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THE DEVELOPMENT OF INDIGENOUS
BUSINESS ORGANIZATIONS IN PAPUA NEW GUINEA

by

Yash P. Ghai

[Editor's Note: This report was written as a section of Professor Ghai's longer paper, "State, Law and Participatory Institutions: The Papua New Guinea Experience" which appears in Part II of this symposium. For purposes of organizing the material in this symposium, this particular report (on indigenous business groups) was transposed to this section, for it analyzes an interesting attempt to use state law to foster development of "non-state" structures as a vehicle for participatory projects for rural development. Readers are referred to the introductory sections of Professor Ghai's first paper for discussion of the "historical and social context" within which the legislation on business groups was developed, and also to the concluding observations in that paper wherein he comments more generally on the limitations and difficulties of attempting to use the law and bureaucracies of the central state to promote significant redistributions of power in favor of rural people.]

Business Groups

During the colonial era, as part of their efforts at self-improvement, Papua New Guineans periodically attempted to enter into business activities which extended beyond local and traditional occupations. However, historically, there were considerable difficulties impeding their entry into the money economy. Few had the necessary resources or the possibility of mobilising them. Serious involvement in monetary economic activities could only be developed through group participation. Yet the forms of business organisations allowed under the existing state law could scarcely accommodate the kind of business group activities which were developed within Papua New Guinean communities.¹

The two common forms of business organisations recognized by state law were the company and partnership. The former has the advantage that under it a legal body or personality is established, which is separate from its members, whose financial liability is limited to the amount of their contribution to the equity. One disadvantage lies in the complexity and expense of organizing a company. Further, formation and management of a company requires skills that were often impossible to find within the community, and would thus usually force a reliance upon intermediaries or expatriates.

Also, the relationships between shareholders, directors and management are such that formation of a company would have ill fitted the needs of rural people. Moreover, if the number of members of a company exceeded fifty, it must be registered as a public company with additional, onerous requirements of maintenance and disclosure of accounts.

The partnership is a less formal arrangement, and there are fewer legal requirements as to its formation and operation. But there are two serious defects as regards its serviceability for our purposes. It does not provide for the limitation of the liability of its members, so that if the enterprise were to fail with outstanding debts, each member would be individually liable for the payment. Second, a partnership may not exceed 20 members; otherwise it will be illegal. The resources that an average Papua New Guinean was able to muster were so meager that if an enterprise could count for support from only 20 members, its capital would be too low for any serious activity. Moreover, the desire of the Papua New Guineans to enter into economic activities usually was not limited to the profit motive.

A further possibility existed: the cooperative. This form does limit the liability of the members, and it does not restrict the number of members. However, while the cooperative principle may be said to be congruent with customary concepts of shared activity, cooperatives in much of the Third World (including Papua New Guinea) have seldom grown from the grass roots. They are usually officially sponsored institutions encouraged in part to channel (and thus control) rural economic activity; and pervasive official intervention in their activities has made them unattractive to the rural people.²

A form of business group that would be suitable for the economic activities of rural people, would have to meet several needs. Formation of the group should be a simple procedure. There should be only minimal requirements of filing annual reports or accounting, and a group's right to operate should, as far as possible, not depend on state officials. The concepts underlying the form should be readily comprehensible and based as far as possible on traditional norms and practices. Decision-making processes should be congruent with customary methods. The organisational form should enable the pooling of resources of a wide number of people, and should enable membership not only of individuals, but also villages and clans as juristic persons. The liability of the large number of members should be limited, although a higher degree of responsibility might be demanded of those who manage the affairs of the group. Although attempts have been made by some indigenous groups to use the company form to achieve their goals,³ it is obvious that the above objects could not

be implemented merely through the reform of organisations formed under the existing, imposed law of business organisations.

Indigenous business organisations had appeared over a number of years, operating with varying degrees of success, allegedly governed by traditional norms.⁴ Some of these indigenous organisations reflected attempts of communal work-sharing groups to extend activities into the monetary economy. Other group activities might revolve around projects, initiated by the leader of the group (the "big man" of Melanesian society).^{*} Contributions would be collected by him from the members of the group and invested (for the group) in a trade store or a transport vehicle or some similar locally-based venture. Or resources would be collected on behalf of and invested by a local collective entity, a "juristic person" in customary law, which symbolised the unity and corporate character of the group. In all these instances, the project would be managed by one or more persons, although various kinds of decisions could only be made or approved by the larger group. The rights of "managers" and members would be determined by customary norms and expectations, and traditional methods were used to determine disputes. But what these expectations were, was not always clear; for example, the traditional expectation of reciprocity and gifts from the "big man" could not always be easily translated into a new business venture situation. When, as happened in one or two instances, the group would be incorporated as a company, the relations between the members would be regulated and governed by the legislation with attempts to superimpose customary obligations and expectations upon them.

Experience suggested various advantages in working through such customary institutions. A whole community could become involved in a customary business group. It was a form which could be easily understood; it was easy for people to identify with it. As the relations of the members inter se were governed by customary norms, there was a better understanding of them than might be the case, if the relations were governed, for example, by company law. Procedures were simple and little paper work was involved. There was at least some significant measure of popular participation in decision making. There was little involvement or interference by state officials, and there were corresponding valued elements of autonomy and self-governance of these enterprises.

There were, however, some drawbacks. The very ambiguity of the obligations and expectations that arose from the translation of traditional customary transactions into a monetary and commercial context could

* Editor's Note: For discussion of the role of the "Big Man" in Papua New Guinean society, see Professor Ghai's paper in Part II of this symposium.

create situations which could be exploited by the managers, and allegations were sometimes made that a "big man" had abused his position--using communal funds for what were essentially personal enterprises, and buying off pressures for distribution and sharing by making token gifts or by creating a social distance between himself and the rest of the community. In such cases, enforcement of customary obligations through traditional methods would be difficult, and the formal courts might either have no jurisdiction or lack the necessary evidence to resolve claims. But it was when groups dealt with outsiders that some of the drawbacks were most highlighted. It was difficult for a group to obtain credit if it had no legal personality recognized by state law. This would reduce the value of any security for the loan or credit, although it is probable that the presence of legal personality would not have enhanced the credit worthiness of the group in the "modern" private sector. As far as official agencies were concerned, it might be thought that the absence of a formal personality would not matter, but the attitude taken by legal officers was that these groups were illegal (rather than extra-legal), and any support to them by a state official would open him to charges of conspiracy.⁵ Denied outside credit, the group's potential as a commercial enterprise was severely limited. Lack of legal personality could also make it difficult for groups to collect contributions from members,⁶ to enter into transactions in the name of the group and to hold property on its behalf. As the business of a local group expanded, the absence of a proper legal status was a serious handicap. If a group wanted to play a meaningful role in commercial affairs, it would have to cross the border from customary to official law. But if the only alternatives were to become a company or a cooperative, the group would be seriously changed and unable to rely upon traditional practices.

The Business Groups Act was passed in order to enable groups to become juristic entities without unduly changing their traditional characteristics. The Act states that its basic purpose is to promote "greater participation by local people in the national economy by the establishment by them of business groups and other economic enterprises."⁷ It enables customary groups (as groups) to become juristic persons for purposes of: entering into legal transactions with outsiders; holding land (except customary land) or other property; suing (and being sued) in its corporate name; mortgaging its property in order to raise loans. The group can determine the activities it wishes to engage in, and these must be set out in its constitution, which must be submitted with an application to be registered as a business group. The constitution can thereafter be amended to enable the group to engage in different activities, but the Act itself prohibits a few kinds of group activities, for example: raising money from the public. A few rules are laid down for the protection of the finances of the members and outsiders who deal with the group: the

group has to open a bank account, it has to issue receipts for all capital moneys collected by or on behalf of the group; it has to prepare annually statements of assets and liabilities and lodge it with the registrar (who may also give the group instructions as to the manner in which accounts and records of the group should be maintained). Charges against the group's assets can be registered, and they have a priority in case of winding up-- a provision which, in theory, facilitates loans to the group.

The group may be wound up on the order of the Registrar for a number of reasons: if the members so desire, if a creditor requests it, or if the dispute settling authority (for which see below) concludes that the continued existence of the group is unlikely or undesirable. The registrar can also order the winding up of the group on his own initiative if he is satisfied inter alia, that the group is unable to meet its debts, that its conduct is oppressive to any of its members, that the group has failed for two successive years to produce annual statements of assest and liabilities, or that for some reason the group ought to be incorporated as a company or co-operative.

The liability of a member is limited to the amount of his interest in the property of the group, plus any amount owing by him to the group, although this rule could be displaced or modified through the group constitution or by the applicable customary law. The group is required to have a committee (or controlling body by another name) which must have a minimum number of three members. The liability of a member of the committee is unlimited, in respect of transactions when he was a member of the committee. The combination of the limited liability of the members of the group but the unlimited liability of those charged with the management of the affairs of the group (analogous to a limited partnership) is consistent with the reality of these groups when a large number of families and individuals contribute to the capital of the venture, but a few leaders manage the affairs.

The Act has attempted to keep formalities to a minimum, and an application for incorporation can be made orally. It requires few transactions to be recorded in writing. It says relatively little about the rights and obligations of members inter se or between the members and the committee. A great deal of freedom is given to the members to adopt rules which they want to govern in their own relationships and procedures. It is assumed that many of these matters can be determined by the relevant customary law of the group, and a group may specify in its constitution the customs it wants to adopt. In order to minimise outside interference in the internal affairs of the group, and to ensure the application of customary law, each group is required, as a condition of incorporation, to specify at least one dispute settling authority. This could be one or more persons identified by name, office or an agreed procedure. Intra-group disputes have to

be referred to this authority, the courts have no jurisdiction unless the constitution specifically identifies disputes to be resolved by a court. In either event, the authority or the court is not to apply any rule of law (other than the Act) but endeavour to "do substantial justice between all persons interested, in accordance with this Act, the constitution and any relevant custom."⁸ In keeping with this aim, appeals are to be determined by internal authorities.

It is clear that in many ways the Act has attempted to maintain the traditional nature of the group and to enable it to operate with the advantages that come from incorporation while at the same time keeping to a minimum legal or accounting formalities. Some of the shortcomings of the legislation should, however, be pointed out. First, the notion of providing legal underpinning for traditional groups has been carried to an excess in the rule that a group cannot be incorporated unless all the proposed members belong to the same customary group. Since ethnic groups in Papua New Guinea tend often to be small, this can be a serious restriction. The restriction also reduces the value of the legislation in urban areas where a group may well be part of a new "community," but may have come from different parts of the country. Second, despite the intention and attempts to make the group as autonomous as possible, the state officials, mainly the registrar and his agent, have considerable control over incorporation and operation. The registrar, can, for example, refuse incorporation if he is satisfied that the group characteristics are so "temporary, evanescent or doubtful that the group does not have a corporate nature," or "that some other form of incorporation or of organisation under some other Act would be more appropriate and effective."

There is no study on the operation of the business groups. The following impressions and analyses are based in large part on the examination of official documents, interviews with officials responsible for the implementation of the legislation, both at the capital and the provinces, members of provincial governments, and a few persons who have acted as advisors to business groups.

There is evidence to suggest that the business groups are popular. In mid 1978, four years after the Act came into effect, over 800 groups had been registered, and applications were pending in respect of another 800 proposed groups. A great many more had applied for registration than were incorporated; in one district only one in ten applications was eventually successful, while in another only three out of 25 were registered. Groups seek to register themselves under the legislation because thereby they get a status in law, which enables them to deal with the state officials and to benefit from official schemes of loans and licenses, especially in view of the declared public policy of favouring groups over individuals.

Another reason for incorporation is that it strengthens the group or corporate character of, say, a village community, and some constitutions have carefully provided for the representation of various age and interest groups in the committee as well as of elders in the dispute settlement authority. In this way some of the younger members of a community have been able to harness the resources and energies of the community for commercial economic activities or other forms of self-improvement. Sometimes a group has sought incorporation to make clear the rights of members, so as to prevent exploitation of a community by a "big man." At other times, in contrast to the above aims, a group has sought incorporation to distance itself from the rest of the community, so that it does not have to share the fruits of its efforts with it; the legal demarcation that incorporation brings about limits the group which has a right to share in the profits. Some villages have organised themselves into groups so that they can, as a collectivity, buy shares in large companies, and in fact one of the largest indigenously-owned companies now has only business groups as its shareholders. If the total number of such groups can be kept down to 50, the company is able to take advantage of incorporation as a private company, thus avoiding several formalities of reporting, accounting and disclosure, while at the same time involving a large number of people in ownership. Provincial governments which have been anxious to support collective as opposed to individual entrepreneurship, have encouraged the formation of groups. In one or more instances, when the government has had to distribute timber royalties to the residents of an area, it has organised them into a group; the royalties are then paid to the group which has the responsibility for distributing it among its members in accordance with proprietary rights under customary law.

Most groups engage in small-scale activities: running a trade store, occasionally a plantation or fermentary, fishing, transport, vegetable production, crocodile farms, cultivating cash crops, and in at least one instance, running a cinema. In some of these the members are fairly passive, the initiative and management left to one or more members of the committee. Others are based on collective participation in production, and these tend also to be run on the basis of collective decision making. Typically these are village based, and their activities encompass a variety of efforts, from commercial to communal education and self-improvement. In some areas, therefore, the groups have reinforced communal values and identity, while in others they have contributed to their erosion, and are taking on increasingly the characteristics of a normal commercial company. There were fears that "big men" would use the group as a front, in order to exploit the members as well as to benefit from the government schemes in favour of collective enterprise. It is difficult to tell if this has happened. Some groups have been initiated by "big men," and by others who wanted to stake claims to leadership in the community. But it is not clear

that they have exploited the people; although it is not improbable that some big men have claimed rather special rights for themselves, and members who questioned their actions were told to take their contribution and leave the group.

While legislation has thus provided a channel for the initiatives and activities of the rural people, without too much of a disruption of traditional concepts and procedures (at least in some instances), we should note an important aspect of the way the law has operated. The legislation has brought the communities securely within the ambit of the state. Now whenever a community or group of individuals want to cooperate on a project, they are advised (whether by public servants or the educated members of the community) to form a group under the legislation. The pressure to form the group is high if the groups want a loan, and indeed that is an important reason to incorporate; almost all groups have some sort of state loan.

Officials have been posted to all the provinces to help people who want to form groups. They decide whether the business group is the most suitable form. If they consider that the company form would be more appropriate, they can deny the group incorporation. In practice, if the group is urban-based, or if some complex undertaking is contemplated, or if large sums of money are involved, the officials are likely to recommend the formation of a company. Although the legislation is intended to provide a simple procedure for the establishment of the group, the process has become highly bureaucratic and various forms have to be completed. There can be long delays in getting registered; sometimes as long as a year. As one lawyer who has helped various groups to register has said: "What was supposed to have been an easy method of registering customary-type corporations, is now as complex as company or cooperative society formation."⁹ Once a group is registered, official involvement in its operations continues. Getting a loan for a group means that it has to satisfy various officials of its viability and the feasibility of the project. It is not clear how far the registrar's supervisory functions are in fact exercised and it is probable that this is so far limited (a paradox of failed bureaucratisation). If the power were exercised, the groups would be further drawn into a network of bureaucratic guidance and controls, which would adversely affect the groups' autonomy and self-reliance--underlying assumptions of the legislation.

FOOTNOTES

1. G. Nash, "Legal Structures and Indigenous Business Enterprise: The Need for Change," The Indigenous Role in Business Enterprise, New Guinea Research Bulletin, 1979.
2. See Peter Fitzpatrick, "A New Law for Cooperatives," Annals of Public and Cooperative Economy (1975), 277-287; see C.G. Wisstrand, Cooperatives and Rural Development in East Africa, 1970, for similar experiences in Africa; and Donald Curtis et al., Participation and Basic Needs, 1978, Development Administration Group, University of Birmingham, Chap. VI.
3. See Peter Fitzpatrick, The Community Corporation in Papua New Guinea, Nov. 1976, IASER Discussion Paper; Kaputin, "The New Guinea Development Corporation," in F.S. Stevens and B.P. Wolfers (eds.), Racism: the Australian Experience 1977; L.J. Fairbairn, Namasu, New Guinea Research Bulletin, No. 28, 1969.
4. See B.R. Finney, New Guinea Entrepreneurs, 1969, Peter Fitzpatrick and Julia Southwold, The Community Corporation in Papua New Guinea, 1976, Institute of Applied and Social and Economic Research, P.N.G.; Ron Crocombe, Communal Cash Cropping Among the Orokaiva, New Guinea Research Bulletin, 1964, Port Moresby.
5. Fitzpatrick and Southwood, op. cit., p. 18.
6. Kaputin, op. cit., 408.
7. Business Groups Incorporation Act, 1974, sec. 1.
8. Ibid., sec.
9. Personal communication.

CONTRASTING APPROACHES TO
WATER MANAGEMENT DEVELOPMENT IN SRI LANKA

Norman Uphoff

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