NATIONAL GOALS AND LAW REFORM. A REPORT ON THE GOROKA SEMINAR

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I. Background.

The Government of Papua New Guinea attaches great importance to the role of law and legal institutions in the harmonious development of the country. Under the Constitution, a Law Reform Commission has been set up to examine the law and legal institutions, and to make recommendations for their reform.1 The responsibilities of the Commission are wide-ranging and exceed those of reform agencies in most other countries. The importance attached to law arises from various factors. First, the colonial experience, when law was used to create a labour force, regulate agriculture, and keep the local people in a state of submissiveness, showed to the present leaders that law can be an important instrument to effect and channel change. Second, most of the law that the country inherited on independence is based on Australian and British laws and legal concepts, developed in response to the needs of a society with a very different economic, social and cultural background. It is not suitable for the conditions in Papua New Guinea, and even less suitable for the goals of national development. Third, the articulated policy of the government has emphasised at least two points: that Papua New Guinea should aim for self-reliance in its development, and that there should be wide participation by citizens in the decision-making in the country.

A self-reliant development assumes that local resources should be used, and in the area of law this means that a greater effort should be made to base the legal system on the values, rules and procedures of customary law. A foreign imposed system of law has built into it a continuing or at least a long-term reliance on foreign techniques, cases and legislation, and personnel. The particular foreign system imposed on Papua New Guinea is not geared towards popular participation. In fact as the imposed legal system has spread through the country, it has resulted in less and less participation by the people in dispute settlement processes, while at the same time its effect was to centralise power. Thus the concern with law reform has its roots in many sources, in a perception that there is more to law than technique, and that a self-reliant and autonomous development is not possible unless the legal system is changed in radical ways.

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1. Constitution, Schedule II, Part 6.

II. *Time, place and participants.*

In order to explore some of the implications of the imposed system, and to discuss possible reforms of the system, the Law Reform Commission organised, in cooperation with the Dag Hammarskjold Foundation, a four day seminar on Law and Self-reliance from July 29 to August 1 in Goroka, Papua New Guinea.

The seminar was attended by about 50 persons who, with a few exceptions, are citizens of the country. The participants consisted of lawyers, academics, magistrates of district and local courts, students, politicians, social workers, and representatives of the police. Among them were Mr. Ebia Olewale, the Minister for Justice, Mr. Barry Holloway, Speaker of the National Assembly, Mr. John Kaputin, Deputy Speaker of the Assembly and former Minister for Justice, and Mr. Andrew Maino, an *ombudsman* appointed by the Government.

The intention was to seek the views of the citizens, especially those who were involved in the daily operations of the legal system. The seminar was organised through a series of plenary sessions as well as group discussions. Three students were employed for five weeks to collect court statistics and a few participants were invited to prepare papers for distribution in advance of the seminar, on traditional systems of dispute settlement, village courts, law and village economy, para-legals, customary law, law reform and national goals. In addition to the presentation of these papers, the planning committee had prepared a moot case in order to concretise the issues for discussion. It was originally intended that the powers and procedures of the district court - based on the English model - should be used in the disposal of the moot case, but at the suggestion of one of the participants, the moot was also run through the powers and procedures of a village court - based on the traditional system. The moots were a very good way both to engage the attention of the participants and as a device to highlight the differences between traditional and introduced systems of dispensing justice.

The discussion at all times was serious and animated; the seminar was a unique event - for the first time Papua New Guineans had met to discuss their own legal system, and many useful proposals were made. It was the view of the Law Reform Commission that an extensive agenda for reform had been defined, and that considerable work would be needed to explore and elaborate the proposals, and to put them in the form of legislative bills.

In the remaining part of this report, the specific issues raised during the seminar will be dealt with in the following order: (a) the Role that the National Goals of Papua New Guinea ought to play in Law Reform; (b) the Fundamental Issue: What kind of Law Reform is needed?; (c) the Areas for Reform; (d) Custom as a Basis for Reforms in Substantive Law; and (e) Constraints on Law Reform.

III. *The Role that the National Goals of Papua New Guinea ought to play in Law Reform.*

Mr. Bernard Narakobi, the Chairman of the Law Reform Commission, outlined to the seminar the relevance of the National Goals of Papua New Guinea to the task of law reform. The participants were firmly of the opinion that the National Goals as set out in the Constitution[2] must provide the

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2. See *Constitution*, Preamble, National Goals and Directive Principles.

major policy objectives for any law reform and shape the legal system of the new independent state. The views advanced may be summarised as follows:

1. When the Constitution speaks of an Integral Human Development as one of the National Goals, it calls for an emphasis on the development of the person as a human being. Thus the law must be such that it fosters an atmosphere conducive to serving human needs so that man becomes the centre for development.

2. The second National Goal is to ensure that all citizens have equal opportunity to participate in and benefit from all social, political and economic institutions in Papua New Guinea and the services they offer. This does not mean the mere provision of equal opportunities; it means ensuring that each citizen is in a position to actually participate in benefiting from the institutions and their services. Thus, where the necessary institutions and services are not available, the law ought to be instrumental in bringing about such institutions and services. However, where it means reforming the existing institutions to provide the necessary services, then the law must be used to that effect.

3. The third Goal is for Papua New Guinea to preserve its national sovereignty and to be politically and economically independent. The purpose of this Goal is to ensure that the citizens run their own political and economic institutions so that political and economic decision-making is not directly or indirectly in the hands of foreigners. The Government must ensure that all political and economic institutions are subject to its control as a sovereign power and that it actively engages itself in the distribution of the services provided by such institutions. Additionally, with respect to law, it means that our legal system must be controlled by Papua New Guineans. Laws must also provide for the control of the whole economy by Papua New Guineans.

4. The fourth Goal is to conserve Papua New Guinea's natural resources and environment. It means enacting laws and regulations which will protect the resources and the environment and promote activities which are not detrimental to that Goal.

5. The fifth goal is to foster the use of Papua New Guinean forms of social, political and economic organisations as the tools for achieving the social, political and economic development of Papua New Guinea. Laws must be such that these organisations are not suppressed, but rather are encouraged as the basic institutions through which development should take place.

Since the policy objectives of the Goals are clear and concise, what is needed now is the actual reform of the law and to make the social, political and economic institutions serve these objectives.

IV. *The Fundamental Issue: What Kind of Law Reform is needed?*

Once it was assumed that law reform was needed for the purpose of achieving the National Goals, the next and the most fundamental issue for the seminar was to define the nature of law reform. The issue boiled down to whether law reform means: (1) merely modifying the existing legal system, which would basically continue to service the existing social,

political and economic system, or rather (2) introducing fundamental changes in the existing system, using the law as an instrument for achieving those changes.

The assumption upon which the seminar proceeded was that a legal system is like a maintenance agency which services and ensures the functioning of a given society with its social, political and economic institutions. Thus, basically the nature of a legal system is determined by the political and economic institutions which exist in a given society and which the legal system is designed to serve. If the nature of the existing institutions is such that they would hinder the achievement of the policy objectives of the National Goals, then there ought to be structural changes in these institutions. Such changes would be essential so that these institutions may be oriented towards the achievement of the objectives behind the National Goals.

However, the seminar participants were clearly aware of the fact that there are limits to what law reform can do. It is possible that the whole society might not be ready for fundamental changes. Individuals who have been conditioned into serving certain kinds of social, political and economic institutions may react unfavourably to the new roles they would be assigned to play. And, of course, movement towards fundamental reform and restructuring of societal institutions would encounter staunch resistance from those groups which currently hold real political and economic power, where they perceive that those changes will be contrary to their vested interests. If the structures of society are inherently opposed to law reform, even if existing laws are changed, they will be ineffective.

One example of how the efforts of a well meaning government can be negated by those holding economic power was given by Michael Mel who pointed out that expatriate coffee buyers were effectively avoiding the *Coffee Dealing (Control) Act*[3] by using loopholes in the legislation.

The potential stumbling-blocks in the path of law reform do not mean that reform should not be attempted. There is a great will among the general population for law reform in Papua New Guinea. The existence of limitations indicates that law reform is a part of the wider process of change in society.

V. *The Areas for Reform.*

Having defined the nature of law reform that can best achieve the National Goals, the next task for the Seminar was one of identifying and making suggestions as to reform in specific areas. As time was limited, the seminar could not discuss all the issues it would have liked to have discussed. One issue which could not be discussed, for example, was that of women and the law. However, the seminar concentrated on issues which were considered to be of a structural nature. These were divided into: A. The Judiciary and the Courts. B. The Lawyer and the Legal Profession; C. The Police Force; D. Custom as a Basis for Reforms in Substantive Law.

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3. No. 20 of 1974. The Act prohibits non-nationals from dealing directly with raw coffee producers. Mr. Mel is a Law Graduate of the University of Papua New Guinea, who is working with the Pipilka Association in the Western Highlands. The Association runs businesses along communal lines.

A. The Judiciary and the Courts

The Seminar participants were aware that Papua New Guinea has inherited a judiciary and a system of courts which are alien to Papua New Guinean ways. While efforts are being made to reform these structures, there is clearly much which still remains to be done. This was brought out particularly in two 'mock court' exercises which were conducted as background to the discussion. One was based on the District Court procedure and with representation by lawyers. The other was based on the Village Court procedure. All parties appeared to be lost in the complexities of the District Court. On the other hand, in the Village Court there was a genuine feeling of popular participation and understanding.

1. The Role of the Courts and the Procedure

Courts are held out as impartial tribunals to which disputing parties may go for the purpose of having their dispute adjudicated so that their respective rights and duties might be decided. Basically, the courts are instruments for maintaining order in the functioning of the existing social, political and economic institutions.

The Seminar considered that there is a need to redefine the role of the Courts. There ought to be more emphasis on achieving compromises between disputing parties while ensuring that no guilty party benefits from its wrong doing.

Further, the Courts should seek to uncover the underlying cause of each dispute so that they may come to see the situation as the disputing parties themselves see it. To date there is a tendency to take each dispute and treat it as if it arose in a vacuum. An enquiry to uncover the actual cause may be fruitless under the present situation, due to the fact that court procedures for admission of evidence might exclude, as hearsay or irrelevant, certain evidence which might be vital for a rational decision-making.

Thus, possible improvements in the court system will lie within the area of procedure. Court procedures should be in line with the basic objectives of the courts, namely, uncovering and resolving underlying causes of disputes. The need for a smooth administration of the process of dispute settlement should not be confused with the fundamental objectives of the courts and rules designed to enable the courts to speedily perform their function should not be maintained at the expense of the function itself.

(a) *Introduction of a Pre-trial Mediation Process in All Courts.* The Seminar considered that one channel for effective resolution of disputes is the introduction of a required process of mediation before parties would be permitted to bring cases to the court system for adjudication. Thus, the judicial predisposition towards out-of-court settlements would become institutionalised. Basically, mediation is a process of negotiation with the assistance of an independent third party (who may or may not be a magistrate or judge), which parties to a dispute can utilise for the purpose of working out solutions acceptable to both sides. Since mediation is a possible answer to the strict and formal rules of court procedures, the process of mediation should be characterised by a sense of informality. That is, mediators should be free to hear or to call for any evidence which may lead to uncovering the underlying causes of the disputes.

Mediation does not only have the cathartic effect of enabling the disputing parties to sort out their own grievances, but it would also help to reduce the work load before the courts. Through mediation the parties on both sides would gain a definite understanding as to what the specific issues are upon which court would give its decisions. Thus mediation is beneficial both to the courts and the disputing parties who would feel that they are participating in the decision-making process of the courts.

The Seminar came to the conclusion that certain personnel, such as welfare officers, missionaries, policemen and other specified persons could play the role of mediators.

(b) *Making Village Court Procedures more Effective.* With respect to Village Courts, it was noted that they have been introduced in Papua New Guinea to give emphasis to the idea of mediation and compromise, and to encourage popular participation in dispute settlement. Indeed, the opinion was voiced at the seminar that village courts should be further strengthened by removing the jurisdiction of local courts wherever village courts are established. However, it was also pointed out that the Village Courts' procedures do not always work in the ideal manner envisaged by the organic law.4 Some Village Courts have used the common law courts, rather than traditional moots, as role models, imposing unduly formal procedures in the dispute settlement process. For this reason it was felt that there should be more emphasis on customary procedures of mediation, compromise, compensation and popular participation, and less on fines and imprisonment, and winner-take-all adjudicatory judgments.

(c) *Change in Courts' Sentencing Policies.* Under the heading "Role of the Courts", participants at the Seminar considered various reforms, including the area of the courts' sentencing policies. It was felt that there is a need to give emphasis to compensation of the victims of any crime or any braach of the law, rather than on exacting fines from or incarcerating the guilty party. Though imposing a fine is raising revenue for the Government, the courts' fundamental function is not one of raising revenue for the state, but rather of ascertaining causes of disputes and settling such disputes.

The imposition of a fine by the courts in certain criminal cases, such as assault, is not in line with traditional Melanesian concepts of justice. While the State benefits from the wrongdoing of one of the parties, the victim of the act of assault goes uncompensated unless he institutes a separate civil suit. If the victim decides to bring suit against the assailant, then he would have to pay for legal services, the cost of which might well exceed the damages he might recover if the action is successful. Such a state of affairs in no way enables a court of law to play its proper role, namely, settling disputes between parties with a view towards eliminating the *root causes* of such disputes.

What is needed is a change in policy so that there will be more emphasis on compensating the victims of crimes and eliminating the need for "payback" or further hostilities, rather than imposing fines or imprisoning the guilty party. Papua New Guineans do not view fines or imprisonment as adequate or appropriate recompense to the victim or the victim's family. Only some positive compensation for the wrong he has suffered is likely to satisfy the victim, and meet with generally held notions of fairness and justice.

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4. *Village Courts Act 1973*, No. 12 of 1974.

(d) *Access to Courts by the Public.* Another broad area that the seminar looked into was the question of access to the courts. It was noted that although the courts are theoretically open to the public, realistic access to the actual services of the legal system are limited only to those few who can afford to pay for legal services. Thus the courts now look more like a commercial venture for the benefit of the legal profession than an institution for dispensing justice and promoting equality and harmony.

Because the question of access to courts is interwoven with the question of access to services offered by the legal profession, it was felt that there ought to be basic changes in the nature of the legal profession in order that members of the public may have ready access to the service offered by the Courts.

2. The Role of Judges.

For every dispute that comes before a court a decision must be rendered by a judge or magistrate. This is to irrespective of whether the dispute calls for application of the criminal code or whether it involves ihe interpretation of Papua New Guinea's Consititution or the assessment of civil liability.

The judge must sort out the competing claims of the parties in the light of some guiding principles. Because the judge is in a position of power, he must be acutely aware of the need to implement the National Goals. Thus,when called upon to apply or to interpret *any* law, the judge should be concerned with reaching a decision which would serve to implement the National Goals.

Two specific proposals were mooted at the Seminar to encourage the judiciary to move firmly in the directions ordered by the National Goals. First, it was suggested that the question of nationalisation of the Bench in the near future should be explored. The second possibility was the enactment of a law, under the Constitution, dealing with the basic principles under which a Papua New Guinea judiciary should operate.

B. The Lawyer and the Legal Profession

The Seminar discussed the general questions of the role and nature of the legal profession in Papua New Guinea. The main problem, it was noted, was one of providing the public with easy access to legal services offered by the profession. The substance of the discussions involved an enquiry into various methods through which changes could be made in the legal profession. It was agreed that such changes must be geared towards achieving the National Goals and, in particular, ensuring a more equal distribution of legal services throughout the population.

1. The Role of the Lawyer.

With specific reference to the position of the lawyer, it was noted that the role of the lawyer is determined by the social, political and economic institutions that exist in a given society, and that the services lawyers are required to offer are greared towards maintaining order in the functioning of the institutions within that society. Hence, the

Seminar considered the difficulty of attempting to change the role of the lawyer without first changing the social, political and economic institutions. It was felt that there ought to be some structural changes in the existing institutions so as to change the role of the lawyer.

2. Access to Legal Services

Having looked at the problem of access to legal services, the Seminar suggested some possible changes which would enable the legal profession to cater for a greater number of people. They are: (1) To train para-legal personnel to do certain legal or semi-legal work; (2) To nationalise the legal profession; or (3) To establish a National Legal Corporation.

With respect to training para-legal personnel, it was noted that such a scheme was effectively carried out in the Micronesian Islands. There, para-legals are employed as court clerks, trial assistants, or to go out into the field and solve problems of a semi-legal nature. It was suggested that the nature of the work which para-legals can perform needs to be ascertained so that they can be trained specifically for these purposes.

As for the alternative of nationalising the legal profession, the Seminar recognised certain major difficulties. First, it is difficult to fundamentally change the role of the legal profession without first introducing like changes in political and economic institutions.

Thus, it was suggested that changes in the legal profession should initially take place through liberal reform, but the long term objective of the reform must be that of a final transformation of both the legal system and the profession, and the existing social, political and economic institutions.

With that long-term objective in mind, the Seminar found that there is a need to establish a National Legal Corporation for the purpose of providing services to individual nationals and to public corporations, like the PNG Housing Commission and the National Electricity Commission. This Legal Corporation must be an independent statutory body. The establishment of the National Legal Corporation should be regarded as a step towards nationalising the legal profession so that in due course there is an integrated legal profession from which all clients could receive the same services. As a single legal profession takes over, private law practice should be phased out.

C. The Police Force.

The Seminar viewed the Police as an important institution, ultimately responsible for the administration of the law and an integral part of the legal system in any given society.

As an administrator of the law, the Police are vested with broad powers which may easily be abused, so there is an urgent necessity to have a police force which is sensitive to the needs of each community within the country. Together with this concern, it was also expressed that historically the Police have not had a good image in the eyes of the Papua New Guinean public. The Police has been perceived as a colonial instrument, the function of which was to ensure "order", in the interests of those who were exploiting the people and their resources.

Various methods through which the Police could improve their services to the public, and at the same time improve their public image were discussed at the Seminar. It was stressed that one of the fundamental changes that ought to be made is in police prosecution procedures. The eagerness on the part of the Police to automatically issue summons each time there is a complaint needs to be reviewed. Instead of solely playing the role of prosecutor, the Police Force ought to more often play the role of mediator between disputing parties. The Police should see their function as that of assisting the parties concerned in reaching an amicable and mutually acceptable agreement.

The Seminar stressed, too, that the Police ought to emphasise their preventive role more, rather than focusing on detection of crimes and apprehension of suspected lawbreakers. It was felt that in their daily lives members of the Police Force were too divorced from ordinary members of the community, because of the fact that almost all policemen live in barracks secluded from other people. This seclusion only reinforces the public image of the Police Force as a hostile force and alien oppressor of the people. In addition, this seclusion also bars the policeman from playing his role to the full as a crime prevention agent. It was recommended that some policemen should be encouraged to live among the general population in the various residential areas. Their mere presence in residential areas would allow them to interact more freely with the community, in non-contentious situations - sensitising them to the needs of the people and humanising their public image.

D. Custom as a Basis for Reforms in Substantive Law.

A major topic for discussion was the need to recognise and implement Papua New Guinean custom as the basic, or underlying, law in Papua New Guinea. To achieve that end, it was recommended that positive steps be taken to formulate rules and principles of customary law that are common throughout Papua New Guinea. Having recognised this as an objective, discussions were held to determine which rules and principles of customary law were common throughout Papua New Guinea within the areas of family law; succession law; land law; and economic laws.

The Seminar recommended that when formulating rules and principles of customary law common throughout Papua New Guinea, care should be taken to ensure that these customary rules and principles were modified, where necessary, to conform to the policy objectives of the National Goals.

1. Family Law

Questions were raised with respect to the status of marriages under the existing marriage laws, namely, the Marriage Act,[5] customary marriage laws,[6] and the so-called "church marriages". It was recommended that there ought to be only one form of marriage under a single body of marriage law, and not a plurality of forms of marriage or marriage laws, as presently exists.

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5. *Marriage Act 1963* (No. 8 of 1964).

6. Recognised in the *Native Customs (Recognition) Act 1963* (No. 28 of 1963).

A new Marriage Act should be drafted to incorporate common customary law principles, as modified in accordance with the National Goals. The participants in the Seminar concluded that intending parties to a marriage ought to have some sense of commitment to uphold the marriage so that there was a need to incorporate in the marriage law a set of prerequisites to a binding marriage. Such prerequisites could include: (1) Compulsory counselling by specified personnel designated as marriage counsellors; (2) certification by a marriage counsel to the effect that the parties are well informed of their obligations to each other and likely to uphold the marriage; (3) the possibility of requiring the intending parties to pay a specified sum of money into a special fund as an indemnity against the risk of dissolution of the marriage. This condition was recommended as a possible answer to "loose marriages" or "bandwagon marriages" that take place in cities like Port Moresby and Lae.

Participants in the Seminar also raised and discussed the issue of divorce in Papua New Guinea. It was generally accepted that divorces ought to be recognised in Papua New Guinea, but the law should not make it too easy for parties to obtain divorces, especially when children are involved. It was recommended that before a divorce decree is granted, certain conditions must be fulfilled, including: (1) Compulsory counselling for conciliation; and if that fails (2) mediation, which may then be followed by a divorce if there is no hope of reconciliation.

As to drawing up a divorce settlement under which both parties may divide up the property of the marriage, it was recommended that the persons who act as counsellors or mediators should assist both parties in reaching an equitable settlement.

With regard to the dependent children of dissolving marriages, both parties should also work out custody arrangements. The interest of the child should be the prime consideration in questions of custody.

With respect to return of bride price after a dissolution of marriage, the participants noted that, while bride price payment was widely practised, it was not a universal practice in Papua New Guinea. It was agreed that there was a need to regulate questions of bride price payment and the return of such payment if dissolutions occur, but it was emphasised that provision be made for recognising the differing customary approaches to the problem by the various customary groups.

2. Succession Laws

The participants in the Seminar noted that the law of succession is interwoven with questions of family law and land law, so that there is a need for coordination in these areas to ensure that reforms suggested in the laws of succession would not render obsolete certain customary rules and principles which govern rights to land, or conflict with principles of family law.

It was recommended that there ought to be a uniform law of succession so that there could be certainty in the devolution of property left by the deceased. The main goal of the law of succession should be to ensure that the descendants of the deceased are adequately provided for. At least two types of descent systems must be accounted for: those based on a matrilineal family system, and those based on a patrilineal family system.

3. Land Law

The Seminar participants considered questions dealing with ownership of land. It was suggested that a single system of land law. which provided adequately for differences in customary rules and principles relating to land ownership,should be adopted.

The main disputes over land ownership are said to centre around land that is clan-owned as distinct from individual plots owned by individual members of a clan, and boundary questions. It was recommended that known land boundaries be marked by specific and well-identifiable features, like concrete posts, to avoid future disputes over boundaries.

Basically, rights to ownership of land should be governed by customary rules and principles as incorporated in a single system of land law,

4. Economic Laws.

In line with Papua New Guinea's Consititution, which calls for economic development on the basis of traditional institutions as they exist in Papua New Guinea, the participants discussed ways through which the traditional institutions like the extended family or the clan could be utilised as a channel for economic development, thus giving the extended family or the clan the autonomy to establish and conduct business activities. It was emphasised that group, rather than private, ownership of businesses should be encouraged.

The participants noted that there was a need to simplify many economic laws to make it easier for people to grasp the legal requirements for setting up and running commercial activities. It was suggested that the Department of Information and Extension Services should undertake the task of translating and interpreting some of our economic laws into Motu, Pidgin, and simple English.

VI. *Constraints on Law Reform.*

The final topic, but one of great importance, was the issue of constraints to law reform. The participants attempted to identify what may be considered constraints or obstacles to law reform and suggested ways through which such constraints could be overcome.

The first obstacle was identified as the lack of cooperation between politicians, bureaucrats and others. The need to educate these groups in the National Goals was stressed. It was recommended that another seminar on 'Law Reform and the National Goals' be convened to involve politicians and their advisers, so that proposals for reform put forth by the Law Reform Commission may not be defeated in the Parliament because they are not fully understood.

The participants noted that there were two basic reasons for the lack of cooperation when it comes to introducing major reforms of the law and of the social, political and economic institutions: (1) the fear of introducing fundamental changes without a thorough understanding of the objectives of the reforms: and (2) positive opposition from those with vested interests in the existing political and economic institutions. It was recommended that there was a need to educate the public in the National Goals in order to win popular support for reforms that help implement the National Goals .