TOWARDS A DEMYSTIFICATION OF CRIME

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BETTY KAARI MURUNGI

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DEDICATION.

To the "friends" of the people of Kenya.

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Very sincere feelings of gratitude are hereby directed to my friends at the University with whom we have shared so many good and intellectually stimulating moments.

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INTRODUCTION

STATEMENT OF THE PROBLEM

This study is inspired by a desire to expose the forces behind the creation of political and property crimes in a capitalist society. The problem may be presented as one of criminal definitions viz the role of the state in influencing them.

We examine the objectives of criminal law within capitalist formations. To this end we examine the forces at play in a capitalist society that necessitate the criminalization of particular acts. We examine more specifically the role of the state in the criminalization process. We address our mind to the question as to why certain acts are considered criminal in a particular stage of societal development and not so in another. We posit that Criminal Law, which plays the greater part in criminal definitions, is not autonomous within society. It is a construction created by those in positions of power.

The theme that runs through this study is that through the criminalization of certain conduct by the order of the criminal law, the hegemony of the ruling

class is assured. Our observations are limited to criminal definitions and the objects of criminal law and the role of the state in influencing them. We are not concerned with describing political or property crimes, rather we examine the 'rationale' behind the existence of these crimes.

THE THEORETICAL FRAMEWORK

Dialectical and historical materialism in the Marxist-Leninist tradition constitutes the theoretical backloth of this study. We proceed on the basis that the economic structure of any given society determines the changes in the superstructure. Hence our analysis of crime, crime theory and criminal definitions is posited against the background of i) the economic development of society ii) the changes in the mode of production and exchange and iii) the interests of the dominant class.

It shall be argued in the main that the politically and economically dominant class in society expresses its will through the law and through the exercise of state power.

CHAPTERIZATION OF STUDY

This dissertation is in four chapters. In the first chapter we examine crime as a historical and social phenomenon. We examine briefly the emergence of criminal law and trace its development through the known historical epochs viz, communalism, slave economy feudalism and capitalism.

In chapter two, we examine existing theories of crime and we offer a critique thereof. Chapter three constitutes our major arguments. We examine the role of the state in criminal definitions.

Chapter four constitutes the consolidation of our arguments in the form of a conclusion. We offer a definition of what crime really is in a Capitalist Society. (like Kenya).

We have limited our observations to political and property crimes for purposes of offering examples but our thesis can be applied to a host of other crimes.

RESEARCH METHODOLOGY AND DATA COLLECTION.

We shall draw most of our research material from secondary sources i.e. published materials in the form of books and articles. A large number of research hours will be spent in the University Library. Recourse will also be made to the criminal registry, High Court, at Nairobi.

CHAPTER ONE

CRIME AS A HISTORICAL AND SOCIAL CATEGORY

1:1 INTRODUCTION[1]

Crime is a definition of human conduct that is created by authorised agents in a politically organised society. In respect hereof, agents of the Law are *inter-alia* Legislators, police, prosecutors and judges who represent segments of a politically organised society. These same agents are responsible for formulating crimes and administering criminal law. Crime is therefore a definition of behaviour that is conferred on some persons by others.

Persons and modes of behaviour therefore become criminal because of the formulation and application of criminal definitions. Thus the rubric crime is attached to certain human conduct. Crime therefore is not inherent in behaviour but is a judgment made by some people about the actions and characteristics of others.[2] Criminal definitions are therefore formulated according to, and in pursuit of the interests of the dominant class in society which class has the power to translate its interests into law and public policy.[3]

1:2 THE EMERGENCE OF CRIMINAL LAW

Criminal Law is the Channel through which the ruling class makes it known to those who are ruled how much

freedom they can enjoy and what aspects of their behaviour will invite sanctions. This dissertation is not concerned with any exposition of criminal Law per se but we recognise that 'crime' as a concept cannot stand on its own feet as an exclusive discipline, it must seek companionship in a variety of other fields, of which criminal law is probably the most important single associate. That is why a preliminary observation on criminal law has been deemed essential.

According to almost all criminal codes of the world, Crime in general is defined as an action or behaviour that qualifies as crime by the order of Criminal Law. Criminal Law thus comprises the norms (norma agendi), the rules of what is permited and what is prohibited. These norms are designed and established by the power that essentially makes this Criminal Law. The dominant class formulates the permissions and prohibitions or in other words defines what is confornity and as a corollary, what is crime.

Therefore we see the emergence of Criminal Law as historically a political phenomenon. Because of the conflicting interests of different social classes,[5] Criminal Law was created and it has continued to operate in various social and historical contexts for the benefit of diverse and shifting interests of the dominant class.[6]

Once Criminal Law emerged as a concept it became widely used as a means of regulating human conduct in politically organised societies. Conceivably all forms of human behaviour have been placed under the jurisdiction of criminal law. Each criminal law specifies the illegality of some specific behaviour.

1:3 A HISTORICAL PURVIEW

Criminal Law as we know it today emerged in several different social contexts, notably those of Greece, Rome and England. The experience of these Countries has shaped our own conception of crime and criminal law. Contemporary criminal law embodies notions of the public, political and state nature of crimes. This was not always the case.

In the Primitive Societies, people lived communally mainly on tribal basis. The institution of private property was unknown to them.[7] No form of authority was exercised by one group over another. In the case of a wrong being committed against anybody, the injured individual and his family had the responsibility of securing retribution from the parties that had wronged them.

Societies certainly agreed upon socially necessary principles of conduct whose violation would result in punishment. This kind of "law" is an illustration of the principle expressed by Cicero as ubi societietas, ubi jus - wherever there is community, there is law.

The institution of the state[8] grew at a later stage of human development. It has been shown beyond doubt that the state grew as a result of the growth of private property,[9] classes emerged in the society and the first major division of society into classes took the form of slaves and slave masters.

The state therefore arose as an institution which safeguarded the newly acquired property of private individuals against the Communistic traditions of the old order, but also as an institution which would sanctify private property.[10] It is in the latter respect that criminal law has a part to play.

The history of Ancient Greece from the heroic age (800 - 700 B.C.) up to the collapse of Ancient Greece in around 100 B.C. shows how Greece was essentially a slave owner society.[11] The Romans were no different. Law at this stage was essentially aimed at suppressing the slaves. The slaves were not considered as human beings but as chattels. They were not even covered by the law of manslaughter![12] Their masters could kill them and suffer non for it.

The decisive step in the emergence of criminal law was taken in Athens at the beginning of the sixth century B.C. several enactments were instituted which gave every citizen (not slaves) the right of action in the prosecution

of certain offences e.g. murder and arson. These enactments formed the basis of the development of criminal law.[13]

In Rome concepts of criminal law developed a little later (third century B.C.) when a criminal jurisdiction was established for the control of those engaged in such politically threatening activities as violence, treason, arson and theft of state property. The criminal law was a device created mainly for the protection of the state itself.[14] The reverse, i.e. protection of the rights of the individual from the state was not a concept recognised by Roman law.

The class and political structure of the ancient state consisted of an oligarchy of the wealthy and privileg that ruled over a large proletariat. The lower classes were politically subjugated and were made the object of merciless economic exploitation. Alongside wealth in slaves and money, the ruling class had in their possession wealth in land also. We attempt to show in the following pages how the dominant class promulgated criminal laws for their own benefit. In doing so, we shall give specific examples of certain laws which were-in operation during the feudalist and capitalist eras, which laws criminalized acts which hitherto were purely ordinary and non injurious acts incapable of being rounded up as crim

The feudal mode of production was, in so far as means of production was concerned, dominated by the land and a natural economy in which neither labour nor the products of labour were commodities. The immediate producer, i.e. the peasant, was united to the means of production, the soil, by a specific relationship. The literal formula of this relationship was provided by the legal definition of serfdom - glebae ad scripti or 'bound to the earth'. Serfs had juridically restricted mobility. The peasants who occupied and tilled the land were not its owners. Agrarian property was privately controlled by a class of feudal lords who extracted a surplus from the peasants by politico-legal relations of compulsion.[15]

A perfect example of such politico-legal relations of compulsion would be the vagrancy laws passed during this period in England. Most vagrancy laws the world over criminalize the very existence of unemployed persons. The situation in England at this time and during the transition into capitalism in relation to vagrancy laws has been analysed quite well by a modern writer Chambliss, and I quote him in extenso on the matter.

> '... an analysis of vagrancy laws has demonstrated that these laws were a legislative innovation which reflected the socially perceived necessity of providing an abundance of cheap labour to landowners during a period

> when serfdom was breaking down and when the pool of available labour was depleted. With the eventual breaking of feudalism the need for such laws eventually disappeared and the increased dependance of the economy upon industry and commerce rendered the former use of vagrancy statutes unnecessary"16

Chambliss goes on to explain that the vagrancy laws however revived and were subjected to considerable alteration to suit the new econo-politico order. He says;

> "Whereas in their earlier inscription, the law focussed upon the "idle" and "Those refusing to labour", after the turn of the sixteenth century an emphasis came to be upon "rogues" and "vagabonds" and "others suspected of being engaged in criminal activities..." The increased importance of commerce to England during this period made it necessary that some protection be given persons (sic!) engaged in this enterprise and the vagrancy statutes provided one source for such protection by refocussing the acts to be included under these statutes."17

In other words, the formulation and changes in the vagrancy statutes were the result of the effects of powerful interest groups. The vagrancy laws which emerged in order to provide the powerful landowners with supply of cheap labour were rendered unnecessary when the landowners were no longer the dominant class in society and they were no longer dependant upon cheap labour. When a new interest group emerged, the laws were altered so as to afford protection to this group.

The imperialist powers used these same laws in Africa following the colonization of the continent. The British who colonized Kenya passed Vagrancy Regulations in 1900[18]. The then governor, Charles Elliot, promulgated these regulations which provided for the arrest and detention of any person found asking for alms or wandering about without employment or visible means of subsistence.

The settlers at this time faced a problem of unavailability of cheap labour to work their farms. The infamous Hut Tax Ordinance 1901 was therefore no accident. This law made it mandatory for anybody who owned a hut to pay tax. This requirement forced the Africans to go out and seek wage employment which was available only on European farms.

The equally infamous Native Passes Regulations of 1900 [19] was passed to regulate movement of Africans within the protectorate. These regulations made it mandatory for each African to carry a 'Kipande' signed by his employer, wherever he went.

The total effect of these extremely oppressive laws was that they made it a crime for an African who was not employed by a white settler, to move about in his own country. Infact the effect of the Hut tax[20] was to make it criminal not to work for a white man for how else was the African to raise the money to pay the hut tax?

The tenor of these Regulations was in effect to confer a criminal definition upon acts such as non-employment which were hitherto not deemed criminal. The demand for criminalization of such behaviour arose out of the need to service an economy that was suffering from lack of labour which in turn adversely affected the perks of the dominant social class locally represented by the European settlers.

Capitalism replaced feudalism as a mode of production. This stage can be conveniently divided into three eras; (i) mercantilist era, (ii) industrial capitalist era, (iii) monopoly capitalist era. It was during the third capitalist era that Kenya was inculcated into the international capitalist whirlpool.

The mercantilist period began as early as the fourteenth century in Europe. The first mercantilist states were the Italian states followed by Spain, Portugal, England and France. This period was dominated by 'primitive accumulation of capital'.[21] Trade routes were opened up with state aid. Piracy developed as a crime specifically because of the economic conditions. Brigandage[22] was the order of the day. Had there been no trade via the sea or transportation of goods over the land, these 'crimes' would never have arisen.

Thus we note that the creation of a particular criminal law must have its conception in some concrete setting in time and place. The development of the law of theft demonstrates this necessity. It was during the Fifteenth Century in England that the modern law of theft was officially formulated and introduced into criminal law. The law relating to theft was shaped by changing social conditions, and especially to protect the interests of the dominant class of the time.

The definition of theft as a crime was a solution to a legal problem that arose within a particular social framework. The case in point wherein the legal concept of theft as a crime was enunciated is The Carriers Case[23] of 1473. The facts of the case were that the defendant was hired to carry bales to Southampton. Instead of fulfilling his obligation, he carried the goods to another place, broke open the bales and absconded with the contents.

The most illustrious judges of the time discussed the case at length and although the majority were agreed on the guilt of the defendant, they nonetheless were beset by a legal problem for prior to this case the criminal law recognised no criminality in a person who came legally into possession of anything and later converted the same to his own use. The reason of the common law had been that the owner of transported goods was responsible for protecting himself by hiring or employing trustworthy persons.

The socio-economic conditions of the period were especially important for the decision reached by the judges in the above case. At this time a commercial revolution was taking place in England. The feudal structure resting on an agricultural economy was definitely giving way to a new capitalist order based on industry and trade. The Carriers case demonstrates quite clearly the manner in which changing social conditions and emerging social interests may bring about the formulation of a criminal law.[24]

With the growth of capitalism, Banks and other similar financial institutions whose business transactions required the use of paper currency, bills of exchange, letters of credit e.t.c., the criminal law also developed to include crimes such as embezzlement and fraud. The British parliament in the eighteenth century passed an embezzlement statute in order to protect mercantile interests. It becomes extremely clear that crimes were being defined and criminal laws promulgated for the protection of private property. The persons responsible for defining crime and passing these laws were of course the dominant and propertied segments of society.

In the following chapter we shall have occassion to examine other categories of crimes which reflect class interests. Here we also have in mind 'property' and 'political' crimes.

CHAPTER ONE

FOOTNOTES

1. See Hugh J. Klarke Changing concepts of crime and its treatment (Pergamon Press 1966) on definition of crime, at pg. 17;

> "Crime is no absolute like sin, that can be defined and have an existence beyond the limits of what men say and do. It is essentially a relative definition of behaviour that is constantly undergoing change. The law is far from immutable."

2. See generally Quinney R. The Social Reality of Crime especially Chapter two. Chapter two of this dissertation deals with crime theory and offers a critique thereof.

3. The term 'public policy' used here in the context of Egerton vs. Brownslow (1853) 4 H.C.L. 1-25,

> "...that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good."

4. This point is better discussed in chapter three hereof.

5. Quinney R. Ibid, chapter three.

6. See chapter three of this dissertation.

7. See generally Max Gluckman.

8. The whole question of the role the state plays in criminal definitions is discussed in chapter three of this dissertation.

9. Mrx and Engels Selected Works Vol. III (Progress publishers 1973.) Engels F, in "The origin of the family, private property and the state" pg. 191-316.

10. Ibid pg. 275.

11. See generally George M. Calhoun, The Growth of criminal law in Ancient Greece (Berkeley University of California press, 1927).

12. Ibid Chapter one.

13. Ibid.

14. Woolfgang Kunkel. An Introduction to Roman Legal History and Constitutional History. (Oxford University press. 1966) pg. 61.

15. Perry Anderson. Passages from Antiquity to Feudalism. (New Left Books, London, 1974).

16. Chambliss A Sociological Analysis of the Law of Vagrancy. Social Problems 12. (Summer 1964) (New York Colombia University press.)

17. Ibid pg. 69.

18. Regulations were made under the auspices of the East Africa Order-in-Council 1897. This particular regulation was No. 3 of 1900.

19. Ibid. No. 12 of 1900.

20. Karl Marx. Capital Vol I (Moscow 1974) at pg. 667 on the so called Primitive accumulation.

21. Ibid pg. 667.

22. 'Brigandage'-another term for highway robbery.

23. This case has been documented and interpreted by Jerome Hall in his book Theft, Law and Society (indianapolis, Bobbs merril 1952.)

24. In order that we may not confuse the substance with the shadow we must note here that theft arose as an expression of the sharp class differentiation. This aspect of the problem will receive broder attention in the following chapters of this dissertation.

CHAPTER TWO

CRIME THEORY

2.0 PROLEGOMENON

In this chapter we intend to expose the proliferation of crime theories. We shall examine briefly the various crime theories and offer a critique thereof. An excursion into the unlikely realm of crime theory has been deemed necessary because the State which we shall examine in greater detail in the following chapter, often takes recourse to these theories to explain crime. We are looking beyond the theories in our analysis and we discuss these theories with a view to offering a critique.

2.1 SOCIOLOGICAL THEORIES OF CRIME

The sociological view of crime postulates that the offender's criminal personality has developed through his relations with his environment. There are a myriad of sub-theories that fall under the general ambit of sociological theories. We shall consider the most prominent amongst them. Many of these sociological explanations of crime at any rate draw from one another and in the numerous explanations, crime is posed as a sociological phenomenon.

2.1.2. DIFFERENTIAL ASSOCIATION

This theory of criminality was first explicitly formulated by the late Edwin H. Sutherland.[1] This theory was however originally created by the French philosopher monsieur Gabriel Tarde in his theory of 'Laws of imitation'.[2] Sutherland refined Tardes' contribution in his own 'differential association' theory, which proposed that criminal behaviour is learned through interaction with other persons in a process of Communication.[3] Sutherland offered eight propositions to support this basic contention.

He proposed that the principal part of this learning occurs within intimate personal groups. He further contends that learning crime includes learning the technique of committing the crime; Sutherland postulated that a person becomes criminal because of an excess of difinitions favourable to violation of the criminal law; This is what he termed the principle of 'differential association' referring to both criminal and anti-criminal associations. Sutherland further proposed that differential association may vary in frequency, duration, priority and intensity. Finally Sutherland suggested that while criminal behaviour is an expression of general needs and values, it is not explained by those needs and values; for example thieves steal and honest men work in pursuit of the same thing - money.

Sutherlands' hypothesis has been subject to numerous criticisms even from his counterparts. Nigel Walker[4] thought that Sutherlands' theory simply illustrates the fate of so many criminological theories...,

> 'which begin with the observation of the obvious, generalize it as a principle, and are eventually reduced again to a statement of the limited truths from which they originated.5

We submit that Sutherlands' theory is ahistorical and ascientific to the extent that it cannot be empirically verified. Further the theory was formulated at a high level of abstraction and this fact takes it out of the realm of reality. Such a theory then becomes of academic usefulness only.

2.1.3. THEORIES OF CULTURAL VALUES.

These group of theories of crime make cultural values responsible for crime and propose that culture must be corrected. Donald Taft,[6] commenting on American Society, contends that crime necessarily prevails in that society because it (society) is characterized by 'dynamism, complexity, materialism, impersonality, individualism, status - striving, restricted group loyalty, race discrimination, unscientific orientations in the social field, political corruption, disrespect for some laws, and acceptance of quasi criminal exploitation.'[7]

Taft obviously has a point to make in his analysis, but his explanation does not tell the whole story. Certainly where the society is embroilled in such culture conflicts crime and criminal definitions may appear as an inevitability. The important thing to note is that culture is a reflection of the mode of production of a given society. A capital based mode of production will invariably display such culture as described by Taft. Crime in such a society is a product of this sick culture.

The French philosopher and sociologist Emile Durkheim[8] suggests that crime is a normal phenomenon in the culture of a given society. He further postulated that crime was necessary and useful because it helps the normal evolution of morality and law. Emile Durkheim argued that crime is, inevitable and therefore normal in society. He observed that crime has always been and will always be with society;

> "There is no society that is not confronted with the problem of criminality. Its' form change, its acts thus characterised are not the same everywhere; but, everywhere and always there have been men who have behaved in such a way as to draw upon themselves penal repression.9

Durkheimis' theory was all very well in his day when minds were not fully equipped with analytical tools of deciphering fact from myth. We reject the notion that certain people just behave in a manner likely to draw

penal repression. The question that was not being asked was, who defines these laws that were 'inevitably' being breached?

2.1.4. ANOMIE AND THEORIES OF STRUCTURAL DISTURBANCES

These groups of theories emanated from Emile Durkheim.[10] By Anomie is meant social situations where there is a lack of rules, absence of norms, lawlessness or weakened norms that may lead to deviant conduct. In Durkheim's opinion, Anomic situations develop in societies that cannot or that do not provide clear norms to guide aspiration and to recommend relevant approved behaviour. This is taking the view that rules or laws ordinarily exist to regulate behaviour.

According to Anomic theory, in order to maintain the society, the rules and norms provide individual security by necessarily limiting individual aspirations and goals. If the social constraints break down and the limits of individuality inevitably become uncertain. This uncertainty is what leads to antisocial and devuabt behaviour.

An American criminologist, R. Merton,[11] taking guidance from Durkheim suggests that crime is due to the inequality of achievement among members of a given society[12]

According to Merton, the social structure drives certain people to engage in crime, deliquency or deviance rather than conformist behaviour. Merton emphasizes the importance of analysing man's cultural aspirations on the one hand, and the institutional norms or acceptable modes or social opportunities of achieving these goals on the other.[13] The proposition here is that people have cultural economic and social aspirations but that not all people have the necessary social opportunities to realise these aspirations. Accordingly the failures find themselves in this Anomic trap.

2.1.5. THEORIES CENTERED ON THE ECONOMIC STRUCTURE

These theories seek the solution of the problems of crime exclusively and unconditionally in the social economic structure. Basic to this theory is the assumption that poverty, as an individual crime factor prescribes all crime. This explanation butteresses the orthodox view that crime is prevalent among the lower class of the society due to material deprivation.

In our critique of these explanations we submit that it would be impossible to prove that 'criminality' is as a behavioural quality which is peculiar only to the lower classes. Certainly the economic structure does have a role in criminal definitions[14] but one has to look beyond the structure to the operative forces to discover the real culprit in the exercise of criminal definitions.

2.2. BIOPSYCHOLOGICAL THEORIES OF CRIME

2.2.1. LOMBROSIAN THEORY.

Cesare Lombroso (1836-1909)[15] an Italian physician propagated the heredity theory of crime. He concluded after examining about four hundred Italian inmates that criminals were born[16] and not made. Lombroso's general theory proposed that criminals differ from consformists in their physical manifestation of 'atavistic' or degenerative anomalies. In his observation the criminal is seen as a biological throwback to an earlier stage of human evolution who therefore inevitably cannot adjust to the rules of living in a civilized society. According to Lombroso criminals could be identified by such features as; high cheekbones, excessive hairiness a long lower jaw or abnormal lack of hair?![17]

Lombroso's orientation was primarily psychiatric and anthropological, in the same token it was ahistorical and ascientific. Quite aside from these shortcomings, Lombroso's theory is questionable even at the level of methodology. Why did he not take as a sample of his investigations law abiding citizens?

Lombrosian theory as recently as 1939 found ardent support in E.A. Hooton[18] an American criminologist, who after extensive research lasting twelve years reached the theoretical conclusion that criminals are 'organically inferior' and that crime is the product of the "impact of

environment upon low grade human organisms".[19] Consequently Hooton proposed the "complete segregation of these physically mentally and morally unfit individuals since they demonstrate general constitutional inferiority".[20] Certainly Hooton's conclusions are rather extravagant and suffice it to say, unacceptable as a relevant crime theory of this study. Body type studies (physical and heredity) cannot explain away the question as to what is crime. These group of theories are ahistoric and they cannot be put to strict proof.

2.3. A CRITIQUE

Criminology has for many years been dominated by the perspective of the socio-psychological setting for criminal behaviour as the theories we have examined illustrate. The crime theories examined can also be categorised into jurisprudential schools.

The utilitarian approach to crime is represented by Jeremy Bentham[21] (1748-1832) and John Austin.[22] Bentham's underlying psychological assumption regarding crime and punishment was that individuals calculate the pains and pleasures of crime and thereafter pursue illegal behaviour if the latter exceeds the former.

The structure of the law according to Austin was hierarchical in order to make clear who was giving commands

under the law. Accordingly, individuals who violated the legal prescriptions would have visited upon them the relevant sanctions.[23]

Certain of crime theory can be categorised as 'positivist criminology' represented by Edwin Sutherland[24] and other labelling theorists.[25] The overriding emphasis of this positivistic thought is on the explanation of events, in this case crime and criminal behaviour.

The positivist follow a mechanistic approach in the process of social analysis. We find that the positivist usually couches his explanations in terms of causality. The positivist's other shortfall is that he refuses to recognise that in order to make statements that purport to assess human actions, one must be engaged in some sort of moral endeavour. The positivist's activity is not 'value free! Quinney[26] has the following to say about the positivist approach;

> 'The intellectual failure of positivism is that of not being reflexive. It makes little or no attempt to examine or even question the metaphysics of inquiry. . . The positivist refuses to be introspective. His concern is to get on with the task of explaining without considering what he is doing.'27

Crime study and research has been dominated by this positivistic mode of thought. The legal order is taken for granted, and research is directed toward an understanding of how the system operates. Very little attention is

focussed on the question as to why law exists, whether law is necessary, or indeed what would constitute a just system. Suggestions are usually made for changing particular laws or for adding extra laws, thus in the field of criminology, attention is invariably focussed on the violator of the criminal law rather than on the legal system itself.[28] Solutions to the crime problem manifest themselves in forms of changing the law breaker rather than the law.

The legal order of any given society of which criminal law forms the background, is in essence a human activity. It is an order created for political purposes, to assure the hegemony of the ruling class.

We attempt in this study to offer a dialectic theory of crime based on the marxist perspective. To be sure, Karl Marx himself said little about crime and criminal law, but our task is to develop a critical marxian analysis of crime theory, and to this extent we are indebted to Karl Marx for providing the tools with which to undertake such an analysis. Marxism is the one philosophy of our time that takes as its focus the oppression produced by a capitalist society. It is one form of analysis that is historically specific and locates the problems of whatever epoch in the economic class relations. David Harowitz[29] writes in this regard:

> ".... The traditional marxist paradym is the only economic paradigm which is capable of analysing capitalism as an historical specific, class determined social formation. As such it provides an indispensable framework for understanding the development and crisis of the present social system 30

It is with this critical outlook that we proceed in the next chapter to analyse the Role of the State in criminal definitions and to expose the myth behind the criminalization of political acts or omissions. We also examine the place of property crimes in a capitalist society.

FOOTNOTES

CHAPTER TWO

1. Edwin Sutherland, Principles of Criminology (New York 1939).
2. Gabriel Tarde, La Criminalite Comparee (Paris 1886)
3. E.H. Sutherland Principles of Criminology 4th edition (New York 1947).
4. Nigel Walker Crime and Punishment in Britain (London 1965).
5. Ibid. p.g. 95.
6. Donald Taft and Ralph W. England, Jr. Criminology 4th edition (New York 1964).
7. Ibid. pg. 275-279.
8. Emile Durkheim, Rules of Sociological Method (Glencoe 1950).
9. Ibid. pg. 63.
10. Emile Durkheim The Normal and the Pathological Rules of Sociological Method. (Glenco 1950)
11. Robert Merton, Social Structures and Anomic American Sociological Review (1938).
12. Ibid. pg. 672 - 682.
13. Ibid. pg. 676.
14. See Chapter III hereof.
15. See M. Wolfgang Cesare Lombroso in Mannheimed. Pioneers, pp. 168-227.
16. The term 'born criminal' was coined by Enrico Ferri a student of Lombroso.
17. Cesare Lombroso ibid.
18. E. Hooton. The American Criminal Vol I pg. 309.
19. Ibid. pg. 307.

20. Ibid. pg. 309.

21. Jeremy Bentham 'Principles of Legislation' in the Theory of Legislation (Edited by Ogded) 1931.

22. John Austin 'Lectures on Jurisprudence' (John Murray London 1909)

23. Ibid. generally.

24. See chapter 2.1.2.

25. Ibid.

26. Richard Quinney Critique of Legal Order (little Brown & Co. Boston 1973).

27. Ibid. pg. 3.

28. See Ray Jeffrey 'The Structure of American Criminological Thinking' Journal of Criminal Law, 46 January 1956 pp. 658 - 672.

29. David Harowitz "Marxism and its place in Economic Science" Berkeley Journal of Sociology 16 (1971-72).

30. Ibid. pg. 72.

CHAPTER THREE

THE ROLE OF THE STATE IN CRIMINAL DEFINITIONS

3.0. PROLEGOMENON

Before we take the plunge into stating what we see as the role of the State in criminal definitions, logic propels us to make several preliminary observations. To begin with, we must inquire into the nature of the state. Second, we must determine how the economic class relates to the state and lastly we must examine how criminal law as part of the legal system is used by the state to further and to protect the interests of the dominant class. We are saying that the state is not just an impartial agency devoted to balancing and reconciling the diverse interests of competing groups,[1] it is also, and more poignantly so, a coercive intrument serving the dominant class.

3.1. THE STATE

No better elucidation of the origin of the state and on the role of the state has been proferred since Engels.[2] His is an explanation we accept and adopt in our present analysis. Engels observed that the state had not always existed in all societies, but that it came about as a result of a particular economic development and the division of society into economic classes. Engels further observes

that state power of necessity falls within the hands of the most dominant or powerful class, which class through the medium of the state becomes the politically dominant class.[3] More concretely however, (because the above introductory remarks on the state might appear to sound like well worn cliches in the Marxian tradition) we must examine what we really mean by the term 'state'.

Ralph Miliband[4] offers some guidance at the definition level. He observes that the state is not a thing that exists as such, rather, it stands for a number of particular institutions which together constitute its reality, and which institutions interact as parts of what may be called the "state system"[5]. The so called 'state system' is made up of various elements amongst them, the government, the administration, the military and police (coercive powers) and the judiciary. It is in these institutions that state power reposes, similarly it is in these institutions that power is wielded by the persons who occupy the leading positions.

The state is therefore the form in which the individuals of a ruling class assert their common interests. It follows that the state mediates in the creation of criminal laws which form part of the superstructural institution that is the legal system.

We draw the irresistable conclusion that the state is a device, properly so called, in the hands of the economically dominant class and that its affairs and energies are directed solely towards realising and enforcing the interests of that class. Pursuant to roles outlined above, it poses no inconsistency that the interests talked of are reflected in the criminal law. It should come as no rude shock to a keen observer with an open mind that in a capitalist oriented society, conduct that violates sanctity of private property (property crimes properly so called) is criminalized and draws very severe penal consequences. We shall look at this aspect in greater detail in 3:6. Conduct that does not conform to the political order or conduct that poses any threat to the ruling class is also criminalized. We examine the criminalization of politics in greater detail in 3.5. (infra.)

3.2. THE 'DOMINANT CLASS'

On our second preliminary observation, we state simply that in a capitalist society, the dominant class is that which is economically superior, that class which is in control of the means of production. This class' role viz the state is that it is the class in which state power reposes. It is the class which makes the laws.

3.3. THE LAW

On our third preliminary observation we examine the role of criminal law viz the state. Discussing law and state, Marx and Engels said that the state, law, political parties, religion and ideology are not mere abstractions but are conditioned and formed by the concrete socio-economic system. These phenomena and the institutions which arise to support them is what is refered to in Marxian tradition as the superstructural features. The legal system which encompasses criminal law is one such.

The state and law are twin institutions, historically determined social phenomena with no independent existence of their own. We have expounded on what the state is, and a brief exposition on what we understand by the term 'law' will suffice for now. We view law as the aggregate of rules of conduct expressing the will of the dominant class and the application and enforcement which is guaranteed by the coercive forces of the state. A clear function of the law is the safeguarding and perpetration of the interests of the dominant class. We shall see how this is done practically when we analyse the objectives of criminal law and specifically how these objectives manifest themselves in our statute books. We shall look at 'property crimes' and 'political crimes'. Our argument

in the main is that the legal system (of which criminal law is part) is the ultimate means by which the state secures the interests of the dominant class. Laws institutionalize and legitimate existing property relations. In other words, the ruling class through the use of the legal system is able to preserve an order (political and social) that allows the dominant economic interests to be maintained and reproduced.

3.4. THE OBJECTIVES OF CRIMINAL LAW

We stated in chapter one that criminal law is the channel through which the ruling class makes it known to those who are ruled how much freedom they can enjoy and what aspects of their behaviour will invite sanctions. In this study, criminal law is posited against a background that has the capitalist mode of production as its economic base. To discover the connection between criminal law and the mode of production which theme is recurrently harped on in this study, Marx observed that:

> "In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of

> material life conditions the social, political and intellectual life process in general6 (Emphasis added.)

The point we are making here is that the superstructure and the economic basis are in continual interaction, that is, they have a dialectical relationship that further condition the development of each in a given direction.

In our study, criminal law is seen as an instrument of formal social control whereby an organised effort is made to regulate certain areas of behaviour. Criminal law as a particular type of formal social control is characterized by (i) explicit rules of conduct created by political authority, (ii) provisions for punishment, (iii) designated officials to make, interpret and enforce the rules.

The content of the criminal law i.e. the kind of conduct that is proscribed and the nature of sanctions attached depends upon the norms of those groups in society which influence legislation, court decisions and decisions and administrative rulings. In addition we might add that in a capitalist society like the one we have in Kenya, the influencial groups are never in the majority of the population.

The ability of the dominant group to influence the formulation of criminal law is related to the power position of the particular dominant group. Put more tacitly,

a group that can get in a strategic power position can determine the content of criminal law. Further the criminal law changes as the values and interests and other norms of the dominant groups are modified and as the position of these groups is altered in the power structure itself.[7] Therefore what is defined as criminal behaviour in a society is related to the success of certain groups in influencing legislation. In addition the determination of what is criminal extends into the interpretation of the law. R. Quinney observes:

> "The values and norms of groups in positions of power can enter at any point in establishing the criminality of any behaviour.8

Having so tacitly stated the case for criminal law in a capitalist society we now proceed to examine exactly how the dominant class in Kenya has manipulated the criminal law to serve its own interests, in reproducing the system and also in giving it a longer lease of life politically in the face of mounting opposition. If we may resort to a well worn cliche' but one which is always relevant, criminal law as part of a broader entity 'law', does not exist in a vaccum. It has to be concretized, within a specific political setting. Its' functions and objectives are therefore political.

3.5. THE CRIMINALIZATION OF POLITICS

We have postulated that particular kinds of criminal laws are created to protect the political order of the state. These political criminal laws define as criminal those forms of behaviours that are regarded as dangers or threats to the existence of the political order. Otto Kirchheimer, the guru on political justice observed;

> "The political nature of the administration of criminal law is also affected by the government itself; In every society the wielders of government power use criminal law to legitimate their assertions, and the criminal courts to maintain their domination. Opposing political viewpoints and actions may be suppressed through the use of courts by the government10 (Emphasis added)"

The Kenyan ruling class effectuates a whole myriad of criminal laws to criminalize political behaviour that threatens its longevity. In the cases of R v. Waruru Kanja,[11] R v. Jonesmus Mwanzia Kikuyu[12] R v. Chelagat Mutai[13] the laws relating to contravention of foreign exchange regulations,[14] seditious,[15] and fraud[16] respectively were used to criminalize the political opposition expressed in the utterances and conduct of the respective defendants[17].

Political prosecutions are almost the trademark or talisman of Kenyan society. Witness the prosecution of sixty nine University of Nairobi students and several

of their lecturers and numerous other citizens between August 1982 and December 1983. The criminal laws that were apparently being contravened were those relating to sedition and treason. These laws were not clearly spelt out nor were their prescriptions adhered to strictu sensu.[18] The particular crimes of sedition and treason are specific examples of how the State utilizes criminal law to propagate itself and to give the dominant and ruling class a longer lease of life. It does this by stiffling opposition by the way of instituting criminal prosecutions that upon conviction draw maximum penal sanctions. For instance sedition draws upto a maximum of Ten years and the courts usually exercise their discretion in granting a sentence that is nearer the maximum than the minimum. The following cases are illustrative, R v. Tito Adungosi[19] (Ten years imprisonment.) R v. Nicholas Ogego[20] Ten Years.) R v. Maina wa Kinyatti[21] (Six years) R v. David Fredrick Oloo[22] (Five years) R v. Wangondu Kariuki[23] (Four years).

In R v. Oloo,[24] a twenty three year old student of political science at the University of Nairobi, was charged with and printing a seditious publication entited "A plea to Comrades" contrary to S.57 of the Penal Code.[25]

Oloo who had been abadoned by his two lawyers[26] conducted his own defence. He stated that "A plea to Comrades was not a seditious publication and that he had not had any seditious intention in writing it. He said:

> "My intention in drafting the unfinished article was that as a student of social science, I have the capacity, moral obligation and academic freedom to critically analyse issues . . . I fail to understand how I can be considered to be raising disaffection promoting feelings of ill will or trying to overthrow the government".27

Oloo further told the court that he believed that every individual was free to discuss or analyse any issue without being victimized. Theoretically of course Oloo's views are supposed to hold true in a 'democracy' but of course the reality is different. We see in these sedition cases how the state intervenes to criminalize free discussions, expression of opinion etc. The state resorts to vague generalizations when a particular conduct it wishes to proscribe and punish does not fall within given definitions. Oloo wondered what indeed was sedition, he said:

> ". . . It seems that all kinds of value judgment distorted by ulterior motives can be used by almost anybody to call anything whatsover sedition . . . where is the demarcation point where somebody says here is where constructive criticism stops and this is where sedition begins.28

Oloo was in essence questioning the criminalization process that the government as an arm of the state had so indiscriminately put into gear.

Criminal law is sometimes found wanting, thus the state often resorts to the draconian measure of detention without trial, the effect of which denies a person all his rights and liberties.[29] The very act of detention is supposed to put the fear of the Almighty in those citizens who do not tow the line. An exposition on Detention per se is beyond the scope of this study, but we mention it here because it helps to clarify our point. The Kenyan state often does, through its various agents e.g. The Secretary of state or minister of state, detain Kenyan citizens under any vague pretext[30] under the infamous Preservation of Public Security Act.[31] Detention is also provided for in the supreme law of the land - S. 83 of the Kenya Constitution. The resort to detention bill fills the gap when no other law can be as effectively actuated to visit the penal sanction required on the 'offender'. The so called preventive detention is so vague that the empowered government official can use it even in instances where there is no breach or apparent intention to breach existing laws.

The commonly utilized criminal laws actuated by the state to suppress opposition apart from treason and sedition, include, conspiracy, unlawful assembly, Riot, inciting dissaffection, promoting warlike activities, inciting mutiny, inducing dissertion, incitement to violence and economic sabotage.[32] All these laws are enacted and effected purely for political exigency.

3.6. DEMYSTIFYING PROPERTY CRIMES.

PROLEGOMENON

Viewed historically, the capitalist state is the Natural product of a society divided by economic classes. The ruling class is "that class which owns and controls the means of production and which is able by virtue of the economic power thus conferred upon it, to use the state as its instrument for the domination of society".[33] The theme that we have developed and continue to harp on is that criminal laws institutionalize and legitimate existing property relations. It is through the legal system that the state explicitly and forcefully protects and assures the continuation of the interests of the dominant class.

We turn now to consider offences against property. Suffice it to say that in capitalist society private property is diefied. The Kenya Constitution S.75 has a proviso affording protection from deprivation of private property. Offences against property draw heavy penal sanctions. We examine briefly some of the more common offences against property.

Theft: a person who fraudulently and without claim of right takes anything capable of being stolen, or special owner thereof, any property, is said to steal that thing or property.[34] The general penal sanction for odinary theft

is a maximum of three years imprisonment,[35] but there are exceptions. Stock theft draws a minimum of seven years imprisonment while theft of a testamentary will make the offender liable to ten years imprisonment. Handling stolen property draws a minimum of seven years.[36]

Burglary is an offence which is punishable by maximum of ten years imprisonment. Housebraking, a related offence, is punishable with a maximum of seven years imprisonment.[37]

Arson is another offence against property and it draws a maximum sentence of life imprisonment.[38] The most serious in as far as penal consequences are concerned is Armed Robbery, which if proved carries a mandatory death sentence.[39] Plain robbery draws fourteen years imprisonment.

A perfunctory comparison between crimes against property and crimes against the person e.g. Rape, or Assault, reveals a descrepancy in the penal consequences. This discrepancy leads us to draw the irresistable conclusion that the criminal law is a mere tool which assists in the reproduction of the capitalist society.

In capitalist society therefore, crime is in accordance with and the result of the exploitation of man by man and the modes of behaviour caused by such exploitation viz, "inequality, need, poverty, oppression, selfishness, the desire for enrichment and disdain for the true interest of mankind".[40] These are factors which determine what behaviour or conduct the state criminalizes.

FOOTNOTES

CHAPTER III

1. The state does indeed have this 'arbitor' function evidenced in its role in the prosecuting of offences such as murder, Rape, Assault See Engels on The Origin of the Family Private Property and The State.

2. ENGELS, The Origin of the family private property and the state in Karl marx and FREDRICK ENGELS; Selected Works (progress publishers Moscow) pg.576.

3. Ibid. p. 579-578.

4. Ralph milliband, The State in Capitalist Society (New York Basic Books (1969)

5. Ibid. p. 49.

6. K. Marx, 'Preface' A Contribution to the Critique of Political Economy. (1970 Progress publishers Moscow) p. 20-21.

7. See Chapter one of this dissertation. See generally Ooko O. Ombaka Political Justice in Kenya - 4 verfassung Und Recht in Uberseee (1982) pp. 10-21 on power struggles within the dominant class.

8. R. QUINNEY. "Is criminal behaviour deviant Behaviour? in DINITZ and RECKLESS Critical Issues in the Study of Crime (little Brown and Co. (1969) p. 59.

9. This phrase is not original. It has been used in similar interpretations by OHO Kirchheimer, Political Justice (Princeton University Press 1961) O.O. Ombaka 'Political Justice in Kenya' (supra) and Richard Quinney 'A Social Reality of Crime' (supra

10. ottoKirchheimer, Political Justice: The use of Legal procedure for political ends. (Princeton University Press) 1961 pg. 46.

11. Criminal Case No. 1433 of 1981

12. Criminal Case No. 861 of 1981

13. Criminal Case No. 2179 of 1981

14. Cap. 113 Laws of Kenya S.4(1); S.4(1)(3) part II

15. The Penal Code S.57(1) and S.56(1)(b), Cap. 63, Laws of Kenya.

16. Chelagat was charged with making false mileage claims from the Kenya National Assembly.

17. See generally Ombaka, Political Justice (supra) for a good account of the three cases quoted above.

18. See R v. Oloo (infra.)

19. Criminal Case No 2298/82

20. Criminal Case No (not available.)

21 Criminal Case No 1239/82

22. Criminal Case No (not available)

23. Criminal Case No 1096/82

24. R v. Oloo, Ibid.

25. Cap 63, Laws of Kenya.

26. Oloo was abandoned by his two lawyers after he rejected a plea Bargain by them and the prosection.

27. Daily Nation Nov. 5th 1982 pg 1.

28. Ibid.

29. George Anyona, Koigi wa Wamwere, Edward Oyugi, Kamoji Wachira, Stephen Mureithi, Raila Odinga are presently in detention.

30. The detention orders for all the detainees gives as reason for their detention; "utterances and activities" against the good government of Kenya.

31. Cap 57, Laws of Kenya

32. The Tanzanian and Mozambique governments have anti-Sabotage Acts in their statute Books.

33. See generally Ralph Miliband. The State in Capitalist Society (New York Basic Books 1969) pg. 16023.

34. Penal Code S. 268(1).

35. Ibid, S275

36. S 322(2) Cap 63

37. S. 304, Cap 63

38. S. 332, Cap 63

39. The Penal Code (amendment) Act (No. 1 of 1973) This amendment is often erroneously referred to as the "Hanging Act."

40. Beyer K.H. Outlines of Fundamental Questions of socialist Law. Quoted by L. Shaidi in Dar-es-Salaam University Law Journal (Vol. 6 April 1977) pg. 97.

CHAPTER FOUR

CONCLUSION

In the preceding chapters we have stated that the legal system serves in a crucial way to legitimate and to enforce a particular mode of production. This is done through the criminal law which is an instrument of formal social control which regulates and criminalizes certain areas of behaviour.

No lesser person than Karl Marx[1] observed that:

> "Society is not based on law, that is a legal fiction, rather law must be based on society; it must be the expression of the society's common interests...."[2]

In addition Marx viewed crime as contributing to political stability of a group by legitimizing the states' monopoly on violence and justifying political and legal control of the masses.[3] This observation by Marx is entirely crucial in the understanding of the role of the state viz. Crime and criminal difinitions.

We reduce our conclusions to the following; that Kenyan society is based on a capitalist economy at the monopoly capital stage. The Kenyan neo-colonial state is thus organised to serve the interests of the dominant economic class, that is, the imperialist capitalist class.

Criminal law is an instrument of the state and the ruling class to maintain and perpetuate the existing social and politico-economic order. An act is therefore criminal because it is in the interests of the ruling class to so define it. Persons are therefore labelled criminal because by so defining them, the law serves the interests of the dominant class.

The contradictions with capitalism requires that the lower classes remain oppressed by whatever means necessary especially through coercion and violence effectuated by the legal order. In chapter one we saw how this is done by politico-legal measures of compulsion. We analysed the serfs and the regulations relating to vagrancy.

Taylor and Walton[4] have observed that as capitalist societies industrialize further, the division between the social classes will grow and penal laws will increasingly have to be passed and enforced to maintain temporary stability by curtailing violent confrontations between social classes. They have further observed that crime directs the hostility of the oppressed away from the oppressors and towards their own class. This ofcourse ensures the longevity of existing power relations.

CHAPTER FOUR

FOOTNOTES

1. Marx,K. 'Preface' A Contribution to the Critique of Political Economy (Progress Publishers, Moscow, 1970)

2. Ibid.

3. Ibid.

4. Walton and Young ed. 1 Taylor Critical Criminology (London Routledge Kegan Paul 1975

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