmony, by preserving a basic equilibrium.
The stress is on the group's harmony, in a situation where it absorbs even the liability, or act by a person against another, as an act against one group by another.

b) The Conciliatory Theory, which also emphasises on social harmony, but adds that forms of customary law and the functions of family elders was to arbitrate, though in pursuit of re-establishing harmony. Reconciling groups, after transgressions and not punishing the individual transgressor.

For both theories, the major object is the maintainance or restoration of harmony. Harmony is the major ingredient, if any social equilibrium is to be maintained and the reconciliation of parties or groups, is a step towards achieving a similar set of social relations. In the end, the distinction between the two theories, may turn out to be merely semantical.

However, notwithstanding any difference, between these two theories, they do appear to recognise, the role of the customary forms of social control, as being dictated, by the nature of production in the pre-capitalist societies, which were of a communalized form, breeding the necessity for a social equilibrium and social compromise.

The pre-capitalist societies, had no radical economic or social differences, as these exist in a capitalist state, requiring the radical needs within the social and economic conflicts, that a capitalist mode of production presents. The pre-capitalist societies have a homogeneity, within their substantive objectives i.e. maintainance of social harmony. In contrast a capitalist within itself, cannot have such homogeneity due to diverse class interests and inharmonious social and economic interaction.

This may also go to explain why traditional societies, did not uphold any distinction of law into civil or criminal because the major objective of customary law did not give occasion for such distinction, as it was applied on the whole, in the context of the necessity to maintain social harmony. Without the differing social objectives, there was no need for customary law to have branches. Everything was viewed, in it's relation to society and the consequences it might have, on social co-existence.
Customary law was like we have seen, did have a spirit. It derived its logical basis from the ethos of society, since it was based on custom through conduct formulation, that sanctioned the maintainance of the particular methods of social relations, as a mechanism of the reproduction of the mode of production. Examples from specific ethnic groups illustrates this point.

The Agikuyu, existed within the community mode of production. Their 'economy' was agrarian and subsistence. Their major means of production was the land. There was however, no individual ownership of land as Prof. Okoth-Ogendo has rightly asserted. The "Mbari", the Agikuyu family unit held the lands and administered them, for the benefit of its members, who gained access to it, on account of their membership to the Mbari.

In the land of the Agikuyu, the prevalent social thought, was that the Mbari, derived the land from 'Ngai', the Agikuyu conception of God and who was reputed to reside on Kirinyaga (Mt Kenya). The old Agikuyu adage about one Gikuyu and his wife Mumbi, having been created by 'Ngai' and settled at Mukuruwe wa Gathanga is an expression of the idea, that the Agikuyu received their land from their God.

They therefore evolved conceptions of social acquiescence, that would bestow gratitude to Ngai and abhorred conduct that might, as believed, precipitate His wrath upon them, in the form of pestilences, death, drought or other cosmogenic phenomena, beyond their control.

It appears, that social conduct was formulated such that it would not only, effectively maintain social cohesion and interaction, but also keep society in a state acceptable to 'Ngai', since he was their major benefactor, traceable any time, land or the existence of the Agikuyu was at issue.

No doubt certain forms of conduct, came to be regarded as bringing ritual unholiness, "Thahu," in the eyes of 'Ngai'. This condition of unholiness was viewed by the Agikuyu as...
capable, of causing anger to their God, attracting his sanctions.

This deitual manifestation, shaped especially, the social morality of the agrarian Agikuyu societies. Certain moral conduct was regarded as unclean and became proscribed. It arose from actual conduct, within these societies, as to what they regarded, as the proper way of propagating their existence in the eyes of Ngai and the interpretations given to cosmogenic forces and manifestations.

Morality offences among the Agikuyu were not necessarily sexual. Gidwana has argued, that their classification, hinged on their outlook as forms of behaviour generally. There were three categories of varying weight, "Waganu", "Umeramari" and "Uturika". These were classifications upon the degree of moral transgression in relation to the acceptable standards of social behaviour.

These conceptions were linked to the deitual manifestation that existed, and upon which social conduct was formulated, as "Ngai" was the symbol of matters good, holiness and life. He represented the solidarity of the Agikuyu groups and was therefore the measure of their customary laws, and the Agikuyu were applying standards of social conduct within perceived supernatural stipulations. This was the spirit of the Agikuyu customary law; the relationship between them, their environment and their Deity.

The Kamba7, even though they believed in a similar 'Ngai' to the Agikuyu, likewise believed in Spirit Worship8 i.e. the continued life after death. Moral transgressions and anti-social conduct was particularly feared, due to the fear of sanctions from those departed souls of family members. Therefore one finds as the most prevalent sanction among the Akamba, the Curse, which depended on the ancestors invoking, unsavoury effects upon the cursed. The worst sanctions were likewise undertaken through the oath 'Kithitu' which had magical binding and enforcement propensities9, showing a heavy reliance on the mystical and ancestral aspect of Akamba life.

This apparent distinction, of spirit worship and a heavy reliance on the mystical, by the Akamba who share
a common origin with the Agikuyu, can be explained from the fact, that, the Akamba were a hunter tribe too. Some groups engaged in game hunting and the gathering of natural materials as their livelihood. Here the community mode of production and the petty commodity exchange mode of production are seen in simultaneous existence. These modes of production were not in competition, but in a form of complementary and/or supplementary relationship. The petty commodity exchange mode of production, existed in the form of game hunting for exchange either internally or externally to the group. It also provided materials for the production of herbal cures, which the Akamba are known to have been articulate in and for making the 'Ohbai' poison, fatal to both man and animal. This mode of production as practiced by the Kamba, required a life generally spent outside the family units or settlements. The groups, that practiced it, therefore, placed a heavy reliance on Providence for their livelihood, and more so relied on the gratitude of the spirits of their ancestors for their protection and safety.

These hunter-oriented societies were of importance to the Akamba society. Their existence alongside the major community mode of production, lent their influence to the Akamba social superstructure. The spirit of Kamba customary law was in those ancestral manifestations that provided for its social existence, and militated its perspective towards life and it's undertaking. The Akamba, formulated their conduct according to what was interpreted as acceptable, to those spirits and ancestors. This can be strengthened by the role of the medicine man, the "Kithitu" and the curse in Kamba society, all depending on some cosmogenic intervention, to have effect.

The Maasai were pastoralists. Their social behaviour was totally different. There was more desire for survival than harmony, as for harmony, eventhough of importance, relied on the survival of the Maasai as a tribe or group, in their rather harsh conditions of existence, and hostile environment. They evolved alongside needs that loosened
up social conduct, as they sought survival for both themselves and their animals, their main means of production.

Maasai Societies, in comparison to the other societies may be seen, as unorthodox in their moral-sexual formulation. They also had an advanced system of central authority, and their age groups, had very distinctly tabulated social functions and bonds.

Their moral-sexual conduct formulation may appear 'permissive'. The writer contends that this is not the case, if we are to accept, that social conduct was precipitated from the needs of that society, in it's bid for self preservation, within it's conditions of existence and production. The types of moral-sexual conduct, in Maasai society had a function, and this is what made them acceptable forms of conduct.

Thus, while the Maasai had a valid concept of polygamous marriage, sexual communion with the wife or wives, was extended, barring the husband's express refusal, to his brothers, friends and guests. It appears that as far as the guest/friend was concerned, the duty for the husband to give his wife, to him for sexual purposes was obligatory. However, no clear documentation of this exists. I'd rather leave it open, but note that it existed.

In their quasi normadic pastoral life, which was unsettled, men got removed from their rather impermanent homestead, as they grazed their herds. In this process, they relied on the interaction with other Maasai clusters belonging to their major groups, basically then, offshoots of the main unit. They were normally united by the bonds of brotherhood by blood and initiations, and the facilitation given by their 'communalized' sexual relations, a type of sexual communism, was a feature that appears to have deprived, from that form of social consciousness and reinforced it too.

Being so impermanent in settlement, the Maasai placed emphasis on a dualistic perception of maintaining contact with their God, the idea of maintaining shrines or sacred grooves being inexpedient, to their form of social existence. Among the most severe ritualistic practices, were those before the ceremonial Lion hunt, where the
participants sought courage and protection from the God. Basically however, it is clear that in their relations of production, the Maasai herded communally and as a group. The operation of their customary laws and the maintenance of a rigid authority structure, pursued the attainment of that objective. What they developed, in terms of social conduct, be it moral-sexual or otherwise, was indeed a mechanism, operative in that context, to reinforce society.

The Kalenjin\textsuperscript{13} were a warrior tribe. They consisted of various regional groups, classifiable as the Kalenjin, but all sharing a common origin. They believed in both Deital and ancestral manifestations in society. Their conceptions of customary transgressions, were based on what was moral \textit{(in their view)} and the sanctions most feared, were those that were supernatural. The Kalenjin display a more articulate species of moral-sexual transgressions\textsuperscript{14} than other pre-capitalist societies.

The unsuitability of proscribed conduct, was regarded in terms of the bad consequences, that might result. The Kalenjin also had the notion of cleansing and purification and this goes to explain their views, on the consequences of transgression in terms that, it would affect their acceptability to the supernatural forces they held dear, in their social ethos and especially the ancestral aspect of it.

'Crime' to the Kalenjin was regarded as being harmful to the social co-existence,\textsuperscript{15} the base of those societies. They as warriors had to survive as integrated fighting groups and the agrarian subsistence that was carried out by the women, too required, a communal co-existence.

However, it has not been clearly established, whether this supplementary mode of production among the Kalenjin, was a collective effort of the women of the household \textit{(The Kalenjin were polygamous)} or was undertaken within the larger extended family concept as with the Agikuyu. Thus where the Kalenjin, like the Maasai had a cattle biased, warrior type existence in their mode of production, there was also, the settled agrarian subsistence
form of production. This needless to say, was undertaken by the womenfolk, who could never be warriors. This may possibly explain, why the Kalenjin evolved stricter moral Sexual formations, unlike the Maasai, due to the influences of the agrarian subsistence form or production, which required a settled society.

Of the moral-sexual formulations, it appears from anthropological data, that the Kalenjin had a wider classification in favour of the women, than other societies. Their formulations appear to have been more clear cut and defined. Sodomy and beastiality existed as proscribed behaviour. Pre-initiation intercourse was also proscribed, the Kalenjin girl having to undergo circumcision while a virgin. Thereafter her sexual indulgence, does not appear to have been subject to rigid control and problems arose, only when a girl became pregnant out of wedlock. Her lover, had to pay compensation to her father and the child born was put to death.

Rape, Child Defilement, abusing the modesty of women, and indecent assault are also classified, as having existed within the moral-sexual formulation. It is discernable, that the Kalenjin society gave their womenfolk a lot of social protection. This phenomenon, is attributable, to the social value of the women, as the supplementary producers in Kalenjin society, the importance of that form of agrarian production, and therefore the higher degree of social order required to maintain effective production, Indeed male interference, with the women and girls was not looked at too kindly.

PeriStany in his study of the Kalenjin, stated that among the Kipsigis, rape against women, was perpetrated to remove, "a deceased's uncleanliness and as a panacea of other ailments." Chemirmir departs from this view. The writer also thinks it as highly unlikely, in the form that Perishany alleges it to have occurred, but it's possibility cannot be discounted. Chemirmir, argues that he stayed in the Kericho area for two years around 1978 and 1980, and he says, "I have not yet heard of what PeriStany alleges".
However whether this existed or not, is a question, I shall leave for someone else to answer, but it is my contention that, no radical differences in the modes of production, or ancestral Deital manifestations, the whole social ethos, existed between the Kipsigis and other Kalenjin groups, creating this stupendous peculiarity in the customary moral sexual conduct and it's proscription. If there was, then it may be possible to conclude, that the Kipsigis espoused a 'ritual or ceremonial rape' as an acceptable moral sexual conduct. If there wasn't then, it may not be possible, to so conclude. Like Chemirmir has said, maybe Peristany was misinformed by his informers.

From the foregoing discussion, it transpires that all these societies, different as they were, had a tendency towards self preservation, but which tendency as propagated within social existence and produced as conduct, was purposeful. It followed or reflected, those particular social and production relations, that a society had. Logical influence was had, from the celestial or supernatural entities, that were linked to those social and production relations. While therefore, a particular mode of production supposed a particular form of production, the Ritual, ancestral and Deital manifestations, linked up with it, to provide the basis for it's reproduction.

Every differing mode of pre-capitalist production, was buried within a differing conception of a genesis, no doubt of a supernatural nature. The theme of the supernatural, points to what the groups owed extra-social allegiance to. This led them to propagate social conduct consonant with that conception. It is beyond doubt, that these supernatural forces were regarded as holding the ultimate destiny of the society and submission, to their 'ideals' was obligatory and formed the basis of the formulated codes of conduct, actual conduct and it's regulation.

Where two or more pre-capitalist modes of production existed, then a fusion of conceptions occurred. The conceptions in fusion, were those necessarily, a result of the relations of production conducive to the modes of production fusing.
The fusion appears to have taken the form of a compromise between interests, seeking to serve the same purpose, not conflicting, nor competing. The existence within, two or more modes of pre-capitalist production was therefore harmonious.

It is the writer's contention, that the spirit of customary forms of social morality, as translated into 'laws', sought the maintenance of social coherence and integration, by not disturbing the social equilibrium, and restoring it where it was disturbed. The abject necessity was to maintain production, undertaken collectively and communally.

Customary law enforcement, was not geared towards the adverse punishment of the offender or his retribution. It sought to maintain or restore social forms in a static, harmonious state. It's primary sanctions was compensation, which normally went to the complainant and his group and part of it, to recompense the adjudicators for work. In some instances, purification or cleansing was generally required, if the transgressor and in certain situations, especially involving incidents of a sexual nature, the victim too, had to be cleansed. Compensation had therefore, this role of appeasing, the supernatural forces.

If the nature of the act, was such that it was incapable of cleansing or purification, as the case of a habitual transgressor or incest and rape in many societies, then such a person would be isolated from society, either temporarily or permanently. This was due to the perceived idea, that his continued existence in society, kept it under threat of the supernatural causes (sanctions).

The effect of certain forms of conduct, was seen as magnanimous, to society.

Redfield has said, "Customary law observance will arise out of sacred and supernatural sanctions. Socially disapproved behaviour is so controlled, for it invokes a mutual sanction. It brings ritual uncleanness to him or group. It requires frustration and expiation rather than punishment or compensation."
Redfield is right to the extent that he emphasizes, the importance, of expiation and lustration as basic facets of customary law sanction. However, the writer does not agree with him on compensation. Compensation was the major sanction for any wrong done against the social code. Punishment was not physically exerted on the offender, except in rare cases and in few societies. For death too, few societies practiced capital punishment, even in situations of murder or adultery. Compensation was still the major sanction. Only witchcraft or sorcery was penalised by death in many tribes, and these were considered the ultimate transgressions, against and affecting, the whole of society, operating against the supernatural forces of good, harmony and life. The ultimate sanction in pre-capitalist society, was that of isolation, for it certainly meant death to the isolated, for existence as an individual was then almost impossible. It has been claimed that most 'Jadaks' and 'Muhois' or similar persons, were persons isolated from their own communities, who for the sake of survival attached themselves to other groups.

The importance of compensation, which Redfield attempts to ignore or reject, as a means of restoring social harmony, is the result of the social reciprocity, that existed in the communalized production and social systems of pre-capitalist societies. Social relations, were a factor of this reciprocity and social misconduct, interferred with it. This goes for moral-sexual conduct or any other forms, for there was no distinction into branches. A proscribed act was seen in that context, and regardless of it's nature was capable of certain effects on society. All conduct formulation in general and sexual-moral in particular, was a reflection of the social consciousness. This derived from the social ethos, as society was linked to it's form of production. Given the differences that existed between the various tribal groups, moral-sexual conduct among pre-capitalist societies, also differed, according to the peculiarities of existence and production. The aim of any formulation was to service, the society, that
it derived from and applied to and not any other. It was as it were, generic to the groups or societies, particular conduct to particular situations and formations, part of their ethos, whatever it's nature.

Having dealt with the African customary position on moral sexual conduct formulation and control, I turn to the English position, as the second part of this discussion.

PART TWO

In attempting to understand, the current English common law and statutory law in general and sexual offences law in particular, recourse must be had, to those phenomena that led to it's existence as it is known today. The history of current English society, must be traced to it's roots and understood. However I intend to start at feudalism.

In feudalism, as Pound said, "The Law regarded a person upon his social servitude. Thus a person would normally be classified upon the Manor he was under. He was regarded as a second rate creature. The duties of the law belonged to the relation of master and servant. It was a legal consequence".

Thus in feudalism, even though there appears to have been a kind of universality of legal principles, their application depended entirely on the master, and if he was himself a vassal, on his relationship between him and his greater lord. A peasant upon a particular manor, formulated his conduct according to the way his lord maintained authority and order and how he himself behaved. No doubt he was regarded as a second rate creature, there to imitate and oblige.

Radcliffe talks about the majority of Courts in feudal England being local or private courts. Only about three Royal Courts existed between the Twelfth and Thirteenth centuries. This emphasises, the fact that more importance was given to these private and local courts manned by the local lords. The fact of the King holding ascendancy over all other nobility is crucial in understanding the application of principles, having the semblence of homogenity at
the basic principle. Application, for this is what meets actual conduct, was however variant. This depended on the Lord, of the manor.

Feudalism is classified, as an age of moral and social decadence due to the indulgencies of both the state and Church, which were still undifferentiated. The Lords and Abotts engaged in various activities from which they derived great pleasure, the hunts, feasts, pageantries etc. Even though Monkism preached asceticism, it was personalized to one man and God. It was asceticism, that was confined to the Abbot and had little effect on society except admiration, but not practice.

Protestantism, when it came, even though it did not deny the need for a state, but only for the maintenance of order, it opposed the Catholic decadence and its attachment to the ruling apparatus. The Reformation was therefore the rebellion against the prevailing ideological and philosophical ideas of feudalism, as they were articulated by the Lords and the Established Church. The Reformation was the culmination of phenomena, that contributed to the decline of feudalism and finally broke it up. From the ruins of feudalism, capitalism emerged.

Kitch in the introduction of his book commenting on Max Weber's deriving of capitalism from the idea of the Reformation, says,

"Weber's contention is that the spirit of capitalism describes a social ethos, a set of beliefs which both permitted and encouraged the evolution of modern capitalism. The spirit of capitalism had to be born first in men's minds, it was not the rationalization of commercial practices. The capitalist mentality was so novel that an intellectual revolution was needed, before traditional attitudes could be replaced. The protestant Reformation, brought about such a revolution. Weber asserted that in all ages and all societies, men had greedily sought profits, and engaged in trade. Only in the west had these universal phenomena been transformed into the system of modern Capitalism."

Kitch's observations on Weber's ideas, is by all means satisfactory. The Reformation, was not just a religious
upheaval, it was the upheaval of the whole society. It affected everything, including, the economic structures. It wrought a new mode of production, a new set of social relations, religion and other features of the superstructure. It was merely the instrument through which, feudalism as a mode of production and social life, was challenged by the nascent bourgeoisie. It was, however, a gradual process, not a spontaneous act of revolution. It encompassed, as Weber saw it,

"those psychological sanctions which originating in religious belief and the practice of religion, gave the direction to practical conduct and held the individual to it."

Central to the Reformation as espoused by the nascent bourgeoisie, were the ideas of Puritanism, which preached what has been referred to as "Worldly asceticism." Asceticism is "sternly self denying, austere, strict." Worldly asceticism had two major precepts,

a) The idea of a calling, a vocation or Thrift,
b) The idea of man's obligation to live an orderly life acceptable to God.

Precept (b) reinforces (a), in that within the ordered life of a puritan, his thrift or domestic economy was a sign of his personal moderation. The religious attitudes became significant, in inculcating a mentality in him, to practice asceticism. To spend money on the indulgence of luxurious and carnal pleasures, it was seen, not only turned men away from contemplation of heavenly things and directed them from their vocation to serve God, but also revealed "a dreadful reversal of values."

William Perkins analysing the vocation commented

"A vocation or calling is a certain kind of life ordained and imposed on man by God... It is a certain condition or kind of life; that is a certain manner of leading our lives in this world."

Weber believed that it was this concern of the puritan with the vocation or thrift, as a particular way of life, as ordained and as ordered and orderly as it was, that did more than anything else, to encourage worldly asceticism;
the sum up of the protestant ethic. What the Reformation, brought, was a new system of social values, that were used, consistently to undermine feudalism, at both it's economic base and it's superstructural elements. Taking religion as a point of departure, from feudalism, may not have been quite accidental. It was the one thing, that both the feudalists and the nascent bourgeoisie, formerly guildmen and petty merchants and disgruntled peasants, had in common; the Catholic religion. It was the religion, upon which, the basis of the feudalistic monarchy itself, the greatest feudal owner of the means of production, the land, relied on, the divine Right, to rule. Of necessity, a breakdown, had to start from there.

Hitherto, having analysed the reasons given to support the contention, which I also subscribe to, that the ideological and philosophical content of the Reformation, referred to generally as Protestantism, injected new 'blood' into the society, leading to the crumble of feudalism and the rise of capitalism, I turn to the counter arguments against this contention.

Indeed many critics, of the Weberian position, relating the emergence of capitalism from the Reformation, have sought to state that the idea is wrong because a capitalistic spirit existed, even before the Reformation.

Farfan 52, the most interesting of them, argues that in the heyday of catholicism, the capitalistic spirit existed, and he seeks to destabilize Weber's theory, in the debate relating to religion either as the Establishment of Church or a system of morals, saying that,

"In spite of this unconscious confusion most historians ... have considered religion more as a system of morals than as an ecclesiastical organization i.e. Max Weber.\[52\] It goes without saying that this attitude does not in the least imply neglect of the mystical, still less the theological content of religion. Such dissociation, would be impossible, for moral doctrine is bound up with, or better founded on, the theological doctrine and if for scientific convenience, it may be considered apart, in reality it is only another aspect of the same fact. It is a system of corollaries deduced from a system of postulates. Theology provides the principle and morals, their application and
these two are indissolubly linked. If in estimating the relationship between capitalism, it is convenient to consider the moral aspect involved without explicit references to underlying theology, the conclusions reached will be none the less valid."

The writer is of the opinion, that the application of these attitudes as Farfani sees them, if different between two systems applying them, will create different results, even though sharing a common base. This is the difference between Catholicism and Protestantism, where the interpretation and application of principles and morals, within differing perspectives, both sharing one underlying theology, produces variable phenomena and if we intend, to trace them, we have to analyse the principles and morals as applied, and so dictate the ecclesiastical organization. For Weber, this difference of interpretation and perspectives towards, the application of principles and morals to society, bred a society of capitalism.

When Farfani stresses on the Ecclesiastical organization of the church, he is asking us to look at the whole set up of the Catholic church before the Reformation and see a capitalistic spirit in it's day to day affairs, and he, like Hallam H. E. further states that, capitalism on account of the existence of an accumulating spirit, existed in pre-capitalist times; but without it's distinct mode of production, it would appear. This cannot be possible.

To reinforce his fallacious argument, Hallam takes a look at the Abbots and monastries as was also true of the feudal Lords, and alleges that they engaged in a form of accumulation, capable of being called capitalistic, in fact, so he argues. One distinct example presented itself.

The Abbot of Crowland, a man of affairs from 1299, when he was elected to the abbey, upto 1316, appears to have "invested" and created a structure of "real property". In all this 're-investment' he seems however, to have invested in such things like abbot houses, and their chambers, chapels, Bridges, Dove and Rabbit cots, fencing for his horses, a mill here and there and brewhouses. He simply did not invest
in the acquisition of land, the basic means of production. Therefore his accumulation and that of others like him, cannot be called capitalistic, since accumulation to be capitalistic must essentially have some purposes of utility within the economic or production set up. It must tend towards the reproduction process.

Capitalist accumulation of surplus, properly so, is utilized in the expansion of the means of production or to enhance the production of more surplus value, i.e. the reproduction process. If conspicuous consumption has to occur, then it occurs only when the means of production are stable and capable of reproduction while allowing capital to be diverted elsewhere, where no economic purpose or utility exists. In the area of luxury and indulgence, is conspicuous consumption.

Worldly asceticism imparted, a doctrine of stiff production and accumulation as a logical end unceasingly and in this the practice of self denial. The surplus value accumulated, which undeniably, it would be against Puritanism, to indulge in satisfaction of the pleasures of nature, would be redirected to the reproduction process, for more success in the vocation. Such success was looked at, as grace from God. It was this process, that, eventually leads to the Industrial Revolution, as the new class of capitalists, the nascent bourgeoisie, sought to produce and sell more and Mercantilism, its attendant market-trade system.

If therefore, as critics argue the capitalist spirit of accumulation existed in pre-capitalist days, to justify it's being equated with the Post Reformation accumulation of capitalism, then why it failed in all these years, as an economic activity, to produce the essential superstructure or institutions of trade, it may be hard to explain. It is the writer's contention, that these are specific capitalist institutions and superstructure, which did not appear until after the Reformation was well into it's final stages, when society was recovering, from the upheavals, that had marked this period.

Other critics have sought to find, capitalism in
slavery, by perceiving an acquisitive element, characteristic of today's wage labour expansion. They fail to understand that in slavery, there was more replacement of slaves than expansion of the labour force. Their working conditions and the toll it had on the slaves, speaks for itself.

When one talks about capitalism, one is talking of a definite socio-economic system that produces determinate economic and social phenomena, peculiar to its relations of production. Only when, there is a transition period between two modes of production to another, can the features of two modes of production fuse or interact i.e., appear within one production system in both form and content, for we would still have, two modes of production existing then. However, feudalism was a definite mode of production. It could not exhibit, the institutions or relations of another mode of production, that hadn't even articulated with it. Such institutions, if any existed, must have been forms arising out of feudal relations and therefore, to be interpreted in those terms. I.e., in the context of feudal relations and society.

After having found that the Reformation gave rise to Capitalism as a mode of production, I turn to the social conduct that motivated the development of capitalism as an idea of puritanism and which may turn out to be the root of today's law of sexual offences in England.

The second principle of Worldly Asceticism, constituted, the basis upon which social conduct, especially in the moral-sexual domain, was regulated, this being essential to the new forms of production and social relations.

Pound traced the development of the common law in England to essentially two influences; Feudalism forming a background and Puritanism to which he accredited the greater role, thus forming it's ideological and philosophical basis. He said of Puritanism, "... Possibly because of the deeper rooted cause of which it was a manifestation, puritanism has been a significant factor in moulding
the spirit of our common law. That indeed there are special reasons for believing that puritanism has been in a sense a controlling factor.

Within the sway of Puritanism, the moral conduct of the average man was deprived of its "planless and unsystematic" character and subjected to a consistent method of conduct as a whole. The God of Calvinism (read protestantism) demanded of his believers, not single good works, but a life of good works, combined into a unified system. This was the propagation of self-denial. Weber said, therefore that, "Combined with the harsh doctrines of the absolute transcendentality of God and the corruption of everything pertaining to the flesh, this inner isolation of the individual contains on the one hand, the reason of the entirely negative attitude of puritanism to all sensuous and emotional elements in culture and religion, because they are of no use towards salvation and promote sentimental illusions and idolatrous superstition. Thus it provides a basis for a fundamental antagonism to sensuous culture of all kinds." On the other hand, it forms one of the roots of that disillusioned and pessimistically inclined individualism.

Puritanism stressed continuous bodily and mental work and preached against temptation to indulge, into the pleasures of life and nature, as these would distract the nascent bourgeoisie, from conducting their thrift or vocation. The puritan believed that sexual indulgence ought to be in marriage only. Even in marriage, it could only be performed as a means of increasing its glory according to the commandment "Be truthul and multiply."

Therefore, along with a moderate vegetable diet and cold baths, the same prescription is given for all sexual temptations, as was used against religious doubts and a sense of moral unworthiness. Lastly, the prescription called upon men to work hard in their vocation.

It is then clear, that the ordering of the moral-sexual conduct of society, was essential if, capitalism as emergent, was to be sustained, from its domestic roots. It is only logical, that nascent bourgeoisie promulgated, as a reflection of their actual conduct,
a theoretical code of moral-sexual conduct, that would rigidify it's maintainence in society.

In seeking to enhance these basic ideals and philosophies of their society, and establish capitalism plus the conditions suitable, for it's existence in Post feudal England, to mould society by the law, Pound says of puritanism,

"The fundamental proposition from which the puritan proceeded was the doctrine of a willing covenant of conscious faith made by the individual. Thus he put individual conscious and judgment [at the fore]. Everyone must assume and abide to the consequences of the choice he has made. [The objectively guilty mind].

This is the theme behind, the Fundamentalist Theory of the function of law, which has a corollary in the operation of the doctrine of retribution, regarding the application of sanctions by the law, especially the criminal law. The function of the law in this theory is to keep society within a defined code of order and relations. Any deviations from this, are seen as deliberate, and the wrong-doer must suffer, if need be physically, for the deviation. This is also meant to act as a deterrence against others, so similarly inclined to act.

Except possibly for those crimes like theft of property or money and related offences, that went against the core of capitalist private ownership, in post-Reformation society, the moral-sexual crimes, were the most crucial, going to the root of that society's ordered production in thrift and calling, which it has been shown, relied on the propagation of self denial of pleasures, especially carnal or sensual.

The law of sexual offences, then as a reflection of the basic social consciousness of the nascent bourgeois, the puritans, as a basic ingredient for capitalism's development, at that time embroycnic, received great importance. In this epoch, sexual offences, as a reflection of this consciousness, became rigidified and harsh. Crimes of Rape became punishable by capital sentence.
The abduction of a female, below the age of eleven (11) had existed in feudalism, against those who 'stole' heiresses, as the abduction of a heiress or a girl with the intention of marriage. It's emphasis were on the social consequences, in relation of masters and their servants. It sought to prevent and punish, the unscrupulous marrying into noble family, or and maintain the class structures. Abduction as an offence, gained a distinct sexual character, and the emphasis shifted, to the fact of the sexual intentions of the abductor. Today it is charged with the offence of Child Defilement, in the alternative.

The offences of the defilement of girls under the age of consent, Child defilement, were notwithstanding the consent of such a girl, a man commits the offence, when he has sexual intercourse with her, since she is deemed incapable of offering consent, has a peculiar history. The development of production after the Reformation, especially after the Industrial Revolution, caused a lot of social displacement, poverty and depravity. Prostitution by women, unable to provide for themselves otherwise, than by the cheaper and quicker means, of placing their bodies for sexual gratification for payment, rose. Young girls, driven by the same influences, or persuaded and even through intimidation, became readily available, for this form of exploitation. The position, became so serious, that it became a criminal offence, to have sexual intercourse, with an underage female, with or without her consent. The age of consent was fixed at sixteen years. In the same vein prostitution was outlawed, due to the social consequences, it was having, on the production and social relations, by putting cheap and readily available, carnal pleasure on the streets. Furthermore, the Puritans, regarded, the prostitutes, as women of insatiable sexual lusts and desires, and perceived their male customers in equal contempt. Basic puritan theology, could not be expected to tolerate such phenomena. Needless to say, the ideals of puritanism, regarded the chastity of women and men highly, in the society where
sexual abstinence was preached. Indecent assaults, are a consequence of sexual temptations, that were abhorred and for which vegetable diets and cold baths were recommended. They were punished harshly and extended protection to females generally and to young boys against homosexual practices, which were prevalent in the age of merchantilism, especially on the high seas.

There was such a moral repugnancy, against sodomy, and other unnatural offences, that when these occurred aboard the sea faring vessels of merchantile destination or of the Military Navy, upon a person being found guilty, by a Court Martial, on ship, such a person was executed by shooting. Aside the moral repugnance of these acts to the puritan, they were also regarded, as interfering, with the sailors' duties, and this was unaffordable, in the cutthroat race to markets, in monopoly capitalism.

As this historical development seeks, how, the domain, of moral sexual conduct, became as a facet of worldly asceticism, a factor used to stabilize society and therefore maintain a particular order, within which it was possible to exhort for greater production, diligence and ability to work. As a code of reference, which offered to adjust actual conduct, or/and reinforce it, the law of sexual offences was a thoroughly rigid code. It embodied the sexually conservative puritan morality.

However, after capitalism made great strides in production, solidified and consolidated itself, as it moved from, it's primitive stages, to the monopoly stage and was proceeding to the competitive state, a strange phenomena occurs. In England, a general disillusionment with religion, and God in the mid Eighteenth to early nine-tenth Century, occurred. Capitalism had become self supporting entirely, and required no longer, the ideologies of the protestant moderation in life to enhance production. The greater reliance on machinery meant that production could go on, without exhortations upon human beings. Labour was more readily and cheaply available. Thus productive society, became relaxed, both
socially and morally. Conspicuous consumption was setting in.

Capitalism, as an established mode of production, then is found, dictating the superstructural feature, and concerns itself, with those essential to it's reproduction process. So even though the laws of sexual offences, still exist, a general relaxation of the standards of moral-sexual occurs in society and rigid regulation becomes farcical. The clamour, for the law as a code of conduct, to reflect actual conduct, heightens. Even today in England, the movement is towards, the recognition of homosexuality as 'private' acceptable conduct, and lowering the age of consent to about twelve years of age. Judicial decisions like Morgan v D.P.P accept an honest belief in consent, as a defence to a rape charge. Rigid moral-sexual control is no longer necessary.

However in what has been referred to as the age of Imperialism, the highest stage of capitalistic development, according to Lenin. This is the time competitive capitalism really takes off. In England, at this time the Nineteenth Century, as though by coincidence a Puritan monarch takes power; Victoria I. This is an era of capitalist expansionism, beyond the national borders of England, as new markets and sources for raw materials, are sought. In this era, puritanism, it's ideas of ascetism, and religion generally receive added emphasis. Capitalism, in this form of expansion is dependent on human resources. Naturally it turns to the ideas of puritanism, both to propagate capitalism, as a production system, in the new regions, and as a code of operation, for it's agents, especially the colonial agents.

Thus these factors, get translated into the colonies, as part of the framework, within which, the expansionism will operate. The laws of sexual offences, are applied as part of a legal system, to both White, Asian and indigenous African. In the next chapter, this imposition, it's reasons and ethics is demystified.
CHAPTER TWO

THE IMPOSITION OF THE ENGLISH LAW OF
SEXUAL OFFENCES

Contents:

A: The Coming of the English
   (i) FORERUNNERS,
       Missionaries and Explorers
       I.E.A.C.
   (ii) The Colonial State: From Protectorate to Kenya Colony
       Legal and Jurisdictional Issues
       The Law of Sexual Offences

B: IMPERIALISM, ENGLISH MORALITY AND THE LAW
   OF SEXUAL OFFENCES: A Comment.

C: THE KENYA PENAL CODE
The rise of capitalism in post Reformation England, gave rein to a production phenomenon, that witnessed the expansion of the economic base of that country. Merchantile capitalism, as one of the stages of capitalist economic development, resulted from the increased emphasis by the bourgeoisie ruling classes on profit trading, that was transacted across the high seas. It was correspondingly fuelled by the Industrialization of production in the production of manufactured goods. The Industrial Revolution reached its peak about the 1760's. Coupled with what has been referred to as 'English adventurism' this shipping trade was enhanced as it sought new markets and sources of raw materials.

Before the proper sending, of colonialists into other lands to establish, outposts in the search for markets and raw materials, as a definite policy of the British government, Missionaries and explorers had already made their mark in Africa. In most cases the roles of Missionaries and explorers were combined and were sponsored by a conglomeration of religious and anthropological organizations.

There was in particular, the ideology resulting from Social Darwinism, that England had a duty of civilizing the backward races and therefore the gathering of data to enhance, the performance of this duty was essential. First and foremost, it was widely believed that Africa, was a land full of 'natives', who were primitive, barbaric and pagans; objects of disgust who knew no law and who ought to be educated and be brought to the behest of humanity. It was believed that these were not human beings, but some sort of advanced ape beings.

Whereas the purely commercial explorers, had at their priority, the assessment of economic opportunities in Africa, their duty was therefore to provide, to the English bourgeois organizations, the viability of possessions in Africa. They did not so much as engage themselves, in any trade or attempt to create the same, until the proper commercial companies invaded Africa, in pursuit of the
reported profits. But this, is not to say that their role, 
was not crucial. They paved the way for the subsequent 
economic imperialism.

The missionaries, came to spread a particular 
gospel. Along with it was a particular social economic 
ideology; that of capitalism. They specifically saw their 
role, as bringing the African to salvation through civilization.
Christianity/Read Protestantism/ was not only the religion 
of the British ruling bourgeois classes, but also of impe-
rialism, and Christian missionaries are to be found enjoying, 
an unusual form of protection and moral support from the 
imperial authorities 1

The missionaries are, as is the contention of the 
writer, not extricable from the whole process of colonization 
and imperialism. There is great indication that they, were 
part and parcel of the whole exercise, contrary to what has 
been regarded as their philanthropic undertakings in Africa.
Their role was that of an advance party. D. A. Low 1 correctly 
observed this connection and he wrote, 
'Christianity often provided the framework 
for structuring a new order. 2

It has been the contention of the writer, that Christianity 
/Read Protestantism/ was the basis of the capitalist society 
that existed in Britain. It had provided during the days 
of the Reformation, ideas and concepts that formed, a 
framework for the new capitalist order. Therefore, the conversion 
of Africans into Christianity would operate as a framework 
within which change may occur. The colonial role was 
appreciated even further. It was asserted, that, 
'Christianity or at all, events associated 
with Christianity, has provided marked 
opportunities for social advancement, more 
especially within the order of Empire 
maintained. 3

The General Acts of the Berlin and Brussels Conference 
1885 had, imposed an obligation on the signatory powers, 
to establish systems of justice in their African possessions, 
and had stressed the importance of judicial institutions as 
a civilizing influence. 4 Those who are apologists for the 
colonialisation of Africa and the British role in it, are
therefore to be heard glorifying, the introduction of the
Rule of Law and English conceptions of justice, as the two
most important legacies, from Britain to the people of
Africa. They further argue that the creation of an English
legal system in her colonial lands, had succeeded in
being one of the foremost civilizing and enlightening
institutions. One of them C. C. Roberts had this to say,

"In throwing doubt upon the wisdom of some
of the laws which have been put in force
in Africa one is not impugning the motive,
nor questioning the ability of the men
responsible. The ideal of justice and
good government is the guiding star of
British administration. That there were
evils which called for a strong hand of
reform nobody who knows the facts can deny."

(ii)

In 1890, the British Colonial government after the
failure of the chartered Imperial British East Africa Company
TBEAC to discharge the duties it had undertaken to perform
on behalf of Her Majesty's government, a protectorate was
declared over the territory today known as Kenya, formerly
part of the British East Africa Sphere of influence. The
British derived this occupation from the Foreign Jurisdiction
Act of England 1843 & 1890 and they set about their role of
structuring the new possessions. In 1920 the Kenya Annexation
Order in Council was promulgated under East Africa Order in
Council. They derived jurisdiction from the British Settlements
Acts 1887. The criminal code that was initially applied was
the Indian Penal Code, an English type legislation, codified
from English Criminal law principles for the Indian possessions.
It contained therefore English conceptions of the laws of
sexual offences. Later in 1925, a model penal code, codified
from the Nigerian Criminal Code and English criminal law
principles was applied. This new Kenya Penal Code, did not
radically depart from the Indian Penal Code, and to all intents
and purposes was the same.

All that the British colonialists were doing was to
create their infrastructure, such social infrastructure as
would enable them to accomplish their roles and goals in Kenya.
Quite clearly however, this process of extra-territorial expansionism, tending to the establishment of service states in other continents, properly so called imperialism.

In the great debate, over what the aims of imperialism were, two major and differing views have ascendancy. First and foremost, led by marxist and neo-marxist scholars, is the view of imperialism as having an economic aim. Basically the argument asserts, that upon the accumulation of capital in capitalist Europe generally and England in particular, there was a need for re-investment and expansion which could not be satisfied in the mother countries. Secondly raw materials for the home industries, were required, which role was not capable of internal satisfaction. Thirdly markets for manufactured products of now industrialized nations in Europe had to be sought.

The imperialists turned their eyes to other continents and Africa was one capable of satisfying this purely economic needs. Aided by the reports of the foremen, they carved for themselves their areas of operation in the conferences of Berlin and Brussels.

The marxist school, therefore views imperialism as a phenomenon, logically arising out of capitalism and it being a tool for the economic exploitation of other nations, weaker than the capitalist state itself. For this view, the economic aims are paramount and other consequences or aims of imperialism merely incidental.

Although this view has been traced to J. A. Hobson, it's most ardent and noteworthy exponent V. I. Lenin, who saw it as a historical consequence, of the wholesale accumulation of surplus as capital in capitalism. He called it the highest stage in capitalism.

The other major view, and especially that propagated by bourgeois scholars partially of English descent, is that of the aims of imperialism, being the civilization of the backward races. Their attempt is to give it a social and positive
face, D. A. Low, states these aims as social engineering where governmental action was supposed to secure, maintain and restore good life, which the writer contends must have been according to the Englishman's view of a good life.

Both ideological positions, for they are no doubt ideological, agree on one aspect. This is that the result of imperialism whatever its aims, on the pre-capitalist formations, was to commercialize society and give rise to a capitalistic economic mode of production, as peculiar as that propagated by the mother country.

It is the writer's contention that the difference between these two stances is on emphasis. It is further contended that whether it is economic or 'civilization', they are complementary. As Lord Lugard argued, for the British colonial government to perpetrate an economic structure in Kenya, that would be able to satisfy their interests of coming into the region, they would be better suited, if they created an outpost modelled on their English society. This he saw as advantageous to the profitable economic achievement. To create a money economy, that would serve the imperial aims, a transformation of society had to occur, since it was clear that such an economy could not be perpetrated within the traditional pre-capitalist modes of production.

As Low asserts this was to involve the 'proletarianisation' of the African population, whose role was to be that of the labourers. Elspeth Huxley, a colonial pundit put it in even higher terms. She said:

'The native must be taught that work was the solid basis of prosperity; that you cannot in the long run get something for nothing, that to enjoy the fruits of civilization you must also cultivate the tree that bears them.'

and in the Legislative Council, Sir Henry Belfield stated, as though in affirmation that,

'I am prepared to state definitely that we desire to make the native a useful citizen.'

The writer contends that, Sir Belfield was talking about 'useful' in the overall sense regarding the English capitalist economic production, and that the native would be
so useful, as to aid the colonialist attain his aims in Kenya. Since they had to make the native 'useful', it would require them to civilize him into the ethics of a westernized society, whereby then, the native could labour or produce in an individualistic commercial society.

The colonial imperialists, may have intended, to procure economic advantage from their colonial possessions. They, however, did realize the necessity for some groundwork breaking. They realized that, they could not impose on the spur of a moment, a completely alien mode of production, without first 'educating' the native on it's basic conceptions, and therefore transforming him, from his traditional subsistence production. The English may have hoodwinked us, that they intended to 'civilize' this place, that they intended to bring about a better existence in the social spheres, a better life than before, of which Thornton states,

'The insistence of Englishmen that their first task anywhere, they went was to establish law and order had always more to it than a misplaced devotion to police routine. It had a moral basis. Security of life and person within the bounds of organized imperial control was at once a symbol of a disciplined civilization and a hope expressed for greater things to come. It established a safe base, on which these things could grow,'

but it was clear that they had an ultimate aim and this was to economically exploit the colony. Eventhough the civilization aim served as a mask behind which they could attain their economic aim, they recognised the necessity to create a self fulfilling society as the major step to the creation of a periphery state. The law of sexual offences is a direct consequence of the British maneuvering in that attempt. It was part of a careful and deliberate planning to bring social life, into a conducive state of affairs for capitalist production. The idea here was to consistently undermine the traditional social set-up, by the similar application and introduction of English social mores.

In this task and especially in the sexual-moral conduct which forms part of the basic cornerstones of any society's
social structure, the colonialists were not only aided but also looked upon the missionaries, to lead in this aspect of transformation. Oginga Odinga commenting on this in his illustrious book 'NOT YET UHURU', said,

"It dawned on the Africans that administration and church were different representation of the same white authority. The policy of the church was ever in accord with that of the administration."

Christianity was a furtive doctrine, which the colonialists used to undermine the very basis of traditional societies. By supporting a new morality and moral values, in place of the old one, they sought to create a new society, based on English morality and moral values.

A totally different society than the one before. In a book written for prospective missionaries to Africa, Edwin Smith glorified the effects of christianity on the Africans. He wrote of christianity,

"It will moralize their whole life. It will substitute the eternal moral law for the evan, altogether inadequate tribal morality and will give an incentive to higher living, purifying away the actual foul conditions of things."

In East Africa he said,

"The result has been to raise the birth rate among negroes by discouraging polygamy and above all by strenously urging the abolition of the depraving initiation ceremonies and of all, immoral behaviour among young girls and boys. There is nothing whatever in the Bantu religion as it exists today that can better the moral state of the people. They need the absolute imperative and the moral ideals that christianity brings."

Eventhough Smith displayed an ignorance of the customary law of sexual-moral conduct, in that foration was proscribed and subject to severe compensatory sanctions and ritual taboos in many of the pre-capitalist societies, thereby making it a rare occurrence that, would not have necessitated his
preoccupation with it, he at least made it clear, that in his view, which must have reflected those of his contemporaries, it was essential that English moral standards be injected into the natives, otherwise it would be impossible to affect any change of this society and it's production structures consequently.

The effect of such introduction is what he called 'high living', a reflection of the puritan way of life characteristic of post-feudal Reformation England. Smith did not find customary institutions and social life adequate and advocated their complete overhaul through the introduction of an alternative; Christianity. Whereas customary social ideology or 'theology' had the effect of collectivising the social fabric, the exact opposite of what the imperialist wanted, Smith saw that Christianity would make the 'native' a progressive individual against corporate responsibility. Such individualism, in society and it's production systems was a most essential aspect of capitalist production.

A. J. Temu also pointed out the link between missionary and colonialist. He cited as an example the adage of the Mau Mau insurrection that "Gutiri Muthungu na Mubea", Kikuyu for there is no difference between the colonial administrator and the priest (white). He maintains in the same view of Oginga Odinga, that the missionaries were politically the adjuncts of the administration, who demanded submission and total obedience from their converts, presumably to the teachings that were supposed to remove them from the African way of life and production into the English aspect. Socially, Temu states that the missionaries, maintained a 'Victorian ethic and violently opposed African cultural nationalism.'

If anything therefore, the writer contends that the gospel and ideology the missionaries came to sell here, was that of the protestant ethic and the ideas of puritanism, which during the reign of Victoria I, a time of rapid economic expansionism and development, the same ideas received added emphasis in English socio-political and economic life. The missionaries, did not only observe this Victorian ethic,
They taught it to the native. They practiced it themselves, upon the large tracts of land, that they had by now expropriated from the 'natives'. All the 'native' had to do, was to observe the results and adopt it. From the very beginning the British protestant missions, had demanded, that their converts throw away their beliefs, customs and traditions and accept without question or qualification a completely new way of life, social code and morality. This was the civilizing notion, the ground breaking work undertaken by the colonial and imperialist English society to just sell an ideology of capitalist production before it's actual implementation as a forceful policy by the state, through the scourge of taxes and other mechanisms, like the propagation of cash crop farming.

It can then be clear, the close link between the introduction of new sexual moral conceptions and the ultimate idea of economic restructuring among the African peoples. It does not appear as though, the law of sexual offences was brought in, to punish upon what right? Africans who had been considered as extremely immoral people, but merely as a reaction to the fact, that once English type morality was introduced, and the society intended had taken root, an institution would be required outside the missions and then educational system, to act as a watchdog and reinforce the entrenchment of the new social-moral order. From the economic determinism viewpoint law is rightly, an instrument in the hands of the ruling class reflecting their wishes, that is used to entrench, reinforce and safeguard their interests. In Kenya, these were the creation of a conducive society, conducive to the intended capitalist economic mode of production, where the indigenous peoples would be incorporated into the production system.

The attempts to Anglicize, the African before meaningful economic production was achievable, was undertaken in this manner of civilization. Religion provided the basis upon which, such an Anglicized society of 'natives' could be created. Once so converted and espousing English ethics,
the incorporation could be achieved. The necessity here was that, the colonial economy being racialised, each group had an economic role to play and this could only be done, if ideologically there was parity in the ideas of individualised production. The criminal law in general and the law of sexual offences in particular, would exist as the theoretical code of conduct, that would be manifestly used to adjust social behaviour, to the ideals of westernized social life. Given that it had a sanction, the Africans were obliged to observe the theoretical code and translate it into the praxis. As Weber argued, the moral limitation was only a limitation in the utility of accumulated capital. That was its purpose in thrift. That it must be purposeful i.e. that it must be injected into the capitalist production. Once however, production was self sustaining as to negate, the very personal indigence of the owner in the production process, then the moral limitation was dispensed with. The basis of our law of sexual offences is entwined therefore, within a system that sought to preserve itself by prohibiting human passions, that were likely to interfere with the production ethics, within which the 'native' would be gradually elevated from labourer to a self sustaining capitalist. The Swynnerton Plan appears to have been a culmination of this project. Even though, the view concerning the African as a creature of sexual indulgence was not correct, the capitalist laws of sexual offences, as a comprehensive code for the regulation of sexual moral conduct in 1897, sought to order a capitalist society, through the prohibition of generic human activities, that were characteristic in the maintenance of social harmony in the subsistence production, which itself has been regarded as a social rather than economic activity per se. It is no wonder therefore that enticement, abducting and abduction of young girls, which to common knowledge was a form of transacting marriages, became crimes. If the law of sexual offences, had a relevance of its own special nature, in the creation of a capitalist
society of 'natives' then, such role was, as in post feudal English Society. It was supposed to remove too, the African from his socialized morality, that signified the pre-capitalist social ethos, based as it were on the reciprocity of group members. The new conception of English moralism, even before being translated into offences, would fix the African into an individualized ethos. Morality would no longer be exercised as a group but as an individual.

It is arguable that essentially, the English conceptions of morality were part of the consciousness, that gave rise to capitalism, even though at the time, that they were imposed on Kenya, they may not have been as rigid as in 1650. But admittedly they were harsher than the English position. Their basic aim however was to instil in the African nature, abstainence in human passions and related emotions. Such abstainence was seen as conjunctive with economic production at an accelerated level, as indulgence in the pleasures of life would distract the person from work. Another incentive here was the simultaneous introduction of taxation measures, that required almost personal mitigation. One had to work individually to pay these or face the consequences. By the time therefore the theoretical code was introduced, much had been done in the way of removing the African from his social production.

This had almost unilaterally been undertaken, within the theology of the missionaries. Morality is the province of theology. In fact Lord Devlin stated that English morality is derived from Christianity. By making the people change, their basic attitudes to good, bad or evil, right or wrong, it is possible to change their whole basis of social interaction. New value systems based on the teaching of theological propaganda, based on the acceptance of the Bible, as the guide to better life were thus created. And those who have more shall be added to them, and those who don't have, the little they have shall be taken away from them. People were forced to work.

The old value systems consonant with the Deitol, ritual and ancestral manifestations in society, shrivelled
as they were constantly undermined. Things that were never wrong, became wrong. Things that could have been wrong, became wrong. Society experienced a turn up in sexual-moral values. Then after such wrongs had become justified in society's new production systems and protection ethics, the theoretical code was brought in, to ensure survivability. Coercion was applied to ensure conformity. The idea here was to maintain definite social relations.

The whole system was rigidified to a set of acceptable forms of social relations. It is clear that in most African pre-capitalist societies, little purely economic relations existed. The mode of exchange was a question of necessity. Even where they could be said to occur, they derived out of a social relation i.e. dowry. But I do not subscribe to the view that dowry is contractual. Pre-Capitalist societies, by the very nature, were basically formed upon social relations of co-existence. The greater element of that co-existence, other than that taken up by it's subsistence production, was that of social indulgence. Cultural festivities i.e. dances, feasts, ritual performances and basic social communion. A great deal went into sexual-moral communion.

In a capitalist society, the relations that receive the bulk of attention, are contractual, work and general economic pasttimes. Purely social relations exist at low levels. Thus the emphasis of a pre-capitalist society would be detrimental to a capitalist production. This is what, had to be avoided. The pre-capitalist society's emphasis had to be undermined, and simultaneously a new one introduced.

The earliest reception of English Criminal law was in the East Africa Order in Council (O-in-C hereinafter)1889 where it said,

"Jurisdiction shall so far as circumstances admit be exercised upon the principles of and in conformity with the substance of law from the time being in force in England."
In 1897 on application to Kenya of protectorate status, the 1897 East Africa O-in-C stated, "Her Majesty's criminal jurisdiction in the Protectorate shall so far as circumstances admit be exercised on the principles and in conformity with the enactment... of the Governor of India... and where applicable shall be exercised in accordance with the common law and statute law in England."

In 1902 the O-in-C stated that, "Such criminal jurisdiction shall so far as circumstances admit be exercised in conformity with the Indian Penal Code" and in 1911 added, "In conformity with the substance of the common law, doctrine of Equity and Statute of General application in force in England on 12th August 1897 and according to the procedure and practice followed in England. The said shall only be in force as far as circumstances in the protectorate and its inhabitants admit."

This criminal law was to be applied to the 'natives' under the Native Courts Regulations of 1897 which created European manned native courts for criminal jurisdiction over natives and were administered by lay magistrates.

The settler community, however due to a racial emotionalism did not favour the Indian Penal Code. They argued they were 'freeborn Englishmen' and therefore entitled...
to the best of English justice. They disliked the reference to India in the Code. So they being ignorant of the fact that it was merely a restatement of English criminal law agitated for its withdrawal. This saw in 1925, the introduction of the Kenya Penal Code, codified from the Nigerian Criminal Code and English criminal law principles. Basically it was the same thing all over again, with a few minor adjustments here and there. This model penal code, maintained among others the disparity and double standards of English justice when dealing with racial groups. The punishment of an African for the rape of a white woman was capital punishment. For an African woman, 3 years imprisonment.

The crime of Child defilement was also introduced. Thus it was criminal to have carnal knowledge of with or without consent, of a girl under the age of fourteen (14).

Operating in concert with this code, was of course the clauses that dealt with repugnancy, that go a long way in showing us the attitude of the colonialists, towards things African, and their substitution by things better and English. In Gwao bin Kilimo v Kisunda bin Ifuti, the court left no doubt over the nature of the application of civilization standards. It said,

"...[The] only standard of justice and morality which a British Court in Africa can apply is its own British Standard." 

The theoretical code, is here being used to adjust the praxis of the indigenous people. They are supposed to operate within British Standards.

The colonial administration viewed the African life with an abhorrence and definitely subscribed a nature of immorality or repugnance to it. That the Victorian age was the age of puritan is in no doubt. It was a clear intention to moralize the native, as a newspaper in England put it "drilling savage races into decent order".

Today, the Penal Code exists without any substantial changes in the principles concerned, though the racialism has been "removed." Adultery too has been removed and the
chapter on sexual offences is more comprehensive and includes offences unknown to Customary law.

Thus the introduction of the English conceptions of morality and its attendant sexual moral conduct formulation appears from the foregoing had a basic utility. They were among the instruments that were used to mellow down, the society for reception of the economic system, the English wished to introduce in Kenya. This is the contention of the writer.
CHAPTER THREE

THE ARTICULATION OF MODES OF PRODUCTION
After looking at the nature of the two diverse positions in sexual-moral control and motivation institutions i.e. the customary and English, in chapter one, and the ideals that were behind the imposition of the latter in chapter two, I turn to contemporary society in Kenya, in an attempt to understand its effect and expose the peculiar nature of contemporary society, in this field of sexual-moral conduct existence, conduct control and motivation institutions.

In the analysis of any phenomena, the Marxian view is to look, for the basic internal contradictions which determined, the movement of the whole. Ideological forms as state, law, religion etc. are explained by reference to the contradictions of the capitalist mode of production. The mode of production, then is analysed by Marx, as the site, or the unity, of so many distinct social practices (productions) in which individuals conduct their everyday activities and interact, through which they define and express their lives as social beings.

"The mode of production must not be considered simply as being the production of the physical existence of the individuals. Rather it is a definite form of activity of these individuals, a definite form of of expressing their life, a definite mode of life on their part. As individuals express their life, so they are. What they are, therefore, coincides with their production, both what they produce and how they produce." 

The elaboration of productions include not only material economic productions, strictly speaking, as Marx asserted, but all of the various social practices of man; Religion, family, state, law, morality, science, art etc, are only particular forms of production and fall under its general laws. I add here that they are inter-related, interactive practices and constitute, the essential value systems.

Social alignment and displacement is a facet of the contradictions innate, when two value systems clash and where one is in the process of suppression. This involves, the differences that arise, out of economic conditions and attendant beliefs as religion, and these are among the
more important factors which, give rise to differences in morality. A clash in value systems must be interpreted in terms therefore of the whole. This, even though it forms our background to analysis, we restrict ourselves to such differences of a social nature and especially in the diversity of conduct, which since we are dealing with moral-sexual conduct, is properly so, a diversity in moral positions.

Friedmann observed that, the types of conduct, that a particular society considers sufficiently worthy of prohibition by 'criminal' sanction, is deeply influenced by the values governing that society. This he added, vary from country to country, place to place, historical era to historical era.

This is an attempt to explain the clash in Kenya, between the value systems of the English capitalist system, that were imposed here. My concern is more with the effects of this clash, which process is referred to as the contradictions of the articulation of modes of production, and possibly within it, explain the resultant rise in proscribed and/or proscribable sexual-moral conduct.

The operation of the law, the English theoretical code of conduct, must be seen in totality, as a body of specialised rules created and interpreted in a politically organised society or state, with the authorized power to govern the lives and activities of all the inhabitants. As an act of politics, law and legal decisions do not represent, the interests of all persons in society. Whenever a law is created or interpreted, the values of some are necessarily assured and the values of others are either ignored or negated.

In this exposure on the articulation of two modes of production, of the English oriented Penal Code operating in Kenya, the writer contends, must be seen in the light of the preceding paragraph, since it constitutes the embodiment of the sexual-moral values, that at the imposition reflected the Victorian position on the same. The
A word of caution. Howard Zehr argues that crime is inherently political. I am constrained from adopting such a view of the type of crime and incidence, that concerns me here. Zehr's type of crime, must be that crime, that generates as a reaction against, the contradictions of a particular society or state, and especially if it is one of unequal opportunity and untrammelled ambition to acquire and level up, to some heuristic levels of bourgeois existence. The gross economic inequalities manifest themselves socially. In that case Zehr, arguably may be right, for indeed, that crime must be interpreted in the context of that society's contradictions and class struggles.

Here, in contemporary Kenya, it is the writer's contention, that crime is essentially the result, of the consequences of the process of modes of production articulating, which results in amongst other things, in social disorganisation, the breakdown of the family fabric, personal disorientation and cultural shock, where essential social institutions, essential to the pre-capitalist mode of production have, been disintegrated, and the new substitutes have failed to become efficacious.

Zehr's opinions are conducive, to a society having a settled capitalist mode of production, such that they are directly, the result of it's internal contradictions and as it were, not of the interplay between two modes of production conflicting. In our case, actual sexual-moral conduct is formulated within a vacuum of social control institutions and is a reflection of the different tensions and dislocations, in the period of existence, which is a period of transition, in the progression of value systems. Sexual-moral crimes, here, unlike Zehr, the writer argues are a symptom of social and moral disorganisation.

Zehr's approach is that of Emile Durkheim, that prostulates crime as "an integral part of all healthy societies." The writer refutes this Durkheimian approach. A healthy society has no crime, and that may be the only reason why, it may be billed as healthy, for this in itself,
reflects the absence of any conflicts in the mode of production. Needless to say, Durkheim was an apostle of the capitalist social structure and therefore his conception of a "healthy society" is debatable. The writer here argues, that only the "Utopian Socialist State" can give rise to a healthy society and that this is, why there would be no necessity for the law. For What? Perhaps, it can be noted in this context, that the communalistic traditional African societies, came close to that state of social homogeneity, that must constitute the very basis of the healthy society. Prohibited conduct in these societies was rather on the very low side and within their own contexts they were obviously nearly healthy societies.

When two modes of production clash, the weaker mode of the two, is subjected to various influences by the stronger mode. This may involve either a process of dissolution or conservation of institutions, in part or in whole, of that weaker mode of production, or alternatively the consistent operation of both dissolution and conservation.

The supposition here is that the stronger mode of production, in overwhelming the weaker mode, goes towards the creation, of a different set of social relations. This new set of social relations is crucial, if the stronger mode is to make any impact on the existing society. In this respect, institutions of the weaker mode, that are found to be obnoxious to the stronger mode of production or the newer one are done away with. Conversely others are found necessary either because they may likely fit into the social relations of production of the stronger mode or because they are required, so as to maintain a particular set of social equilibrium. This was the position, when the colonial government conserved the African concepts of family law, so as not to upset the social fabric or equilibrium, as the dissolution of these personal laws was likely to cause greater resistance did not threaten the colonial aims.

Generally then, in the realm of 'personal law'...
For lack of a better word, unless such personal law, directly impinges, on the very basic set of ideologies consonant with the stronger mode, then such realm of personal law, may be conserved or actually assimilated, as a distinct peculiarity of the articulation process. This will reasonably depend on what modes of production are articulating.

When however, the realm is that of 'public law' for lack of a better word, in the status of any dogma, that is in society to undertake the cohesive existence of the members of that society in interaction, then the stronger mode must feel obliged to interfere, since by such interference and the subsequent substitution with it's own dogma, the stronger mode seeks to change or stimulate change in the very praxis of interaction in the society and breed new social relations. This may explain why the colonial government, overthrew, that customary law, that dealt with the maintainence of social order, conduct and control, in the context that any society, formulates institutions to keep it within the desired social relations of it's mode of production.

In this manner the operation of colonial mechanisms, like the Repugnancy clause and the creation of Native courts manned by Europeans for criminal matters and also the African manned section for personal law matters, and the introduction of the English oriented criminal and administrative laws, will be understood.

It is then clear that the articulation process in Kenya, involved both dissolution and conservation, and that both these processes when implemented, were to be or were of an advantageous nature to the incoming relations of production.

However, the removal of the institutions, which controlled actual conduct, either by pronouncement or guidance, gave way to actual conduct where possible to deviate from the accepted norms. The introduction of the Native Tribunals, had the effect of throwing overboard, the role of elders in the pre-capitalist societies, as
Instruments of control and guidance. The social ideologies of the colonialists undermined the existing social ideologies, to the extent that they came to be disregarded or metamorphosed.

Social conduct at this point burst its seams and thus in 1907, it was observed that fornication especially around the very missions teaching chastity and abstainence, had become a problem.

A.J. Temu writes,

"With conversion, social disintegration some social problems arose. By 1907 fornication was causing concern to the moral missionaries. Morality or its control was no doubt on the decline as to necessitate their attempt to create Christian tribunals, as Christian fornicators were no longer subject to customary santon."

Social conduct, in this process of articulation, also a period of transition and modernization, appears to hold none of the conflicting dogmas or theoretical codes of conduct in sway. The governance of the pre-capitalist codes wanes, and the English code fails to take effective root, and prohibited conduct, for both codes rises.

At any rate, whereas most of the pre-capitalist societies had a very low incidence of sexual-moral transgressions especially in rape and mostly so in Child Defilement, which it has been observed was virtually none existent, the use of the word 'transgressions' here, only relates to that type of particular conduct that, was prohibited, since as with some societies, i.e. the Kikuyu there was what is known as 'ceremonial rape', where young initiates would roam in bands, attempting to cure their sexual 'virginity' upon wayward women, preferably belonging to different groups or tribes, other than their own. This type of 'rape', therefore, could not fall under the word 'transgression'. Statistics obtained from the Kenya Police Records indicate that the crime of rape, was registering an increase nationwide, after 1922.
Le Vine reported a substantially high rape rate among the Gusii, which in 1955-56 was an estimated 47.2 per 100,000 population, leading him to label it as a "high-rape culture", even though he stated, that the tribe had no word for "rape". Various people have noted that rape was on the increase, and especially in the rural areas, and this is beyond doubt true. The reasons, however, which have been given for this trend, most I find incompatible with my own view.

For instance, it has been rationalized that the presence of a place to report these crimes, gives the impression, that there is an increase. The attempt behind this, is of course, to claim that rape was as common in pre-capitalist formations as today, only that no records exist and that therefore one is inclined to assume that there were no rapes. However, these persons can only be ignorant of the customary process itself.

In customary society, the reporting of transgressions by victims was a family matter, following, a chain like process. A victim would almost report either to her contemporaries or her mother, since no central reporting institution existed. From these the father would know, and he in turn would petition either the family elders or the group elders. These were the adjudicating institutions. The consequences of these transgressions upon the victim herself, within the context of her ritual uncleanliness, meant, that the acts became known to the group, since such consequences were a matter likely to affect the group, thus the necessity to offset these, being above the so called stigma issue. Furthermore the prohibited act when done was not seen, merely as against the victim personally, but against the group, which therefore had a right to know and thus the victim, a duty to report.

Elders approached on this aspect, state emphatically that rape was of minimal occurrence. One, in fact went further to state that the reason behind this was what may loosely be termed as a balanced 'sex economy', the balance of sexual forces of demand and supply or availability
and the graded participation, in matters of sexual intercourse among the various age groups, coupled with social control educatively by such institutions as the "Naiviko" among the Kikuyu.

These situational sexual moral crime increases, must therefore be related directly to the consequences that arose, out of the breakdown of customary social control institutions and the subsequent social disorganisation.

Other scholars, following the psychology trend in thought and analysis of society, relates the incidence of sexual-moral offences, to various factors acting on the human psychology, indicating, correctly though, that certain social influences may lead to crime or deviant behaviour. Such influences may be as poverty, adverse deprivation and frustration(personal). It is a fact however, that within the close knit customary societies of communalism, these factors did not exist. Deviance in their perspective of existence cannot therefore be explained in this manner of thought.

The effect of colonialism was to introduce new conditions of life, that had some of these properties and especially in the urban areas, and crime generally manifests itself in higher rates in the urban centres. But these operative influences, when taken within the context of society as a totality are just, part of the cataclysmic effects of the articulation of the capitalist mode of production with the pre-capitalist formations, where the individualisation and mechanization of society, from it's communalistic and subsistence existence is one of the consequences.

The psychology school merely particularises itself on the individual, and refuses to realise the social forces, that have led him to that state of existence, the contradictions which when existing in society give rise to such conditions and influences on him, and in our case, the dynamics of the 'modernization' process, as it relates to the problematic of the articulation or blocking of the modes of production in conflict, breaking down and
revamping the individual's very existence, to affect his praxis.

Robert Sinai wrote,

"Modernization in it's underlying thrust involves the shattering of traditional institutions of governmental authority and social control, a radical shift in class and economic relations and a thorough going re-evaluation of the pre-dominant myths and symbolic images of the society. It implies a change of the historical gravitation."

To emphasize this point further, he stated,

"Modernization represents a war between the old system and the new, and the routes which this war traverses become a crusade as well as diverging pathways. ... It is dependent on a forceful ideology to affect the traditional scale of values and habits and to shape conduct, incite to action and create a new type of character."

Among the routes of 'crusades and diverging pathways', that this process of social change takes, many things both desirable and undesirable are bound to happen. It is a period of confusion, as the individual is torn between many of the aspects that, the transition period operates within, until one particular set of homogeneous notions, however metamorphosised may take complete dominance. Until then it remains a period when man is beset by,

"the most excruciating psychological conflicts, neuroses and crisis of identity. When a civil war rages in every soul."

The primary effect of the introduction of the capitalist mode of production, by disrupting the pre-capitalist social order was to start this process of modernization. That this effects on the individual are a result of that clash and conflict of the two modes of production, clearly shows, that the psychology school has no case in our situation, except to mystify the issues. We must therefore trace our phenomena from the movement of the whole, and then can we get to it's genetics, and see the conduct at issue as part of the problems of compatibility, adaptability
and conflict, which Malinowski, though in his usual detached style saw as centering, around the main functions and the subsidiary influences of an institution and its constituent factors, therefore leading to a conclusion, that the removal or introduction of an institution was bound to have an effect on society's existence depending on the nature of its role or classification in the social relations of production.

In the articulation process, here in Kenya, society was left naked out of such a removal. The new institutions failed to become efficacious and possibly fill a void, the effect being the haphazard development of sexual-moral conduct, only as a result, because of the removal of institutions, crucial to the propagation of particular forms of conduct.

A classic example of the hybrid development of sexual-moral conduct is offered by the offence of Child Defilement. At customary law, the age of consent was 12 - 13 years for a girl and in some societies lower. Generally, it was taken at the age of Puberty. Below the societies age of puberty, consent was not known. But this age of consent was not for purposes of sexual intercourse strictu sensu. There existed the notion of marriage, in these types of sexual relationships, that formed the need to fix the consent at the early stages of puberty when a girl upon initiation, at this stage, done preferably before her first menstruation, was subjected to educative practices of her role in society. Since society required in its communalistic production manual labour at enlarged family levels, within the context of polygamy, the earlier a girl was productive procreatively, it has been correctly posited, may be the basis of this early consent ages. It is however clear then, that these sexual relations were not in the manner as would occur today per se.

In England, the offence of Defilement of young girls
under 16, itself, was a consequence of the rising trend in the sexual exploitation of poor depraved girls as prostitutes for the elite men, who frequented brothels, the displacement of such girls and the sexual values being a result of the Industrial Revolution. The legislature in reaction to this appalling state of affairs and the puritanical existence of post Restoration England, enacted the predecessors of today's provisions on the defilement of under-age girls.

'Child sex', therefore existed in England. In the customary societies, it was not billed as such. Upon reference to the theoretical code of conduct being introduced, this activity became criminal. But this code, as I have argued earlier on was not efficacious. Concurrently, the traditional institutions of control no longer existed or were so weakened, as to be unable, to deal with actual conduct. The activity therefore, overstepped its bounds. Today, except outside the so-called forced child marriages, most intercourse with under-age girls (below 14 years) may appear to have acquired the nature of the sexual exploitation of under-age girls and one elitist Women's Magazine, has been the major propagator of this view. In this type of argument, we would be asserting that, the substantial rural populations, where most of this incidences are, have adopted, English standards of female maturity and therefore ability to consent to sexual acts. The issue, the writer asserts, is really one of standards of consent, and that most of the rural populations, who effectively still adhere to their traditional philosophies of life, view the girl, reaching puberty, as a potential wife or mother; as a woman. The only difference is that whereas before, the notion of marriage represented the major, ingredient of such sexual relationships, today it does not. Given that therefore, this is part of consensual relationships in sex, it cannot be looked at as exploitation or in otherwise similar terms.

The fact that a man, may had promised a girl "a new pair of slippers" is just part of the antics of
seduction. It is clearly a non issue to our problem. Rural based folk I have talked to, indicate that, this nature of relationship is common, and that it is not looked upon as criminal. It is also accepted that girls reaching puberty, understand and appreciate the nature of the act of sexual intercourse and it's implication, and it is tied, to the currently sensitive issue of female circumcision, which ritual almost gives a girl, the license to sexual relationships with men, possible suitors or in fact suitors. It is therefore, not a surprise, that an accused person will claim to be the boyfriend of a 12 or 13 year old girl.

What therefore will make this a crime is the supposition by English standards of her inability to consent and posit the man as a sexual offender. When these relationships are not in the progression of marriage, they can only be in bad taste to customary notions and their occurrence in this form in contemporary society, is due to the absence of an institution, that would have effectuated, their occurrence within the 'sounder' norms of marriage. What we therefore see today, as criminal activity, is simply displaced activity the result of a social control vacuum, but still not yet within that prohibited transgression, for defilement, if any occurred within the traditional society, would be that below the accepted standards of consent.

Below the standards of consent sexual intercourse is on the rise. This clearly cannot be a question of consent, for even in the customary ambit, there can be none. The basic argument that has been used, here to explain, this is that of personality disorders. This is the psychology school again, which I earlier on dismissed and gave what I contend to be the proper viewpoint and explanation.

Here one factor is crucial, in the creation of those influences that the psychologists would talk about. That of the sex economy. The nature of pre-capitalist society, was that there was no sexual depravity, arising of the fact of some men not having women. It all depended on the group to aid a member acquire a woman, for it was and still is an accepted fact, that the urge to have sexual relations is generic to human beings. Notwithstanding, the monopoly of polygamy, women were available to men, upon
attaining certain status in society. The ability to such status was a question of equal opportunity, for all it involved was the graded rise, through age and peer groups. The sexual interaction of women and men had a social dimension to it, and it was open to everybody. Dowry did not constitute a problem to the acquisition of women by men. It was merely functional to certain ritual and ceremonial ends. Therefore male sexual tensions and passions had outlets, as women were available.

Today, the dimension of interaction of women and men is contractual. A sizeable number of men, a great number indeed, lack this ability, while others have too much of it. This is merely part of the commercialization of society. Part of the consequences of the articulation of the modes of production. The social relations of capitalism, have the effect of creating a disequilibrium in the economic and social structure of existence, unequal opportunity to social goods. Therefore, the availability of women to men is no longer balanced and the effect of such non availability, is to hinder, the expiation of generic human sexual passions, creating considerable neurosis and sexual depravity, among those who cannot satisfy their desires. This is why, when the chance offers itself, some may turn upon grossly underage female children or commit unnatural offences. The appearance of these influences, is properly a result of the destabilization, of the social ethos, by the process of 'Modernization'.

It is also clear that I would not hasten, to adopt or accept the contemporary bourgeois views on why men rape or will rape to explain our situation. Dr Ndetei writing in one of the dailies, argues in what appears to be a socio-medico opinion that, rape may be a factor of a man expressing dominance over women and a similar view is also aired by another psychiatrist Dr Martin Mould.

However, the writer asserts, that this issue of dominance cannot be adequate to explain, the phenomena in contemporary Kenya, since for many people, in the rural areas where rape is highest, the issue of male's dominance
over women is a foregone conclusion and indisputable. Therefore, since such dominance socially already exists, a peasant man will not indeed rape to express the same, for if that is why rape is being perpetrated, then it means that a conflict of dominance, will exist between the sexes, so that an action may be interpreted, as an act tending to the resolution or propagation of the issue of dominance. 

Dr Ndetei²⁴ goes further to indicate, that most rapists do not rape their victims, in pursuit of sexual gratification. One would fail to understand why then, they are likely to rape, when there exists, so much opportunity, without criminal sanction, of pursuing the aims of dominance, humiliation and related attributes on the woman, without raping her. It is asserted by the writer, that the very sensual nature of the act of rape and the role of sex in society, will distinguish it, from any other crime which may arise from various forms of neuroses. It is the writer's contention that, the act of rape in contemporary Kenya, more often than not, is done, where sexual passions cannot be legitimately directed and that these are acts of gratification, acts directly the result of consequences arising, out of the interplay between two sets of social forces, in the articulation of modes of production. Sexual moral conduct must be looked at in the content of a particular society, and unless this is done, they cannot be understood as they occur in this context. Our attribution to these phenomena, of western concepts, can only be right if at any rate, contemporary society as a whole, has so adopted the western ideals, to a position where, it can be said that, we are no longer in transition and that we have progressed to a point, where we can perceive the society, as being subject to those influences and structures that constitute, the western societies.

It is the writer's contention, that contemporary society still has no homogeneity of mode of production (capitalist) that various modes of production are simultaneously co-existing is true. The fact that the
capitalist mode, is the dominant mode is clear, but it is
not the only one attaining and therefore we cannot subject
society, to an analysis, based upon it's structures or
relations of production only. Any analysis must proceed,
if we are analyzing social structures within the context
of the contradictions, that result from the articulation
process, because in any event, it is the effect of this
process, that society is currently being subjected to.

Conclusively from the foregoing discussions, it
can be stated, that the nature and incidence of sexual
offences generally and Rape and Child Defilement in parti-
cular, after the imposition of colonialism and in
contemporary society is the result of, firstly, the break-
down of generic institutions of sexual-moral control and
guidance, as the role of elders and the family set up and
such institutions as in the case of the Kikuyu, the 'Ngiklo'
rituals, a form of 'socialised masturbation', seeking to re-
lease sexual tensions within comformable limits, and to
teach young men and women, sexual self control. This feature
was common among the diverse pre-capitalist formations.

It is secondly, the attribution of criminality, to
otherwise formerly acceptable sexual moral conduct and where
the alien theoretical code of conduct, or dogma, has failed
to adjust actual conduct; the praxis, to it's ideals and
consequently such formerly acceptable sexual moral conduct,
continues in society, albeit the criminality that now
attains to it.

Thirdly it is a result of a disturbed 'sex economy',
arising as a result of the breaking down of the social
relations of production in the wake of the capitalist mode
of production's onslaught.

In this light it cannot be far fetched to say, that
the law of sexual offences in Kenya, is an anomaly, as far
as it seeks to deal with the incidence of sexual offences
and control them, because it's approach is wrong. Because
it does not reflect the prevailing social forces operating
and to the extent that it has failed to become efficacious.
The necessity of having a code of sexual-moral conduct control in any society, is of the highest importance. To underscore this need Bohannan\textsuperscript{42} wrote,

"Society is impossible without regulated sexuality, the degrees of regulation differs among societies. But total repression leads to extinction, Total lack of repression also leads to extinction."\textsuperscript{43}

It is with this in mind that I proceed to propose reform in the next chapter.
CHAPTER FOUR

A NEW MODEL ?

"Possible Reforms and Conclusion"
Much has been said, about both the nature of the law and its reform. It is not my wish, to engage myself into the dynamics of the law reform debate here. Moral sexual conduct control, has however been essential in society, whatever the nature of society due, to the peculiar status that it occupies in the social ethos and in the propagation of the human race itself.

The writer is of the opinion, that some form of norms governing moral-sexual conduct are necessary, since as it has rightly been asserted, "All societies seek to control and direct sexual energy in order to maintain their group structure and functions." Unchannelled, the sex drive threatens to disrupt patterns of social and family organisations. Properly controlled on the other hand, sexual energy moves people into relationships and activities which sustain the group."

This thesis has argued, that the imposition of the English law of sexual offences, as a unit of the general framework of capitalism, was a tool to be used, to adjust the moral-sexual conduct in particular and conduct generally among the African Societies, to bring them about, to those relations and activities conducive to the capitalistic social and economic relations, and to maintain, attendant group structures and functions among them.
The movement of this imposition; the effects of the contradictions of the articulating modes of production, was to disorganise and disorientate pre-capitalist formations. These were subjected to the new social and economic relations and activities, of the capitalist mode of production wholesale, aided by the mechanism of the colonial state. The institutions, that served as the safeguards and custodians for the customary social and moral-sexual control in particular broke down. Due to the fact that those new institutions, that sought to replace them, were ineffective on then existing societies, a void in social control was created and it has remained ever since.

Contemporary society in Kenya, is a reflection of this state of disorganisation and disorientation, where the standards of moral-sexual conduct and values that are used, to formulate actual conduct, are a reflection of the socio-economic and political confusion, that can be attributed to the effects of the articulation process. No clear, or established norms or guidelines seem to affect the bulk of society, which can be called or seen as, a universal or national standard. What is taken stock of, is the vast ethnic disparity in the ethos and this is usually the standard applying to it's peculiar society. Intergration of peoples, through socio-economic migrations merely complicates the problem of standards and values further. To this, added, the class differences in social values and the English type values.

Many societies in the pre-capitalist formation proscribed rape. Rape is understood to mean, sexual intercourse by a man upon a women without her consent. As to what degree of involvement required to constitute rape differences will exist.
The major ingredient, is that of lack of consent and also some form of penetration at least, again this may involve local peculiarities. However generally, the act of rape, properly described must be non-consensual sexual contact in the manner prescribed.

What today, may elicit itself as rape may not actually be rape. Some societies had a form of ritual "rape". The young Kikuyu initiates, did have forceful carnal knowledge of women, preferably outside their group, in a bid to lose their "sexual virginity", a purely accepted phenomena. There is also the controversial observation, by Peristany, occurring within the circumstances provided, was permissible conduct and if such conduct still occurs today, and this may be the type of problem being faced in Gusii regions, such conduct can never be justifiably subjected, to other standards and value systems.

Our quarrel with such conduct, can only be that it has outlived its purpose and change must flow from society, in appreciation of its changed nature and the non-usefulness of these forms of conduct. But they as vestiges of the cultural life of the societies, cannot be outlawed or criminalised.

The bone of contention here, is from what viewpoint, we are prepared to look at these occurrences. Our problem is one of value standards to be applied in dealing with forms of conduct prescribed or permitted. Whose values, how and why? The perspective from which you look at it, determines your opinion.

The issue of child Defilement is similar. Confusion reigns regarding the application of social value standards, on the age, in life, when a female child becomes a woman, and is mentally and sexually mature,
to appreciate the nature of her roles in society, and especially those of a sexual relation, procreation being one. The child defiler, is the male adult, who knowing that a girl, has not reached the permitted age, in his value system, proceeds to have sexual intercourse with her. These values are many. Which applies or is to be applied is the major issue, and it's application must fit the particular form of social and economic relations in society. To dispense justice to these communities, giving effect to those norms that reflect their social consciousness, could be a proper thing to do. It can be argued, that we are giving effect to the wishes of the people; that there is social equality and that people will lead their lives, according to their social wishes. But, whether it will benefit them to do so, is a question we must ask ourselves. Secondly, this would be no small task, given the problems of ascertainment and the metamorphosis and intergration of societies too.

One thing, however remains clear. That the capitalist mode of production and its social relations and consequences, are not of advantage, to the majority of the Kenyan population, except to a small class of bourgeoisie and petty-bourgeoisie Africans, and their foreign friends or exploiters. It's basic feature is social and economic inequity. An unequivocal "NO", must be expressed towards this system, that today drives us towards Europe and It's capitalist societies. The trend of Eurocentrism must be reversed.

As Willy Mutunga said, one cannot talk of law in a vacuum. Therefore since the law operates in society, that society needs some form of change itself, for changing the law would be merely a cosmetic change, failing to affect, the substantive reasons behind it's existence, for any law has utili in and for a particular aspect of society.
Therefore, changing the law of sexual offences itself, would not help us solve the problems, that bedevilling our society, have rendered moral-sexual control and conduct formulation a farce. It has been indicted, as part of the capitalist social system and any argument, that proposes it's removal, also supposes a removal of those social and economic relations, that have created, the need for the current law of sexual offences.

When we talk of alternatives, we are suggesting alternative societies. We must choose between going back to traditional society qua traditionalism or any other advantageous society.

The writer's contention here, is that, it would be most adequate and realistic, to have traditional systems of social control and social systems, as a base from which to start from. From there, the development or movement, must be towards an egalitarian society, both socially and economically; one able to spread out it's resources to all. This, envisaged society, is of the socialist type.

Remaining on customary society per se, would be unrealistic, due to the fact that, within that period of colonialism and today’s neo-colonialism, a lot has changed, that cannot simply be erased, that must remain part of our society, and which must be fitted into any society that will have to be created. Among these, economic infrastructure, changed systems of production, education, cultural atrophy and a horde of many more.

Even though one cannot talk of a homogeneous society, it is a better goal to work for one, instead of working to split and maintain tribal units, or clans, etc. as would occur, if we reverted back to traditionalism.
Neither could it's production system, be able to sustain present day society. A new society must be created, and the most advantageous is the socialist and to all. The law of sexual offences, then will be a reflection of socialist values and tendency in that society to be created. It must incorporate, what there will be, until, that type of conduct as existing, is phased out in favour of what will be developed, as a consequence of the social engineering for it and the acceptance of the new social and economic relations, from which it must arise, and of which, the law's duty is to reflect.
INTRODUCTION: FOOTNOTES

1. THE DUAL MANDATE IN TROPICAL AFRICA:

2. Refer Chapter One for the discussion of this.

3. MAX GLUCKMAN


5. Refer Chapter One for the discussion of this.


7. W. Friedmann, Law in a Changing Society:

8. Emphasis mine

9. Supra 7 at


11. Supra 10 at


14. Refer Chapter Two for the discussion on this.

15. Supra 13

16. In my discussions with him.
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41. Supra Roscoe Bund.
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9. Supra: LION RAMPANT
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27. LORD DEVLIN: THE ENFORCEMENT OF MORALS


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30. Ibid
CHAPTER THREE: FOOTNOTES:

2. Ibid P. 42
3. KARL MARX: THE ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844. NEW YORK: INTERNATIONAL PUBLISHER (1844)
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5a. This term is also referred to as the 'Blocking' of the productive forces. For a general Restatement refer to:
   ii) NICOS FOULANTZAS: CLASSES IN CONTEMPORARY CAPITALISM
5b. Underlining Mine.


7. EMILE DURKHEIM: THE RULES OF SOCIOLOGICAL METHOD.

8. Ibid P. 65. 73
9. Supra 5a(i)
10. Supra 5a(i)

12. This here will include the penal code and the whole criminal process and the institutions of state as the police.


14. Ibid PIII
14B. An Article. MODERNIZATION: A FEW QUERIES
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16. Refer Schedule appended.

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18. Ibid. He stated that what existed was such words
describing the act as 'to fight', 'to stamp on'
and 'to spoil'.

19. Magistrates, Scholars and Commentators, without
mentioning names.

20. Anthropologists like Brissberg, Bohannon, Malinowski
and Lowie, including scholars of the customary law
nature and process.

21. Local elders around Embu South, and Aguthi Location
in Nyeri, to whom I am personally acquainted.

22. Lambert supra at 15. has commented on this.

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30. LAMBERT: Supra at 15.
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32. This term has been used by the administration at various times, to excite disaffection against some of our customary traditions, as the administration propagates its neo-colonial role.


34. Quote from Viva, OCT. 1982 V0L.8 No. 10 P.10

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36. Supra Viva at 34 P.11

37. The Encyclopaedia of Sexual Knowledge:

38. Ibid


40. Viva August 1983 Vol.9 No.8 P.11 an article; VIOLENCE ON WOMEN: RAPE: DR. MARTIN MOULD

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   this view.
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9. The problems of the so called forced child
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REPORTED (RECORDED) CASES

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Table A: KENYA POLICE ANNUAL REPORTS (SETTLED AND URBAN AREAS) RAPE only.

Table B: SUNDAY STANDARD 4th MARCH, 1984 p.7:
Interview by Deputy Commissioner of Police: Rape and attempted Rape figures.

1. A Rejoinder to the Deputy Commissioner.

Even after having explained to the Kenya Police authorities, the purposes for my requiring extensive crime statistics, with particular interest in sexual offences, the authorities, in erstwhile execution of their duties, by conduct refused to allow my perusal of the available records. However, they did, suddenly, on 4th March, 1984, publish as part of an exclusive interview with the Deputy Commissioner of Police in the Sunday Standard of that day, statistics similar to those sought. The general intent and purport of that statement was to argue, that Crime in Kenya was on the decrease. Their "graph" was incomprehensive and as befuddled as it's intention. I beg to differ with the Police Official. Two reasons;

a) Many persons, including persons able to know, agree that sexual offences, shown on the decrease are in fact on the increase.
None of those writing on this subject, let alone in the last ten years of Independence, has mentioned a decrease. One does not even need recorded figures to know that there is an increase. Casual social observation is enough, especially in the crime of defilement of underage girls and Rape or it's attempt under the Kenya Penal Code. Refer chapter three of this paper.

b) The hypothesis painted, that crime is committed by foreigners in Kenya is untenable as it is unbelievable and false. For the sexual offences in particular, the majority occurrence is in the rural areas, not even in the cities. Refer chapter three of this paper.

It is clear that what was released in the Statement and the "graph" had a propaganda message, if it was not one itself. It was a clear distortion of fact. The police could not have been expected to do better.