LABOURING IN LEGAL MYSTIFICATION

D.W. Smith, Labour and the Law in Papua New Guinea. The Australian National University, Canberra, 1975.

This is the first monograph produced by the Development Studies Centre at the Australian National University. It does provide occasion, in reviewing it, to present an alternative argument about labour and the law in Papua New Guinea. The book itself cannot be described as 'alternative'. As a justification of colonialism in Papua New Guinea it is in the dominant Australian academic tradition of the sixties.

It claims to examine "the evolution of the framework... for the conduct of labour relations...from the beginning of European settlement to the present day." But it is very light on history and almost completely neglects the early days of colonisation when the enduring "framework" was set. The book is mostly an account of relatively recent and current "labour law" which goes ploddingly through the "native employment" and industrial relations legislation and relates the legislation occasionally and loosely to its social and policy context. For this context the author relies mainly on official sources - Annual Reports, departmental publications and reports of official enquiries. These sources are used unquestioningly and the vocabulary and rhetoric of the colonial administrations are made the author's own. I will firstly summarise the author's views on "labour and the law in Papua New Guinea", with a couple of bracketed additions, and then, by way of critique, I will present a contrary view.

The author's perspective can accurately be labelled 'the balance theory'. The law provided a balance by helping Europeans get and keep labour, yet, on the other hand, it protected the interests of the labourer and of the colonised people generally. The provision and retention of labour was served by the indenture system which used criminal penalties (imprisonment usually and, earlier in New Guinea, flogging as well) to ensure that the labourer worked well and did not "desert" before the end of the period of indenture (-"really rather like slavery", as Murray said[1]). This compulsion is needed because Papua New Guineans live in "primitive affluence"[2] and so they lack the "usual motivations" to labour and keep on labouring in plantations - there is "no pressing economic incentive". At the same time the law protected the labourer against "fraud and compulsion" and against the cruelty and injustice of employer and since, in

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1 H. Murray, *The Scientific Method as Applied to Native Labour Problems in Papua* (1931) 9.

2 On this Smith refers to E.K. Fisk, The Economic Structure, in E.K. Fisk (ed), *New Guinea on the Threshhold* (1966) 23.

the author's view, the law was mostly complied with, the system "on the human level... was neither brutal nor particularly oppressive." In terms of the interests of the people generally, the "enlightened" (Australian) administration aimed at, as the administration put it, "controlling the nature and rate of social change so as to preserve the people's social structure." To this end, the law required a labourer to be repatriated to his home area after his indenture expired and, very generally, the labourer could not be re-engaged for a specific period after that expiry. Also, restrictions were set on the number of people who could be recruited from particular areas. These measurers were meant "to minimise the effects of development on traditional native life" and "to avoid the creation of a landless proleteriat."

However, and by and by, a new breed of urban worker emerged for whom protective legislation was not seen as necessary and, as well, there was a "recognition that independence could not be long delayed [and] there was, therefore, a natural impulse to legislate quickly for a new institutional framework in the labour field" - hence, the legislation of 1962 providing numerous ways for the settlement of industrial disputes and for the registration and regulation of trade unions. This "major change" in Australian policy was "designed to serve an emerging urban wage labour force" and was aimed at the "encouragement" of trade unions. Without any objection or qualification, Smith quotes Hasluck's description in 1961 of the proposed legislation - Hasluck then being Minister for Territories:

> At this stage our purpose has been to provide the minimum necessary for the legal existence, recognition and proper functioning of industrial organizations and for the conduct of industrial relations, and to leave as much room as possible for development and adjustment so that the people of the Territory may work out for themselves the form of organization and the industrial system best suited to local needs and their own wishes. We have tried to refrain from imposing on the Territory too much of our own ideas or methods.[3]

Although Smith does not make the point, there is implicit in his account of the balance theory the idea of some conflict between promoting the interests of Europeans and protecting those of the colonised people. Particularly, the measures that aimed to preserve traditional life also had the effect of decressing the supply of labour: restrictions on the number that could be recruited obviously and directly decreased the supply; enforced repatriation more obliquely decreased the supply of labour in that people were often unwilling to sign

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3 Commonwealth Parliamentary Debates (House of Representatives) Vol. 32, 23rd Parliament, 3rd Session, 15th August 1961, 16.

on for a second period under indenture. The need to continually hire new recruits (and Smith does make this point) was bad for "productivity" because there was no accumulated work experience and skills and so, it could be the quality as well as the quantity of labour was affected.

The alternative argument I will offer could be called, somewhat grandly, "the control and disorganisation theory". The in colonial society (including labour law) serves to "hold down" colonised people, as Balandier has put it.[4] More specifically colonial law is used to effect control by the colonist and an aspect of this control is the use of law to counter any tendency of the colonised people to organise out of the traditional context and independently of the colonist and thence perhaps in opposition to him. Law and the use of force which it serves to "legitimate" are particularly important in a colonial society; such a society is, as between its disparate strata, markedly un-integrated and at this overall level most forms of social control subtler than law tend not to exist. As Black and Mileski put in the general theoretical context, "law seems to pour into gaps where social life offers no other form of control"[5] - although "no" other is putting it too strongly.

From the frequency of its mention in official reports and debates, "controlling the nature and rate of social change" was an obsession of the Australian administrations - or, as it was sometimes and perhaps more revealingly put, the creation of a "landless proleteriat" was to be avoided. Contrary to Smith's assumption, closer analysis suggests that this concern was not purely humanitarian or altruistic. Until recently, Papua New Guinea was a depressed backwater economically, quite incapable of absorbing (and thus, hopefully, politically neutralising) a "landless proleteriat" of any significant size. Quite apart from "labour law" narrowly conceived, the colonist had a plethora of laws dealing with curfews, residence location, "vagrancy" and recreation which aimed at keeping the towns white preserves

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4 G. Balandier, *The Sociology of Black Africa* (1970) 29.

5 D. Black and M. Mileski, "Introduction" in D. Black and M. Mileski (eds) *The Social Organisation of Law* (1973) 9. It may be objected to my argument that (some of) the colonists of various kinds did not see or mean it this way. As Smith says, it is "all too easy to be critical" with the advantage of hinds sight. But all I am saying is that my argument may help explain objectively - that is, quite apart from individual actors' intentions - the relation between "labour and the law in Papua New Guinea."

which the Papua New Guinean could only enter as an employee of a European and where (s)he was not allowed to associate with his/her fellows in any meaningful or enduring way.[6] More generally, Wolfers, in his recent book,[7] argues that colonial law in Papua New Guinea served basically to prevent the political development of the people - to stifle their initiative and to prevent their associating in ways that would threaten the colonists' control. Also it can hardly be denied, even though it can be ignored, that traditional life has to be preserved as it heavily subsidises the plantations and mines. Colonial labour is cheap because much of the cost of its maintenance and reproduction is borne by the village. The village supports the workers' family, it supports him during periods of unemployment and sickness and during his old age.

If the labour laws aimed at "controlling the nature and rate of social change" were purely or basically humanitarian, we could expect that (absent other motivations for enforcement) their neighbouring laws relating to conditions of work would be seriously regarded and conscientiously complied with or enforced.[8] If this is a valid approach, then Smith's view about compliance assumes added importance - his view that these neighbouring laws were mostly complied with and so the system "on the human level...was neither brutal nor particularly oppressive."

I will argue the contrary on two related fronts: first, the economic and administrative environment encouraged non-compliance and, second, the evidence indicates that the law law was not complied with. The environment in which plantations operated hardly encouraged spontaneous compliance with the law by employers. The Department of Labour has, in suitably antiseptic terms, recently but it this way:

> The very ease with which labour has been supplied to employers over the years has not been conductive to making the system attractive. This ease has fostered a general adherence by management to the bare minimum conditions prescribed by the Native

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6 R. Jackson, L. Blaxter and P. Fitzpatrick, "Laws Shaping Towns" in R. Jackson (ed) *Towns of Papua New Guinea* (fourthcoming).

7 E.P. Wolfers, *Race Relations and Colonial Rule in Papua New Guinea* (1975).

8 The repatriation laws aimed at preserving traditional society were closely and carefully administered and, presumably, in this way effectively enforced.

> Employment Ordinance, and insufficient attention to labour relations, the human element and needs; it has not been conducive to the development of a high standard in rural management (with noted individual exceptions).[9]

The ethos implicit in this account would suggest not adherence "to bare minimum conditions prescribed" but to the minimum that "management" could get away with. Also it could be added that, quite apart from the "ease of the labour supply" (a very debatable point in any case), people who had laboured on plantations or mines did not, in the main, re-engage, so there was no need to make conditions "attractive" from this perspective either. More generally, Mair has said of "conditions in practice" in New Guinea:

> Where conditions of work were concerned the pressure of economic demand was stronger than humanitarian considerations. Rapid development, it was argued, was in the interests of the whole country, and therefore of course in those of the native population; it must not be hampered by pedantic insistence on the letter of the law. The plantations had had to encounter every kind of difficulty, and should not have their burdens increased beyond what they could bear. Inspection was in any case inadequate, and officers who were anxious to enforce the prescribed conditions felt that they could not count on support from headquarters.[10]

The administrative environment should be more closely considered. One reason for the complex of detailed regulation in "native labour" codea is because the labourer and the employer are in a low-trust relation where neither is going to do much or anything for the other unless forced to.[11] The employer had already access to a white man's court to enforce his side of the labour laws but the Papua New Guinea had, in practical terms, absolutely no access to courts to enforce his side. Enforcement of his side depended on a system of official inspection which, as Smith recognizes, was grossly inadequate. Thus one finds, especially in New Guinea, breaches by "natives" of labour laws taking up a major part of courts' work whereas employers were prosecuted about one tenth as much as workers were and for approximately the last twenty years employers have been prosecuted hardly at all. Of course, this could be because employers basic-

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9 As quoted in: Territory of Papua New Guinea, *Report of Board of Inquiry...Investigating Rural Minimum Wages... Minimum Wage Fixing Machinery and Related Matters* (1970) 121-2 (the "Cochrane Report").

10 L.P. Mair, *Australia in New Guinea* (1970) 184.

11 For the idea of 'low-trust' relations see A. Fox, *Beyond Contract: Work, Power and Trust Relations* (1974).

ally complied with the law as Smith claims but, as the environment in which the law operated strongly suggests, this was probably most unlikely.

Nor does the actual evidence support Smith's view - especially his seeing the system as "neither brutal nor particularly oppressive". Evidence of particular brutality and atrocity abounds (and Smith ignores it) but there is always the problem of just how many swallows do make a summer. More generally, however, it is surely significant that an observer as knowledgable and sensitive (and moderate) as Rowley should see "the (long illegal) use or threat of violence as the basic labour incentive."[12] Perhaps this and the dreary living conditions could explain people's reluctance to work on plantations (and Smith's reliance on the simplistic notion of "primitive affluence" may well not be adquate). Also it must be indicative that "desertion" was such a major problem when there were so many pressures on the labourer to stay: as well as the standard criminal sanctions against "desertion"., the "deserter" stood to lose his deferred pay (the great bulk of his wages were, by law, accumulated for payment on expiry of the indenture); he would usually find himself in a strange and hostile area and even if he got home there would still be the economic pressure of the "native tax" forcing him to return or to find plantation work elsewhere. On another important aspect a general indication has been provided by the Public Service Association which has argued that, as of June 1972, payment of rural wages below what it called "the miserably low minimum required by law" appears almost certainly to have been the rule.[13] Also each year the official reports that Smith relies on, disclose hundreds and sometimes thousands of complaints by agreement workers that would, if proved in court, constitute offences by employers - yet such court action by officials is almost non-existent.

The introduction of trade union and "industrial relations" legislation also serves to support the thesis of control and disorganisation although the picture here is probably more complicated and nothing more is presented than an incomplete and suggestive account. It will be recalled that Smith saw this legislation as a response to the emergence of the urban worker who did not need protective regulation, saw it as "a recognition that independence could not be long delayed" and as an "encouragement" of trade unions. As for the last reason,

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12 C.D. Rowley, *The New Guinea Villager* (1972) 115.

13 Public Service Association of Papua New Guinea, *Submission to National Minimum Wage Enquiry* (n.d.) 5. The categories under which this information is officially collected are, however, too crude to be more certain than I have put the position here.

I will argue later that the legislation serves to discourage trade unions. As for the second point about independence, it is not one of great explanatory power. The first point about the emerging urban worker does seem significant. However, in the, say, ten years before Hasluck's announcement in 1961 of the proposed legislation, the workforce, especially the non-indentured or uncontrolled workforce, did not increase to an extent that could conceivably be considered threatening or, it would seem otherwise very significant. Perhaps of more immediate relevance was the emergence in the late 1950s of Papua New Guinean trade unions in Port Moresby and Madang. Besides conventional "industrial" aims, the Port Moresby union advocated and pressed for wide-ranging social and political changes.[14]

From the perspective of hindsight however the emergence of the urban worker also appears significant. During the sixties and early seventies there was a rapid increase in economic "development" which absorbed a great increase in the number of non-identured workers - the number of indentured workers having peaked in the early sixties.[15] Perhaps it is also significant that the legislation lifting legal restrictions on the growth of "free" or non-indentured labour, the *Native Employment Act* 1962, came into force on 28 March 1963 (not in 1962 as Smith says) and this was the same day on which the trade unions and industrial relations legislation came into force.

As for the legislation, it will be recalled that Hasluck said that it was the "minimum necessary for the legal existence, recognition and proper functioning of industrial organisations and for the conduct of industrial relations" and that it left things to "the people of the Territory" to work out for themselves. Smith describes certain repressive aspects of the law as "the accepted pattern of this kind of legislation." The "accepted pattern" however is distinctly Australian and Australia must be close to unique in the western world in the high degree of its regulation and control of trade unions and industrial action. Not only this, but the Papua New Guinean legislation goes considerably further than the Australian in its repressive or control aspects some of which are clearly borrowed from British trade union legislation in Africa.

Generally, under the Papua New Guinean legislation, unregistered "industrial organisations" are unlawful and the Registrar of Industrial Organisations has wide powers of supervision and control over registered industrial

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14 A.M. Kiki, *Kiki: Ten Thousand Years in a Lifetime* (1968) 97-99.

15 Territory of Papua and New Guinea, *op. cit.*, 33.

organisations. In their internal ordering, industrial organisations are subjected to a system of complex and detailed legal rules. For various and numerous infractions, individual organisations can be deregistered by the Registrar and thus made unlawful and, as Smith says, "strict enforcement of the provisions of the *Industrial Organisations Ordinance* by the Registrar would result in the registration of many of these 'unions' being cancelled." Strike action is tightly curtailed and, where awards are applicable (and most urban workers are covered by awards), strikes are, in an oblique but adequate way, prescribed as illegal. Also obliquely but adequately, affiliation with political bodies is prohibited. Thus it would seem, and in some official quarters as much is granted,[16] that the purpose of this legislation is to control and channel "industrial" organisation and action of workers.

It may not be surprising then that (again) moderate observers find the system under the new legislation repressive and restrictive. Martin sees the legislation and its enforcement as smothering andhindering union activity and he suggests that official insistence on matters of comparative inconsequence has served to distract union leaders' attention from significant matters.[17] And it is Seddon's opinion "that the benign over-regulation of unions and their affiars acts as...[an] inhibitor on what should be a burgeoning trade-union movement."[18] But on this it may be doubted whether trade-unions would in any probable case be burgeoning. Australia was an inexperienced, small and nervous imperialist and both here and in the laws on indentured labour there was probably an element of "overkill".

- Peter Fitzpatrick.

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16 J. Paterson, "New Guinea's Trade Unions" (1969) 4 *New Guinea* 26, 28. A labour officer who prefers not to have the point attributed explicitly to him has said that the aim in the early days was to produce "tame-cat" unions.

17 R.M. Martin, "Tribesmen into Trade Unionsts: the African Experience and the Papua New Guinea Prospect" (1969) 11 *Journal of Industrial Relations* 125, 160.

18 N. Seddon, "Legal Problems Facing Trade Unions in Papua New Guinea" (1975) III *Melanesian Law Journal* 103, 103.