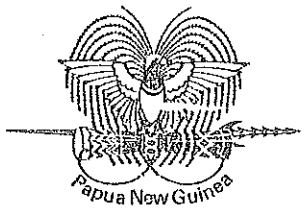
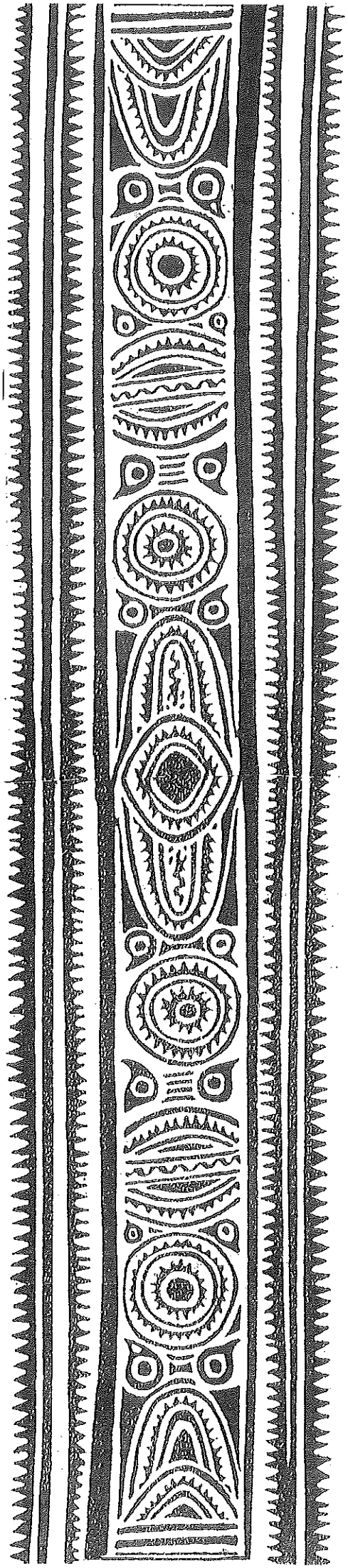


NEW DIRECTIONS IN RESOURCE MANAGEMENT FOR PAPUA NEW GUINEA

OCCASIONAL PAPER NO. 20

1990

LAW REFORM COMMISSION



NEW DIRECTIONS IN RESOURCE MANAGEMENT FOR PAPUA NEW GUINEA

REPORT OF THE LAW REFORM COMMISSION RESOURCES MANAGEMENT WORKSHOP, MAY 1990

OCCASIONAL PAPER NO. 20

1990

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PREFACE

In May-June 1990, the Law Reform Commission convened a Workshop to discuss new directions in Resource Management for Papua New Guinea. National lawyers, public servants, academics and others attended by invitation. Keynote addresses were made by experts and working groups then addressed various fields of enquiry, eventually producing the sets of recommendations and proposals which are contained in this paper.

The Workshop was run under "Chatham House Rules", which provide that nothing said or produced in the course of proceedings may be attributed to any participant, except by express consent.

Similarly, this paper does not represent any one person's views, or the final views of the Commission.

Suggestions, opinions and recommendations were offered in many ways by participants, and may therefore vary, even conflict. This paper presents them all for consideration, and is intended to provoke public debate and discussion. Comment will be welcomed by the Law Reform Commission.

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SUMMARY AND RECOMMENDATIONS

SUMMARY

Principal Needs

-to decentralise decision-making and coordinate the allocation of resource operation initiative, as between resource sectors and as between all involved parties.

-to acknowledge the supremacy of landowners in controlling the resources produced from their land while at the same time insulating landowners from the direct manipulation of outside developers.

- ownership of customary land must remain vested in customary landowners.
- land registration must take place, with the clear proviso that land does not thereby become a saleable or alienable commodity.
- the role of central government to become one of advisor, policy-maker and provider of technical assistance.
- to adopt practices of contract-management and production-sharing for major resource operations which are clearly beyond the reach of domestic capacity.
- to encourage domestic consumption, processing and extraction, if necessary by banning export of the raw resource or foreign participation in its extraction.
- to suspend extraction of a resource until it is clear that the means and process of extraction accords with the National Goals and Directive Principles of the Constitution.
- to build into legislation, wherever possible, justiciable guidelines for resource licensing and development which take into account the National Goals and Directive Principles, in particular, in relation to resource development, the principles of participation and environmental preservation and replenishment.

Main Proposal.

To establish one major piece of legislation governing all resource extraction.

To establish a system of national and provincial resource "boards", along the lines of the Physical Planning Act.

To establish a system of specific resource "courts" at national and provincial level to adjudicate resource disputes, and provide a system of checks and balances against overly-narrow concentration of power.

Further Recommendations.

National/Provincial/Local Government:

- Clearer definition and demarcation of National/provincial legislative powers.
- review of provincial government operations
- reviews within provinces of local government operations
- complete diagnosis of existing mechanisms of dispute settlement

Land Matters:

- participation by landowners in decisions over the use of their land for resource extraction
- landowners' financial interest and active participation in resource development to be a factor in development and financing proposals.
- recognition of "landowner groups" be given only to groups duly incorporated under the Land Groups Incorporation Act.

Foreign Investment and Banking:

- control by way of residential status and controls over repatriation of profits.
- foreign access licensing treaties, investment treaties and agreements with other countries be carefully reviewed.
- to examine the export credit financing model (the turn-key style of project)
- wider banking facilities within the country.
- to establish a Stock Exchange
- to aim always towards import substitution

THE NATIONAL GOALS AND DIRECTIVE PRINCIPLES AS THEY RELATE TO RESOURCES AND ENVIRONMENT LAW: CREATING THE INTERMEDIATE LEGAL NORMS.

CONSTITUTION Section 25. Implementation of the National Goals and Directive Principles.

(1) .....the National Goals and Directive Principles are non-justiciable.
(2) Nevertheless, it is the duty of all governmental bodies to apply and give effect to them as far as it lies within their respective powers.....

It is necessary to think jurisprudentially about the relationship between the National Goals and Directive Principles and the ordinary legal norms of statute and Underlying Law.

The National Goals and Directive Principles are legal norms, of a non-justiciable nature, cast at a higher level of abstraction than is normally found in statute law. What is missing is a middle-level or intermediate group of legal norms that would enable the values of the National Goals and Directive Principles to be transmitted into statutory form.

In hierarchical form the scheme can be represented thus:

National Goals and Directive Principles

Intermediate Legal-norms of Resources and Environment Law

Statute Law and Underlying Law.

It is possible to begin to sketch the broad nature of the intermediate group of legal norms, or as they may be referred to: the "Basic Precepts of Resources and Environmental Law".

GOAL 1. **Integral human development.**
We declare our first goal to be for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others.

WE ACCORDINGLY CALL FOR -

(1) everyone to be involved in our endeavours to achieve integral human development of the whole person for every person and to seek fulfilment through his or her contribution to the common good; and

(2) education to be based on mutual respect and dialogue, and to promote awareness of our human potential and motivation to achieve our National Goals through self-reliant effort; and

(3) all forms of beneficial creativity, including sciences and cultures, to be actively encouraged; and

(4) improvement in the level of nutrition and the standard of public health to enable our people to attain self fulfilment; and

(5) the family unit to be recognized as the fundamental basis of our society, and for every step to be taken to promote the moral, cultural, economic and social standing of the Melanesian family; and

(6) development to take place primarily through the use of Papua New Guinean forms of social and political organization.

The core values of this Goal for the purposes of Resources and Environment Law are

- participation
- dialogue
- promotion of Papua New Guinean social and political organisation.

The Intermediate legal norms should reflect a close relationship between all those involved in resources development: landowners, project managers, workers, National Government, Provincial Government. Institutions and mechanisms should facilitate what the Goal terms as the dynamic involvement of individuals in resource development, and in the decision-making processes which will determine the impact of the development on the environment.

The emphasis on traditional and customary values points to the creation of institutions that would allow land-groups and other customary groups to participate in decision-making processes. It also points to the importance of land owing groups and the legal form that could be given to their incorporation - a preference for the Land Groups Act as opposed to incorporation under the Companies Act, or Incorporated Associations Act.

GOAL 2. Equality and participation.

We declare our second goal to be for all citizens to have an equal opportunity to participate in, and benefit from, the development of our country.

WE ACCORDINGLY CALL FOR -

(1) an equal opportunity for every citizen to take part in the political, economic, social, religious and cultural life of the country; and

(2) the creation of political structures that will enable effective, meaningful participation by our people in that life, and in view of the rich cultural and ethnic diversity of our people for those structures to provide for substantial decentralization of all forms of government activity; and

(3) every effort to be made to achieve an equitable distribution of incomes and other benefits of development among individuals and throughout the various parts of the country; and

(4) equalization of services in all parts of the country, and for every citizen to have equal access to legal processes and all services, governmental and otherwise, that are required for the fulfilment of his or her real needs and aspirations; and

(5) equal participation by women citizens in all political, economic, social and religious activities; and

(6) the maximization of the number of citizens participating in every aspect of development; and

(7) active steps to be taken to facilitate the organization and legal recognition of all groups engaging in development activities; and

(8) means to be provided to ensure that any citizen can exercise his personal creativity and enterprise in pursuit of fulfilment that is consistent with the common good, and for no citizen to be deprived of this opportunity because of the predominant position of another; and

(9) every citizen to be able to participate, either directly or through a representative, in the consideration of any matter affecting his interests or the interests of his community; and

(10) all persons and governmental bodies of Papua New Guinea to ensure that, as far as possible, political and official bodies are so composed as to be broadly representative of citizens from the various areas of the country; and

(11) all persons and govenmental bodies to endeavour to achieve universal literacy in Pisin, Hiri Motu or English, and in "tok ples" or "ita eda tano gado"; and

(12) recognition of the principles that a complete relationship in marriage rests on equality of rights and duties of the partners, and that responsible parenthood is based on that equality.

The core values of the second goal emphasise **equality**, but as with the First Goal, they put that quality in the context of **participation**.

Participation is linked with political institutions so that the people can have an equal opportunity to take part in all aspects of life. Paragraph 5 is in terms of the maximizing of participation in all aspects of development. The opportunity for equal participation is particularized in that special attention is given to the participation of women.

In real terms the Second Goal emphasises equality of participation in

- the benefits (profits) that flow from the resource
- decision-making
- access to information
- and conflict resolution.

At the National Level the institutions which would be established to allow such participation should have a representation that reflects an equal opportunity to participate on the basis of provinces, regions, and gender.

GOAL 3. **National sovereignty and self-reliance.**

We declare our third goal to be for Papua New Guinea to be politically and economically independent, and our economy basically self-reliant.

WE ACCORDINGLY CALL FOR -

(1) our leaders to be committed to these National Goals and Directive Principles, to ensure that their freedom to make decisions is not restricted by obligations to or relationship with others, and to make all of their decisions in the national interest; and

(2) all governmental bodies to base their planning for political, economic and social development on these Goals and Principles; and

(3) internal interdependence and solidarity among citizens, and between provinces, to be actively promoted; and

(4) citizens and governmental bodies to have control of the bulk of economic enterprise and production; and

(5) strict control of foreign investment capital and wise assessment of foreign ideas and values so that these will be subordinate to the goal of national sovereignty and self-reliance, and in particular for the entry of foreign capital to be geared to internal social and economic policies and to the integrity of the Nation and the People; and

(6) the State to take effective measures to control and actively participate in the national economy, and in particular to control major enterprises engaged in the exploitation of natural resources; and

(7) economic development to take place primarily by the use of skills and resources available in the country either from citizens or the State and not in dependence on imported skills and resources; and

(8) the constant recognition of our sovereignty, which must not be undermined by dependence on foreign assistance of any sort, and in particular for no investment, military or foreign-aid agreement or understanding to be entered into that imperils our self-respect, or our commitment to these National Goals and Directive Principles, or that may lead to substantial dependence upon or influence by any country, investor, lender or donor.

The major values in the Third National Goal, or it applies to Resources and Environment Law are

- **the emphasis on internal interdependence**
- **the priority given citizens and the State in the control of production**
- **the strict control of foreign investment**
- **and an emphasis on state participation in and control of major national resources enterprises.**

The emphasis on internal interdependence would point to maximising, in Papua New Guinea, the processing of raw materials obtained in Papua New Guinea, for domestic markets.

Natural Resources projects which are owned by foreign investors would need to be "strictly controlled", but the real emphasis is on citizen-ownership, and state participation and control.

GOAL 4. **Natural resources and environment.**

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.

WE ACCORDINGLY CALL FOR -

(1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and

(2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and

(3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.

The Fourth Goal predicates the use of natural resources for the benefit of all with the idea of **conservation** and **sustainability**. The Goal is not cast in terms of no

development, but rather in terms of "wise use". Flora and fauna species are to receive "adequate protection".

Legislation under this Goal would appear to need to contain criteria which would make the task of deciding what is the "wise use" of a resource. Sustainability (conservation and replenishment) and protection of flora and fauna would need to be particularised in future statutes to the extent that the statutes lived up to this Goal.

GOAL 5. **Papua New Guinea ways.**

We declare our fifth goal to be to achieve development primarily through the use of Papua New Guinean forms of social, political and economic organization.

WE ACCORDINGLY CALL FOR -

(1) a fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People; and

(2) particular emphasis in our economic development to be placed on small-scale artisan, service and business activity; and

(3) recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture, including language, in all their richness and variety, as well as for a willingness to apply these ways dynamically and creatively for the tasks of development; and

(4) traditional villages and communities to remain as viable units of Papua New Guinean society, and for active steps to be taken to improve their cultural, social, economic and ethical quality.

The emphasis in the fifth and final Goal is on

- **a fundamental re-orientation of state and social institutions towards Papua New Guinea forms of participation, consultation and consensus.**
- **small-scale development.**
- **the fostering of respect for traditional culture and its dynamic use in development.**
- **and the safe-guarding and improvement of village and traditional communities.**

The immediate relevance of this Goal to Resources and Environment Law reinforces the call in other Goals for institutions and mechanisms which would allow real and meaningful participation of Papua New Guineans at all stages of the natural resource development. Resources and Environmental Laws must address the problem of integrating customary concepts and institutions into the development process.

CONCLUSION

Participation.

The National Goals and Directive Principles propose -

> the dynamic involvement of those directly participating in natural resources development, and of the communities who will bear the impact of the development in terms of environmental and social change.
>
> Quantatively, there should be some equality in participation in terms of the benefits from resource development, the decision-making process, access to information and conflict resolution.
>
> At the National level of participation, institutional arrangements should allow for equality on the basis of provincial, regional and gender differences.
>
> Land owners, workers, provincial representatives, and National Government would all appear to be the components to be accommodated in the boards of the development companies, and the supervisory agencies.

Participation should be meaningful - and not tokenistic or a sham.

Control of investment.

Foreign investment should be strictly controlled.
National private investment is to be encouraged.
Local processing is to be encouraged.
The State has a positive role both as a supervisor and participant in natural resources development.

The Environment.

Resources and Environment legislation will need to come to grips with concepts of "wise use" and "sustainability". The broad nature of these concepts will need to be tempered into a set of narrower legal norms that will realise the spirit of the Fourth Goal in practice.

WORKSHOP; INSTITUTIONAL STRUCTURES AND GOVERNMENT.

KEYNOTE ADDRESS:

THE DECENTRALISED SYSTEM OF GOVERNMENT AND THE FUTURE MANAGEMENT OF NATIONAL RESOURCES IN PAPUA NEW GUINEA.

By A.J. Regan, Faculty of Law, University of Papua New Guinea.

Events of the past few years have given rise to grave doubts about the way in which the natural resources of Papua New Guinea are being managed. Any serious consideration of possible changes must take account of the likely effects of decisions about resources management on a wide range of local interests. These interests include not only owners of the land on which resources are located but other people affected by decisions for or against commercial or other forms of 'development' and the manner in which 'development' takes place i.e. adjoining landowners, trade unions and potential employees, local businesses as well as the governmental organisations intended to represent these and other local interests, namely provincial governments and local level governments.

Provincial governments now merit particular consideration. In the past three or four years, a number of provincial governments have for the first time been taking seriously their legitimate role in representing local interests in relation to resource management issues. In particular, some provincial governments have become quite active in debate about resource industries and are even directly intervening in resource industries for the first time.

This paper assumes that the National Government is serious in developing improved arrangements for managing the development of natural resources, and attempts to sketch in outline a framework for evaluating the role which provincial and local level governments should play in such future arrangements. The paper assumes that there is much to be learnt about the appropriate role for provincial and local level governments in resource management from an evaluation of the operation of the decentralised system of government over the past 13 years since the Organic Law on Provincial Government came into effect. Accordingly, the paper summarises:

- the aims and the structures for a decentralised system of government as envisaged by the Constitutional Planning Committee (the CPC) in its 1974 Final Report;

- the significant modifications made to the system envisaged by the CPC both during the phase when the provincial government system was being established and in its operation since then and key ways in which expectations of the CPC were not met;

- the present role being played by provincial and local governments in relation to natural resource management; and

- the likely long term prospects for the decentralised system of government in the light of ongoing debate about its future.

Against that background, some comments are made about possible appropriate ways for future involvement of provincial and local level governments.

Original Aims and Proposals

It is important to look briefly at the original aims of the decentralised system of government as propounded by the CPC because they remain central to an understanding of the relevant provisions of the Constitution and the Organic Law on Provincial Government.

In large part reacting to and rejecting the highly centralised and bureaucratic colonial administration, the CPC aimed to establish a highly participatory system of government. Participation of people in decisions about matters that affected them would, the CPC believed, make government more effective and more responsive to local needs. It would also help in nation-building by providing a bridge between local communities and the National Government. Provincial governments were to be the main new participatory form of government. With their structures reflecting local needs as a result of being chosen by the people of a province through a consultation process and elected by those same people, provincial governments were to be new centres of political power and legitimate voices for local interests in national discourse.

The new governments were to be vested with significant powers, and were to do so under their own laws to ensure both that local policy-making occurred and that they had a more secure basis for exercise of their powers than they would have had under administrative delegations. But where necessary in the national interest, provincial policy-making was to take place within a framework of over-arching national policy, which would be set in National Government laws with provincial governments dealing with matters of local concern.

Provincial governments were also to be guaranteed shares of fiscal and personnel resources necessary to utilise their legal powers. As there were likely to be tensions between the National Government and powerful new centres of political power, a system for handling intergovernmental relations was required. But it was to be a consultative system, avoiding reliance on the courts, whose methods were likely to be too legalistic for dealing with what would largely be political matters.

The CPC envisaged provincial governments being fully accountable to their people, in part through the people being politically mobilised through the consultative processes for establishment of the new governments. Mobilised public opinion would put pressure on elected politicians to act in the best interests of their people. The CPC did recognise, however, that only a few areas of the country were ready for provincial government, and recommended both a phased introduction of the governments and a system with graduated powers - the graduation depending on capacity. Little was said about supporting accountability through supervision and control from the National Government level, though the proposals for suspension as a last resort weapon against wayward provincial governments suggests the CPC envisaged such a role for the National Government.

Although provincial governments were the focus, the CPC was not unaware that they were relatively large organisations through which to encourage effective participation in government, and therefore emphasised the need for encouragement of various forms of local level government. But perhaps because its principal focus was its 'radical' proposals for provincial government, little was said about how local level government was to operate other than that it should, as a matter of principle, be under the control of provincial governments.

Modifications to Proposals and Failure to Meet Expectations

Although the CPC aims and proposals remained central, much of the detail of the system was modified both during negotiations over its establishment and as a result of its subsequent operation from 1977 to date. Major modifications occurred during the establishment negotiations between the Bougainville leaders and the National Government in 1976, and the concessions won by Bougainville in settlement of its attempted secession resulted in provincial governments being given more powers and independence than originally envisaged. Further, proposals about phased introduction and graduated powers were largely forgotten. During the establishment phase, any idea of a graduated system largely 'went out the window' as the administration of the system was built upon uniform transfers of powers and functions to all provincial governments, regardless of capacity and preparedness.

In the establishment and operation of the system, the degree of political mobilisation which the CPC had, perhaps naively, expected to develop around provincial governments did not occur on a wide scale. Provincial governments were accountable mainly in those provinces where public opinion ws already mobilised - such as North Solomons and East New Britain, arising from pre-Independence struggles against the colonial administration; or where there were strong institutions; such as stable provincial bureaucracies or strong local government councils, which helped keep pressure on the new governments. In many of the cases where these factors were not present, the new institutions were captured by local elites or those aspiring to become part of the local elite, and the powers, funds and personnel became a source of patronage and embezzlement rather than resources to be used for the people.

Powers, functions, finance and personnel transferred to provincial governments have not been as extensive as the CPC expected, in part because of bureaucratic and political obstruction and inertia at the centre and in part because of the poor performance of a majority of provincial governments. Provincial governments' policy development initiatives have been few and most of their powers continue to be exercised under administrative delegations of doubtful legal validity rather than under provincial government laws.

Funds available to provincial governments are particularly limited, especially in provinces without mining royalties or a broad base for retail sales and land taxes. In the provinces which do not have these 'advantages' (the majority of them) the steady reduction, in real terms, in grant funding, has put great strains on provincial governments unable to meet the growing expectations of expanding populations.

The National Government has shown itself almost incapable of maintaining effective oversight of the provincial government system. Mismanagement and corruption in

many provinces attracts little attention or action from the National Government. When it has taken action, it has used the most draconian - suspension - rather than use its array of lesser powers, and in most cases has done very little to bring about long-lasting changes in the suspended provincial governments, most of which (in the absence of mobilised public opinion to keep them accountable) have quickly reverted to their former ways when suspension was lifted.

Tensions between provincial governments and the National Government manifested themselves quickly, but in a form and with a virulence that the CPC apparently had not anticipated - the National Government Members of Parliament were found to be threatened by the new provincial governments which had largely usurped what had previously been their sources of patronage and largesse. The institutions and processes for inter-governmental relations recommended by the CPC have not been able to deal effectively with this tension, and the courts have been far more involved in dispute settlement than was envisaged by either the CPC or the Organic Law on Provincial Government.

In a majority of provinces, far from being important participatory organisations, local level governments are almost moribund - in part because of the lack of powers and resources on the part of the provincial governments but also in part due to tensions and jealousies between provincial government politicians and local government politicians. In a few provinces - notably North Solomons, Manus, East New Britain and Morobe - efforts made to build smaller-scale and more effective community governments to replace the old local government councils have met with mixed success, for even in those provinces staff and funds are limited.

Many of the difficulties of the provincial government system are certainly linked to two closely related trends in Papua New Guinea. The first is the growing extent to which government institutions at all levels are regarded as sources of accumulation of personal wealth. The second is the decreasing administrative capacity of the bureaucracy - a problem evident as much at the national as at the provincial level.

Present Roles of Provincial and Local Governments Concerning Resources Management

As the restricted role played by provincial and local governments in resource management has started to change, we can learn lessons about the future roles they may or should play by examining their record to date.

Until the last three to four years the role of provincial governments have been largely restricted to limited administration of the forestry sector (provincial forestry officers administering the national forestry laws are under the direction of provincial governments) and being consulted by the National Government about new resource projects, as required by Section 85 of the Organic Law on Provincial Government. Local level governments have had an even smaller role, reflecting their minuscule powers and resources in most provinces. But recently there have been some noticeable changes, as provincial governments seek to take a more interventionist role in relation to management of natural resource extraction industries.

Since about 1987 there has been a noticeable change, with provincial governments generally seeking greater involvement in decision-making about resource management. The most obvious manifestations of the new direction have been the demands concerning the mining sector coming from the Premiers' Council and individual provincial governments. The demands are for provincial government involvement in negotiations about large mining projects and for increased provincial and landowners' shares in revenue from such projects, rather than for a provincial role in policy or legislative development. But there are some indications of provincial government moves towards a far more active role in regulation of both the mining and petroleum industries - note, for example, the Enga Provincial Government role in the Porgera negotiations, and its public criticism of CRA in relation to the Mt. Kare project; and the Southern Highlands Provincial Government public comments on the way in which the proposed Iagifu oil project should proceed. In some respects, provincial governments' positions are at odds with National Government policy.

But in the cases of East Sepik, with its 1987 **Customary Land Registration Act**, and Manus, with its 1989 **Forest Resource Management Act**, provincial governments are attempting to take radical new policy steps which are very much at variance with accepted wisdom at the national level. In both cases the provincial governments have been attempting to take long-term action to assist landowners. In both cases the provincial government action involves a major attempt to regulate economic activity - perhaps the first serious attempts in that regard on the part of any provincial government.

The East Sepik law seeks to mobilise land for economic development while retaining traditional ownership and control. The Manus legislation seeks to prevent destruction of the small but valuable provincial forest resource by setting sustained yield limits which must be met by forest operators licensed under national forest laws.

In both cases conflict with the National Government has resulted: conflict which is proving - at least in the case of Manus - too much for the dispute settlement mechanism under the **Organic Law on Provincial Government** to deal with, largely due to the refusal of the relevant National Government minister to cooperate in submitting the disputes to the procedures[1]. The inability of the Manus Provincial Government to resolve its problems with the National Government through consultative processes does not augur well for future provincial government involvement in resource management.

The Manus case is also significant in demonstrating the difficulties caused by the vesting of significant discretionary powers over decisions on resouree projects in single National Government ministers or public servants. This is something of a pattern in National Government legislation, not only on natural resources; a pattern reflecting the bureaucratic system of government that existed prior to Independence - the major change in the laws since Independence has been to vest in ministers many of the powers once exercised solely by colonial bureaucrats. It is also a pattern which tends to open the doors to inconsistent decision-making as well as the strong

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[1] An outline of the history of the disputes in the Manus case is attached to this paper.

possibility of corruption. It is a pattern which obviously has a strong tendency to result in local interests being ignored in the decision-making process, and so whatever the role of provincial and local level governments in resource management, there must be some change in this pattern and a clearer role for provincial and local government inputs.

It should also be noted that in the Manus case the provincial government action has caused conflict with 'private enterprise'. The more active role that some provincial governments - particularly Enga and Southern Highlands - are seeking to play in relation to mining projects, is likely to result in some conflict too, with foreign companies unhappy about the need to deal with a range of authorities with perhaps conflicting, or at least not always consistent, objectives. Any new role for provincial and local governments should seek to find ways of minimising this kind of tension.

While both the particular new provincial government laws discussed involve apparently positive moves, there is little doubt that in some cases the opportunities for gain presented to various individuals will also be a factor in provincial governments seeking to become actively involved in regulation or other active involvement concerning the resource industries in their provinces. This will obviously be a particularly severe danger in some of the worst-managed provinces, and must be taken into account in developing proposals for new roles for provincial and local level government.

The Future of the Decentralised System of Government

Before considering the ways in which arrangements should be made for future involvement of provincial and local level governments in the management of natural resources, the likely long-term future of the decentralised system requires brief comment, for the ongoing and recently intensified public debate about the future of provincial government may be regarded as indicative of its early demise. If it is likely to be soon abolished and replaced, there may be little point in building an important role for the system when planning any new governmental arrangements.

The debate about provincial government is largely fuelled by the tension between National Government MPs and provincial governments already discussed. The Parliamentary Select Committee on the Future of Provincial Government established in March 1990 and chaired by Mr. Hesingut, and recent strident calls for abolition of provincial governments by a number of MPs and by the Governor General, are just the latest manifestations of that tension[2].

There is no doubt that many (probably most) MPs would like to abolish the system. Proposals for its replacement include a return to centralised provincial administration under positions similar to the old District Commissioners, and the establishment of district coordinating committees headed by National Government MPs - draft legislation entitled "District Development Authority Bill 1990" which would provide for such committees has recently been prepared for a Private Members' Committee of the National Parliament.

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[2] Note that the Governor-General was a major figure in a national political party immediately prior to his appointment.

Both abolition and replacement of the provincial government system would be a massive and costly exercise which could not be easily undertaken. Indeed, depending on the extent of restructuring of existing provincial administration required, it may even be beyond the capacity of the central bureaucracy. Political opposition to such moves is likely to be fierce, particularly from the Islands and perhaps parts of the Mamose regions. In the Islands there is more public support for the provincial government system, not only because of reasonably good performance of some provincial governments but also because of concern at possible dominance by the more populous mainland. Morever, in the past the excellent record of the North Solomons Provincial Government, and the real likelihood of attempted secession of that province if abolition was attempted, were particularly potent factors working for the continuance of the system. But even without North Solomons, if serious attempts at abolition are made, opposition to the move is likely to be extremely divisive. But it is more likely that the debate will reach a peak - as it has several times in the past - when growing opposition to abolition will convince the National Government that it is not a serious option, particularly as the great difficulty involved in abolition in the islands makes it impractical to consider abolition elsewhere.

The possible implications of another development need to be noted. The National Government is examining proposals for greater autonomy for the North Solomons Provincial Government as part of its negotiating package to be offered in any talks held to resolve the crisis in the North Solomons. The proposals include a much more graduated approach to decentralisation, with a new status of 'autonomous' provincial governments being created. To obtain that status, a provincial government would have to meet difficult criteria showing it had an excellent record in a wide range of matters such as policy-making, financial management, general administration and so on. A province with autonomous status would have much wider powers: in particular, its laws on the concurrent legislative subjects under the **Organic Law on Provincial Government** would prevail over National Government laws. The unitary nature of the present system would be preserved through the National Parliament retaining ultimate authority to disallow any provincial law it considers not to be in the public interest.

While it remains possible that abolition will be attempted - particularly if the 'Bougainville crisis' continues without a negotiated settlement for an extended period - perhaps the more likely outcome of the debate will be some serious attempts to restructure and reform the system. For example, a proposal discussed recently by the abovementioned Parliamentary Select Committee would see use of a provision in the **Organic Law on Provincial Government** which enables provincial government assemblies to be composed of persons nominated by local level governments as a way of making provincial and local level governments work more closely together. The costs of the system might be reduced - perhaps by providing for only the Premier to be paid on a full-time basis. Administration in the worst-managed provinces might be improved by more direct intervention by the Department of Personnel Management. A much more graduated system of government might be adopted, and so on.

Future Involvement of Provincial Government in Resource Management.

Provincial and local level governments have a legitimate interest in having a more active involvement in resource management, largely in order to ensure the interests

of the local groups affected by decisions on such matters are protected. Such interests of local groups include an interest in ensuring that a proper share ofthe benefits flowing from any development project will return to local groups, either directly or through contributions to provincial government revenue, but can extend much further - for example, the Manus forestry case indicates that particular kinds of local or provincial interests may include conservation or even sustained yield management of a resource which the National Government is not overly concerned to maintain.

On the other hand, the National Government has a legitimate interest in such things as ensuring that the national interest is met in relation to a range of matters such as: encouragement of foreign investment in industries where there is not sufficient local capital or technical expertise for the development of some industry judged desirable by the National Government; conservation; revenue to the nation as a whole; ensuring of balanced and to some degree equal development among the provinces and so on.

These interests of the different levels of government are of course not mutually exclusive, so that, for example, even where the main concerns of the National Government are encouragement of foreign investment and raising of revenue, provincial and local level governments may have legitimate concerns to express which may, if given proper consideration by the National Government, result in modifications to or even cancellation of particular projects. The essential thing is to find decision-making and management mechanisms which allow proper weight to be given to the full range of interests.

Although to date provincial government involvement has been minor, we have seen that there are signs of change. Hence there is an urgent need to determine the appropriate role for provincial and local level governments, particularly given the aims of the decentralised system of government and the lessons learnt from over 13 years of its operation.

There is time for only a brief discussion of the issues. However, the matters considered in this paper would suggest that whatever might be the demands of provincial and local level governments or the capacity of particular governments, as a group they do not have the capacity - policy-making, administrative or financial - to take primary responsibility for regulation of resource management. Hence there should not be any general move towards provincial government legislation being the main legislation in respect of resource development. On the other hand, the continued vesting of wide discretionary powers in the hands of National Government ministers and officials will almost certainly exclude provincial governments from decision-making and create ever increasing tensions between the levels of government.

It is suggested that given the wide variation in capacity of provincial governments, there is a need to go back to a graduated approach to decentralisation more in line with the original aims of the CPC. It might be time to develop at least two levels of approach to the involvement of provincial and local governments.

The first level would apply mainly to the majority of provincial governments with records of poor performance. The aim would be to develop new National Government laws on management of development in various sectors of resource manage-

ment (forestry, fisheries, mining etc.) National boards would be responsible for setting overall national policy for the sector, and provincial boards could set local policy and perhaps regulate the development of smaller scale projects in line with both sets of policies. Provincial governments as a group would have input to the national boards through membership - perhaps nominated by the Premier's Council - while although provincial boards might have a larger element of provincial and local representation, they would also include representation of other interests including National Government, industry, wider community interests and so on.

Through the use of such boards, the discretionary powers of ministers and officials under present resource laws would be exercised by representative boards. Both provincial and local governments would be provided with an input into both policy development and management of resource development. A possible model already exists for the suggested approach - the system of national and provincial boards provided for under the Physical Planning Act 1989 might be adapted to the needs of the resource sectors.

The second level would apply only to those few provincial governments with a good record of capacity and performance. It may well be that it would apply only to those few which would be eligible for the proposed status of 'autonomous' provincial governments, as mentioned in the previous section of this paper. They would be given much greater scope to legislate on and generally regulate whichever resource sectors they were most concerned about. As under the proposed 'autonomous' status arrangements their legislation would prevail over National Government laws on concurrent legislative subjects, there would be considerable scope for provincial government policy-making. The greater powers being exercised by the few 'autonomous' provincial governments may even provide incentives to other provincial governments to improve their performance to the point where they too would be eligible for the greater powers.

These proposals would need much more examination and development before they could be considered as the basis for new arrangements. But arrangements of this kind require close consideration as a way of ensuring participation in decision-making, reducing tensions between the levels of government and providing for more rational and orderly management of natural resources.

APPENDIX

The Manus Forestry Case.

For some years the Provincial Government had been developing a policy concerning, and plans for, development of the Manus forest resources on a sustained yield basis (selective logging designed to maintain the viability of the resource indefinitely). Only one forest operator was to be selected to log and then process the annual harvest in facilities in the province, thereby creating employment and adding value to the product. Difficulties in arranging purchase of timber rights from some landowners meant that when the developers was selected in mid-1988, substantial areas of the Manus resource were not covered by the forestry licenses issued under

the **Forestry Act.**[3] Later in 1988, the new Minister for Forests indicated his intention of declaring those areas to be 'local forest areas' under the **Forestry (Private Dealings) Act.**[4] Once such declarations are made, landowners can, in general, deal directly with whatever developers they wish and development can proceed with minimum government control. The Manus Provincial Government feared that the result would be uncontrolled logging with attendant rapid depletion of the resource and the processing facility becoming non-viable.

After numerous attempts to persuade the national Minister not to make the declarations, in November 1988 the provincial government invoked the mediation procedures under the **Provincial Governments (Mediation and Arbitration Procedures) Act.** Upon being advised by the State's lawyers that, in their view, the mediation procedures did not impede the power of the Minister to make the declarations under the **Forestry (Private Dealings) Act,** the Provincial Government sought and obtained an *ex parte* injunction preventing the Minister from making the declarations. The State was joined as defendant by the logging company hoping to commence operations under the **Forestry (Private Dealings) Act.** The defendants sought discharge of the injunction, arguing *inter alia* that the Milne Bay case prevented the Provincial Government from having recourse to the courts in relation to any dispute or any aspect of any dispute with the national government, and that this principle extended to the application for the injunction in the proceedings before the court. The court[5] accepted that argument but in addition, it decided that as the provincial government had no legal or equitable interests under the **Forestry (Private Dealings) Act,** it had no right to an injunction. The Court ordered discharge of the injunction and the striking out of the Provincial Government's proceedings (see *Manus Provincial Government v. Kark Stack and Ors* (1988 unreported) WS No. 1006 of 1988).[6]

The Provincial Government then appealed to the Supreme Court and obtained a temporary stay of the National Court's orders for one week while the Court[7] considered the matter further. The main effect of the stay was to preserve the original injunction against the Minister. But shortly afterwards, the Minister gazetted the declaration under the **Forestry (Private Dealings) Act.** Subsequently, the stay was granted pending the outcome of the provincial government's appeal. But, in addition, using its powers under **Constitution** s155(4), the Court ordered that the Minister's gazetted declaration was null and void. Further, the Minister, the Secretary of the Department of Forests, the State's lawyers who had conduct of the matter and the Government Printer were all summoned before the court to explain why the declaration had been gazetted in the face of the stay order. While initially considering contempt proceedings, the court accepted explanations involving breakdowns in communications between lawyers, administrators and politicians, but

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3 Chapter 216

4 Chapter 217

5 Amet J.

6 (1988 unreported: WS No. 1006 of 1988).

7 Hinchcliffe J.

nevertheless reprimanded the Secretary of the Department of Forests and a senior state lawyer[8]. Subsequently, early in 1989 the Provincial Government's appeal to the Supreme Court was rejected, but reasons for that decision were not available at the time of writing.

Following the granting of the stay order by Hinchcliffe J. the mediation procedures were commenced. The mediator, Sir Ravu Henao, reported in February 1989 that he had been unable to resolve the dispute due to the refusal of the Minister for Forests and the staff of his Department to play "any constructive role" in the mediation of the dispute.[9] The Provincial Government then invoked the second stage of the procedure available under the **Provincial Governments (Mediation and Arbitration Procedures) Act** - arbitration procedures. The Chief Justice appointed an arbitrator, Brunton A.J. The hearing of the arbitration was set for a date after the hearing of the Supreme Court appeal referred to above, pending publication of the judgment and was adjourned, on the basis that the draft judgment of at least one of the judges hearing the appeal indicated that as the logging company was a party to the Court proceedings, the matter was no longer a dispute solely between governments as required by Section 3 of the **Mediation and Arbitration Procedures Act**. Hence, the Act did not apply to the dispute.

Following the rejection of the appeal and adjournment of the arbitration proceedings, the Provincial Government has not sat back. It has imaginatively and vigorously explored a bewildering range of other avenues in an effort to ensure planned and balanced development of its provincial forest resources.

First, it passed its own law on forestry matters - the **Manus Forest Resource Management Act** 1989. Coming into effect in the first half of 1989, it was designed to 'supplement' the National Government's forestry laws by providing that licensees under national laws could only harvest logs on sustained yield basis. The forest operator commenced harvesting after the Minister made the disputed declarations and as soon as the harvest exceeded limits set under the provincial law, a successful prosecution was made by the Provincial Government in late 1989. The forest operator is appealing that decision. In 1990, a second operator exceeded the limit set under the provincial government law and a second prosecution has been launched. The Provincial Government sought orders from the National Court impounding logs cut by and logging equipment owned by the defendant pending the hearing and partially succeeded, for it obtained an order for the payment into Court of over K250,000 pending the outcome of the matter. The prosecution has not yet been heard[10].

Second, the Provincial Government made a reference under Section 19 of the **Constitution**, questioning whether the **Forestry (Private Dealings) Act** - under which the impugned declarations had been made - was in breach of the **Constitution's** protection of citizens from unjust deprivation of property. The reference was argued in February 1990, but no judgment has been published at the date of writing.

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8 Post-Courier, 20 December 1988.

9 Department Provincial Affairs 1989.

10 Late May 1990.

Third, the Provincial Government has sought judicial review of the appointment of a person in Manus as the authority intended, under the Forestry (Private Dealings) Act, to protect the interests of local timber rights owners and of various administrative steps taken by that person preparatory to logging commencing. Those proceedings were heard recently.

The complex, expensive and wasteful chain of proceedings is a stark example of what the CPC had hoped to avoid in inter-governmental relations. The entire chain was begun by the initial refusal of the National Government Minister for Forests to consult with the Provincial Government, and his subsequent effective refusal to submit the dispute to mediation and arbitration procedures. Those procedures cannot possibly prevent disputes being dealt with by litigation without good faith on both sides. With tensions between the levels of government growing, and with some provinces - such as Manus - increasing their effectiveness and at the same time seeking to exercise more powers and to guide provincial development more effectively, more disputes of this kind can be expected.

The history of this dispute may not hold much hope for the avoidance of litigation, but it does have its positive side. One of the original reasons for establishing provincial governments was to set up alternative centres of power - centres which might balance or oppose excesses at the centre, and which might fight for local interests against decisions by the centre inimicable to those interests. In this case, the Manus Provincial Government has provided powerful proof of the fulfilment of the CPC's hopes in this regard.

KEYNOTE ADDRESS:

COMMUNITY EMPOWERMENT:

RESOURCES MANAGEMENT AND INSTITUTIONAL STRUCTURES

THE NEED FOR A NEW SOCIAL CONTRACT

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1. INTRODUCTION

Some years ago, a young Cree Indian girl committed suicide, in one of Canada's western provinces. It was not the first time that an Indian girl had killed herself. However, this suicide was reported not merely in the local press but in the national media as well.

There had been an investigation, of the type which always takes place after a suicide. The investigation found that the young girl had had difficulties with many organs of local government, including:

- her school teachers
- the trustees of the local school board
- police officers (including community relations policewomen)
- social workers
- drug addiction counsellors.

The list of local government agencies was quite a long one. But it was not this long list of difficulties which brought the case into the national media. What was it then which rivetted the attention of the national media of the world's second largest country on this tragic death?

What attracted national comment was the fact that this girl could not speak the Cree language. She could speak only English. But her grandparents and the elders of her band could not speak English. They could only speak Cree. (Her parents were, in fact, bilingual in both English and Cree but she was on bad terms with them).

The Cree language is the largest Indian language group in Canada. The Cree nation once stretched from the Arctic to the southern border with the U.S.A. and from Canada's beautiful eastern woodlands across the best plains of the Canadian Prairies, almost to the foothills of the Rocky Mountains. The mighty Cree warriors of the plains were once famous for their horsemanship and their magnificent war costumes and headdresses. The Cree culture was old when Greece and China were young. But the young girl had lost touch with that great culture.

The grandmother of the young girl spoke to the national media through an interpreter. She spoke of how the bonds between the old and the young Crees were being sundered. She spoke of her anguish. She spoke of how the culture of the ancestors could have come to the aid of the young girl, if there had been a language bridge. She spoke of a tragedy which might perhaps have been averted.

This is a sad story. It is not a story about resources management as such, according to the definitions of the white man. But it is a story about human resources. And the Cree Indians have never made any distinction between the world of humans, the spiritual world and the physical environment.

But it is also in part a story of western-style municipal government and "local" government services. Such governments are, indeed, governments of local people. But, these institutions are not always government *by* the local people or government *for* the local people. In psychological terms, these governments often seem to Indians as remote and alien as the governments in far away provincial capitals or in far away Ottawa, the national capital of Canada.

2. TRADITIONAL GOVERNMENT

But what existed before the coming of the white man and before the coming of his institutions? It is a question of importance both in Canada and in Papua New Guinea.

Was there anarchy? Of course not. There was what is now called "traditional government" in the history books. Is this traditional government something which should be treated with distaste, or perhaps even as a subject of historical curiosity?

Let me answer in this way. Every lawyer and historian in this country has studied the concept of the separation of powers. Probably, most of these lawyers and historians have read about the separation of powers as practised in the U.S. system of government. But do your lawyers and historians know that the U.S. system of the separation of powers was adopted from the traditional government of the Six Nations (the Iroquois Indians)? Clearly, the Indians knew things which the Fathers of the American Revolution felt were worth copying!

3. TRADITIONAL GOVERNMENT IN PAPUA NEW GUINEA

Before coming here to Port Moresby, I gathered a number of books which are used in P.N.G. schools to teach government and history. In the books which I found, traditional government is referred to in the past tense, like talking about a dead language. Let me cite some examples:

- *"... decisions were made in family, clan or village meetings ..."*
- *"Community meetings took a long time ..."*
- *"Sometimes decisions were made by consensus".*
- *"The discussion which the class enjoyed most was about how conflicts were solved ..."*
- *"Rules were usually obeyed because ..."*

In the books, there is no mention of elders playing any role today. Community leaders are hardly mentioned. When they are mentioned, they are seen in the role of organizing ceremonial activities but not of leading development efforts.

The overall message seems to be as follows:

> "Traditional government used to be like this. But today we have national provincial and municipal government".

4. THE EFFECTIVENESS OF GOVERNMENT: EASTERN EUROPE

There is certainly no shortage of national, provincial and municipal government throughout the world.

Probably no peoples in the world have ever been governed in such minute detail as the East Europeans. Yet we have seen that all the peoples of Eastern Europe are trying to abolish the "command economy" with its centralized decision-making and centralized political elites. Where free elections have been held recently in Eastern Europe, it is clear that most electors would prefer to have western style government than a "command economy".

The western countries do, of course, have "mixed economies" as distinct from Eastern Europe's "command economy". But what part of the western mixture is it which most attracts East Europeans? Is it the performance of western governments in government programs or is it the role played in western economies by the private sector and by non-government organizations?

5. THE EFFECTIVENESS OF GOVERNMENT: THE WESTERN COUNTRIES

Clearly, western societies have been more effective and more just than the societies of eastern Europe. However, does that mean that westerners are really satisfied with the performance of their own governments?

Really, if we are honest with ourselves, we must admit that westerners do not trust government as much today as forty years ago. In opinion polls, in many western countries, the least respected profession is the profession of politics.

In the opinion polls, in many western countries, young people are becoming more and more discontented, not only with national and provincial government but also with local government.

Let us look more closely at local government. Many journalists often speak of local government as less exciting than national government. Yet, many of the most burning issues in government begin as issues in local government. For example:

1. the taxpayers' revolts in California in the late 70's started off as revolts against high realty taxes at the municipal level rather than over state or national taxes.

2. the fall from power of General de Gaulle had nothing to do with the war in Algeria or the ending of the French empire in Africa. It had nothing to do with his conflicts with the Americans or with the European Community. His fall from power was caused by the defeat of his proposals for reforming regional and local government.

3. the most dangerous challenge which Mrs. Thatcher has faced, as the Prime Minister of Britain, has not come from the coalminers, or even, from the Agentinian armed forces which invaded the Falklands. The most dangerous

challenge has come from those people who opposed the new municipal poll taxes in 1990.

6. COMPLEXITY OF MODERN GOVERNMENT

I have taught public administration in a number of countries. One thing that strikes me, in teaching that subject, is the extraordinary complexity of modern government, even in small countries. In fact, even the most simplified textbooks can present major difficulties for some students.

Clearly, a teacher of public administration has to approach student assessment as do teachers of other subjects. If a student has not learned his cost accounting, he fails the course. If he has not learned his public administration, he fails the course. But can a modern society afford a system of government so complex that many intelligent university students in administration and political science cannot adequately grasp the subject? If university students find the subject difficult, what about young people outside university?

In addition, I have taught public servants in many countries. Frequently, I have found that different public servants have different interpretations of the laws and regulations governing particular programs. If public servants have such difficulties, is it not likely that rural people too will have problems in dealing with government?

Sometimes, these differences of interpretation crop up inside particular ministries. Sometimes, they crop up in inter-ministerial committees. Sometimes, they crop up in discussions between different levels of government.

These problems have led to increasing numbers of the most talented public servants working in inter-ministerial relations and in inter-governmental relations. Thus, we have gifted public servants spending their work days negotiating with other public servants in other organisations. Indeed, many of these individuals have no contact with members of the general public at all.

Leading military theorists talk about the need for *"unity of purpose"*. Leading management writers say *"keep things simple"*, *"stick to your knitting"* and *"concentrate on the customer"*. But such concepts, many publics servants will admit, are extremely hard to apply in government.

7. LACK OF MONEY AND LACK OF APPROPRIATE MANPOWER

The above problems are universal. Many, if not most, countries face two other problems as well:

1. those countries do not have enough money for the public service to carry out all the programs which it would like to carry out, or to respond to requests for new programs from the public.

2. those western countries do not have enough trained people in the public service to carry out its required activities.

8. LACK OF MONEY AND APPROPRIATE MANPOWER: AN IN-BUILT FACTOR NOT A PASSING PROBLEM IN GOVERNMENT

The lack of money and manpower is not a passing problem. They are not cyclical events related to such factors as the trade cycle or tax buoyancy. These shortages are built into the system.

Few government programs can operate on a cost-recovery basis, and even fewer on a profitable basis. As such programs grow, the demands for larger government budgets grow also. But, there is a limit to how much government can increase taxes without damaging the economy. As government spending grows, the tax burden grows, and government use of the capital market grows. Private investment begins to be crowded out.

Furthermore, new government programs may eventually lead to a narrowing of the market for the private sector. Instead of having competition in the market amongst businesses, there is growing competition for funding *inside* government between different ministries and programs. Likewise, as government programs diversify, government needs an ever broader range of human skills.

However, it becomes increasingly costly and difficult to recruit, keep and provide career paths for such an ever-growing pool of talent. Furthermore, such individuals may not be able to work effectively inside bureaucracy. For example, how many governments can run a first-class hotel? And how many can offer a career path to a good hotel manager?

9. THE CROWDING OUT OF COMMUNITY BODIES

There is, of course, another danger to the endless growth of government. As we have seen, government can crowd out investment by the private sector. But also, government can crowd out community institutions. In some societies, government crowds out N.G.O.'s and community bodies deliberately. (Such has been the case in the Soviet Union).

However, in many societies (such as the western countries), government may crowd out community bodies without thinking. This may have been the case with the local government and the Crees in the case of the suicide which I mentioned earlier.

In other words, we have to re-visit the central assumptions which are made about government and resources management.

10. NATURAL RESOURCES MANAGEMENT AND ASSUMPTIONS ABOUT CENTRAL GOVERNMENT

In the western countries, a number of implicit assumptions used to be made by public servants at the national level about the role of central government in resources management:

1. the belief that, in resources policy, the central government was superior and should have the final say;

2. the belief that local government was the smallest jurisdiction with power and resources and, therefore, the lowest level to which other governments should talk;

3. the belief that a lack of interest in the neighbourhood and community was acceptable;

4. the belief that government did not have to consider the right level at which natural resource decisions should be made.

In recent years, of course, these assumptions have been increasingly questioned by many public servants and by many legislators. And many of them would perhaps admit, at least in private, that local government does not always represent the local community.

In some countries, the national constitution may indicate which level of government has responsibility for a particular natural resource. However, clarity in the constitution does not guarantee that a consensus will emerge, inside a government or between different governments, on how a particular project or program should be planned. Also, local governments are considered to be "creatures" of either the central or provincial governments in many countries. Thus, the views of local governments may, in fact, be dismissed by more senior governments. Likewise the view of the local community may not even be ascertained, let alone consulted.

11. BEHAVIOUR OF GOVERNMENT TOWARDS LOCAL COMMUNITIES

The above-mentioned assumptions can in fact lead to particular types of behaviour towards communities by senior levels of government, for example:

1. a lack of interest in creating or strengthening a local agricultural base;

2. the viewing of a new resource project as an enclave rather than as a regional growth center;

3. the introduction of resource policies and new projects without studying local preferences or customs;

4. the belief that there is little or no rural capital to mobilize in the community and, therefore, no need to study that issue;

5. the funding of local groups in such a way that they become more dependent on government rather than more self-supporting.

As a result of the above, in many western countries, local communities have a sense of loss of control. Local leadership (even if it has been successful in obtaining outside funding) may also seem to be losing control. Eventually, the leadership may in fact, lose its prestige and status in the local society.

12. CONFLICT BETWEEN THE LOCAL COMMUNITY AND LARGE OUTSIDE ORGANIZATIONS

How important is this sense of loss of control by local communities and local individuals? Do the assumptions made about central government have any real impact on rural communities?

In reality, these factors are of critical importance. Indeed, they have led in many regions of the world to serious conflicts between rural communities and outside organisations, including the central government.

13. WHO IS IN CONFLICT?

But who is in conflict? The local, traditional community obviously has traditional beliefs. Dr Tonnies, a well-known German sociologist in the nineteenth century described such a body as *Gemeinschaft* (or "Association"). Likewise, government, and companies are all *Gesellschaft* in the eyes of the community. (see Attachment).

14. THE ROLE OF LOCAL GOVERNMENT AS "GESELLSCHAFT"

It is important to realize that in many countries local government is viewed in the community as an arm of government and not of the community. In other words, local government is *Gesellschaft* just like a central government and is not *Gemeinschaft*.

15. THE CALL FOR DECENTRALIZATION

Clearly, the conflict in many parts of the world between rural communities and outside organizations, including government, is in part, a reflection of the chasm which separates the traditional community (*Gemeinschaft*) from the modern organization (*Gesellschaft*).

Is there a way of building a bridge across that chasm?

In many countries the answer to that question has been a call for decentralization. However, such words as decentralization and devolution mean widely different things to different people.

16. THE MEANING OF "DECENTRALIZATION"

Let us look, therefore, at examples of the views of various individuals on the meaning of the word "decentralization":

a. **Thomas Jefferson**
   That government governs best which governs least.

b. **John Stuart Mill**
   Local government can best handle details. But in the comprehension of the principles, even of purely local management, the superiority of the central government ought to be prodigious.

c. **Dr E.F. Schuhmaker**
   Small is beautiful.

d. Professor Peter Drucker
Responsible worker, responsible work group and self-government work community are decentralization.

17. DECENTRALIZATION AND THE RURAL COMMUNITY

At this point, we must be crystal clear as to what we mean by decentralization. For example, in some western countries, governments believe that decentralization means taking public servants from head office and putting them in a regional office!

Professor Drucker's definition of decentralization, as quoted above, is revealing:
Responsible worker, responsible work group and self-governing work community are decentralization.

What this means, of course, is that the objectives of resource projects need as much as possible to be influenced by the villagers and not just imposed by outsiders. Outside change agents will be needed in many, if not most, village projects. However, these outsiders should come in as advisors or consultants to the project.

18. THE NEED TO MOBILIZE RURAL CAPITAL

Rural resource projects are often proposed as a means of enhancing village self-sufficiency. However, self-sufficiency must also come to grips with the need for capital. A resource project which makes a village permanently dependent on outside sources of finance is making the village *less* self-reliant and not more self-reliant.

All such projects should, therefore, include components for mobilizing rural capital. Clearly, the larger and more capital-intensive the project, the greater the difficulty in raising adequate supplies of local capital.

However, it is interesting to note that commercial bankers are increasingly stressing the need for landowner equity in landowner projects.

19. NEW EMPHASIS IN DECISION-MAKING FOR NATURAL RESOURCES

Therefore, there needs to be meaningful participation by the community in decision-making. This, in turn, calls for meaningful participation by the community in all phases of the project cycle and programe cycle including:
- *Ex ante* assessments, data gathering and analysis
- setting of objectives
- project design and program design
- project and program execution
- ex post evaluation

20. INSTITUTION-BUILDING AND THE CREATION OF NEW REGIONAL BODIES

The new emphasis described above can be implemented in tandem with institution-building and the creation of new regional or community bodies. Institution-building may be promoted, for example by:
- setting up revolving funds

- providing technical assistance to villages
- creating village resource centres, including maintenance workshops
- setting up village extension services
- encouraging village networking and regional groupings of villages

21. A SPECIAL BARRIER TO CHANGE: AVIODANCE BY SOME PNG ORGANISATIONS OF DATA GATHERING AND PROBLEM ANALYSIS

A special barrier faces change in this field. Unfortunately, some PNG organizations outside government (including a few which hope to influence landowners) are reluctant to gather data and to do problem analysis. In some cases these organizations have no interest even in obtaining copies of data and analysis which have been assembled in other locations. Such organizations frequently rely on fly-in/fly-out foreign specialists to give verbal briefing and to dictate strategy. But sometimes these organizations will not even read the reports written by the foreign experts!

Clearly, such practices are a recipe for disaster both at the community and national level. Such practices may merely lead to major conflicts at a later date.

22. COMMUNITY ENHANCEMENT: A NEW ROLE FOR GOVERNMENT

Do the above new approaches, in 19 above, mean that government is abolished?

No. What they mean is that government can step in on a management by exception basis and not on a permanent basis. Government can be the banker of last resort rather than the banker of first resort. Government can be a facilitator rather than an officer-in-charge. Government can be an educator rather than a decision-maker.

In any event, we know that no individual level of government in any modern country has the resources, either alone or with other levels of government, to monopolize decision-making in resources management or rural development.

Some of you may have seen a Chinese acupuncturist at work with a patient. A patient has a lot of skin and the acupuncturist has a lot of needles. But the acupuncturiest does not put needles everywhere in the body and he does not use all his needles at any one time. He selects carefully the points at which he must intervene.

Government cannot control everything. Attempts to control everything lead to systems breakdowns, as we have seen in Eastern Europe. Governments need to work out those critical control points which must be subject either to:

1. initial government intervention
2. or to subsequent government review on a management-by-exception basis
3. or routine monitoring

23. THE NEED FOR A NEW SOCIAL CONTRACT

Clearly modern states need not only new types of legislation but also a new approach to management and the local community. We need to spend considerable time on revising what Montesquieu called the "social contract".

APPENDIX

	Suggested Topics	Possible Approach
1.	Interface of state and community	change the relationship: the government as advisor, consultant to the community not as a dirigiste state.
2.	Flattening the hierarchy	- re-organize government to serve the community - need a flat hierarchy (like a consulting firm) - reduce duplication of same service by different levels of government.
3.	Goals	- local goals to be set by local community - regional goals to be set by regional groupings of communities.
4.	Strategic planning	to be done by communities (with technical assistance).
5.	Intersection of individual groups	- to be handled at community level - government to help with conciliation and mediation, conflict resolution - government to provide compulsory arbitration, legal remedies in cases of unresolved problems or of injustice.
6.	Accommodation of unequal development	communities should not be forced to develop or or grow economically let communities grow at their own pace (with government as a consultant on request) communities don't have to grow at equal speed

(Compare
Alaska, USA: rapid economic growth, many bankruptcies, collapse of culture of indigenous people.

North West Territories, Canada - slower economic growth, fewer bankruptcies, cultural change slower than in Alaska, attempts to preserve traditional cultures.)

7.	Power of review	- government power of review of community decisions to be designed on an as - needed basis - management - by - exception - need for a special study of the subject.

ATTACHMENT

GEMEINSCHAFT AND GESELLSCHAFT

Gemeinschaft ("Community")		*Gesellschaft* ("Association")	
1.	Like a family or church.	1.	An economic , profit-making or budget-maximising organisation
2.	Spiritual unity.	2.	No spiritual dimension.
3.	The individual belongs to a group solidarity.	3.	An individual is an atom (detailed job descriptions and division of labour).
4.	Lifetime relationships.	4.	Contractual relationships, often with high turnover of labour.
5.	Elders/Leaders.	5.	Superiors and subordinates.
6.	Cohesion.	6.	Tension.
7.	Community objectives are well understood	7.	Objectives may not be communicated.
8.	Participatory.	8.	Instructions handed down.
9.	The individual identifies with community objectives.	9.	The individual suffers from *anomie*.
10.	Long-range thinking.	10.	Short-range thinking (e.g. the budget or the next profit/earnings statement).
11.	Use of ideologies.	11.	Limited symbols. No ideology (the objective is bigger profits, bigger budgets, or more growth).
12.	High-context culture.	12.	Low-context culture.
13.	People know each other, and have a sense of neighbourhood.	13.	People do not know each other; people may not even be acquainted.
14.	Tends to be small.	14.	Generally much bigger than the *Gemeinschaft*.

Source: Based on "*Gesellschaft and Gemeinschaft*", F. Tonnies, 1887.

WORKING GROUP PAPER:

INSTITUTIONAL STRUCTURES AND RESOURCE DEVELOPMENT

PART I. INSTITUTIONAL STRUCTURES

1. EXISTING STRUCTURES

The group identified the following existing structures who have varying roles to play in the exploitation of the natural resources of the country.

(a) National Government

Land is identified as one of the most important resources in the country and is managed primarily at national level. The Group noted the following important factors in respect to land ownership and control in Papua New Guinea:

* 95% of the total land mass of the country is owned by the customary land owners. The balance of 5% alienated land is owned by the State and governed by the National Laws.

* Papua New Guinea is unique in this regard.

* The existing land laws in the country and most particularly the Land Act are used extensively by the Lands Department in administering alienated land in the country. There are other laws also dealing with land.

Critique: There are many beneficial results the country has gained from the use of land legislation. To name a few:

* enabling the development of large modern towns and cities on alienated land.

* development of major large scale development projects such as large plantations of cocoa, coconut, palm oil.

* the developments in town gave rise to employment opportunities to Papua New Guineans and non Papua New Guineans as well.

* the country as a whole was able to generate much needed revenue to become financially self sufficient.

Some of the adverse effects could be stated as follows:

* large numbers of people whose land has been alienated are fast realising that they are losing or have completely lost control over the very "root" of their existence. This has resulted in the original land owners becoming estranged squatters on their own land by operation of law.

* their cultures are submerged in the wake of tidal waves caused by large-scale development.

* these events have planted seeds for deep rooted future rebellious attitudes towards these large scale developments and authorities. An air of suspicion and distrust between the original land owners and the Government authorities has become the everyday norm.

* In cases of large scale development, such as mining development, the Mining Act operates to secure the use of traditional land by a way of a prospecting authority. The prospecting authority, if proven to be viable, is given a new status, a mining lease. The new status is given by the National Minister for Minerals and Energy who grants a special mining lease or lease for mining purposes on application from the holder of the prospecting authority.

* The status of traditional land ownership completely changes. The local people have in their minds the notion that they still own the land and what is in or under the land as well. They become bewildered when they see "their land" completely destroyed and get minimal benefits from it in return. The same applies to acquisition of large areas of virgin forest for major agricultural development projects.

* Another area of major concern to the land owners is the destruction of:
  - hunting grounds
  - fishing grounds
  - materials for building houses, canoes
  - total change in cultural lifestyle as a direct consequence of large scale development.

It would be safe to state generally that the existing National Government laws which govern and regulate our major natural resources such as:
- Minerals and Petroluem
- Land
- Forestry
- Marine Resources
- Human Resources

are laws which were adopted from Australia. Most of these laws are outdated and have became onerous to the nation and its people in their application.

(b) **Provincial Government**

We note that provincial governments have played a major, though unofficial, role in the development of major resources in the provinces. Notably, Provincial Government powers under the **Organic Law on Provincial Government** are extremely limited in regard to exploitation of major natural resources in the province. They have always acted as middle-man between the land owners and the National Government.

In many cases provincial governments have been forced to act on behalf of National Government in such things as dispute settlement, land acquisition, compensation payments etc., in an effort to pave the way for major developments to take place.

A case can be made for the abolition of provincial governments, on the grounds that their introduction has rendered local level government, previously a strong

institution, defunct now. While national government is recognised generally at a grassroots level, provincial governments are not really accepted or representative. If they are not to be abolished, the bottom level of local government must be strengthened - and if any level is to be cut back, it should be provincial government.

However, the basic question is whether we support centralisation or decentralisation. The general consensus is to support decentralisation.

Also, we strongly believe that the current political forces at play would make it extremely difficult for the provincial government system to be abolished. The reality of the situation is that there is no political will to abolish provincial government. The country never really had a chance to try out a centralised system - the Bougainville situation at Independence forced decentralisation right from the outset.

A further argument against abolition is that basic provincial services need to be kept going regardless of what is happening at the centre. These services now rely on provincial government.

So long as the system exists, it should be pointed out that the National Government should recognise and bestow upon provincial governments the requisite skilled manpower and the legal powers necessary for responsible administration and regulation of resource extraction in the provinces.

In such resources as:

- Forestry Development
- Fishery Development
- Mines and Petroluem
- Major Agricultural Developments
- Human Resource Development,

provincial governments have always been regarded as "interested and concerned parties to the development project". This has been one of the major contributing factors of bewilderment by both provincial government and the land owners. Provincial governments cannot be expected to assist and make legally binding decisions to appease belligerent land owners, if they do not have the power nor the authority to do so.

Most of the administrative staff serving the provincial governments are members of the National Public Service. It is a common factor throughout the provincial public services that most of the staff are either old and have reached the end of their productivity and cannot go any further, or they are too young and do not have the experience or the requisite qualifications.

Under these circumstances, it would be irresponsible on the part of the National Government to grant more powers to the provinces who do not have the capacity to exercise such powers. It is equally wrong for the National Government not to train its provincial public servants and update them in current practices, rules and norms in modern administration.

We recognise that provincial governments are grossly under-staffed and under-resourced for the kinds of tasks they are expected to perform, especially in areas with

poor infra-structure. But at the same time, head offices rely on the provinces to carry out operations on their behalf:

eg. the situation with fisheries operations in Milne Bay.

eg. the forestry situation, where there are insufficient qualified foresters for adequate monitoring in the field.

Staff shortages at provincial level end up being blamed. Rather than blaming them, or perpetrating the arguments of whether or not to abolish them, the strengths and weaknesses of the system at the moment should be established and attempts made to resolve them.

(c) Local Level Government

Experiences in most of the Provinces have shown that whenever there is a large scale development taking place in any given District, the Council in the area is the first body the concerned land owners go to, to lay their grievances. The Council, if it is not involved as a party to the project, would normally direct the concern of the village people to their provincial government. The situation becomes worse when provincial government has to advise the people that it is not officially involved in such major large scale development and that they would have to take their complaints to National Government in Port Moresby.

An important point to bear in mind is that most of the local level governments in the provinces do not have the staff, the funds nor the technical knowhow to have constructive input into the development of any major resource in their area. Usually they have to rely on the advice of the public servants in their District.

Village people, particularly the land owners, often become angry when they are given "half baked" advice from an inexperienced public servant and the advice turned out to be disastrous for them.

Invariably the only major role the Council plays in the development of any major resource in any given area is to relay whatever information there is from provincial government (if any) to them.

(d) Traditional Land Owners

In most instances where large scale development is taking place, it involves the use of traditional land eg. large agricultural estates, mines or petroleum development etc. To achieve this, the National Government nearly always declares such development as a matter of "National Interest". Under the flag of "National Interest" it has in most issues used its powers under the Land Act to compulsorily acquire the land from the traditional land owners, after payment of minimal compensation to them.

The system of compulsory acquisition automatically cuts the traditional landowners off from having any meaningful say in their right to the use, occupancy or enjoyment of the land. Although the law says that they no longer own the land after the compulsory acquisition has taken place, the landowners firmly and sincerely believe

that whoever is coming in to do something on the land has not taken away their right to live and use the land at any time they wish.

It is only when the developer and the landowner come face to face and the developer resorts to "force of law" to enforce his acquired land rights that the traditional land owner suddenly realises that it is now a serious matter - and the dispute over the real right to real ownership to land begins.

All along, the traditional landowner is only regarded as "a party to be informed later when the damage is done". This attitude has not ceased and is still been practised. So long as such a practice exists, it shall continue to be one of the major contributory factors towards creating misunderstanding and animosity between the developers and the traditional land owners.

(e) **Financial Institutions**

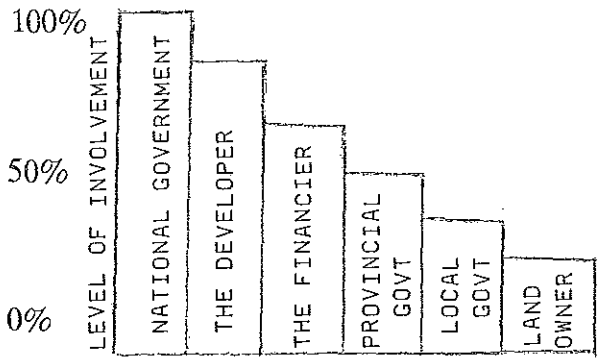
Financial institutions, because of their loan security requirements, have been a direct or indirect causal factor in the acquisition of customary land, by insisting on enforcable securities from the developer, such as mortgages over registered land etc. prior to considering any loan finance. This is particularly so when a developer is seeking millions of kina. It has never been the concern of banks to enquire into anything to do with customary ownership other than the production of a registered lease and the execution of a mortgage over the lease. This is particularly so with foreign banks. Financial institutions as a matter of policy do not entertain customary land as collateral for any major loan finance.

(f) **The Scenario - Land Acquisition and Involvement of Landowners**

The following illustrations show the extent of involvement of various categories of landowners in parting with their land to another.

Illustration "A" shows the extent of involvement of a customary landowner, the Local Government Council and the Provincial Government in the sale or compulsory acquisition of customary land.

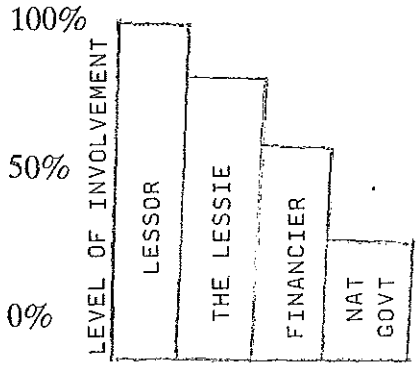
Illustration "A".



TRADITIONAL LAND
(landowner's role diminishes)

Illustration "B" shows the involvement of a lease holder in respect to the decision making and the eventual sale and transfer of the land (say in town) to another person or developer.

Illustration "B".



LEASEHOLD LAND
(landowner's role increases)

The National Government uses the process of compulsory acquisition of customary land to assume management. This increasingly alienates the landowners. But with alienated land, the National Government plays a minimal role. This is not an equitable situation.

This scenario displays the crucial issue in the recent upheavals, and the increasing problem of compensation claims.

(g) **Recommendations**

Under the current regime of Government structures, it would appear that the delivery system based upon the existing structures, in relation to the exploitation of natural resources on traditional land, does not seem to favour the grassroot people and hence the majority of the people in Papua New Guinea. The purposes and intents expressed in the National Goals and Directive Principles have therefore not been given their due recognition.

We realise, however, that any recommendations we make must be practical. If they are unworkable in reality, they will simply be shelved in the bureaucratic process. We therefore make the following recommendations:

(1) In order to allow customary landowners the undeniable right to participate in the decision making process of permitting the use of their land for major development projects, a body or pool of experts be established and paid by the National Government and Provincial Government whose sole responsibility is to identify resources, document proposals and provide expert advice to National, provincial and local governments and particularly to the landowners, of the issues involved and their respective rights to the land.

(2) Clear definition and demarcation of legislative powers to be given by way of amendment to the **Organic Law on Provincial Government**, particularly in respect to the concurrent functions.

(3) Provision of adequate, regular training of provincial and local level government staff to be given priority.

(4) Regular consciousness-raising of the rural population in relation to integral human development, using all available media.

(5) Specialist Committee be set up utilising the personnel in para (i) to carry out an overall review of the provincial government system, its powers, functions, failures and achievements etc. for the last ten years, and make appropriate recommendations to the National Government.

(6) Provincial governments to set up specialist committees in their respective areas to examine the strengths and weakness of the local level governments and make appropriate recommendations to the provincial government.

(7) Financial institutions who have been approached to finance large scale development on an area of land which has been converted from traditional land to leasehold land should be advised as a matter of policy to consider and take into account the aspirations of the customary land owners, by requesting the developer to provide to the bank approved schemes, where the landowners' financial interest and active participation would be guaranteed.

PART II. THE INTERRELATIONSHIP OF INSTITUTIONS.

1. INTRODUCTION

The working group addressed the following issues in relation to resource exploitation:

* the various tiers of government and their relationship with each other

* relationship between each of the governmental instrumentalities and the non-government sector

* relationship between the governmental instrumentalities, the public sector and the financial institutions

* relationship with all of the above, individually and collectively, with the traditional landowners.

The approach was to discuss and highlight the current strengths and weaknesses of existing institutions in relation to their respective roles in resource exploitation.

2. INTER-GOVERNMENTAL RELATIONSHIP

(1) National Government

Within the National Government, the various operative arms of the government, namely departments, play a very important role in the policy-making and the decision-making process in exploiting a given natural resource.

Weaknesses:

(a) Most of the departments tend to operate in total isolation from each other although there are regular meetings of Departmental Heads from time to time.

(b) This could have stemmed from the lack of definitive political will to direct policy. Departments lack a sense of cohesiveness and a strong team spirit, from the Head to the rank and and file staff in line departments.

(c) The current trend is "more pay less work"

(d) Corrupt practices at upper levels have set a poor example to both middle and lower management level. Corrective measures such as disciplinary action against offending staff are rarely taken. Hence the system is abused and staff down the line become complacent.

Strengths:

(a) Most national government departments tend to hold onto their powers under the relevant legislation and can dictate to provinces and indeed veto any administrative action which tends to usurp such powers.

(b) Provincial politicians who would have liked to exercise more powers are unable to do so because such powers are vested with the relevant national departments.

(c) The National Government is able to use such powers for the collective good of the whole State.

(d) Compartmentalisation of departmental functions encourages specialisation, skill and proficiency in doing one's job.

(2) **Provincial Government**

Weaknesses:

The relationship between the National Government and provincial governments is at its lowest ebb. The following characteristics are noted:

(a) No meaningful dialogue and consultation in the development of major natural resources in the provinces.

(b) constant threats of abolition of provincial governments

(c) constant cuts in provincial budgetary allocations

(d) little concerted effort by the National Government to regularly check on provincial government performances etc.

(e) little remedial action towards provincial governments that are not functioning well

(f) disputes and threats leveled at each other on issues such as misuse of public funds, compensation, legal actions against each other, tend to increase every year.

(g) total breakdown in established institutions to deal with disputes between provincial governments and the National Government e.g. National Fiscal Commission, Mediation and Arbitration Tribunal, Premiers' Council and Secretaries' Conference, the Secretariat of the Premiers' Council etc. Formal courts are being used to litigate and settle disputes etc.

Strengths:

(a) Premiers' Council and Secretaries' Conferences have provided a venue for bringing National Government officials and provincial government officials together to discuss matters of mutual concern to the nation.

(b) The **Organic Law on Provincial Government** has made provision to give MPs the right to sit at provincial assembly meetings and participate in debate, but they do not have the right to vote. The law also allows one MP representative from the Province's MPs to sit at the Provincial Executive Council meetings and take part in the discussions but without voting powers.

(c) The relationship between public servants in the Provinces and with their respective parent departments in Port Moresby is usually friendly. There is regular dialogue between provincial staff and the staff of parent departments in Waigani and Konedobu. The same applies to the relationship between the provincial departmental head and most of his counterparts at the National Department.

(d) The relationship between various provincial government counterparts has generally been good.

(3) **Local Level Governments**

As a general rule, because of the creation of the provincial governments, from a local government viewpoint, the National Government seems to be very far away in terms of obtaining decisions and consultation. Thoughts have been expressed lately that provincial governments be abolished and local level governments strengthened due to their close proximity to the village people. The Office of Commissioner for Local/Community Government at Waigani does not seem to exist as far as the councils or the rural areas are concerned. Their relationship with provincial governments varies from province to province. Some work very well, others do not.

Weaknesses:

(a) Local/community governments in the provinces, although they exist, do not seem to be given their due importance by the provincial government and

National Government. They are not given sufficient funds to carry out much-needed projects such as village development and ports etc.

(b) Most local government councils, due to lack of trained staff and supervision, are run-down and have become a mere institution without a function.

(c) Lack of adequate funding for council operation is a deterrent factor in the council carrying out its responsibilities.

(d) When the above conditions exist in a given council, the village people lose trust and hope in their council as their mouthpiece in settling disputes etc.

Strengths:

(a) In areas where councils and community governments have been functioning well, goods and services have been delivered to the villages.

(b) Where a good working relationship exists between councils and the provincial government, disputes over land, gardens etc. are readily solved by councils often acting as mediators.

(c) Where councils are functioning well, village sanitation, roads etc. are generally clean.

(d) On questions of exploitation of natural resources by the State and its contractors on the basis of "national interest", councils' voices supporting the landowners often carry great weight.

(4) Villages and Elders

Weaknesses:
Linkages for purposes of relaying concerns, information etc. on developmental issues between the provincial governments and the National Government have not been easy in most cases, particularly in the development of large or major projects. The concern would usually be in terms of destruction to the land, environment etc. and the consequential compensation claim. The voice of the village elders to the developer, who is even closer to them, doing the damage on their land, though ostensibly very near is in reality even further away than the provincial or National Government.

To begin with, the developer, in most cases a multi-national corporation, does not speak the same financial and economic language as the village elder.

This has tended to:

(a) create antagonistic attitudes in village elders etc. against governmental authorities for letting them down so badly.

(b) They see governmental authorities as liars or traitors.

(c) They see the developer as an intruder that must be regarded as Enemy No.1.

(d) The project often grinds to a halt as a result of constant harassment to company staff coupled with compensation claims.

(e) Corrupt practices develop between lenders and developer.

Strengths:
Where the developer has realised the weaknesses in governmental authorities in their liaison with the landowners etc., it has taken the initiative to talk with the landowners. The common practice these days is to befriend the principal landowners or thos who are most vocal. The developer tends to promise and in most cases provide such services as the following to soften up the landowner:

(a) Occasional trips to Port Moresby by plane and accommodation in expensive hotels.

(b) Provision of sugar, tobacco and rice, luxuries which government officials never made easily avaiable to them.

(c) Provision of a little aid post, a water tank or even the establshment of a trade store for the landowners. A dream come true - a status symbol fulfilled.

(d) The once unknown remote village or area is now brought into the limelight through this development project. Cash is generated in the village. Children's school fees are paid and they are sent to community or even to high schools.

3. DISPUTE SETTLEMENT MECHANISMS.

Between National and provincial governments:
(a) National Fiscal Commission - for resolution of disputes in relation to fiscal matters between provincial and national government, and between provincial governments.

Comment: The NFC has not lived up to expectations as envisaged in the Organic Law on Provincial Government, and is no longer operating.

(b) Provincial Government Mediation and Arbitration Tribunal - for settling disputes between National and Provincial governments, the objective being to avoid litigation.

Comment: this Tribunal has been very ineffective.

(c) Mining Wardens' Courts. These are used on all matters relating to mining etc. Courts are normally held at the project location.

Comment: the Warden's Court only performs recommendatory functions. The process of transmitting the viewpoints of parties to the Mining Board then to the Minister often waters them down.

(d) Lands Titles Commission, Land Court Secretariat, National Lands Commission - these courts deal specifically with either land compensation, or acquisition of title and settlement of disputes over customary land.

Comment: due to shortage of staff etc. the courts have not been able to attend to all major complaints in relation to land.

(e) Village Courts - these deal mainly with dispute settlement on matters that concern the villagers. Jurisdiction is limited.

(f) Formal Courts: District Court, National Court and Supreme Court. Due to weaknesses in the alternative dispute settlement systems, resort has been made to formal courts.

Comment: village people do not always have access to money for hiring lawyers to act on their behalf.

4. RECOMMENDATIONS

The following recommendations are put forward for consideration:

(a) Undertake a complete diagnosis of existing mechanisms of dispute settlement, identify weaknesses and revitalise them.

(b) On the question of the relationship between provincial governments and the National Government, in relation to natural resources, there needs to be a much closer and open dialogue particularly with the line departments.

(c) More staff should be employed to deal exclusively with dispute settlement regarding land, compensation etc.

(d) More education and encouragement to politicians to make themselves more accessible to their people in the villages. The same applies to line department public servants, particularly field staff. More foot patrols to be done rather than relying on boats and air travel.

(e) That some thought be given to amending relevant legislation to enable the establishment of one quasi-judicial body to deal with all matters relating to dealings over and hearing of applications and settlement of disputes and claims relating to all natural resources such as:
- timber
- fisheries
- mines and petroleum
- other matters such as environment

KEYNOTE ADDRESS:

LAND STRUCTURES AND MOBILISATION

BY

PROFESSOR R.W. JAMES, UNIVERSITY OF PAPUA NEW GUINEA

1. LAND POLICY - A CONSPECTUS

The land policy adopted by the Colonial powers was one of paternalism. This policy was reflected in a variety of legislation which *prohibited* direct dealings between traditional owners and expatriates, and *protected* the former from expropriation of their lands by the state so that they would have no land shortage. Notwithstanding the element of dualism in the laws and ownership, that policy remained the single most dominant one and its success is reflected in the fact that alienated land still represents less than 3 percent of the total land area of the country.

In the 1960s, policy statements reflected an urgency to increase the extent of the modernised sector at the expense of the subsistence one by the adoption of a principle of "parallel development". Paternalism, however, remained dominant. Proposals for land reforms in the 1970s were expressed by the options of to "indigenisation" and "westernisation".[11]

They represented on the one hand Simpson's transformation model and on the other hand the recommendations of the Commission of Inquiry into Land Matters for group titles mirroring the traditional base. Both models responded inter alia to the call for land mobilisation, but whilst the former individuals the system of land ownership, the latter emphasised the collectivist process and inspired the **Land Group Corporation Act**. This act facilitates the incorporation of traditional groups for purposes of registering their group titles, but no national legislation was introduced for registration of group titles.

The national government, beyond the passage of that enactment, procrastinated on adopting one or the other policy and the pressure for improved access for land and finance for development resulted in a number of piecemeal legislative moves and the recognition of fictitious arrangements to achieve land mobilisation. These include tenure conversion mainly on a sporadic basis, state leases, lease-leaseback and clan lands agreement. The commodity notion of land increased in the 1980s and restrictions and prohibitions on land alienation came to be expressed as 'transactional costs', which should give way to 'direct dealings'.[12]

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11 R.W. James "Land Tenure Reform in Development Countries: from westernisation to indigenisation", UPNG Professorial Lecture, 1975.

12 Trebilcock and Knetsch, "Land Policy and Economic Development in Papua New Guinea" (1981) MLJ 102.

The LAIP and LEAD reports were essentially concerned with land administration and information service. They defined land tenure reform needs in terms of -

- simplifying and amending the laws and consolidating land legislation;
- providing for certainty of title to owners whether they are the state, groups or individuals;
- ensuring that land disputes are quickly and efficiently settled;
- allowing for the more efficient administration of land by state officials.

They expressed the view that beyond these activities a government is best if it governs least. There was therefore, in the view of the authors of these reports, an urgent need to remove the barriers to 'direct dealings'. These reforms were intended to accelerate the processing of land transactions and improve access to land and therefore finance for agricultural development and promotion of land based industries such as logging. They were justified as attempts to eschew (i) paternalism, by reversing the assumption that automatic citizens are unable to protect and promote their own best interests, and (ii) heavy - handedness and bureaucratic intervention in the affairs of the people.

The land tenure component of the LMP was conceived in an atmosphere characterised by policy indecision and lacking of creativity. It therefore held out stop gap measures as the interim solution. The East Sepik experiment, which adopted a radical approach, effected an important break-through in the stalemate. Dr Fingleton, who drafted the two provincial laws - **The Land Law** (1987) and **Customary Land Registration Law** (1987) - evaluated the model as being -

> "The most significant breakthrough in the field of customary land tenure reform, not only in Papua New Guinea but in the South West Pacific generally".[13]

This land tenure structure emphasised systematic registration of group titles in the manner proposed by the CILM, "subject", however, "in all respects to and regulated by custom".

Technically it attempted to juxtapose some **irreconcilables** in matters of title registration, e.g. certainty and flexibility; conclusiveness and presumptiveness; written laws and unwritten customs. In matters of policy administration it resulted in the existence of two competing levels, that of the national government regulated by the **Land Act**, 1962 and the **Land Titles Commission Act** (1963), and the provincial government informed by the two provincial laws.

> The justification for the East Sepik model as an interim measure was the urgent need to pursue a provincial LMP in order to fill the vacuum caused by inaction at the national level. Dr Fingleton eloquently articulated the frustration which some

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[13] See his contribution to the forthcoming publication (ed.) P. Larmour, Decentralisation Customary Land Registration, chap.12 captioned "The East Sepik Legislation" p.1.

provincial governments, including that of East Sepik, felt because of the lack of central government initiatives in this matter.[14]

It should be noted that, theoretically, both the initiatives of the East Sepik Provincial Government in arrogating to itself land policy powers, and the Bougainville Land Owners Association in adopting a self help strategy,[15] arose from *inter alia* frustration, i.e. the inertia of the central government to address meaningful land tenure reform. To state this proposition is in no way intended to detract from the merits of the East Sepik model, it is to impress the urgency for long term policy solutions.

2. CENTRALISED POLICIES, DECENTRALISED ADMINISTRATION

Reference is made above to the need for an imaginative approach to decentralisation by devolution as the long term model. This option vests policies on tenure and administration in the central government. The creation of structures for implementation is, however, the responsibility of the provincial governments. The model envisages a truncated role for the DLPP in land administration in the long term, though an all-important and pervasive role in policy directives.

The arguments for a unified national policy on tenure and administration are overwhelming. It is essential that there should be uniformity of the forms of land tenure and common structures of administration. These structures should involve the provincial and local governments and the landowners. Stated negatively, this model avoids the danger of the emergence of a variety of inconsistent and/or discriminatory tenure and administrative systems in various parts of the country. It addresses the criticisms of government's new approach of giving landowners *carte blanche* in the exploitation of their lands. It safeguards the national interests in conservation and protection of the environment and is the best means of realising the National Goals and Directive Principles pledged in the Constitution. It offers the best means of achieving uniformity of the much desired objective of collaboration between central and provincial governments and the resource owners in development.

Given the provincial base of land mobilisation, meaningful programmes must ensure that in the long term control of provincial lands are vested in capable provincial governments. Central government should retain only such lands and powers that are necessary to satisfy its occupational needs and to effect its constitutional obligations, including those of its instrumentalities. These include the provision of roads, public utilities, national parks, reserves, etc.

Because of the diversity of needs of the provinces and in their administrative capacity, a selective approach needs to be adopted to devolution. Centralised policies and decentralised administration are the best means to accommodate diversities in unity.

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[14] J. Fingleton, "Proposed National Framework Legislation for Customary Land Registration: Final Report" (1988).

[15] Cf. Colin Filer, "The Bougainville Rebellion, The Mining Industry and the Process of Social Disintegration in Papua New Guinea" (unreported mimeo. Jan. 1990) pp. 13-20.

3. NATIONAL FRAMEWORK LEGISLATION

Concept

Central to the success of the model discussed above is the 'national framework legislation' on land tenure, and land administration policies. The concept formed the basis of the land reform strategy of Nigeria in 1978. It has been adopted by Dr. Fingleton who proposed a 'National Framework Legislation for Customary Land Registration' (Final Report, 1988). The latter is proposed as an integral part of a joint national - provincial governments legislative approach to customary land registration. The objectives of both initiatives are theoretically the same. They are stated in the 'Fingleton Proposals' as being -

> "[To establish] the broad national policy on the subject...while the details and implementation of that policy are covered by provincial (or state) enactments - the other part of the joint approach." (appendix 4 A.1).

They, however, differ in some material particulars. The Nigerian model adopts a holistic approach to the statements of land policy, the latter is charactered by its particularity. The former unlike the latter is general and eschews consideration of details. Finally the levels of abstraction of the subject matter differ: the former is a complete code of policies of land tenure and administrations: the latter sets out policies on customary land registration and its administration. The Nigerian model is of paramount importance because of the technique it adopts, and deserves closer consideration.

Nigerian Land Use Act

Historically, land policy in Nigeria was no different from what it was in Papua New Guinea - paternalism prevailed. With the adoption of a federal status both policy and administration were vested in the States. Paternalistic policy continued by the Northern State, but new commitments to transormaction were made by the Southern states following the Simpson Report, 1957 (in Lagos), and that of the Lyody's Committee, 1959 (in Western Nigeria).

The concept of decentralising *land policy* was criticised during the military regime and instead a centralised policy was substituted by the passage of the Land Use Decree, 1978. This was in furtherance of new economic and social commitments which were defined in the Development Plans and, subsequently, in the 'Goals and Principles' in the Constitution. The latter included -

(1) the political objective of 'national integration'; and

(2) the economic and social objectives of 'controlling the natural resources' and 'the environment', and providing adequate 'shelter for all Nigerians;.[16]

The centralisation of *land policy* by the Military evoked no controversy at the time. Its unpopularity, however, became apparent on the return to constitutional government. It was seen as conflicting with State sovereignty in land matters. The

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16 See R.W. James, Nigerian Land Use Act: Policy and Principles (1985) c.2.

limitations on the forms and contents of interests in land were thought to be too restrictive.[17]

The Land Use Act was however entrenched in the Constitution therefore land policy could not tampered with by State governments, let alone the State judiciaries.

The advantages of centralised land policy were not difficult to find. It promoted centralised environmental planning and conservation national unity and uniformity of land tenure and ownership. It guaranteed the commitments of the basic rights contained in the Constitution.

In contrast the Land Use Act vested responsibilities for land administration in the Federal government only over lands which the federation or its instrumentalities held in the States, including the Federal Capital District. It vested all other lands including administrative responsibility over them in the 19 States, including Lagos, the National Capital, which as regarded as a State for purposes of land administration.

By retaining control of its lands, the national government has access to land in the Federal Territory and in the States in order to pursue its constitutional assigned duties, including providing low cost public sector housing programmes. These activities were frowned upon in States wherever the regime in power was in opposition to the central government at the centre.[18] These projects were vote catching! All lands not in use by the Federal government are vested in the States: the former, however, has an entitlement to land from a State government if required for federal purposes.

Though land policy is centralised, implementation is vested in the State governments and governed by State legislation eg. land registration enactments, land control acts, survey legislation etc. These are however fairly uniform.

For purposes of land administration, the Land Use Act entrenched Land Administration policy. The scheme of the Act is to apportion powers of management and control between the States, local governments and landowners. For example each State is required to establish 'Advisory Committees' to advise on specified matters of land administration. The land is divided into urban and rural sectors, with the former under the control of the State government and the latter managed by the local governments.

The **Land Use and Allocation Committees** are important in advising on matters of *urban* land administration (e.g. allocation and revocation of interests in state lands, resettlement of persons dispossessed on ground of overriding public interests, etc). These Committees are established under state legislation and therefore their composition varies from State to State. Their membership must, however, include:

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17 Id. p.35.

18 For an account of the various bitter conflicts between the states and the central government see B. Nwabueze, Nigeria's Presidential Constitution 1979-83 (Longman, 1985) c.4.

(a) not less than two persons possessing qualifications as estate surveyors or land officers; and

(b) a legal practitioner.

The **Land Allocation Advisory Committees** is established in each local government area. It has the responsibility of advising the local government on matters connected with the management of land in non-urban areas within its area of jurisdiction. The state executive appoints the members of this committee after consultation with the appropriate local government. Consultation, like advice, does not mean consent or accord. It must, however, be meaningful and allow for a genuine consideration of their views.

It was suggested that an attempt could be made to reestablish some of the authority of the traditional rulers in land matters by appointing them as member of the Land Allocating Committees. This has been the approach in Oyo State where the presidents of the traditional councils are appointed chairmen of the committees.[19]

4. THE FUTURE

Legislative statements relevant to land policy are not new in Papua New Guinea. The Constitution articulated some major policy statements using varying degrees of abstraction. Some are more specific. Examples of the former are statements on the 'National Goals and Directive Principles' and on the division of powers in land matters between the national and provincial governments.

The national government responded speedily to implement some of the *specifics* on such subjects as (limitations on) freehold tenure, and (restriction on) compulsory acquisition and compensation.[20] It has only partially responded to the preference for the Land Group Corporation as the instrument of land mobilisation, by providing the means of group incorporation. It is with reference to abstract policy statements that there are confusion and uncertainties. For example, the CILM recommended an embargo on the creation of freehold titles. It suggested new principles to govern valuation for compensation. These need to be re-examined.

This review addressed issued of land tenure and land administration policy reforms, and in particular the respective roles of the national, provincial and district governments assisted by the resource owners in the land mobilisation programme. It suggests the technique of the 'national framework legislation' as the best means of realising lower level nation policies. It is for the provincial governments to address the specifics within the policy formulations contained in the framework legislation. No consideration has been given to the mechanics of customary land registration which are of exclusive provincial interest. The way forward is the East Sepik customary land registration proposals. This may be reviewed in the light of national policy formulation, for adoption by those provincial governments which are well established and are able to manage a land mobilisation programme.

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19 R.W. James, op.cit. p.80.

20 See R.W. James, Land Law & Policy in Papua New Guinea, cc.8-10.

Apart from land tenure and administration there are other urgent areas identified by S.R. Simpson and the CILM that need to be addressed. These include the perennial issues of the 'rights of squatters'[21] and 'succession to land'. Both reports raised issues of policy on these subjects and suggest solutions that are no longer acceptable. These are not discussed in this paper. It is also not suggested that all land matters raise issues of competing or/and complementary national and provincial interests. Some might be exclusively matters of national or provincial interests. One would need, as a first step, to identify those matters which are of -

(1) competing and or/complementary national-provincial interests;

(2) exclusively national interest; and

(3) exclusively provincial interest.

This categorisation would then determine the agenda for and contents of land law reform. The Law Reform Commission could take the initiative to propose legislation on matters identified as falling within (1) and (2). The reform of the land laws is germane to that Commission's reference on 'National Resources'.

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21 Recent legislation acknowledges a squatter's title by limitation after a period of 30 years adverse possession - see s.22(4), Statute of Frauds and Limitations Act, 3/1988. The scope of the Act must remain problematic. Simpson recommended a law of prescription.

WORKING GROUP PAPER:

LAND STRUCTURES, MOBILISATION AND LANDOWNER INVOLVEMENT

Introduction

The Fourth Goal of the Constitution requires the conservation and replenishment of resources "for future generations". This accords with the traditional Papua New Guinean view: that land is held in trust for the future - that "landowners" actually comprise a vast family, only some of whom are living at any one time. Conseqently, the landowner role is of vital significance in resource extraction.

But the formal legal system pays little or no attention to this, for example the Mining Act and the Petroleum Act. These statutes cater primarily to the needs of developers. Their ambits should be extended, and some of their basic principles questioned. For example, there are references to woners and occupiers of land, but no responsibility imposed on the government or developers to determine who the landowners are. Now, it is usually the developer who takes on the responsibility for this process, where it should more realistically be the government's responsibility, and determinations should be made *before* development commences.

However, the responsibility is now being thrown backwards and forwards between central and provincial governments. The declaration of State ownership under the mining and petroleum legislation means problems for provincial governments, who therefore do not want to become involved in ownership questions. Provincial governments also find themselves in the situation of being viewed as just another faction in the land squabble, and cannot claim to be truly representative of the reality of the situation.

It is therefore arguable that the National Government therefore has responsibility. But nowhere is this clarified.

Moreover, the basic contradiction between the concepts of individual vs. communal ownership. This is a fundamental problem when it comes to negotating eg. mining agreements.

Papua New Guinea's resources are the root of all the country's ills today. And resources are all based on land, and the landowners. They must be involved from the outset in any discussion and planning for resource development.

- Landowners of customary lands must participate and must have avenues available to them to participate meaningfully in the use or exploitation of their customary land.

- Whilst we appreciate the need for economic development, by the same token, the rights of customary landowners must be accommodated.

Premise

- Customary landowners who want their land to be registered have to be identified and assistance should be given to them by the relevant level of

government to ensure that their claim of ownership over specific land is registered.

- Primarily the registration of customary land is for the protection of the right of ownership.

RECOMMENDATIONS:

(1) **Registration of customary land**

(a) Ownership, interest and rights of a customary landowner must be defined (preferably at provincial government level).

(b) The various rights and interests of those having ownership and those persons having the right of easement over registered customary land should also be registered.

(c) In cases of major development, royalties or benefits accruing to those persons who have ownership and those who have a right of easement must be clearly defined.

(d) Surveyors should be provided to the customary land owners.

(e) Terms used in the resource legislation eg. "dealings", "alluvial ground", "natural gas", "forest products", to name a few, should be properly and clearly defined in order to allow for scope of application within the traditional context.

"Interest" in regard to resources *on the land* e.g. traditional trees, burial sacred ground, waterings, etc and resources *under the land* must be clearly defined.

(f) Also of importance it must be noted that there is no such thing as unowned land in Papua New Guinea. Therefore any discretion given to the Minister to compulsorily acquire land by the State has to be done away with e.g. S17 of Land Act.

2. **Area of responsibility**

(a) Each Provincial Government should be given the power to legislate for the registration of Customary land.

(b) The purpose of registration must be clearly defined: whether it is a record for avoiding any ownership disputes that may arise or whether it also be extended for business purposes, eg. mortgages, security, etc.

(c) Areas of adjudication should still remain with the National Government through the existing facilities. Nevertheless, it is desirable that Magistrates should be released to sit and adjudicate on land matters in the District Lands Court on a full time basis.

3. Conflict resolution

(a) There is an urgent need to establish a special land Court that carries the jurisdiction of the District Court to be chaired by special magistrates to deal with rights, compensation claims and *anything* that relates to Land.

Any system that is devised for settling land matters must take into account that the losers are never satisfied and will always seek out and try other avenues. Hence the system must be very close to the people. Mediation is suggested in the first instance, it has proved to work well, but delays in the system have been the problem.

Thus we should have the hierarchy of conflict resolution as:

MEDIATION
⇓
LOCAL LAND COURT
⇓
SPECIALISED LAND COURT

The special land Court should be the highest Court. Appeal from this Court to National Court by power of review only.

(b) The period of mediation must have a time limit. We recommend the time limit for the mediation process to be a minimum of 6 months and a maximum of 12 months from the time of registration of the dispute.

This would be an incentive for only genuine disputes to be registered and proceeded with without unnecessary delay.

CONCLUSION

In the light of our recommendations, we strongly feel that there is a need for the distribution of powers between the National Government and Provincial Government to be readdressed and redefined in regard to matters relating to land.

WORKING GROUP PAPER:

ECONOMICS, ENVIRONMENT AND THE INTERFACE WITH THE WORLD

INTRODUCTION

Resources extraction is a means of supplying a want. The resource owner and the one wanting the resource meet by negotiation, to lay down a set of rules called an "agreement". However, such agreements in this country completely miss the point, because they take place between the government and the developer, who has the money. The true resource-owner does not participate. So the government negotiates the best deal for itself, not for the owner.

In such negotiations, it is invariably the developer, not the owner, who has the upper hand, not by design but by default, for example where landowners are bought in advance. This may be called "negotiation", but in the end it leads inevitably to inflated compensation claims, and worse. Papua New Guinea has a very high failure rate in its negotiated agreements.

The one with the money, the developer, is always better able to protect his interests.

The role of international regulatory bodies must be questioned. This includes the administrators of international treaties, even the original gatherers and collators of information. One must ask whose money funded them in the first place, where they are located, where their real interests lie. There is always a connection between the organisation, those who fund it and the reasons they fund it. It must always be remembered that international organisations are set up to promote, regulate and control. In this, there is basic conflict of interest from the outset.

Governments always play international protocol games, and international treaties pull in many different ways. None of them are free trade agreements, there is always a hitch, and in the end Papua New Guinea is the loser. The government has entered into various treaties and treaty organisations, but this does not necessarily mean protection of the country's interests.

For example, for coffee the organisation which establishes prices and quotas iq dominated by the major producers, and it is the coffee-drinkers in the USA who have the final say. It is the same for other tree crops, eg. copra is, competes with European olive oil, and the EEC sets up its own quotas.

In forestry, it is only the trees that belong to the landowners - the logs belong to the buyers. The South-East Asian concerns which control log prices and quotas are dominated by the Japanese, who are the principal consumers. They trade in "aid", which benefits the government rather than the tree-owners. There is a major row brewing over the timber-processing industry, and those concerned with making money from trading in logs will oppose a processing industry vehemently, because they stand up lose. They will shape government policy by any means at their disposal.

In minerals, there is no international organisation governing extraction. It is a matter for open market forces. Papua New Guinea, as a major world producer, is

very susceptible to foul play and the manipulations of the minerals marketeers. Similar games have already been played, with success, in countries like Chile and the Honduras. Mines have been closed, bought and sold, re-opened; revolutions have been fought and governments toppled, in mining games.

In fishing, despite all the treaties and conventions, it is really a matter of open market forces and the relative strength of the players. Nations with major fishing fleets also have major canneries which they wish to protect. They will always block a local fish cannery. Papua New Guinea is only the supplier, never the developer.

In small industries, Papua New Guinea is a consumer, not a developer. For example, Taiwan wants to protect its cottage industries producing plastic goods - a local industry could never compete, given banking practices and their rules. The banks themselves manipulate the relative strengths of international money marketing.

And finally, it must not be forgotten that people themselves are a resource. The motives of the ILO and trade unions must be questioned. They also are looking after their own interests first.

Economic and other flow-on benefits from resource development must always be balanced against the hidden costs, for example monitoring costs; environmental degradation. There is always a trade-off: can this be quantified? At any rate, it is an advance at least to be aware of these hidden costs.

To develop resources wisely, to strive to get the best deal for the country and the people, is ultimately a matter of political will.

The various resource sectors were examined in relation to:

1: Foreign Investment and NIDA
2. Human Resources
3. Financial benefits, taxation, owner-participation
4. Management and Control
5. Treaties and the outside world
6. Environmental preservation.

A. FORESTS

Premise

- that the view of the industry will be to continue log export in the long run.

The arguments against this:

the factors if - human resources
financial benefits
management and control
environmental and preservation.

Controls over log exports come under the Exports (Control and Valuation) Act. The Ministerial licensing power releases logs for export under the Customs and Excise Act, and the Minister for Trade and Industry can override him.

Papua New Guinea is sitting on "green gold" in the form of its extensive and unique forests. But this vital resource is neither being adequately investigated, nor properly managed. Ruthless exploitation must be stopped immediately, while data-gathering and assessment proceed and appropriate extraction methods are established.

Recommendations:

- that log export and woodchipping should be banned, and a processing industry must be encouraged.

- Stiff penalties must be provided for breach, and adequate monitoring must be undertaken.

- Future timber concessions must declare an on-shore profit within 5 years of commencement of operations, otherwise the licence is revoked. A transitional period may be allowed for existing licenses to be brought into line with this requirements.

B. PETROLEUM

(a) The extraction regime.

The trend with OPEC countries is for production-sharing. The current view in PNG has been that those wanting equity must pay for it, and benefits accrue to the State through taxation. But it is vital to devise the appropriate framework now. After the start of production it will be too late to change.

Recommendation: to move now to production-sharing

The developer takes the risk of exploration, and on discovery, the State automatically gets 50% equity. This may be apportioned one-third each to the State, the Provincial Government and the landowners. cf. the South Australian Aboriginal Lands model. This should be built into the governing legislation, not just part of the individual agreement.

(b) The Kutubu Oil Development Pipeline.

Premise

This is a matter of control of a strategic resource. Control of the pipeline controls grade and return, and who has access, what the toll charges are. It is vital that this not be in foreign hands. By raising toll charges, it is possible to make a profitable oil reserve unprofitable. If the matter is in state hands, by subsidising the toll charge, it is possible to develop an otherwise less profitable resource.

Recommendation: oil pipelines should be nationally owned.

The proposal put forward by the Southern Highlands Premier (Post Courier 31.5.90) provides a viable model for national ownership of the Kutubu Pipeline.

There is ambiguity between sections 48 and 49 of the Petroleum Act. The Minister appears bound to issue a pipeline licence to a gazetted applicant.

Recommendation: that this area of the legislation be reviewed as a matter of urgency.

C. MINING

Recommendation: to institute moves to a contract-management model.
The present model obviously does not work. To undo and rework existing frameworks is really a matter of political will. Contract-management has already worked with Air Niugini.

The arguments against contract-management are:
- it does not work with low-grade mines.
- it will scare off foreign investment
- it opens up possibilities of inefficiency
  state and provincial corporations already evidence low achievement

The arguments for:L
- it embraces fully the mandate of the Constitutional Goals
- such systems have worked elsewhere and in other fields

This should be effected with State ownership and statutory apportionment. Again, it is a matter of catching the export item at point of export. The developer gets a percentage of the FOB price on each shipment.

The possibility of a power of veto by landowners over mining development, as in the South Australian legislation, should also be considered.

D. FISHERIES

Again, the current policy is licensing the taxation of extraction for export. But monitoring and enforcement are impossible.

Recommendations:
1. To ban, or severely limit, fish export.

The argument for continued licensing of export-directed fishing is that the fisheries resources of this country far exceed domestic demand, even if local processing facilities are established.

The argument for banning or curtailment takes into account:
- inadequate understanding, here and elsewhere, of fish breeding and migration patterns;
- the growing awareness that modern resource exploitation may be having disastrous effects on global ecology; and
- the Constitutional imperative of the Fourth Goal, which requires us to take into account not only the immediate cost-effectiveness of resource extraction but the preservation and replenishment of that resource for the future. There nothing renewable about an extinct species.

2. To ban licensing of foreign boats.

This is directed at encouraging the establishment of a domestic fleet. An alternative to blanket banning would be the the establishment of reserved areas for domestic

boats which could be expanded as capacity increases. However, this system is open to abuse: reservation declarations can, and have been, readily "undeclared".

3. To develop a domestic market, including
- support to the current 3-phase policy of the Fisheries Department
- the establishment of a State authority along the lines proposed in the Commission's "Report on the Laws relating to Gillnet and Driftnet Fishing.

4. A review be undertaken of
- The Tuna Treaty, the USAD and other access licence arrangements.
- The LOS Convention and Papua New Guinea's position in relation to it

5. Provincial Governments be more closely involved in promoting local participation, and the failure of current shore facilities be investigated.

E. AGRICULTURE AND MANUFACTURE

Papua New Guinea's tree crops are all exported as raw materials, and then reimported as processed goods.

Recommendation: to aim always towards import-substitution.

Suggested avenues:
- using quotas to support local processing industries
- seeking cheaper alternative sources of imports, and restricting import rights to PNG importers
- using foreign exchange as a tool to stimulate internal growth, by regulation governing and restricting the repatriation of capital used for paying for imports. e.g. limit the amount of foreign exchange permissible for importing instant coffee. This involves the use of the Central Banking Act and the Foreign Exchange Regulations.
- channelling the public investment programme (fixed-term funding for promoting crops) through the banking system. The trouble with project funds is that they run out and the project collapses. There are also problems with marketing and transport which are not properly addressed. These can be reviewed with a view to subsidisation where needed to stimulate growth.

F. CHECKS AND BALANCES

The question of discretionary Ministerial powers occurs over and over again. An efficient system of review, of checks and balances on these powers, is needed.

In practice, no government will agree to an erosion of Ministerial powers, or allow the court system to be the tribunal of last resort.

An alternative is a system whereby an aggrieved party has a right of appeal to the collective cabinet (cf. Land Board decisions, NIDA).

Recommendation: further consideration of the alternatives in appeal and review matters.

G. HUMAN RESOURCES

Recommendations:

1. Promotion of universal literacy
2. International market value for professionals
3. The use of a bonding system to stimulate training
4. Far greater emphasis be given to the deployment of women - a resource which has so far been grossly neglected to the point of appearing deliberately ignored.

Also, the deployment of public service resources must be investigated, including consideration of:

- An examination system
- promotion on merits to certain levels
- educational qualifications required above certain levels.

H. FOREIGN INVESTMENT AND NIDA

Recommendation: That NIDA should be abolished and foreign investment be controlled instead by a system of

- residential status
- Controls over repatriation of profits.

Residential status: given to any foreign investor whom can bring investment capital above a set minimum eg. K200,000.

Of this, one-third must be invested in real estate (which cannot be repatriated).

The other two-thirds must be invested within the country.

Residential status gives the right to invest, and all Constitutional rights except the right to vote.

Repatriation of profits:

(a) Resource profits: divided into
   (i) strategic resources (mining, petroleum, forests, fisheries) - a cut-off point is laid down for each, beyong which profits must be retained in the country and used for processing.

   (ii) non-stretegic resources: repatriation is encouraged.

(b) Imports:

   (i) strategic imports (staples such as rice and tinned fish) - regulated through foreign exchange control

   (ii) non-strategic imports - a register of importers should be maintained and checked for price control.

Repatriation of profits should only be allowed for non-import substitution industries, with allowance for strategic exports below the cut-off point.

All foreign investment must accept residential status.

Companies which transfer-price to avoid declaring an on-shore profit are controlled by making it a condition of the contract/licence that after an initial period allowed to recoup investment, profit must be declared otherwise the contract/ licence is revoked. With mines, after the initial period, the regime must move to contract-management. Existing contracts must comply after a transition period.

The 15-year divestment of equity condition laid down by NIDA again assujmes that equity must be paid for. This principle is questioned. Participation regimes in other countries should be examined.

Recommendation: that investment treaties with other countries are reviewed and examined for the consideration, benefits and concessions which the other country is prepared to give. There must be fair and equitable consideration.

Although a treaty is a form of contract, the State nevertheless has the power revoke - it is a matter of political will.

I. BANKING PRACTICES

Recommendation: more banking licenses

The current practice is to restrict licences. However, active competition should be encouraged.

Recommendation: to mobilise savings by a savings/post-office bank.

This creates a pool of funds for investment, and allows the mobilisation of rural capital.

Recommendation: to examine the export credit financing model

- whereby in major resource development projects, the host country invests in kind, with equipment and management, which is then passed on to the State/Provincial Government/landowner after it is paid off.

Recommendation: to establish a Stock Exchange

Also, a Securities Commission to monitor the Stock Exchange and also other aspects of company operations.

J. LAND

Recommendation: to establish a Land Bank which holds titles for collateral.

This is one method of land mobilisation. Other means of providing loan security should also be examined.

Another problem with land is the current trend for a minority of landowners, often encouragted by a compradore, to incorporate a "landowners' company" under the Companies Act. Such companies then enter into agreements with developers, unbeknownst to the majority of landowners, who rightfully protest when the dealing is discovered.

Recommendation: only Land Groups incorporated under the Land Groups Act may register titles and enter into development negotiations relating to customary land.

The possibility of giving land groups an initial power of veto over development, along the lines of the South Australian Pitjantijatjara model, should also be investigated.

K. RESOURCE MANAGEMENT REGIME

Recommendation: all resource control should be amalgamated into one Resource Regime, in a system of National and Provincial Resource Boards (along the lines of Physical Planning, Education and the mooted Forestry Boards) with representation from and management of all resource sectors.

Only thus can a co-ordinated approach be macde to resource development. It is vital that the current hasty and piecemeal approach to resource extraction be stopped immediately. All such extraction must comply with the Constitutional Goals and Directives, particularly so in the case of non-renewable resources. Extraction should not continue until

- extraction can be carried out properly and wisely
- the proceeds can be deployed properly, within the country and for the benefit of the country.

Currently, all resources are being exported, and the entire production system is externally orientated. Pure case comes back which is then re-extracted from the country, and the whole economic system is disoriented.

There is a need for production for domestic consumption in agriculture, fisheries, manufacturing and forests. Export income earned from non-renewable resources (which do not need to be extracted immediately anyway) may be applied to financing approved internal manufacturing.

PLENARY SESSION:

Proposal

1. In relation to resource development, we recommend one major piece of legislation. This covers all resource management.

2. It establishes a system of national and provincial resource "boards", along the lines of the Physical Planning Act etc.

3. It establishes a system of specific resource "courts" (quasi-judicial bodies) at national and provincial level to adjudicate all resource disputes, and provide a system of checks and balances against overly-narrow concentration of power.

A. RATIONALE

The next stage is to find an appropriate economic model and institutional system. The original World Bank/Faber Report attitude was to go slow and let development proceed at its own place. This was followed by the Development Strategies. The current policy is the Medium Term Development Strategy, which expires at the end of this year. But it should be stressed that throughout all these policies, the basic scope of institutions has not been altered. No discussion has taken place since 1977 of establishing the correct model to fit existing institutional frameworks. Rationalisation to date has meant no more than discussion the size of institutions eg. amalgamation of institutions and departments. This has not effectively changed any basic structures, or given any indicators of the direction of the country. It is not so much that the development plans aren't working. The problem is basically that of the institutional structures and the people in them.

A sense of commitment and honesty is lacking, and consequently everything else falls down. The middle level knows that the higher levels are corrupt, and sees them grow stronger as a consequence. The logical next step is their corruption. Even enquiries get swept under the carpet. Restructuring work is useless unless individuals take personal responsibility and develop self-respect. Power structures are simply being built *ad hoc* for the benefit of the power-wielder who established them. This is the crux of the matter. The whole system should be shaken up from this point of view, otherwise we will be heading for a Philippines situation, with the entire country running on corruption and misuse of public money. This process is not just taking place at national level, it is happening all over the country and filtering down to provincial level. it is a major indicator that current institutions are not appropriate.

Other deficiencies in the current system are:

- that of monitoring programs after they are started - this has not taken place adequately, and responsibility for this is not clear.

- the current system supports a massive amount of wastage and reduplication. Major streaming is needed.

- the education system does not link with the job-creation system. Not only does the economy fail to sustain the institutions we have, the products of education cannot be absorbed. The cost-benefit analysis of the education system is very poor. However, it should be noted that this is not necessarily the fault of the education system, as is generally claimed.

Some examples of failures under the current system are:

1. the LEAD program - the political instruction was for the Department of Lands and Physical Planning to liaise with other departments, but very little progress has been made despite outside funding.

2. The agricultural public investment program is not giving results dur to a lack of linkages between DPI and the provinces, other departments, banks and financial institutions etc.

To recommend more staff and funds is traditional and easy, but not practical. Even with massive external funding, the desired effect is still not achieved.

We now need to identify an institutional model that will support the structure envisaged in our proposals, and also give us an economic model within which to establish an economic policy. Such a model must take into account the practicalities of the subsisting system.

The process is to -

identify the appropriate system
check the strengths and weaknesses of the current system
revamp the current system to accord with the goals

This approach is preferable to handing out administrative functions with no teeth, and getting by on *ad hoc* remedies. If legislation is required, then it should be brought in - but this requires political will, not only from the legislature but also at the departmental head level, for they too have their political power.

Precedent models:

1. The inter-departmental committee system. This has so far only operated from a departmental level downwards, though efforts are being made to reverse the direction, from the bottom upwards. Current thinking is to support decentralisation, but a workable system has not yet been instituted.

2. Other proposals for reform - the "Administrative Reform System" - have not been worked out in any detail.

We must be pragmatic to get a workable structure.

1. Firstly, we must look at the current role-players and tailor their activities to accord with the model chosen.

2. When cutting off excess power, we must ensure that it is decentralised and not just re-allocated at the same central level.

B. THE PROPOSAL

A single-stream resource management system will result in the streaming of departments and ministries. One powerful government department will handle administration, using the best people from the current fragmented resource departments. It is imperative that departments be rationalised - apart from theoretical considerations, the rising costs of funding separate departments cannot be supported. A sense of commitment only comes from good wages and conditions - it may be advisable to have all officers on contract conditions.

This single-stream system will be able to co-ordinate and adjudicate conflicting land use and resource demands eg. where mining conflicts with fisheries etc. It will also maintain the environmental perspective over all resource development proposals.

The relationship of the Ministry to the Boards must be carefully examined also.

The Boards.

The boards will have sectorial representation in each resource field pertinent to its province.

The boards are to sustain themselves and their monitoring systems on their own revenue. An example already in place is that of the Tourist Corporation.

All bargaining over resources must commence with the landowners. [The relationship with the landowners]

The boards will function and transmit power from the bottom up, commencing with landowner involvement. Only later, and in specified circumstances, does the National Government take over such a system has the potential to give a developer security from the outset, and should minimise compensation problems.

The Resource Courts.

these will cover all kinds of disputes, at the adjudication, and appeal and review level. Preliminary mediation, negotiation and bargaining should take place first.

Their powers will be wider than simply those of recommendation, as is the case with the current Mining Wardens courts.

The Land court system proposed by the Land Working Group will be subsumed in this system, with the provision of prior mediation taking place. The resource courts will absorb the functions of the current DO Lands (customary land matters) and the Local Land Courts at provincial level.

C. FURTHER RECOMMENDATIONS

All resources should be vested in landowners. Governmental bodies assume an advisory and assistant role in planning extraction.

No foreign developer can negotiate directly with landowners, no matter what the resource.

An original power of veto, and the power to stipulate conditions from the outset, must be vested in landowners, with allowance for arbitration or adjudication by the resource courts.

The compulsory acquisition process should be limited to only extreme cases of public purposes.

It would be preferable to ban all purchase of customary land. This accords with the traditional view of the inalienability of land. Land should only be leased, with mandatory ten-year review (such a system has already proved to work in trial projects in forestry matters). This is to overcome the problem of "the generation change" whereby new generations continually refute the actions of their predecessors in land dealings. Many compensation claims are initiated because of this social process, and could therefore be avoided.

As an alternative to land sale, landowner equity, production sharing and contract management must be used. Percentage benefits should be clearly laid down by legislative process.

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