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[Editor's Note: One section of Professor Ghai's paper which reports on legal measures undertaken in Papua New Guinea, to facilitate the creation, organization and activities of "Indigenous Business Groups" has been transposed to Part III of this symposium. Part III presents reports and case studies of non-state structures as vehicles for rural development.]

Introduction

This paper examines the role of the law in the establishment and maintenance of institutions for participation by the people in decision making in political and economic activities affecting their lives. The latter is particularly important in most developing countries where so much economic power is monopolized by state agencies or large foreign companies or a combination of both. "Law," as used here, refers to "state law"--law emanating from, or sanctioned by, state institutions. There are significant differences in the method, scale and tendencies of state and non-state systems of regulation and governance, and an understanding of the realities and possibilities of popular participation requires understanding of these differences and an appreciation of the state in the Third World.

Third World states often have a high degree of autonomy from the indigenous people they govern. Created to serve metropolitan interests, the colonial state tended to subordinate all groups and classes in the colonised society and thus deployed even more power than might be necessary to perform the classical task of establishing the hegemony of a ruling class within the society governed. This "overdeveloped state" (a concept not without controversy)[1] was inherited by national leaders. Their accession to power in a situation in which social classes were inchoate or weak, has provided much opportunity to those who govern to control the development of society. Often the state must regulate relationships between two or more modes of production, a task which provides, at least for a period of time, a certain autonomy from affected economic groups. Moreover, new nation-states are often regroupings of different and previously autonomous communities in new geographical entities; the classical pattern is reversed in that the state precedes the nation, and it determines the growth of social classes. Additionally, the state plays a key role in the economy;

it is the country's biggest employer and appropriates a large proportion of the surplus. People gain access to the state institutions because they are politically important, not because they are economically important.

This depiction of the power and autonomy of the state can be overdrawn. It ignores the dependency of the country in the international political economy. The state can hardly be autonomous to the extent the country is not. Secondly, those who accede to a state power are to an extent a predetermined group, created by colonial rule. Often mission educated, recruited from intermediate levels in educational, state and commercial sectors and deeply influenced by metropolitan values, this group (sometimes referred to as the "petty bourgeoisie") has come under scathing attack for its weaknesses and its parasitic role as compradors and intermediaries for international finance, and for its self-serving conservatism.[2] Thirdly, characteristics of the colonial state are not easily changed by the formal transfer of power. The ethos and ideology of bureaucracies remain the same, fortified by programmes of technical training and assistance. These centralised bureaucracies are ill qualified to accommodate the politicisation of the national system, and leaders soon find that that is unnecessary in any event. Hierarchies and authoritarianism are maintained. Civil servants continue to operate under the cover of secrecy. There is little change in decision-making processes; the assumptions of the system remain the same; public participation is sedulously avoided. Like all bureaucracies, those in post-colonial states consolidate their privileged position and are uncomfortable with talk of equality and popuar control.

The role of law in promoting participation in Papua New Guinea is examined here. The paper looks at legislative steps undertaken (during or after independence) to transfer power away from the centre to the people. In order to understand the genesis of these efforts and their subsequent history, it is necessary to understand something about the historical and social context for development and legal development in the country.

Historical and Social Context

In some ways Papua New Guinea is untypical of the developing world. More isolated from the "modern" world than other colonial peoples. Papua New Guineans managed to retain their own culture and institutions untainted to a very great extent. The significance of this cultural independence will be discussed. But the conclusions that emerge from this study have wider relevance. Like so many countries of the Third World, Papua New Guinea is a result of the expansion and consolidation of European capitalist empires, and in important respects, it remains part of the world capitalistic economic system, with its options limited accordingly. Many of the ideals of the "basic human needs" approach may only be achievable by a systematic

withdrawal from that system; certainly the openness of the economy and its continuing close relationship with the former colonial power, Australia, have been serious impediments in the search for an autonomous and participatory form of government.

Papua New Guinea, which consists of one main island and many others containing an estimated 700 linguistic groups, is a constellation of numerous self-reliant and independent communities. Before the colonists came each had its own mode of social organisation and control, in which power was widely dispersed, and there was a large element of popular participation in dispute resolution and decision making.[3] These features of social organisation were contained in and expressed through what may be called the customary law of the communities. The establishment of the colonial state meant an attack on the self-sufficiency of these communities and disruption of their institutions.

Papua New Guinea was successively colonised by the Germans, the British and the Australians. Only limited development of the country took place during this period, in part because Australia, the colonial power for much of this period, was itself a producer of raw materials and on the periphery of international capitalism. Some plantations were established; missionaries set up schools; some cash crops were introduced; there was limited urbanisation; but most of the people remained in subsistence agriculture, poorly connected with their neighboring groups. As a result, most groups tended to look inwards; there was little in the way of nationalism, and political consciousness was low. Nevertheless, despite this disparate character of the country and the people, the state's institutions and law acted as a grid, imposing a "unity" over them. This in itself increased the importance of the law and the state, for outside them there was little basis for authority or consensus. While the state institutions were thin on the ground, the absence of significant competing centres of power meant that the state system came increasingly to dominate the country, and popular participation was severely restricted.

Law and the emergence of modern states are closely intertwined in history.[4] Their interdependence is often obscured by the separation of some key institutions of the law from other agencies of the state, and by ideologies about the neutrality of law. In an ex-colonial country like Papua New Guinea, there is no such obfuscation. Law has clearly been a coercive force which was used to establish colonial rule, deprive inhabitants of their basic rights and establish a regime of privilege for, and exploitation by, the white immigrant community.

State institutions and colonial law displaced communal counterparts in many sectors of social and economic life. While the legal system is too

complex to allow any simple characterization, the ethos and institutions of foreign-imposed law are dominant elements today. State law was used, in part, to promote the centralization of power. This tendency need not necessarily lead to the destruction of local democratic structures and practices of local communities, as European history may sometimes show. But in Papua New Guinea centralization encountered little effective opposition, and the colonial state was undemocratic and authoritarian. The very features of the imposed legal system which ameliorated the potential for authoritarianism in the country of origin--e.g., the franchise, jury service, an independent judiciary--were not part of the colonial legal system. [5] Centralization of power was closely associated with the growth of state bureaucracies. New centres of economic power, prerequisites of a colonial economy, emerged and colonial law provided few bases for holding them accountable.

Another characteristic of the imposed modern law was specialization. Modern legal systems have their own mode of discourse, argumentation and interpretation, with complex specialised procedures. [6] In Papua New Guinea there was, traditionally, community participation in dispute settlement, and while legal disputation and rhetoric may have been an advanced art, they were not esoteric skills used to shut out most of the community from sharing in the administration of justice. Today it is not only those who are caught up in state court processes who experience alienation from the legal system: whole sections of the population are cut off from access to the system of justice and resource distribution. The marginality of the urban squatters in Papua New Guinea and their sense of helplessness is in part the result of their inability to cope with the complexities of the legal and bureaucratic systems that dispense and distribute resources, licences and permits. [7]

The professionalization of the legal system produced other problems of access: justice became a commodity obtainable only if one had resources to deploy skills and influence. The legal system often sanctioned and then defended the unequal appropriation of communal resources. It became an instrument whereby growing disparities in social and economic power began to appear in historically egalitarian societies.

The state legal system also sapped the potential of self-reliance, both at the national level and individual or communal level. It carried with it standards that in practice prohibit activities in the "informal sector." These standards, combined with bureaucratic ineptness, frustrate initiatives by the small man. [8] At the communal level, the non recognition by the law of indigenous clan or village groups as legal entities precluded their participation in the modern economy. The law made it difficult for the members of such groups to pool their resources and labour, thus rendering impossible the only challenge that the indigenous people could mount to the expatriate plantation or factory owner--the challenge of collective self-reliance.

Some of these problems, common to most legal systems, are compounded by the foreign origin of the system. The basic rules of interpretation and the presumptions of the law find their source in alien systems, the hold of which continues even after independence. The crises of legal doctrine in England are all too readily assumed to be the crises of law in Papua New Guinea, and the latest law reforms in England and Australia are seen by many as setting the pace for Papua New Guinea. The development of the law based on indigenous concepts and contemporary problems is stultified because of the force of foreign imitation. Foreign decisions are cited and applied as if they had some intrinsic merit, and foreign textbooks are consulted as if they represented the authoritative law of the land.

The foreign influence is extended also through the continuous recourse to foreign personnel. Key policy decisions are made by outsiders under the guise of technical determinations. When independence is sought from foreign personnel, the system is difficult to operate since the basic concepts and techniques are foreign, not only to the people to whom it applies, but also in most cases to those who administer it. Administrators, lawyers and magistrates do not feel at home with the system, and therefore cannot act with confidence. This has a debilitating effect: it makes them overcautious or overbearing, and results in delays and uncertainty.

Although, theoretically, imposed foreign law displaced indigenous legal structures, a great many disputes were still, in fact, settled through customary procedures, and some economic activities were carried out through traditional institutions illegal under "modern" commercial law. Late in the colonial period (1963), customary law was recognised for many purposes[9] (although compared to analogous colonial legislation in Africa, the recognition was narrow). While customary institutions were placed outside the state legal system, the colonial administration still assumed plenary power to control them.

During the colonial period, the administration was not responsible to any political body in the country; insofar as it was accountable to any authority, it was to the Minister of External Territories in Canberra. Little attempt was made to govern the country through its local leaders or institutions, even though there were some advocates of "native administration" or "indirect rule." At first, the responsibility for administration in the districts (the basic administrative unit in the country) lay with general administrative staff, known as "kiaps."[10] Administration was very thin on the ground and there were no formal bodies to control or advise the kiap. The situation changed considerably after the second world war. The kiap was supplemented by specialist field officers in health, acriculture,

education, etc., who were responsible to their ministries at the capital. The number of government departments and civil servants increased considerably[11] and thus the influence of the capital upon the affairs of the districts. There was little coordination among different functional departments in the districts since the specialist officers took their orders from the national headquarters. The availability of larger funds at the centre and the burgeoning of the civil service led to elaborate bureaucratic structures and complicated channels of communication between headquarters and the field.

The growth of bureaucracy was not accompanied by a corresponding growth of the political institutions. A legislative council, set up in 1951, was dominated by administrators and expatriate interests, and it was not until 1964 that elections were provided, although nearly one third of the seats were still reserved for expatriates or for appointment by the administration. More progress was made at the local government level. Legislation was passed in 1949 for the establishment of local government councils, although its implementation was slow.[12] However, after 1955 the rate of establishment accelerated, by 1969 there were 156 councils covering almost 90% of the population. Although they were supposed to provide an exercise in self-government, they had limited powers, and were at the same time seen as an administrative arm of the central government. In practice it was the latter task they tended to perform, their policy making and advisory functions being minimal,[13] and consequently their legitimacy was never fully established. Moreover, they did not coincide with the basic administrative unit--the district--although legislation in 1970 provided for indirectly elected, largely advisory, bodies at that level. Denied administrative and financial resources, both the local councils and the district-wide councils failed to democratise administration. Thus at both national and local levels, the administration was not responsible to any policital body in the exercise of its very considerable powers. This situation was reinforced by the experience in Australia, where the bureaucracy is extremely powerful and politicians are held in considerable contempt. A student of administration in Papua New Guinea has written:

> A century of colonial rule in Papua New Guinea established a highly centralised and specialised organisation structure which bore little or no relation to the traditional social organisation.
>
> "Papua New Guinea has gone from one possible extreme to the other since its traditional structure was exceptionally fragmented, while the new structures imposed by Australia was more centralised, compartmentalised and bureaucratic than that introduced in many developing countries. [14]

During the colonial period a series of protest movements sought to set up their own alternative institutions based on wide participation and democratic practices.[15] They pursued political, economic and social welfare objectives, seeking a high degree of self-reliance and autonomy. These aims were regarded with hostility by the colonial state, and the groups were suppressed. In such a situation, it may be possible to use the law to challenge the oppressive action of the authorities--possible because of the contradictions within the legal order (or ideology) which the colonial state (despite its authoritarianism) prescribes. The strategy of turning the law of a state against itself can operate, however, only in a very restricted way. The rules which can be called into play by the disadvantaged are likely to be few and far between. And it may be difficult to mobilise people to use these rules because of procedural obstacles and access barriers. But more importantly, colonial and post-colonial states will only tolerate a certain measure of "legal insurgency." Thus the Bhoomi Sena movement in India is tolerated and can make selective use of the law, while the Naxalites are clearly beyond the pale, and ruthlessly suppressed.

Papua New Guinea movements for self-reliance and economic improvement were seen as antagonistic by the colonial authorities. However, towards independence, the attitudes changed. Many of the new political leaders had a base in these movements. With the end of colonialism, it was no longer possible to suppress them with force, and so a policy of co-option seemed more sensible and practical. On the part of the movements, it was recognised that independence would provide greater opportunity for self-expression and self-determination, and there would be official assistance to them in their efforts to improve their economic situation, as for example, in the purchase of white settler plantations. The search therefore was for a closer relationship between the state and these movements, with not entirely beneficial effects on the movements.

The Ideology of Development in Papua New Guinea

The colonial penetration was uneven and selective, and Australia had limited economic objectives so that many parts of the country were allowed to remain in subsistence agriculture with their social structures relatively intact--even though colonial policies favoured the emergence of the "progressive" farmers. One reaction to the thrust of western values was an assertion of Melanesian culture. The centralising tendencies of the state were countered by demands for a decentralised, participatory system of government, drawing its inspiration from notions of traditional systems of authority, the Melanesian way of life.

Whether or not the ideology of the Melanesian way of life accurately represents the former system of authority, it did act as a powerful stimulus to the formulation of new development policies. According to this ideology, traditional society was not authoritarian or hierarchical or centralized,[16] but was based on personal ability rather than inheritance, descent, or supernatural sanction. A leader ("big man") remained a leader only as long as he could successfully help others or to maintain their respect. Since the "big man" also maintained leadership through dispensation of gifts and holding feasts, there was a natural tendency towards distribution of wealth and against personal accumulation. And since a leader has limited material resources to distribute, his authority depends on the acceptance by the people of his claim to leadership, which he could only validate if he listened to them. This, coupled with various other factors, meant that the scale of society was small and wide participation was possible.

These notions of traditional systems were strongly reinforced by the development policies urged by Papua New Guinea's new leaders who had seen the failure of development efforts in Asia and Africa and increasing social stratification in these countries, and distortion of traditional values and institutions, and despoliation of environments, and the negative influences of transnational corporations and new modes of imperial control. Orthodox development theories of the '60s were coming under attack elsewhere, and the country's new leadership had the benefit of the latest fashion in development thinking.[17]

An intensive discussion of development policies, land and constitutional matters produced a strong consensus on development strategies. The Report of the Constitutional Planning Committee (CPC), a parliamentary committee to recommend on the independence constitution, provided the first comprehensive delineation of a national policy of development. It proposed the National Goals and Directive Principles which are now enshrined in the constitution and are the nearest thing the country has to a political manifesto. These declare that the aim of society must be the integral development of man and the realization of his full potential as a human being. The CPC also proposed that the Constitution should include a restrictive code on foreign investment and transnational corporations. Great emphasis was placed on self-reliance, which meant, among other things, that economic development should take place primarily by the use of skills and resources available within the country.

The report stressed equal opportunity for every citizen to share in political, economic, and cultural life, and an equitable distribution of incomes and the benefits of development. The counterpart of equality is

participation. Every citizen must therefore be enabled to participate, either directly or through representatives, in the consideration of any matter affecting his interests or those of his community. In view of the rich culture and ethnic diversity of the people the Report proposed substantial decentralization of all forms of government activity. Emphasis was placed on the use of traditional forms of social, political and economic organization, and the Report declared that traditional villages and communities must remain as viable units of Papua New Guinean society, with new steps taken to improve their social quality.

Law had played such a visible role in the colonial period, as an instrument of control,[18] that it was not surprising that legislation was perceived as a powerful instrument of social change. Because of this view of the potency and instrumentalism of the law, and because of the lack of popular mobilisation and politicisation, discussion of the new policies urged by the CPC were heavily couched in terms of the law and its reform.[19] Two legislative measures undertaken to promote people's participation are now discussed--the establishment of Village Courts and the creation of Provincial Government. A third related measure, encouragement of the formation of Indigenous Business Groups, is discussed in a separate section of this symposium.*

Village Courts

Village courts were established after enactment of legislation in 1973.[20] Since the Australian colonial government had preferred to rule directly through central state institutions (and not, as the British in Africa, through indirect rule) there had been no place for indigenous institutions.[21] State courts, however, had used alien procedures, applied foreign laws and had denied popular participation in decision making. Although these courts had not been entirely unused, most disputes had been taken to local leaders who tried to mediate or adjudicate, applying indigenous norms that were indigenous and permitting public participation in the proceedings.[22]

Proposals for village courts emanated from different groups for different reasons, but a recurrent one was the desire to establish institutions which would place judicial power in the hands of the local leaders, who would emphasize conciliation and apply locally acceptable norms. Village courts were seen both as alternatives to procedure-ridden state courts and as vehicles to give power to laymen in local communities to resolve conflicts.[23]

Several characteristics of village courts distinguish them from the professional courts and tend to make them an integral part of the local

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*Editor's Note: See Part III of the symposium for this report.

community. First, a village court is set up only if the people of the community, acting through their local government council, opt to have it; these courts are not imposed on people. Second, the magistrates, though nominated by the government, are in practice elected by the people from the members of the local community.[24] They do not need any professional training and are part of the community. Third, the courts apply customs of the community rather than a remote, alien law. Fourth, their basic task is to ensure "peace and harmony in the area for which [they are] established by mediating in and endeavouring to obtain just and amicable settlements of disputes."[25] Though they can fine, they cannot (as a rule) imprison, and are expected in any case to solve disputes by promoting amicable settlement rather than adjudication. If they adjudicate, they are expected to order compensation for an injured party or the performance of some task for the community such as service in the local school or clinic. This approach is facilitated by provision that no distinction shall be made between civil and criminal cases. Fifth, no representation by lawyers is allowed, and the courts, not bound by rules of evidence, hear whatever information is available. All of these structural changes were intended to return dispute settlement power to the people in the rural areas, and, in rural areas, this is the key to other power in the community.

Most communities have opted for the establishment of village courts. The magistrates elected by the people are genuinely members of the community. The presence and work of these courts have tended to reduce fights and dissension and have helped to promote cohesion. They have usually enhanced a community's sense of its identity and power.[26] They have won popular support and are extensively used. Yet their mode of operation has not always promoted values espoused by those who originally pushed for their establishment.

The magistrates have made too little use of their powers to mediate between disputing parties, preferring to adjudicate. They have tended to ignore use of customary sanctions, such as work orders, but they all too frequently impose fines. They have asked for the trappings of formal and distant courts, such as special dresses, "proper court buildings" and handcuffs for the accused. People are not allowed to participate in discussion of the case in court; indeed, many magistrates insist on strict "silence and decorum" on the part of the audience. In short, they want to make their courts more like the Australian courts.

These are merely trends, and it is easy to exaggerate them, but it is perhaps not surprising that they should have developed. First, because the formal types of court have been associated with superior state power, it is tempting for village courts to imitate their processes in an attempt to win additional authority among the people. Second, the village courts are

tied to the formal system, for they are supervised by district court magistrates, to whom appeals against their decisions can be made, and so there arises a desire, perhaps natural, for the lower courts to imitate their "superiors." Third, the state has the overall responsibility for the establishment and operation of village courts, and government officials are still concerned that village courts observe certain "proprieties" associated with the Western administrative system. They tend to push the village magistrates in this direction, through training and socialization courses. Finally, the magistrates themselves feel that their power comes from national legislation and (unlike the old traditional system) is not dependent on the acceptability of their decisions in the community: thus they tend to become careless of local sensitivities.

While these courts may in some ways be an improvement on the formal courts, they serve the community less well than the traditional dispute settlers. The establishment of the formal Australian type court did not lead to the disappearance of the traditional system and it had continued to operate, sometimes in opposition to and sometimes in collaboration with the system. But the establishment of the village courts has led to some reduction in informal traditional settlement practices (although, as the village courts become more formal, other avenues for informal settlement are again sought).[27] State law, by institutionalizing traditional practice, has brought the original system under its surveillance, modified its character and reduced the scope for the genuinely traditional type of dispute settlements.

Provincial Government

Of the "reforms" discussed in this paper, the establishment of provincial government is certainly the most important attempt to come to grips with the centralisation and bureaucratisation inherited from the colonial state. Upon independence there were few, meaningful, representative institutions at the district level, the basic unit of administration.

The CPC was anxious to establish a more open and democratic system of government, and, it considered decentralisation of power among the districts to be an essential prerequisite to that end. It therefore proposed a system of provincial government (the designation "province" being preferred to "district" which had colonial connotations) under which there would be a transfer of legislative and executive functions to the provinces. The expectation was that this transfer would lead to a government which would be more responsive to the needs of people, especially rural people, and to greater efficiency in government services. Decentralization would also accommodate cultural and linguistic diversities, for each province would be free to decide on its internal constitution and policies. But the

most important reason for the Committee's recommendation was its view that the colonial bureaucratic system had stifled people's initiative and induced a sense of dependency on officials. Decentralisation would create popular responsibility for decision making at the local level. It would lead to a psychological de-colonisation, a liberation of the mind and spirit of the people.[28]

The proposals of the CPC on provincial government need to be seen in the context of its general analysis of the colonial state, its perception of policies of development, and its wider proposals for a new constitutional order. The wider context also included a constitution which would base a government on universal franchise, a strong parliamentary system with entrenched powers for the opposition and backbenchers and an open system of government with the subordination of officials to political leaders.

While most proposals of the CPC were accepted by the government and the legislature, those dealing with provincial government ran into considerable opposition, mostly from the public servants.[29] On the one hand, proponents of decentralisation saw it as a means to assure the various ethnic communities that they would enjoy a measure of autonomy, and so be more able to identify with a larger collectivity; on the other hand, the opponents saw it as releasing centrifugal forces that would imperil unity. The second argument against decentralisation was that it would be expensive: it would divert funds from development projects to payment of salaries and perqs of provincial politicians and an enlarged bureaucracy. The system would also be complex, and there was a dearth of experienced and talented public servants. The country was edging slowly to rational systems of planning and expenditure, and the gains from these would be lost if policy making and financial powers were passed to provincial politicians. Further, abuse of power at provincial levels would be more difficult to control than at the central level.

Another argument challenged the assumption about greater participation: the province (it was said) was too large a unit; it contained too many different ethnic groups, and the proposed devolution carried the threat that minorities in the province would be victimised. (The theory was that victimisation was less possible if power were exercised at the national level since no single group could dominate the exercise of power at that level.) Considerable concern was also expressed at the tendencies of provincial governments to repress organisations or communities at the village or other sub-provincial levels. It was pointed out that all of the protest movements and attempts of the people to form their own political and economic institutions in opposition to colonial power, were based on communities much smaller than the province; these communities should be seen as the recipients of power, for they carried the richer potential (and in several instances the evidence) for popular participation and communal democracy.

The rejection of the decentralisation proposals by the House of Assembly led to attempts at secession by the province of Bougainville. Subsequent discussions brought the secession to an end--once a new system for decentralisation was agreed upon. Under this system, a new tier of government was set up at the provincial level, but each province could decide if it wanted provincial government, and if it did not, it would continue to be governed from the centre. A province could also opt for only some of the powers which were provided under the law.

In practice all of the 19 provinces have now opted for provincial government, and the national government now prefers that each province should assume all of the powers to which it is entitled. Provincial government consists of a legislature (the provincial assembly) and an executive. The majority of the members of the assembly have to be elected on the basis of universal suffrage; the executive has to be appointed from the assembly, but it is left to each province to decide on the form of the executive, in particular whether it should be a cabinet or committee system. Each province is left a wide measure of freedom to determine its own constitution, within the framework of the national legislation, which is concerned largely with the relationship between the provinces and the centre.

Under the Constitution and the relevant organic law,[30] provincial assemblies have certain exclusive legislative powers; these, for the most part, are matters of local concern (e.g., mobile traders, primary schools, sale and distribution of liquor, sports, village courts, and local government). But there is another legislative list, where the primary responsibility is with the centre, but before exercising its law-making powers, the national government is to consult with the provinces. Also, if there is no national legislation on any of these matters, the provincial assembly is free to legislate. This list is extensive and covers almost all matters of importance to a province (e.g., agriculture, education, transport, public works, marketing and land). The assumption was that in course of time, as provincial government became established and experienced, the legislative power would pass to the provinces. Matters not listed in the law belong to the national government.

Two provisions were made to promote flexible and cooperative relationships between the provinces and the centre: (1) though legislative lists are assigned to one or another government, it is at the same time provided that if a particular field is not occupied by the legislation of the competent body, the other can make a law to fill the gap, and that law will continue to operate unless the competent legislature displaces it; (2) it is possible for a provincial legislative body to delegate its powers to the centre and vice versa.

As a general principle, the executive responsibility of the centre and provinces follows the legislative powers, but it is also possible for one government to delegate executive responsibility in relation to which it has the legislative powers to another. Public servants are, however, recruited by the national government, and are posted to a province according to its needs and wishes. Transfers in and out of a province of senior officials are in law and practice done in consultation with provincial authorities. The provincial government is allowed to appoint up to eight persons to its advisory staff, and it has complete discretion to dismiss them--the idea being to provide a source of independent advice to provincial politicians. The civil servants in a province are responsible to the provincial authority in the discharge of provincial functions.

The provinces have significant financial autonomy. Their own powers to raise taxation is limited; they can levy taxes on retail sales, entertainment, liquor licensing, mobile trading and land, and impose a head tax. In addition, a province receives a certain percent of royalties from the exploitation of natural resources in the provinces and of the duties on exports from the province. The large part of the revenues of a province comes from block grants from the national government, the amount of which is constitutionally determined and protected. The amount of expenditure incurred in a province in 1977-78 is guaranteed to it in future years, after allowance has been made for inflation or increase/decrease in overall government revenue, including foreign aid. These sums are transferred as a block grant, and their appropriation is a matter for the decision of the province. The salaries of the civil servants in a province take up the bulk of the grant, and since the province has limited powers in relation to the size of its own establishment, its powers in relation to the expenditure of its own money (purportedly) are limited.

The law provides for judicial resolution of disputes between the national and provincial governments. It also provides a mechanism, through the Premiers Council, for consultations among the provinces, and between the provinces and the national government. It deals extensively with the relations between the national and provincial governments, and gives the national government, subject to safeguards, power to override provincial legislation and taxes, and to suspend provincial governments.

This outline, which is all that can be presented here, is enough to show the serious attempts made to transfer widescale powers to the provinces. The exercise of these powers by the provinces is not dependent on the whims of the national government because the powers are constitutionally protected rights of the provinces. Moreover, the decision to decentralise in these wide-ranging ways (as opposed, for example, the merely administrative devolution in Tanzania) was essentially a voluntary decision

of the national government, although under pressure from the copper-rich province of Bougainville. It reflects a unique attempt to reverse the centralization tendencies of nearly a century of colonial rule.

It is too early to evaluate the effects of these changes.[31] There is little doubt that the establishment of provincial government has promoted political activity at the provincial level, so much so that sometimes the national politicians feel that they are being undermined by the provincial politicians. This has given people a sense of their own power and a sense of responsibility for their own destiny. Each province had set up its own committee to plan the provincial constitution, which undertook wide consultations. Provincial governments have encouraged participation in the determination of local planning priorities and have underscored the principle that, in a democratic system, the bureaucracy must be answerable to the political authorities. A number of senior public servants and university graduates have left the national capital to work in their provinces, and rural projects have been given a higher priority. All these are valuable gains compared with the previous system when people were intimidated by bureaucratic rule.

Whether provincial government has led to greater participation by the rural people in decision making is another question. Even the supporters of decentralisation have had to concede that not all the developments are positive. As we have seen, the ideology behind decentralisation was strongly populist, emphasising participation, autonomy, self-reliance and local initiatives, and popular control of administration. What appears to have happened is that the bureaucracy, at first strongly opposed to the idea, has effectively taken over its implementation, and makes important decisions about the scope and pace of the transfer of powers. The provincial politicians still look to the centre for funds and other sources of support, and do not appear to understand the scope of their own constitutional powers, and what they can do with them. The reliance on material support from the centre means that the terms of development are still dictated by the centre, and that "people's energies are not released." The province may after all turn out to be too large a unit for meaningful participation and while a few provinces are experimenting with novel forms of participatory government at local levels, others have done little to change the colonial system. The provincial authorities have shown a preference for an expensive infrastructure of administration at the headquarters, and for an increasingly grand life-style. Initiatives of ministers and senior public servants are taken within central structures, rather than as a response to grass-roots demand.

Why has the political momentum of decentralisation been so neutralised? The answer is complex, but one set of key factors has been the constitutional and legal arrangements for decentralisation. These

arrangements are, to begin with, highly complicated and detailed. Grafted as they were upon an already complex, verbose and lengthy constitution, drawn up on the premise of a unitary, centralised state, the questions of their precise scope and the procedures for the transfer and exercise of power become intricate matters of interpretation, administered by lawyers and other bureaucrats. This, coupled with the Australian notion that no official action or policy can be undertaken unless there is clear legislative authority for it (a curious inversion of Dicey) has meant that an extraordinary burden has been placed upon the apparatus of the provinces, to the point that many of them feel paralysed. Thus some progressive ideas in the reorganisation of local government have been thwarted because the lawyers insist on complicated procedures for law repeal and law making before any new plans can be implemented, and because nobody appears to be sure what the procedures are. Ironically, the process of reducing the powers of the bureaucrats has itself become bureaucratised and has thus frustrated the aim of curbing their power. This tendency is aggravated by the fact that since decentralisation as provided necessarily implied the modification rather than the replacement of the centralised and bureaucratic structure, the very complexity of the process requires the services of those working in the present system.

The difficulties which the outsiders, and this includes many ministers and most politicians, have in coming to grips with the system means that the actions of the bureaucracy in the implementation of decentralisation go largely unchecked and unsupervised. The lack of such expertise in the politicians might have been compensated for by a strong ideological understanding and commitment to the goals of decentralisation. Many politicians at the provincial level who have formally acceded to office lack that commitment. That power at the provincial level may be seized by a coalition of an emerging petty-bourgeoisie and a petty kulak class is a high probability.[32] Already there is evidence that power is beginning to crystallize at the provincial headquarters rather than being decentralised further down to the village.

Despite its strongly populist flavour, decentralisation is a neutral device to be seized by the right or the left wing. The objectives of decentralisation, as set out by the CPC, could hardly be achieved without the mobilization of the people around the themes of participation, self-reliance and accountability. Decentralisation is a device which makes these goals possible, but does not by itself bring them about. Law here, as in so many other instances, is not self-executing: it may open up possibilities, it may facilitate certain changes and trends, but it is an instrument strongly susceptible to manipulation and neutralisation by other forces. To consider that the mere passage of a law has achieved its objectives is seriously to misunderstand the nature of law.

Some Concluding Observations

These case studies illustrate a number of themes which are relevant to understanding the role of law in the basic needs strategy. Specific changes in the law can be made in order to try to achieve specific aspects of the strategy. But just as the strategy requires systematic reformulation of policy and not isolated changes, so is the case with law, and piecemeal changes in the system of law will fail to achieve their objective. The village courts and provincial government, in that sense, were both piecemeal. The village courts are part of a formal, hierarchical, professional system of courts, whatever their own characteristics. The environment of the larger system and the procedures and pretensions of the superior courts inevitably contaminated them. Provincial governments were set up in the context of a bureaucratic system with pervasive legalism. Although it was hoped that provincial government would show the way out of bureaucratism and legalism, in the absence of its own resources, with the need for dispensations from the central state system and the lack of political mobilization, it was captured by the system which it sought to change.

More fundamentally, this analysis may well suggest that the strategy of achieving popular participation through law itself is seriously flawed; indeed, we may well have to fight law and legalism. It is clear from the case studies discussed here that the very "legalising" of institutions and movements has vitiated their dynamics. As long as the informal settlements of disputes operated outside the official legal system, they manifested many of the attributes of "popular justice." As long as the strivings for local autonomy, self-reliance and self-management found expression outside the forms provided by the law, they enjoyed a certain vitality and mobilized popular enthusiasm. Once encapsulated in lawful authority, as either local or provincial government, these movements appear unable to retain the enthusiasm of the earlier period. It is not merely that by legalizing them we facilitate their capture by the larger system with its anti-participatory biases: it is also that by requiring the exercise of power through "legal" and bureaucratic means, we help to vitiate the political process and thus undermine the basis of public participation and accountability.

The focus of the paper has been the role of law in participatory institutions, and that approach may exaggerate the importance, negative or positive, of law. Law has not been presented here as an autonomous factor of social relationships, but as an emanation of the state. In order to set the basic propositions of the paper in proper context and balance, it is necessary to refer to other factors which account for the relative failure of Papua New Guinea experiments. The emphasis on legal restructuring tended to undermine the egalitarian and communalitarian objectives which

were intended by the reforms. Except for provincial government, the institutions concerned were peripheral to the exercise of political and economic power unlikely to determine much of the pace and direction of change. Given the underdeveloped nature of rural resources and the low level of technology, these institutions were dependent upon dispensations from the centre for their projects. The centre was able to impose its goals upon them, and choose both the recipients of the dispensations and the projects for which they would be used. It is clear that these institutions would have performed more successfully, in keeping with their original objectives, if the broad policies the state was pursuing was consistent with those objectives. But the state has been pulled towards the "progressive farmer," large-scale investments, urban development, reliance on foreign resources, including the adoption of foreign institutions, fundamentally disregarding the analysis and prescriptions of the CPC. The support for customary institutions, values and procedure was not based on a comprehensive strategy of development; rather it was a reaction to foreign ideologies, arising more out of a sense of inability to cope with foreign influences than a wholehearted affirmation of tradition. And with the accession of new groups to power, "Melanesian way" threatened to become as empty and disingenous as the slogan of "African socialism" elsewhere. Among the genuine supporters of customary values, there was no real appreciation of how easily the superstructure of customary society could be turned to the uses of capitalism, or of its inability to withstand the onslaught of capitalism and its relations. There was too much of a tendency to see custom and modern developments in sharp juxtaposition; the continuum on which they appear was not perceived; and partly as a consequence, there was a failure to appreciate the dynamics of social change. There was thus a failure to develop and canvass for policies which define and determine the relationship of the indigenous sector to local and foreign capitalist activities and secure the former from the disrupting influences of the latter. The indigenous sector was left on its own to face the ravages of an open economy in an acutely underdeveloped and dependent country. Capitalist activities still enjoyed a privileged position.

Thus the law that these reform institutions encountered was the law of the dominant sector, which meant that they had to operate in an alien and at times hostile environment. Indeed the very provision of a legal basis for these progressive initiatives was not entirely unmotivated by desires to exert greater state control over them. It is necessary to avoid an overly cynical interpretation, and the recognition of the initiatives, born out of the confusions and contradictions of the independence period, was a victory for the nationalist and progressive political forces. But it is also clear that the more perceptive of the bureaucrats saw the legalising of the initiatives as an opportunity for co-option. This comes out most clearly in the case of the village courts. Successive administrations during the colonial period

had resisted provisions for a larger scope for customary law and the recognition of traditional systems of dispute resolution.[33] The imminence of independence induced second thoughts in Australia: it was feared that unless Australia took some initiative in this regard, the independent government might reorganize the system of the administration of justice so as to undermine western principles of justice; [34] that the "dual centre of power" (represented by informal settlement of disputes) ought to be brought under the supervision of the formal courts; [35] that the absence of formal institutions at the local level aggravated problems of law and order.[36] Thus in some haste, just before independence, Australia promoted legislation to set up the Village Courts and tied it securely to the formal, state court system. The business groups' legislation* was in part a response to the failure of the cooperatives, which had been promoted to guide and control rural strivings for economic improvement. The case of provincial government is more complex, partly because the risks of the strategy were high; the transfer of power would be less easy to manage, and could easily turn into the real thing; and partly because the political pressure for decentralisation became acute. The bureaucrats, however, had a freer hand in devising the scale of and procedures for decentralisation, and as we have seen, they recovered control over movements that had threatened to go out of control.

What role is there, then, for the law in connection with participatory institutions? The success or failure of such institutions is very much tied up with the nature of the state. However great these benefits, it is a theme of this paper that such co-option by an essentially capitalist state is to the ultimate detriment of the institutions. If, on the other hand, progressive leaders can obtain mastery of the state apparatus and turn it to their purposes, there are many advantages in operating through the law, and indeed in regulating the relationship of the participatory organisations to outsiders and the state, as well as of its members inter se. It may indeed be theoretically possible for the post-colonial state to be thus transformed so that it is responsive to and supportive of progressive initiatives and the wide participation of people in decision making, but it cannot be lightly assumed. A vast number of old norms are embedded in the detailed rules and procedures of the law, and the legal system has developed its own ideology and rationalisation that is resistant to new values. A strategy of altering rather than fundamentally confronting the old system means that inevitably much of the task must be left to the old professionals, who both as a class and as technicians are likely to be oppossed to the changes. Should these organisations then resist any form of integration into the State system? While I have suggested that incorporation was bad for these institutions,

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*Editor's Note: Discussed in a separate report in Part III of this symposium.

the fact is that there is not a good record of their survival on their own. Although their aims have not been narrowly economic, their members have set great store by economic benefits, and when these have not been up to expectation, these movements have tended to atrophy. So there is no guarantee that distance from the state will endure their vitality or survival.

This paper has sought to explore some problems of creating a regime of participatory institutions through state legislation. The conclusions are pessimistic, and it may be tempting to suggest that participation must be established through other means. Law has been viewed in this paper both as technique and substance. But equally, if not more importantly, law has been viewed as an integral part of the state. Thus while it may be easy to bypass the state as a matter of power relationship, the state reflects and reinforces power relationships, both on a domestic and international basis. Papua New Guinea is not alone in being a state where professions of an independent and self-reliant growth have suffered from participation in the international system. The vulnerability of its leaders to outside manipulation has been heightened by close connections with Australian and other foreign influences. The state has continued to serve the economic and political interests which dominated before independence, and attempts at participation and decentralisation have only affected institutions at the periphery; Papua New Guinea is still severely embedded in old norms and practices. There is possibly a lesson here for advocates of basic human needs and participation--conservative regimes can all too easily divert the attention of these advocates away from fundamental problems of change and power relationship by offering, as a token of their earnestness, seemingly progressive experiments on the periphery, which do nothing to affect the essential imbalances in society, and for this reason are bound to fail even in their own narrowly conceived terms.

FOOTNOTES

* I would like to thank Jill Cottrell, Peter Fitzpatrick, Bernard Narakobi and James Paul for comments on an earlier draft of this paper.

1. For a discussion and debate on this question, see Hamza Alavi, "The State in Post-Colonial Societies: Pakistan and Bangladesh," New Left Review 74, pp. 59-81; John Saul, "The State in Post-Colonial Societies: Tanzania," Socialist Registrar, 1974, pp. 349-372; Colin Leys, "The 'Overdeveloped' Post-Colonial State: A Reevaluation," Review of African Political Economy 1976, pp. 39-48.

2. For a strong statement of this position, see Frantz Fanon, The Wretched of the Earth, 1967.

3. This point is developed in my paper, "Law in Another Development," in Development Dialogue, 1977.

4. See, e.g., Peter Lawrence, "The State versus Stateless Societies in Papua and New Guinea," in B.J. Brown, Fashion of Law in New Guinea, 1969; Marilyn Strathern, Official and Unofficial Courts, 1972, and T.E. Barnett, "Law and Justice Melanesian Style," in A. Clunies Ross and J. Langmore, Alternative Strategies for Papua New Guinea, 1973

5. For a similar analysis of the reception of the common law in anglophonic Africa, see Robert Seidman, "The Reception of English Law in Colonial Africa Revisited," in 2 Eastern Africa Law Review 47 (1969).

6. See, e.g., Max Weber, Law in Economy and Society, 1954, especially chapters VI I and XI and Roberto Unger, Law in Modern Society, 1976, Chapter 2.

7. See Peter Fitzpatrick and Lorraine Blaxter, "Imposed Law in the Containment of Papua New Guinean Economic Ventures," in B. Harrell-Bond and Sandra Burman (ed.), Social Consequences of Imposed Law, 1980. See also their article in 1 Yagl-Ambu 303, "Legal Blocks to Popular Development."

8. Ibid.

9. Native Customs (Recognition) Ordinance 1963. See The Role of Customary Law in the Legal System, Law Reform Commission of Papua New Guinea, 1977.

10. See Diana Conyers, The Provincial Government Debate, 1976; Nigel Oram, "Administration, Development and Public Order," in Ross and Langmore, op. cit.

11. Oram, ibid., Conyers, op. cit., p. 5.

12. Local Government Ordinance, 1949.

13. Conyers, op. cit., p. 7.

14. Ibid., p. 9.

15. For a study of these movements, see Peter Worsley, The Trumpet Shall Sound; Peter Lawrence, Road Belong Cargo, 1964; Ron May, Micronationalism in Perspective (forthcoming).

16. M.D. Sahlin, "Poor Man, Rich Man, Big Man, Chief: Political Types in Melanesia and Polynesia," in Comparative Studies in Society and History (1963), 285-303. These assumptions have been questioned by Bill Standish, "The 'Big Men' Model Reconsidered: Power and Stratification in Simbu" (1978 unpublished).

17. Particularly influential was the report prepared by the Overseas Development Group, University of East Anglia (the "Faber Report") which drew upon the latest thinking in 'development circles" (1973).

18. See Barnett, op. cit.; Edward Wolfers, Race Relations and Colonial Law, 1975; Abdul Paliwala, Jean Zorn and Peter Bayne, "Economic Development and the Changing Legal System of Papua New Guinea," in African Law Studies, No. 16, 1978; Bernard Narakobi, "Law Reform in PNG," in Development Dialogue 1979, No. 1.

19. Barnett, op. cit.; Narakobi, op. cit.; Somare (Prime Minister) "Law and the Needs of Papua New Guineas People," in J. Zorn and P. Bayne (eds.), Lo Bilong ol Manuai (1974); John Kaputin, "Colonial Law - A Fraud," in 10 New Guinea 4 (1975).

20. Village Courts Act, 1973.

21. See Strathern, op. cit.

22. Strathern, op. cit.; Barnett, op. cit., etc.

23. For the background to the establishment of the Village Courts, see Barnett, op. cit.; Abdul Paliwala et al., op. cit.; Paliwala, "Village Courts or Colonial Courts?", paper delivered at the Goroka Seminar on Law and Self-Reliance. Pryke, "A History of Village Courts," unpublished paper; Don Chalmers, "Village Courts," chapter in thesis on the Legal System of PNG, University of PNG.

24. Sec. 8, vests the power of appointment in the national government, but this power is in practice exercised according to the choice made at elections locally held. See also Sec. 7.

25. Sec. 19.

26. See Joseph Mac Teine and Abdul Paliwala, "Village Courts in Simbu" (1978), unpublished; Paliwala, Law and Order in the Village: Papua New Guinea's Village Courts (1979), unpublished and Neil Warren, "The Introduction of a Village Court, IASER Discussion Paper, July 1976, Boroko.

27. See Warren, ibid.

28. Report of the Constitutional Planning Committee, 1974, Port Moresby.

29. See Conyers, op. cit.

30. Constitutional Amendment No. 1, 1977, Organic Law on Provincial Law, 1977.

31. This preliminary assessment is based on the author's interviews with officials and politicians in July-September 1978, as well as on a study of government files. A number of academics were also consulted. During this period the author acted as a consultant to the government of PNG on the review of the provisions for decentralisation.

32. M. Donaldson and K. Good, "Class, Power and Provincial Government in the Eastern Highlands," 1978 Waigani Seminar.

33. See Pryke and Chalmers, op. cit.

34. See Pryke, op. cit.

35. The first such courts were established by one of the most militant political movements, the Mataugan Association, before independence, and were seen as a threat to the officially established courts.

36. See the Report of the Commission of Inquiry into Tribal Fighting in the Highlands, Port Moresby 1973.

LAW IN ALTERNATIVE STRATEGIES OF RURAL DEVELOPMENT

Part III: Law in the Design and Administration of Alternative, People-Managed Development