MAGNIFIED FEATURES: THE UNDERDEVELOPMENT OF LAW AND LEGITIMATION

Peter Fitzpatrick[*]

The physiognomies of governments can be best detected in their colonies, for there their features are magnified, and rendered more conspicuous.[1]

Introduction

There is a strong and standard view to be displaced first. Trust and law - law of the modern, occidental variety - are usually taken to be antithetical. Law supervenes in the decline of relations of trust, in a distancing from their more natural or 'symbiotic' character: 'In the midst of strangers, law reaches its highest level'; 'the progress of law consists in the destruction of every natural tie, in a continued process of separation and isolation'; or Michelet, 'law, justice, is more reliable than all our forgetful loves, our tears so quickly dried.'[2] Law is calculative and explicit, set apart and determined, formed and formal. Relations of trust are intimately engaging, embroiled, responsive, informal and uncontained. They are typically placed at the 'level' of the local and small-scale where they are encompassed by a surpassing law.

My initial argument will be to the contrary, at least to the extent that involving and legitimating relations of trust will be shown to be constituent of law itself. Not that this simply derogates from law's remoteness, from its position of determined 'autonomy'. Rather, this very position will be seen to depend on law's trust in and responsiveness to what is beyond position. Position cannot be sustained in an unvarying stasis. There cannot, that is, be position without responsiveness to what is always beyond position. In a seemingly paradoxical way, what is beyond position is also integral to position. Neither, however, can there be a responsiveness without a position from which to respond. Law can then be seen as an operative mode of being in-between position and responsiveness. It brings these differing registers of determined position and responsiveness into an adequate relation with each other. Or at least it should to be effective as law.

This initial argument to do with the necessity of law's legitimating responsiveness is then set against the exigencies of the colonial situation. What is found there is a denial of the dynamic of relation between position and responsiveness in law - a kind of terminal legality which, in its deathly stasis, rejects the dynamic, fails in so doing, and thence confirms the intractability of the dynamic if there is to be law and persistent legitimation. This refinement of the argument is then 'tested' against a remarkable efflorescence of 'development corporations' formed by many large groups in Papua New Guinea in the period around the 'granting' of self-government in 1972. The formation of one such corporation will be taken as an extended instance. The surface of the story is one of law's trusting, involving and legitimating responsiveness. But behind the scenes, the determined and determining law limited its response and failed to bring position and responsiveness into an adequate relation. I will conclude by indicating reasons for this failure in problems of legitimation afflicting the colonial and post-colonial situations.

Law's responsiveness

To extract the intrinsic responsiveness of law, I will look at a typical and contrary perception of it in the epochal idea of the rule of law.[3] With the usual perception of it, this idea would drape law in a secure solidity. And it must be readily conceded that there is point to this. Countless histories and juridical affirmations would have us believe that the rule of law is characterised by certainty, predictability, and order. As against the vagaries of an arbitrary and discretionary power, the rule of law clearly marked out an area of calculability in which the individual could now purposively progress. In order for this law, and 'not men', to rule, it had to be coherent, closed and complete. If it were not coherent but contradictory, something else could be called on to resolve the contradiction. If it were open rather than closed, then something else could enter in and rule along with law. If it were incomplete and not a whole *corpus juris*, and thence related to something else, then that something else could itself rule or share in ruling with law. For all of which, law had to be self-generating and self-regulating because if it were dependent upon something apart from itself for these things, then, again, those things would rule along with or instead of law.

We can, however, take each of these imperative qualities of the rule of law and evoke their opposite 'in' the rule of law itself. For law to rule, it has to be able to do anything, if not everything. It cannot, then, simply secure stability and predictability but also has to do the opposite: it has to ensure that law is ever responsive to change, otherwise law will eventually cease to rule the situation which has changed around it. So, how could the rule of law be complete if it must ever respond to the infinite variety of fact and circumstance impinging on it? How could it be closed when it must hold itself constantly responsive to all that is beyond what it may at any moment be? And how could law, in extending to what is continually other to itself, avoid pervasive contradiction? Law cannot be purely fixed and pre-existent if it is to change and adapt to society, as it is so often said that it must. Its determinations cannot be entirely specific, clear and conclusive if it has integrally or at the same time to exceed all determination, to assume a quality of responsive 'everywhereness.'[4] And every tale of law's bringing order to disordered times and places in the triumph of modernity or capitalist social relations, and such, can be matched by others where it created uncertainty and inflicted massive disorder in the same cause. This appears to be an impasse.

Perhaps then the enquiry should be diverted. Rather than seeking law in that which simply conforms to either side or both sides of the opposition, as is usually done, perhaps we could seek a law which 'is' in-between the opposed dimensions, which 'is' the experienced combination of them, and which has its being because each dimension is inexorable yet unable to be experienced by itself. The condition of being in law would then be unresolved and calling for incessant decision and responsible judgement. We may, nonetheless, find prospects for resolution in these dimensions being not only opposed but somehow integral to each other. Clearly completeness of position and responsiveness to what is beyond position are antithetical things but there can be neither position without responsiveness nor responsiveness without a position from which to respond.

So, even though law has to assume an effective position it must also be incipiently ever beyond position. Law must attach to a social reality but it cannot be fully identified with or lost in that reality. Law is, to borrow Cain's pointed phrase, 'necessarily out of touch.'[5] Law, that is, must take on a quasi-transcendence and stand apart from the social, yet if it becomes 'out of touch' with society it ceases to be effective. But this cannot, of course, be a question of the effectiveness of law as a pre-given entity, even if the issue is normally seen in those terms. Effectiveness and ineffectiveness are not simply sociological questions addressed to a pre-existent law set apart. Law appears only in the failure, the ineffectiveness of pre-existent determination, for if there were full and effective determination that condition would simply and utterly be, without the necessity of any prescription addressed to it. The very determining force of law, in its vaunted objectivity and autonomy, can only subsist in the prospect of law's always being able to be otherwise than its existent, inevitably compromised being. And law can only endure as 'the same' by according itself responsively to the infinite possibility that relentlessly impinges on it.

In all, law's responsiveness and its determinacy cannot be separated from each other either entirely or in calculated proportions. Each suffuses the other to their full extent. The responsive cannot be purely beyond and thence merely inaccessible. It must be positioned in possibility, oriented towards determination and becoming present. Nor can determination be at all set or complete. Its assertion is always entirely and infinitely responsive. It cannot be enduringly stilled in or at any point or in any severable part.

Terminal legality

All of which is meant to be portentous, and negatively so. In what now follows, the colonial situation will provide a testing and, ultimately, a terminal fracturing of law in its two integral dimensions. Modern imperialism itself had to be responsively accommodating in its expansionary encounters, yet the encountered were somehow to be brought into an enduringly set, imperial or civilised identity. It would be difficult to imagine a scene more adapted to 'resolution' through law, or at least ostensibly so. To the imperial eye, law was pre-eminent among the 'gifts' of an expansive civilisation, one which could extend in its abounding generosity to the entire globe.[6] This was the same law which had assumed in modernity a civilising mission within the national territory, and for this purpose had become 'a flexible, indefinitely extensible, and modifiable instrument.'[7] The gift was not perceived, however, simply as one coming from its immediate national donor. It was the gift of a universal (European) civilisation and it was itself composed of universal principles.[8]

But if imperial law was a gift of civilisation, it was also, like its national equivalent, a 'grim present', as the more perceptive of the colonists recognized.[9] Law, that is, had not only to extend into new found worlds but had also forcefully to bring them into a determined order. The supreme justification of imperial rule was that it brought order to chaos, reined in 'archaic instincts', and all this aptly enough through subjection to 'laws.'[10] Looked at another way, the violence of imperialism was legitimated in its being exercised through law since, as Fitzjames Stephen would have it, violence was 'forced, disciplined and regulated in the form of law, [which] played the leading part in the creation of civilization.'[11] A stable order is to be miraculously wrought in a disordering violence. This ambivalence characteristic of occidental self-constitution is transposed in the colonial situation onto the necessarily obliging savage as the Occidental's negated 'other.' The savage, as the mirror opposite of this self-constitution, has to be a violently disordered being, and thus ever needful of a settled subordination, and at the same time inertly over-ordered, ever awaiting the transforming dynamism of colonisation.

The parallel with law in its metropolitan setting now becomes strained. Certainly law was in that setting central to 'the state's social mission' of 'homogenizing and hegemonizing ... a society conceived as inherently fragmented, atomized and centerless.'[12] Law played a formative part in this by seeking to effect a primary, legitimating relation between the state and the individual citizen and, in so doing, to eliminate or dominate all 'intermediate' orders. In the colonies, however, the savage was the carrier of the irresolution in occidental identity and the constituent negation of its civilisation and, so, had to be maintained as intractably apart from that identity and that civilisation. Such an utterly antithetical being could not be brought within the replete realm of civilisation much less integrated into its emphatic instrument, the metropolitan state. The savage was, then, denied a participative legal personality.[13] It was solely the colonist who was to provide civil and civilised order. There were no rights for the savages in this scheme, apart from 'rights' to have things done to them so as to bring them within the ambit of civilisation.[14]

The savage, then, had to become the same as the civilised colonists yet remain unalterably different to

them. That unsettled ambivalence permeated the whole of colonial settlement. The colonist took on the 'burden' of pervasive powers in the cause of an inclusive civilisation, only to use them to exclude, dissipate and generally 'hold down' the savage as incorrigibly deviant. Comprehensive and draconian legal regimes sought to separate out and stultify not only the colonised but also the traditional or customary institutions and processes imputed to them. All of which was enshrouded in ethical imperatives of 'conservation', of 'protecting' the native, especially from too disruptive an exposure to the benison of civilisation. And any native who assumed a precipitate civility would be checked by a tentacular 'native regulation' or by something more brutally informal. Nothing more readily reveals the native as the projection of an irresolution in occidental identity itself than the hysterical and aggressive response of the colonist to the impertinent *évolué* who successfully takes on civilised abilities, denies deep or intractable difference, and thus exposes the fragility of imperial rule at its seemingly confident core.

What the response to the *évolué* reveals is that the imperial project was decidedly less about a bringing into the fold of civilisation and definitively more about a creation and containment as different. The torpid incapacity of the savage was not only one which prevented the assumption of civilised behaviour but also one which denied the ability to act transformatively at all. The savage, that is, could not become anything other than what it had to be in its contrary relation to the dynamism of European identity. Some effective action had to be allowed to the native, however, because of the poverty of colonial rule. Various systems of 'indirect rule', of 'recognition' of native modes necessarily proliferated. But the reach of the native's effective action was always severely circumscribed. Not only was it characterised as static, repetitive and mimetic but, for good measure, it was held or attempted to be held within a supervisory system of administration. Custom, for example, was 'recognised' solely in subordination to the law of the colonist and denied such recognition where it was 'repugnant to natural justice, equity, and good conscience', or contrary to 'the general principles of humanity', to take two standard and indicative formulations. Balandier summarises the resulting situation in this way:

Colonization transformed every political problem into a technical problem to be dealt by the administration. It contained every expression of communal life and every action that seemed to limit or threaten its grip, irrespective of the forms of the native political society and the colonial regimes that organised their domination.[15]

To which should be added a reminder of the prime place given to law in the imperial project, law as an authoritarian assertion of assured position. Given the separation and containment of the natives and the denial to them of effective modes of engagement - 'strictly contractual relations are not possible'[16] there is no space, as it were, for the development of social relations of a more 'organic' kind, relations which would ease and mediate the demands made on an overweening law. The necessity of distance was made a dubious virtue. Like a lawgiver of antiquity, the colonist claimed to bring law from the outside, a civilised law of universal valency free from polluting involvement with the particularity of the local scene.[17] A similar stance imbued the colonist's claim to be able to stand objectively and transcendently apart from the squabbling diversity of the natives and from there, not just to resolve their differences, but to encompass and determine their very destiny. The progressive and evolutionary assumptions of imperial rule placed the colonist in a position that enveloped all lesser conditions of existence. From this exalted position, therefore, the colonist could know and speak for the natives better than they could themselves - and thence decide to act with an appropriate force. So, even when a customary legal system was allowed some operative effect, its aberrations and inadequacies could be put right by superior prescription. In short, relation could only ever be contemplated and effected within an already given and resolutely containing frame.

This deathly disregard of the other marks an extremity of legal determination. It could, in one way, be seen as the apotheosis of legality, its perfected achievement. Here is law, supposedly, in its full determinative force. It has no responsive regard for its subjects, or objects, who are, to borrow Maine's and Bagehot's

definitive descriptions, 'caught...in distinct spots', 'stationary societies' for ever 'stopped' in their development.[18] But the stasis and comprehensive containment visited on the savage comprise the very conditions of this law itself. Lacking a responsive dimension, lacking any vibrant connection to what is beyond its immediate determinations, the laws of imperialism inexorably fail. A premonitory instance of this terminal inadequacy can be discerned in a hiatus vexing the colonial governor of Bombay in the middle of the nineteenth century when he remarked on 'the perilous experiment of continuing to legislate for millions of people, with few means of knowing, except by a rebellion, whether the laws suited them or not.'[19] With an obvious appropriateness, it is the attempt to prolong colonial rule beyond its failure which most sharply reveals its terminal inadequacy - nothing in its life became it like the leaving of it. I will now 'test' the argument so far in a case study of engaged resistance to colonial law.

A case of resistance

The setting for this is one in which law's responsiveness was unusually ascendant because of a systemic latitude which 'allowed' for a time a burgeoning of popular organisation. It was a quality of indecision or vacillation in the system of colonial rule in Papua New Guinea that enabled large groups to form into 'development corporations', which combined political and economic assertion. In the period leading up to self-government in 1972, legitimacy was draining rapidly out of the colonial system and the new rulers entering that system had neither sought nor been able to effect some Proscrustean dictate from the centre. Laws relating to economic organisation, which had previously been more or less strictly applied as against the colonised, became more malleable in their response to new forms of organisation pressing upon them. The particular organisations I am concerned with here usually took the name of 'development corporations' because of the exemplary effect of a company set up by the Tolai people of East New Britain and called the New Guinea Development Corporation. Later development corporations by and large followed the model of this corporation in both their aims and their innovatory structure. Development corporations were usually initiated by established or aspiring leaders and they involved the participation of the members of some large 'traditional' grouping. They were often initiated to unite competing factions within the grouping or to provide a form in which they could go their somewhat separate ways. The element of political and economic leadership was always prominent and often predominant with the corporations frequently providing a base for leaders emerging at the national level.

The influence of this leadership on an uncertain state system heightened the responsiveness of law and the state administration in their involvement with the establishing and operation of these corporations. The state provided various forms of 'assistance' and loan capital and the law was administered somewhat more sensitively and supportively. The orientation of the law was turned more towards the recognition of 'traditional' ways, not only by providing for the incorporation of some groups organised on a 'customary' basis but also by enshrining respect for 'traditional' ways in the new national Constitution.

A modest aspect of this responsiveness was the Prime Minister's engaging me to deal with the formation of several of the development corporations.[20] This involved visiting the area in which the corporation was to operate, discussing its structure and constitution and then attending to the legal formalities of incorporation. This is hardly an intellectually well integrated or rounded focus but it is broader and richer than it may appear to be at first sight. For one thing, people were often concerned to blend much of their own modes of organisation into the corporation and the instance I will now describe was one in which that concern was particularly intense, and one which had an influence in this respect on the formation of later development corporations.

This was a corporation set up by people in part of the area of Papua New Guinea most generally known as Bougainville. The corporation's area of activity covered Buka Island and the Teop and Tinputz areas, all to

the north of Bougainville Island itself. The corporation was called the *Tuki ni Buka* - the *tuki* belonging to Buka. I will come to the meaning of '*tuki*' shortly.

The information I draw on here was gathered during two brief trips to Buka in September 1972 and March 1973. The first visit was one of three days and it was part of a general enquiry commissioned by the Prime Minister into the demand for development corporations in different parts of the country. The second trip lasted five days and it was specifically to assist in the setting up of the *Tuki*. During both trips extensive discussions were held at meetings in many villages along the east coast of Buka. For the second trip a committee of representatives was formed to give me detailed instructions and information on the setting up of the *Tuki*. Representatives came from seven villages spread along the east coast. These representatives were the formally educated and they were fairly young - mostly between thirty and forty. Some older leaders objected to this but satisfied themselves by actively participating in most meetings of the committee.

It was not clear to me just how representative the committee was of the people in the *Tuki's* planned area of coverage. In particular, there were two conflicting factions, and one did seem to be more adequately represented than another. One faction was generally known as the Council group. It was more sympathetic to the existing system of local (Council) government and was strongly represented within the central state system. It predominated at the meetings. Partly for this reason, a meeting was arranged solely with the other group, the Hahalis Welfare Society. Hahalis was a revolutionary group which had asserted its autonomy and rejected colonial rule and the Christianity of the missions. It had set up its own systems of communal production and had introduced widespread social reforms and its own legal system - a system which extended to the execution of offenders. All of which had led to protracted and violent conflict with the colonial regime. The *Tuki* was professedly seen by leaders of both groups, and by the Prime Minister, as a way of bringing the two groups closer together.

As for other information, I relied before going to Buka on Blackwood's ethnographic account published in 1935 and in the writing of this piece I have benefited from a book on Hahalis by Max and Eleanor Rimoldi published in 1992.[21] The information I present here at times differs considerably from these two accounts and so it is offered with a certain temerity. It is of course the case that the short time I spent on Buka, my role as helper taking instructions and the obtaining of information through fairly formal meeting are all factors that tend to an 'ideal' description of those aspects of social organisation outlined here. Another obvious constraint was the legal focus of my concerns. So, remaining faithful to that focus, I will deal first with the legal structure of the *Tuki* and with the rights and obligations entailed in that. Then I will look at the less legally constrained objectives and guiding principles adopted for the operation of the *Tuki* and at the symbols used to present it. What is most conspicuous throughout is the insistence on traditional forms. Although the corporation had to comply with the legally designated forms of the company, the people were concerned to render these in traditional terms and to use the flexible and facilitative, the responsive, aspects of company law as conduits for traditional organisation to enter and be part of the *Tuki*, but to do so in ways which accorded with the ethos of company law. I will use here a kind of ethnographic present even 'though things have since changed greatly, as we will see.

Structure

The invariable and strongly expressed intention of people discussing the *Tuki* was to confine membership to Papua New Guineans. The *u gum turu tson tou* (the board of directors) can refuse consent to a share transfer on racial grounds. Other development corporations are more specific in restricting the transfer and issue of shares to members of a particular group. The practice is somewhat encouraged by changes in company and tax laws that give concessions to companies whose membership is confined, broadly, to 'local persons'. Something insisted on and emphasised very strongly in the formation of the *Tuki* and most

other development corporations is that each member should have one vote only no matter what the member's capital contribution. Shares in the *Tuki* would be held either by individuals directly or by a leader called a *tsunono* on behalf of a group called a *pinaposa* - more on these shortly. There was some generational conflict as to how shares should be held: some young people wanted to hold shares as individuals because they did not trust the *tsunono* to distribute dividends properly.

A *tsunono* is a leader who, as we shall see later, is supposed to play a central part in the *Tuki* and his position in Buka society is - ideally at least - no less central. The *tsunono* is an hereditary leader (male) and *tsunono* is also an ascribed status shared by some few people closely related to him. Traditionally such a leader appeared to have great authority. Today he retains considerable prestige and considerable power over land which is the basic means of production. But the *tsunono* has to look after (*pakoko*) his people and decision-making generally seems to be of the consensus mode, the role of the *tsunono* being one of influence tinged with a vague authority (*nitsunono*). The group lead by a *tsunono* is called a *pinaposa*. It is made up of three or four (matri) lineage groups (*a toangorngorere*). The term *pinaposa* is also sometimes applied to the single lineage group. Each *tsunono* is entitled to build a clubhouse - *tsuhana*. The *tsuhana* is used for meetings and entertainment and is a symbol of community, being once described to me as 'the backbone of the village'; it is 'the place where we discuss laws, land, culture and pass on things to young people', as one old man described it. Somehow or other each *tsuhana* is divided into parts and through links between similar parts of the several different *tsuhana* and through a hierarchical linking of *tsunono* wider political and social alliances and perhaps entities are formed.

The constitution of the *Tuki* provides for a *u hagum turu tsunono* - a sitting of *tsunono*. The *u hagum* is made up of all members of the *Tuki* who are *tsunono qua* leaders. Its basic function is to act as an intermediary between the members (including in that term those people on whose behalf *tsunono* hold shares) and the *u gum turu tson tou* (board of directors) - taking the views of the people to the *u gum* and the views of the *u gum* to the people. Most of the development corporations and other large scale economic organisations have some such arrangement as this - shares held in a representative capacity for traditional groups with the holders forming some sort of mediating body between the people and the directors. Some of these corporations have an interesting variation on this arrangement. It arises out of the legal position under company law whereby small companies called proprietary companies have less onerous obligations than larger companies called public companies. Generally, to qualify as a proprietary company there must be not more than fifty members. So, to take the case of a particular corporation, several - but less than fifty - sub-clan leaders hold shares on behalf of many thousands of people who are looked on as the members of the corporation even though they are not formally such. Of course if they were formally members, the company would be a public one with more onerous legal obligations.

Finally, in the structure there is the *u gum turu tson tou*, which means a sitting of men (not including women), who manage, direct or guide (a particular activity) and is the name for the board of directors. The *u gum* is elected each year by the members. It is given broad power in terms that 'the affairs of the *Tuki* shall be managed by the *u gum* who may exercise all the powers of the *Tuki* except those powers which are required to be exercised' by a general meeting of members of the *Tuki*. This is in line with standard provisions in company constitutions, a point I will return to later.

Rights and obligations

Of course in company law provision is made for the rights and obligations of various people involved in the company. The *Tuki* provides for a fairly straightforward and clear set of rights and obligations which combine company law and local forms and norms. Part of the idea in so doing was to provide rights, and remedies in accessible forms to complement the remote provisions of company law.

Members have a right to attend and vote at meetings of members, they can remove a director - a member of the *u gum turu tson tou* - and they can appoint any person 'to enquire into and report on any aspect of the affairs of the *Tuki* on behalf of the members...'. This was an innovation. Such a person is called a *tson kahete*. A *tson kahete* was a protector, a person who ensured the security of a group, for example a group of women going to the garden, who may be attacked. There is also a general duty protective of the interests of members which provides that 'no action concerning the affairs of the *Tuki* shall disregard the rights or reasonable concerns of any member (*hapeku*) or oppress any member (*pitanputa*)'. Here *hapeku* means to treat like a child or in a childish way and *pitanputa* means stepping on something down below.

A *tsunono* (or other representative shareholder holding shares on behalf of a group) is obliged 'not to act in disregard of or to the detriment of the interests of the *pinaposa* [or] group...and he shall deal in a good and just way (*nigan*) with any moneys payable in respect of the shares'. *Nigan* is a broad concept covering the notions of goodness, fairness and friendliness: it is also used as an equivalent of 'thank-you'. This obligation was fairly generally insisted on to protect people against the misuse of funds by a *tsunono* and to cover disputes where payments from the corporation to a *tsunono* became mixed with other transactions between a *tsunono* and a member of his *pinaposa*.

The *u hagum turu tsunono* - the general sitting of *tsunono* - has, in terms of the constitution of the *Tuki*, to 'make every reasonable effort to ensure that the views of the members of the *Tuki* are adequately taken into account in the conduct of the affairs of the *Tuki*...[and to] keep members of the *Tuki* informed on the affairs of the Tuki..[and to] make every reasonable effort to ensure that any reasonable complaint or grievance of a member of the *Tuki* in respect of the affairs of the *Tuki* is settled satisfactorily and amicably'. The *u hagum* is given power to call a general meeting of members of the *Tuki*, to appoint a *tson kahete* (the person mentioned earlier who can examine the affairs of the *Tuki*) and to interview any member or any employee of the *Tuki* and any members of the *u gum turu tson tou* - the board of directors. The board 'must manage the affairs of the *Tuki* in a way that is good and just (*nigan*) and that will encourage the members of the *Tuki* to trust (*hamana*) the *Tuki*'. The conception of *nigan* has been described earlier. *Hamana* means simply trust or belief in something.

Objectives and guiding principles

Generally, the statement of objectives in the constitution of a company is not very informative because of the practice of making these objectives very broad so as to allow the company to do almost anything in the future without going through the legal complexities of changing its constitution. There is a specific variation on this strategy in the objectives of the *Tuki* (and in the objectives of other development corporations): on the one hand the *Tuki* is given broad power to carry on numerous types of 'businesses and activities' much like an ordinary company but it is also given powers to 'promote and encourage development activities and businesses of all kinds through ... equity participation and loans ... [and through] the provision of management, accounting, marketing and extension services' as well as through other means. Basically the objectives of the *Tuki* are economically oriented. Several other corporations have wider objectives. For example, *Kabisawali*, based in the Trobriand Islands, has power to provide various 'welfare services' and it can provide 'all facilities, services and other matters to cater for all types of *Kula* exchange'.

The constitution of the *Tuki* also provides certain 'guiding principles' in accordance with which the constitution must be 'applied and interpreted'. The principles are briefly expressed and each is accompanied by a keystone concept. The first principle rather hopefully emphasises unity - the *Tuki* seeks 'to unite for development the people of Buka and of the adjacent islands and areas'. The keystone concept here is *gono hovoto*. A *tsunono* is not expected to give large feasts at his own expense; others must bring their contributions as well. *Gono hovoto* connotes the coming together and contributing of food for a big

feast given by a *tsunono*. The second principle is related and emphasises that only in unity can 'the people... compete effectively with expatriates and foreign companies'. The key concept here is *hihikuma,* which means to compete.

The third of the principles refers to those objectives of the *Tuki* that aim to help people 'when the *Tuki* is well established... in setting up and running their businesses'. This idea is conveyed through the concept of *patu* which is a building or a meeting where the leading *tsunono* (*monihil* - there appears to be one for each large village) meet. As a building the *patu* is a big *tsuhana* (or clubhouse) and has a similar symbolic value to the *tsuhana* mentioned earlier in that it represents the unity of the various groups over which the *monihil* rule. The particular relevance of the term *patu* here is that 'a small *tsunono*' wishing 'to build up a *tsuhana*' would have to first discuss the matter in a *patu*. If consent were then given, the *patu* would give him advice and materials.

With the fourth principle, 'the *Tuki* must be self reliant and run by the people'. This was very strongly insisted on mainly in the context of bitter reminiscences about co-operatives promoted by the colonial regime. A typical sentiment here was: 'we do not want any trick on this corporation; it must be run by the people'. The keystone concept for this principle is *alampesa* which connotes an adequate ability to do a thing.

Finally, 'the people must trust and believe in the *Tuki* if they are to participate in the *Tuki* and make it strong'. The theme of trust was returned to often in discussing the formation of the *Tuki*. In relation to the collection of funds for enterprises people felt there had been too many 'humbugs' in the past for them to be too trusting in the future. For this reason many wanted the *Tuki* to develop slowly. The theme of trust was often related to that of unity; people felt there was too much mistrust between groups, too much 'keeping of secrets', but all were ostensibly agreed that this must be overcome in relation to the *Tuki*. This theme of trust is obviously relevant to many of the rights and obligations described earlier. Also the constitution has simple procedures for regulating the collection of funds for the *Tuki*. The keystone concepts here are *hatagalaren bate hamanei*: these mean to participate in, to support the *Tuki* (*hatagalaren* - which also refers to the supports of a house) and to trust and believe in the *Tuki* (*hamanei*).

Symbols

Those aspects of the constitution already covered are saturated in the symbolic but there are two potent symbols not yet covered which were the ones most spontaneously hit upon in the discussions preceding the formation of the *Tuki*. One was the name *Tuki ni Buka* - the *tuki* of the Buka people. The *tuki* ritual is only conducted occasionally nowadays. It is organised by a *tsunono*. It involves the making of a small, fenced-in area in the outline of the *loloho* symbol, to be mentioned shortly. Everyone in the lineage puts ordinary foods inside this area - inside the *tuki*. Then a feast is held and after that the *tuki* is cut open and the food inside it distributed. The ritual symbolises and guarantees the fertility and productivity of the land. The idea of the *tuki* at once affirms a belief in the present relevance of traditional modes and values, optimistically symbolises the idea of investment in a corporation and provides a note of hopeful burgeon.

A more complex symbolic load is carried by the emblem of the *Tuki ni Buka* which, as its constitution says, is 'the *loloho* symbol as found, for example, on the split drum housed in the *tsuhana*'. The *loloho* symbol is a somewhat ornamented diamond shape. It is found towards the top of the drum and it must be struck by a pole in the centre for the drum to make its proper sound. *Loloho* also means vagina and also sling. It used to be cicatriced on people who were of the status *tsunono*.[22]

The *loloho* is the symbol of the four great groups, or *u toa apena*, into which the people of Buka and some northern parts of Bougainville Island are said to be divided. The names of these groups are the *Nabouin*,

the *Nakarib*, the *Nakas* and the *Natasi*. They are difficult to categorise. The people when speaking of them in English call them 'clans' and so does Blackwood. They appear to have no present-day functional significance but Blackwood in referring to the telling of an origin myth of the 'clans' says that one felt that the speakers were telling what was to them 'no mere tale, but a recital of truths that went to the very roots of the life of their people.'[23] Somewhat similarly, as soon as the subject of an emblem was brought up, the *loloho* symbol was chosen instantly by the committee of representatives. Also it was sometimes stressed in various meetings that the four *u toa apena* must be represented in the *Tuki*.[24]

The point need not be laboured. Both in the structure of the *Tuki* and in its objectives and guiding principles, the constant concern was to embed relations of trust and responsibility and, in seeking to do this, the people were quite independently at one with responsive dimensions of the national or proto-national law, not only by being in accord with elevated aims of the Constitution but also by accommodating the more mundane purposes of corporate regulation. An impelling obsession of officials administering company law in the late colonial and early post-colonial periods was how to secure responsibility and accountability of the officers of a corporation to its members when it did not have the resources to comply with the complex supervisory requirements of the companies legislation. One solution hit on was legislation enabling 'customary' groups to be incorporated. It was felt that the 'custom' ruling in the group would help secure responsibility and accountability. This legislation was confined to small groupings, however. In so creatively adapting the ordinary companies legislation to large-scale traditional organisation, people were manifestly seeking to promote trust and responsibility. This would, perhaps too obviously, lead one to expect that officials would be sympathetic to this initiative. Some operative sympathy was required because of the political force behind the formation of development corporations, but this existed alongside a deep official antipathy to them - one founded on the colonial mind-set that only the small-scale group could sustain viable social relations. Anything more extensive was loose and dangerous. In particular, it was strongly and even vehemently felt that large-scale economic organisation could be effectively regulated only by the companies legislation. Never mind that the cost of complying with the legislation was not even remotely within the reach of most enterprises, its requirements assumed the dimension of a moral, even existential imperative.

So, although officialdom had perforce to be compliant to a degree, it was not as compliant as the story of the formation of the *Tuki* would so far suggest. Opposition of an outright kind would provoke adverse political reaction and so it took more unspectacular forms which just as effectively brought the *Tuki* within the determinate demands of the law. The main thrust of contention was, aptly enough, the extent to which the people could utilise a supposedly facilitative and explicitly responsive area of law in their own terms and how far, and in what ways, the law would nonetheless demand deference to its determinate self. The contest is in the detail and the detail involved intricacies of corporate law. A few examples may capture the ethos. The corporate legislation gave the Registrar of Companies a power to disallow any name that was 'objectionable'. On discovering the sexual symbolism of the term '*tuki*', the Registrar signified an intention of rejecting it as objectionable. The Registrar was also adamant that English was to be the governing language of the constitution and that Buka terms could only be approximate indications of offices and functions which would have to be put definitively not just in English terminology but also in the terminology of the national law. There is point to this demand even if it lacked specific legal justification. The constitution of a company is a public document and it should be put in an accessible language. A 'local' language was not generally accessible, but neither was English. English was, however, the language of national executive government and of the national legal system. Even where offices and functions provided for in the constitution of the *Tuki* were intended to come exclusively from the 'local' law, the Registrar tried constantly to assimilate these to offices and functions created and regulated by the Companies Act. A cause of particular contention here was the repeated emphasis in the constitution on securing trust and responsibility in the operations of the *Tuki*. This was to be done, it will be recalled, by providing for apt guiding standards and principles and by the creation of offices which would serve to secure accountability. The Registrar was, however, intensely concerned that the executive operation of the

corporation be free of 'traditional' intrusions, and this insistence went well beyond the requirements of the law. It was, rather, another instance of the colonial mind-set. Economic activity of the larger-scale variety could only be successfully conducted in modern 'introduced' ways. Any intrusion of 'local' ways would be disastrous.

What, in fact, proved disastrous was the concentration of barely accountable, modern, directorial power of a kind which the Registrar was so sedulously concerned to secure. The leadership, as a result of its involvement in a national political party, invested the funds of the *Tuki* in a foreign venture. To borrow a telling of the denouement, this was an investment:

... in the boats of fishermen - Taiwanese - who fished the waters off Buka, using the wharves of Buka Passage as a base and a site for freezers from which they offered the Buka some of their catch - at wholesale prices, it was said. The Buka, who had chosen to put their money in an enterprise under their own control, used to watch the lights of the ships from the cliffs at night as their own fishing grounds were cleaned out. A couple of years after the incorporation of the Tuki, a party of them tore down the Taiwanese outlet at the passage and no more was heard of the Tuki in the wider political tumult then impending.[25]

Conclusion

Both this terminal investment and the impending tumult - protracted warfare provoked by mining on Bougainville Island - are symptoms of the disaster which stilled the creativity which went into the formation of the *Tuki ni Buka*, and that disaster is the singular pervasion of an economy of resource extraction. In the antinomy between the determinate and the responsive in law, the colonial situation has been advanced as a paradigm of the doggedly determinate and unresponsive, and as such it fails to be anything but a law responsive to very few people and purposes. This failure is set in the irrelevance of the great mass of the people to colonial law in its own terms. The (uncivilised) people must come to the (civilising) law. It does not have to go to them, except in its hermetic determination.

The thesis of neo-colonialism has assumed a banality which should be resisted, but at least in its legal effects, the pervasion of an economy of resource extraction in Papua New Guinea comes close to reproducing the conditions attending colonial rule. Law becomes or remains monadically oriented towards a predominant external interest, with little responsive connection to the people, and with at best a marginal involvement in relations between them. Its hold is tenuous and its force of general legitimation weak. In this current scene, development corporations or, more exactly, their straitened successors, are little more than mechanisms of distribution. These are local attachments to large mining and logging operations, legally constituted bodies which can legally provide a receipt for modest royalties paid to them as 'owners' of the land being devastated by those same operations.

Whether or not ultimately 'successful', the instances offered here indicate that colonial resistance should not be viewed as essentially apart from what is resisted but, rather, as intimately related to it. The colonial situation is now revealed in numerous histories no longer as the assumed dissemination of an *imperium* marginally resisted but as a scene of endemic contest, one in which colonial rule was continually shaped and constituted in the engagement with resistance to it.[26] That situation could not be responded to or even be perceived in terms of a civilising law which had always to be determinedly apart - 'insulated, complete and universal.'[27] Such a law could not but fail in this persistent denial of law's intrinsic need to be responsive, to respond adequately to that which it would determine. Modern imperialism, in all, magnifies law's prevalent feature. It manifests a terminal extremity of law.

[*] PETER FITZPATRICK is Anniversary Professor of Law at Birkbeck College University of London and has taught at universities in Europe, North America and Papua New Guinea. He has published works on law and social theory, law and racism and imperialism, a recent one being The Mythology of Modern Law (Routledge). Outside the academy he has been in an international legal practice and was also in the Prime Minister's Office in Papua New Guinea for several years. There he worked on the establishment of large-scale community corporations, development policy and the control of foreign investment.

Endnotes:

[1]. De Tocqueville, A, *The Old Regime and the French Revolution,* 1955, Doubleday: Garden City, 253 (Stuart Gilbert trans.).

[2]. Black, D, *The Behavior of Law,* 1976, Academic Press: New York, 41; Diamond, S, 'The Rule of Law Versus the Order of Custom,' in Black and Meleski (eds), *The Social Organization of Law*, 1973, Seminar Press: New York and London, 326; Michalet, J, *Oeuvres Completes de Jules Michelet XXI,* 1982, Flammarion: Paris, 268.

[3]. For one of the more perspicacious accounts of the rule of law in recent years see Raz, J, *The Authority of Law,* 1979, Clarendon Press: Oxford, chp 11. A broad conspectus of the rule of law, combining theoretical and practical concerns can be found in Fletcher, G, *Basic Concepts of Legal Thought*, 1996, Oxford University Press: New York, chps. 1-4. Connections between the responsiveness of the rule of law and classic jurisprudential debates can be extracted from Lyons, D, *Ethics and the Rule of Law,* 1984, Cambridge University Press: Cambridge.

[4]. Carty, A, 'English Constitutional Law from a Postmodernist Perspective,' in Fitzpatrick (ed), *Dangerous Supplements: Resistance and Renewal in Jurisprudence,* 1991, Pluto Press: London, 196.

[5]. Cain, M, 'Necessarily Out of Touch: Thoughts on the Social Organization of the Bar,' (1976) 23 Soc. Rev. Monograph 226.

[6]. Darby, P, *Three Faces of Imperialism: British and American Approaches to Asia and Africa,* 1987, Yale University Press: Newhaven, 37; Lugard, L, *The Dual Mandate in British Tropical Africa,* 1965, Frank Cass: London (5th ed), 546-47.

[7]. Poggi, H, *The Development of the Modern State: A Sociological Introduction,* 1978, Hutchinson: London, 73-74.

[8]. *See* Stokes, E, *The English Utilitarians and India,* 1959, Clarendon Press: Oxford, 118.

[9]. Stokes, *The English Utilitarians and India,* above 8, 299.

[10]. Stokes, *The English Utilitarians and India*, above 8, 299; Said, E, *Orientalism,* 1985, Penguin: Harmondsworth, 219.

[11]. Stokes, *The English Utilitarians and India*, above 8, 294.

[12]. Stokes, *The English Utilitarians and India*, above 8, 121.

[13]. Some colonial powers allowed some rights of metropolitan citizenship but the overall position of the colonised remained very far from even formal equality.

[14]. Thornton, A, *Doctrines of Imperialism,* 1965, John Wiley & Sons: New York, 158.

[15]. Balandier, G, *Political Anthropology,* 1970, Allen Lane: London, 160 (emphasis in original).

[16]. Maquet, J, 'Inborn Differences and the Premise of Inequality,' in Baxter and Sansom (eds), *Race and Social Difference,* 1972, Penguin: Harmondsworth, 232.

[17]. Stokes, *The English Utilitarians and India*, above 8, 178.

[18]. Bagehot, W, *Physics and Politics, or Thoughts on the Application of the Principles of*

Natural Selection and Inheritance to Political Society, Kegan Paul, Trench and Trubner: London, 29-30; Maine, H, *Ancient Law*, 1931, Oxford University Press: London.

[19]. Thornton, *Doctrines of Imperialism,* above 14, 181.

[20]. The title at the time was 'Chief Minister.' It became 'Prime Minister' on Independence.

[21]. Blackwood, B, *Both Sides of Buka Passage,* 1935, Clarendon Press: Oxford; Rimoldi, M, and Rimoldi, E, *Hahalis and the Labour of Love: A Social Movement on Buka Island,* 1992, Berg: Oxford.

[22]. The 'tsunaun' cicatrice shown in Blackwood, *Both Sides of Buka Passage,* above 21, plate 70b, must be an example.

[23]. Blackwood, *Both Sides of Buka Passage,* above 21, 38.

[24]. Effectively there seem to be only two 'clans'—the *Nabouin* and the *Nakarib.* Of the others, some people think that a few *Nakas* could be found on the north coast of Buka. Assertions are even vaguer about the *Natasi*, but a couple of people suggested there may be some on the north coast of Bougainville Island. There is a kind of ranking among the 'clans.' *Nabouin* are considered very much inferior to both. The *Natasi* do not appear to be ranked in this way. It is often suggested that the *Nakas* are some kind of 'half-castes'. This description of the four groupings raises many suggestive parallels to ER Leach's detailed and fascinating analysis of the four Trobriand clans—a reference for which I am grateful to Loraine Baxter. Leach, ER, 'Concerning Trobriand Clans and the Kinship Category "Tabu"', in Goody (ed), *The Development Cycle in Domestic Groups,* 1958, Cambridge University Press: Cambridge.; *see also* Havini, M, 'How Man First Appeared on Buka,' (1971) 4 New Guinea Writing 4-5. Rimoldi and Rimoldi, *Hahalis and the Labour of Love: A Social Movement on Buka Island*, above 21, 288.

[25]. Rimoldi and Rimoldi, *Hahalis and the Labour of Love: A Social Movement on Buka Island*, above 21, 232.

[26]. Axtell, J, *The Invasion Within: The Conquest of Cultures in Colonial North America*, 1985, Oxford University Press: New York.

[27]. Swain, S, ' Postmodern Narratives and the Absurdity of Law,' in Earnshaw (ed), *Just Postmodernism,* 1997, Editions Rodopi: BV: Amsterdam, 22.