

BOOK REVIEW: FITZPATRICK'S LAW AND STATE
IN PAPUA NEW GUINEA

BY

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The state of 'Law and State' theory in Papua New Guinea:
being a review of Peter Fitzpatrick, LAW AND STATE IN
PAPUA NEW GUINEA. Academic Press: London,
New York, Toronto, Sydney and San
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PART I: INTRODUCTION

The appearance of a new book on law in Papua New Guinea is such a rare event that one should guard against a tendency to welcome it with too much enthusiasm and not enough criticism. Even so, I make no apology for my enthusiastic welcome of Peter Fitzpatrick's LAW AND STATE IN PAPUA NEW GUINEA. This is because it does more than add to the legal literature. It breaks new ground, compelling all who read it to look at law and society in PNG, and indeed in other underdeveloped countries, in new ways.

The book sets out to examine the place of law in the shaping and development of those societies colonised in what the author calls "the 'second imperialism' of the later nineteenth century". /2/ * This examination proceeds within a theoretical framework derived from neo-Marxist underdevelopment theories, giving primary, but not exclusive, importance to the determining effect of the economic element in society. /ix/ It rejects, explicitly, not only the "law and development" school prevalent in the 1960s and early 1970s, but also the then conventional theories of social and economic development on which they were based.

This treatment of the process of underdevelopment and the role of law and state therein differs somewhat from that of most neo-Marxist

* // Numbers in brackets indicate page numbers in the book.

writers in the greater attention paid to the place and dynamism of the pre-capitalist mode. It remains Marxist, however, in that it remains steadfastly historical and materialist.

From this perspective, this book has very much in common with DEVELOPMENT AND DEPENDENCY: THE POLITICAL ECONOMY OF PAPUA NEW GUINEA by Amarshi, Good and Mortimer, which came out at about the same time and from the same setting of the University of Papua New Guinea in the mid-1970s. Indeed Fitzpatrick part-contributed a chapter to that other book. The primary difference is the tighter theoretical coherence of Fitzpatrick's treatment, due in large part to his concentration on the particular role of the law and legal institutions in the development of the PNG social formation.

Fitzpatrick's presentation falls into two main parts: a theoretical and an "applied" part. In the theoretical part (chapters 1 and 2), the author examines underdevelopment theory, the concepts of class and of law and state, and their role in third world social formations. The rest of the book is devoted to a detailed analysis of material on PNG. This analysis at once forms the basis of the theory elaborated in the first part, and at the same time, demonstrates its application to a specific social formation.

It should be noted at the outset that especially the theory chapters (1 and 2) are very hard going indeed. The reader will need to attend very closely to the argumentation and, unless he is intimately acquainted with the material and expert at deciphering the kind of language used, will also have to read over those two chapters at least once to get at the interesting notions there developed. This poses something of a dilemma for this reviewer. I could take the book as read and simply comment on it, as is the usual practice. This would enable me to concentrate on drawing on other writings and extending Fitzpatrick's analysis where necessary. On the other hand, I could set out as comprehensively, simply yet as briefly as possible the main argument and features of the book, in the expectation that my review will make it easier for other readers to comprehend Fitzpatrick's work better. I opted for the latter course and would ask the reader to forgive what in consequence has turned out to be an unusually extended and largely descriptive review.

PART II: THE CONCERNS OF THE BOOK

A central concern of the book is with the interaction between the capitalist mode of production and what are described as the

traditional modes. The conclusion and organising theme, based on an analysis of the historical experience of third world social formations, is that whilst traditional modes were subjected to considerable disruption and change, and whilst they were integrated into the world market by the penetration of capitalist relations, they were nevertheless systematically preserved from total disintegration, because they better served the interests of metropolitan capital that way. This they did in two main ways. First, they subsidised production in the capitalist sector, since, by providing a home for the wife and family of a worker, they enabled the employers of labour to get away with paying the worker only enough to cover his own personal needs. Again, they provided a "free" social security system to displaced or aged workers. This helped lower the cost of production in the capitalist sector, thereby enhancing profitability.

A further function of the conservation of the traditional mode of production is that it helped prevent the development or consolidation of classes and class organisations likely to threaten the colonial enterprise. Thus by preserving ethnic divisions conservation tended to inhibit trans-ethnic class organisation; by preserving the viability of traditional society it prevented the rise of landlessness in the countryside; by ensuring the possibility of circular migration of labour it made it difficult to consolidate urban class relations; and by preserving the social pressures towards egalitarianism it blunted indigenous entrepreneurship such as could provide real competition to metropolitan capital.

The role of law and state in this process, according to the theory, was, and still is, to integrate the traditional mode of production into the operations of metropolitan capital, but to do so in such a way that the traditional mode is not totally dissolved by the unimpeded spread of capitalist production relations. Thus state action and specific laws were and are directed towards the insulation of key sectors of the traditional economy from exploitation by capital.

A Theory of Law and State

A rather striking feature of the book is the fact that the concept of "law and state", so prominent both in the title and in the body of the book, receives hardly any theoretical treatment at all. In a 21-page chapter, which sets out, in part, "to provide a theory of law and state" /28/ less than one page is devoted to a definition of the concept. The nearest we get to a coherent description of the central

concept in the book is the following:

"Law is seen as a type of state action, distinctive in certain operational ways, but sharing its functions with other types of state action. This sharing of functions is signified here in the term 'law and state'. In the following chapters dealing with the Papua New Guinea case, the term 'law and state' signifies, as well, a more central part of state action generally. In dealing with this concrete context, I found it usually impossible to give even the most superficial descriptive content to laws without seeing them as integral parts of various sets of state action. So, the applied chapters, while giving most space to law, approach it through a consideration of wider state action". /28/

So, without definition of "law", or "state", or "law and state", we are launched into an extensive discussion of the role of "law and state" in the third world. Though this role is adequately theorised and abundantly illustrated, especially in the applied chapters, the defective conceptualisation of the term "law and state" and the interchangeable use of "law" and "law and state" in contexts which seem indistinguishable, leave the serious reader with a feeling of incompleteness and frustration.

Briefly and broadly put, the role of law and state in the third world is said to be

- (a) to facilitate the penetration of traditional (pre-capitalist) modes of production by capitalist production relations;
- (b) but to do so in such a way that the pre-capitalist modes are "conserved" (to service the needs of capitalist accumulation), and the two are held together as an "operative combination"; and
- (c) by these means, among others, to
 - (i) integrate the resulting social formation into the world capitalist system, and
 - (ii) consolidate the position of the dominant metropolitan

bourgeoisie, encourage the development of compliant native classes and discourage the rise, or contain the operation, of those social classes liable to threaten the hold of metropolitan capital on the dominated economy.

This role of law and state is amply illustrated and documented in the applied chapters. To create the conditions for the development of capitalist relations law and state operated to extract land and labour out of the traditional setting. Thus the practice was to uphold and provide legitimation for settlers' occupation of land, no matter how such land was acquired. /63/ Again, the indenture system for recruiting labour for the plantations and mines, and providing criminal sanctions for breach of the employment contract /57/, and the imposition of a "native tax" payable in cash /61/, served to provide cheap labour for the new capitalist sector.

The conservation of the traditional mode of production was promoted by a whole range of laws too. The indenture system, for instance, sought to reduce the impact of labour recruitment on traditional societies by setting a limit to the number of workers that could be recruited from one place, requiring the periodic repatriation of those workers back to their home areas, and insisting that repatriated workers remain at home for a period before being signed on again. /77/ As to land, a set of laws were passed to subject dealings in land outside the traditional context to the control of the colonial administration. By these means it was sought to ensure that traditional subsistence agriculture retained sufficient land to remain viable, and the problem of rural landlessness avoided. Again, a set of tough vagrancy laws sought to prevent the draft of displaced rural folk into the towns. It was thus declared illegal for a Papua New Guinean to remain in town for more than four days, unless he could show that he had a job or had obtained official permission to stay. /82/

The consolidation of the dominant position of the metropolitan bourgeoisie was effected in various ways. Among these were those laws whose effect was to reduce native competition with the colonists. For instance, a law requiring a trading licence for the buying of copra, and providing that no licence was available for such buying within two miles of a plantation or buying facility, gave the plantation or other facility (invariably owned by Australian and German planters) a monopoly within that area, and enabled them to buy copra at exploitatively low prices. /83/ In the later colonial period, other licensing laws were used to discriminate against the

national urban bourgeoisie and in favour of metropolitan capital. Examples are liquor licensing laws /190/, and laws licensing buyers. /189/

Most interesting among the categories of laws used to advance the interest of metropolitan capital, are those which, while seemingly universal and non-discriminatory, by favouring those with greater access to capital or technology, favoured metropolitan capital. One illustration should do. Under the Pure Foods Regulations, a seller of meals was required to have a dishwashing machine or double-bowl sink and hot running water. This beneficent and seemingly universal health requirement, by positing "a certain type and a certain minimum scale of operation", had the effect of excluding the small-scale seller in favour of large-scale operators. /192/

Another category of laws, passed ostensibly for the protection of the "native", were used to contain challenges to metropolitan capital. Such was the requirement that any contract made by a "native" had to be approved by colonial officials if the price or value of the subject-matter exceeded a stated level. It is said that official consent was often refused to such a contract if it provided a Papua New Guinean with loan capital for an enterprise that would compete with the colonists. /84/

As to the encouragement of compliant classes and the inhibition of troublesome ones, a host of examples are provided. The use of such laws as the business licensing and passenger motor transport licensing laws to create artificial monopolies for select members of the emerging national bourgeoisie illustrates the "compliant class" laws. /89/ Among the "troublesome class" laws, we have already mentioned the vagrancy laws. Of greater interest, because more subtle, are those laws which direct potentially disruptive class organisation and action into safe, officially-controlled, channels. Such, it is argued, were the laws setting up co-operative societies /127/, local government councils /131/, and village courts /143/, and 'recognising' labour unions (chap. 6).

An analysis of this host of laws shows that in pursuing their role of shaping a colonial and neo-colonial society and economy, law and state operate in two main ways — through coercion and as an ideology. In the coercive form, they operate mainly through public order and emergency laws, and the granting of wide discretionary powers to state officials. Their primary function in this form is to contain disruptive class action by the disadvantaged — the working classes, the underemployed and the unemployed.

In their ideological form, the primary function of law and state is to "/secure/ consensus through popular involvement in, or identification with, the processes of domination". /31/ In its extreme form this function manifests itself as the concept of "the rule of law" or "bourgeois legality", with its concern for minimal legality and a necessary universalism. In a situation of marked inequality between the metropolitan and native bourgeoisies, and between the bourgeoisie generally and the dominated resident classes, this appeal to universalism and equality serves ultimately to reproduce and consolidate the existing structure of domination and exploitation. Illustrations of this proposition, mentioned above, are the various licensing laws and the pure food regulations.

An important point is made about the mix of the coercive and ideological aspects of law and state in the transition from the colonial to the post-colonial periods in PNG. In the colonial period, when capitalist relations were being introduced, the balance was in favour of more direct intervention by law and state in the structuring of the economy and the containment of class organisation and action. Thus the law was distinctly discriminatory against natives and gave colonial officials wide discretionary powers over them. /38-39/ The resulting structure of the colonial economy and society — workers and their families more reliant on wages, peasants more tied to production for the market, production in the modern sector more dependent on metropolitan capital, and the greater presence of the bourgeoisie, national as well as foreign — meant that economic determinants were more effective than before, and "there /was/ less need for direct legal controls to force production and maintain the economy". /41/ Thus bourgeois legality comes more and more into its own.

Social Classes in PNG

Another important theoretical concern of the book is with the question of the formation and operation of social classes within the colonised society. As observed, one of the functions of the policy of conserving the traditional mode is the slowing down of class formation and the containment of troublesome classes. It is the case, nevertheless, that classes did develop. The author observes, in our view quite correctly, that the problem with class analysis of underdeveloped societies is not so much the relevance of the concept of class, as many have claimed, as with the complexity of the context. For here, in addition to the classes characteristic of the developed capitalist mode of production, account needs to be taken of those that characterise the pre-capitalist mode as well as those that inhabit the twilight zone between the two.

The correctness of this observation is fully borne out by the author's own attempt at class analysis of Papua New Guinea society. He puts it beyond doubt that various social classes have existed or developed and acted as classes both during the colonial period and after. When he comes to a categorisation of the various social groups into classes, however, his touch is much less sure, largely because the complexity of the social context defies ready categorisation. Before considering this point further, we present a brief sketch of the classes identified in the account.

- (a) The metropolitan bourgeoisie. The class, "the great absent member", who while not necessarily present physically in PNG is fully represented here through the presence and influence of foreign capital. The interests of this class were promoted by law and state directly during the colonial period and more indirectly thereafter.
- (b) The national bourgeoisie. This group is made up of
 - (i) the urban (or commercial or economic) bourgeoisie;
 - (ii) the big peasantry (or rural bourgeoisie or kulak); and
 - (iii) the bureaucratic (or petty or organisational) bourgeoisie (restricted in the book to "senior state operatives").

This class is, in general, created and specifically sustained by state action, especially through the creation of various artificial monopolies and special subsidies in its favour, in the form of discriminatory licensing laws, extension services, subsidies, soft loans, etc. At the same time law and state ensure that it develops in subordination to, not competition with, metropolitan capital. This is done mainly by the enactment of universalist "international" standards which, as we have seen, tend to favour the stronger, and by the conservation of the traditional mode of production which by preserving customary social calls on the wealth of the emerging national bourgeoisie acts as a brake on their entrepreneurial drive.

- (c) The proletariat (wage workers). This class was created during the colonial period, forcibly at first, but

increasingly through the "natural" operation of economic forces then set in train. The role of law and state was both to create and contain this class. Thus the imposition of a tax payable in cash, combined in some areas with prohibition of cash cropping, pressured peasants into wage work. At the same time, the particular form of indentured labour contracts and the conservation of the traditional mode of production ensured a migratory labour system which initially inhibited working class development. This was supplemented by draconian vagrancy and other laws, and later special industrial relations laws, which tended to block effective class organisation.

- (d) The peasantry. This class is said to straddle the capitalist and pre-capitalist divide in that having a significant independent control of its means of production, it engages in both subsistence production and production for the market. This class, more than any other, is sustained by the conservation of the traditional mode of production in such things as, for instance, the restriction on the alienation of rural land.

- (e) The urban-based petty commodity producers (variously called petty bourgeoisie, lumpen proletariat or urban peasantry). This category is a residual one, lumping together urban groups such as self-employed artisans, small-scale traders, etc., /25/ who are by-products of the development of commodity production, but do not fit any of the major class categories.

The author, conceding that this categorisation is less than perfect, calls in aid the interesting concept of "contradictory class location" to explain the many instances of social groups that did not fit comfortably into any one of the categories. For instance, members of the bureaucratic bourgeoisie are seen as occupying a contradictory position between the bourgeois and proletarian classes, in that whilst their special relationship to the state and metropolitan capital, and their access to, and control over, a considerable portion of the surplus generated within the economy stamp them as bourgeois, their lack of roots in production, their non-ownership of any substantial means of production and their salaried position incline them towards the proletarian. Another type of example is provided by the "big peasant", who is said to occupy a contradictory position not only between the bourgeois and the peasant classes, but also between the traditional and the non-traditional modes. Again, the ordinary peasant is sometimes described as a "disguised proletarian" in his relations

with the capitalist mode.

This concept of contradictory class location eases somewhat the difficulty of categorising social groups in the complex context of third world social formations. But, in this case, it does not remove altogether the element of uncertainty that clouds the categorisation and application of the class concept throughout the book. This feeling of uncertainty is not helped by the use of the expression "class elements", with or without such epithets as "national", "resident", "dominant" or "dominated", especially in the concluding chapter. In some cases, the expression appears to refer to members or elements or a section of the designated class. But consider such statements as:

"The peasantry and the class element of urban-based petty commodity producers typify ...". /249/.

"Indeed, law and state here serve to legitimate the continuing presence of the metropolitan bourgeoisie: if this class element is ...". /250/.

In these statements, the urban-based petty commodity producers and the metropolitan bourgeoisie, as elsewhere the proletariat and the national bourgeoisie, /184, 249/, earlier considered as distinct classes, are described as "class elements". This interchangeable use of the expressions "class" and "class elements" may be seen as an unfortunate stylistic confusion. I suspect that it is more than that; that it is a symptom of the author's unsure grasp of the concept of class and its application in the complex and fluid circumstances of colonial and post-colonial third world social formations. It reflects his equivocation as to whether the elements he describes constitute fully-formed classes.

Fortunately, the discussion of the Papua New Guinea material in the book does not seem to require a particularly sophisticated analysis of social classes. The main burden of the account is to detail how law and state were used to shape colonial society and, in particular, to manipulate and contain resident social classes in the interest of metropolitan capital. Thus the critical distinction is that between the metropolitan bourgeoisie on the one hand and the various resident classes on the other; the critical issue is how the latter classes, separately and together, directly and indirectly, related to the former. In those circumstances, conflicts between the resident classes occupying a secondary position in the account, rigorous definition of resident classes was perhaps less than crucial.

The "applied" chapters, which cover "The Colonists" (chap. 3), "The Colonized" (chap. 4), "The Peasantry" (chap. 5), "The Working Class" (chap. 6), "The Bourgeoisie" (chap. 7) and "Contemporary Law and State" (chap. 8) are quickly dealt with, because, though they contain a wealth of information, they consist in the application of the theoretical model set up in chapters 1 and 2 to the Papua New Guinea material. Chapter 3 looks at the metropolitan bourgeoisie and their predecessors -- the plantation owners and miners -- and the use of law and state to secure and advance their interests. Chapter 4 examines the operation of law and state in the creation of the conditions for capitalist production, as well as the control and containment of the colonised people. This takes the account essentially up to the end of the Second World War.

The remainder of the book is devoted to a detailed examination of the continuing and changing functions of law and state in the post-war period and the run-up to political independence. It ends with an analysis of the contemporary situation, concluding, in effect, that though much has changed in the form of operation of law and state in the post-colonial situation, much more of the substance persists.

PART III: EVALUATION

A critical reading, and re-reading, of the book left this reviewer in a state of combined excitement and frustration. To take the latter first, we have already expressed some reservations about the conceptualisation of the central notion of "law and state", and the rigour of the class analysis. Another worry relates to the sheer difficulty of grasping the meaning of the first two chapters. It is difficult to see how any ordinary reader, and even the not-so-ordinary reader, can make much of those chapters on a first, or even a second, reading. There is no reason why the same material and the same concepts could not have been presented in a more readable form. It is quite clear that the effort to get at the material and the ideas is well worth the making. The only question is whether it is more than the non-specialist reader is prepared to make. It is always a great pity when the circulation of a book like this is artificially restricted by avoidable difficulties of comprehension.

Finally, some worry needs to be expressed about what would appear to be an overstatement of the role and effectiveness of "law and state", particularly as they relate to relations between the classes and the conservation-dissolution of the traditional mode of production. For instance, how far can it be said that the subordination of the

national to the metropolitan bourgeoisie in the post-colonial period is attributable to the specific operation of law and state? Is it not as much the case that the very form and operation of contemporary law and state are determined in each case by the relative strengths and particular relationships between metropolitan and national capitals and their representative classes? Obviously, the answer of a dialectician cannot be other than "more of one and less of the other", and the author is no doubt aware of this. But, perhaps in his concern to emphasise the role of law and state, he overemphasises their effect.

A similar point can be made in relation to the conservation of the traditional mode of production. The detailed account in the book establishes beyond any doubt that law and state have operated, often explicitly, with a view to preventing the precipitate disintegration of the traditional mode of production. But, in our view, not enough is made of the determining effect of force other than law and state, though these are adverted to. For example, in theorising about the conservation of the traditional mode not enough weight is *consistently* given to the effect of the limited amounts of capital injected into the PNG economy till after the Second World War, if not indeed the period of accelerated development in the 1960s, and the nature of that capital. Only a hint of this appears from the concession that the apparent solidity of the traditional mode could be put to severe test by the intervention of "large-scale capitalist 'agribusiness'". /14/.

Again, not enough time is allowed for the assessment of the transforming effect of the penetration of capitalist relations. For instance, an exception is made of "countries of longer /colonisation/ industrialisation/, such as Brazil, Mexico and India ... /where/ the more intense penetration of capitalism tends to undermine and marginalize the traditional mode". /14/ Yet the author dismisses rather lightly such signs of the undermining of the traditional mode in PNG, barely 20-30 years after the intrusion of capital on a serious scale, as the increasing dependence of rural families on remitted wages; the privatisation and commoditisation of some rural land /100/; the increasing proletarianisation of rural labour /136/; the weakening of group controls, and 'the emergence of new dominant class elements having an economic and political basis for their power which is to a degree independent of the traditional social formation". /139/ Similarly, on the basis of developments within one generation, the author inclines to the view that such measures as the Land (Tenure Conversion) Act, 1963 in favour of limited individualisation of land tenure) and the new inheritance laws (favouring individual determination of inheritance) would have but a minimal impact on the conservation of the traditional mode. /124-27/

It may be argued that this failure to give due weight to these economic/ social factors and allow time for the operation of their corrosive effect on the traditional modes of production, has created a tendency to overstate the effectiveness of the conservation policy and the continuing viability of those modes. This, though, is not a matter on which one could be too dogmatic.

In any event, the author's "tendency to overstatement" is not without its positive side. It helps drive home some very significant new perspectives on the study of the PNG and other third world social formations. First is the concern to examine important aspects of PNG society within a consistently Marxian framework, thereby carrying on and extending the work done for PNG studies by Amarshi, Good and Mortimer in *Development and Dependency*. What is new is the extended discussion of developments within the indigenous systems in their interaction with the introduced capitalist mode of production.

A second consequence is that familiar material is effectively presented in a new light. Thus a coherent explanation is offered for the continued existence and viability of the subsistence sector in the face of pressure from the developing capitalist sector. Again, laws and institutions purportedly enacted or set up for the "native" or his interests are exposed as objectively calculated to "conserve" the traditional mode of production and thereby serve the interests, ultimately, of metropolitan capitalist accumulation, or to inhibit or control the development or organisation of social classes liable to threaten those interests. We have already mentioned such laws as the indentured labour laws, the land laws, the requirement for official approval of native contracts, and the industrial relations legislation; such institutions as the co-operative movement and the local district councils. The applied chapters abound with other instances.

Thirdly, the material, by so thoroughly documenting the use of law in the structuring of the colonial economy and society, and their maintenance in the neo-colonial society, brings home very clearly what every Marxist knows, and what every competent social scientist ought to know, namely, that the law, far from being a value-neutral means for modernising a backward society, was freely used in the colonial period, and less obviously so since, on behalf of definite classes to promote and defend definite class interests. This puts paid to the liberal "law and development" theorists of the late 1960s and early 1970s and their claims to scientificity.

It follows from all this that, inspite of anything said above in criticism of aspects of this book, Peter Fitzpatrick has more than achieved his objective -- to put forward and support a theory of law

and state in third world social formations, such as poses and attempts answers to questions not even contemplated by the prevalent law and development theories -- questions about the historical roots and role of law and legal institutions in the colonial and post-colonial situation, the relation of these laws and institutions to other social and economic developments, and, on the basis of answers to such questions, the contemporary role of law and state in the third world.