In "The Discourses", Niccolo Machiavelli wrote "He who desires or attempts to reform the government of a state, and wishes to have it accepted and capable of maintaining itself to the satisfaction of everybody, must at least maintain the semblance of the old forms: so that it may seem to the people that there has been no change in the institutions, even though in fact they are entirely different from the old ones". It is an historical fact that in countries where revolutionary governments which are introducing unfamiliar ideas have gained power, they have had to use coercive means over many years to get these ideas accepted. Usually it is a well organized minority holding the new ideas which brings about the revolution.

Many of those concerned with government in Papua New Guinea appear to have largely overlooked this principle, and to have acted as though the destruction and replacement of institutions is better than adaptation of existing ones. They think that the mere assertion of this to the native should make him immediately adopt the new although they themselves are quite resistant to new doctrines, despite the fact that they are assured that these are for their own good.

II. Customary Land Holding Institutions

It is unusual to find a piece of land owned by a single person in Papua New Guinea, except in some places, such as the Tolai area near Rabaul, where native custom has been modified so as to let individuals have plots of their own, for the planting of coconut palms and cacao trees. Where the only use of land is for the traditional shifting subsistance agriculture, which necessitates leaving old gardens and making new, individual ownership is not necessary. It is something which becomes desirable only when

trees which last for years are planted, and the planter and his family wish to retain them and the land on which they grow for at least the period over which they will bear crops.

Land is usually said to be owned by clans. A clan's land consists of irregularly shaped plots, varying considerably in size, interspersed among the plots of other clans. Within the clan there are lineages, which are similar in form to clans, but smaller. Both clans and lineages are numbers of persons believed to be descended from a common ancestor. In the case of the clan this person is sometimes mythical, or possibly the acts of a number of ancestors have become attributed to a "composite person" who is believed to be the clan ancestor. In the lineage the ancestor is usually a real person, a man or woman only four to six generations removed. The descendants of his brothers and sisters (or classificatory brothers and sisters - that is cousins etc.) regard themselves as being of different lineages of the same clan. If clans are small, they may function as lineages. If large, then the clan land plots are under the control of the lineages which occupy them, and even clan members can be excluded from those clan lands held by other lineages than their own. Should a lineage die out then the clan to which that lineage belongs has the reversionary right to its land.

This is the pattern in both matrilineal and patrilineal societies. The lineage may be called the basic unit of a native society in all its aspects, including the ownership of land. The affairs of a lineage are, or were, usually decided upon in the "mens house" or "club house" of that lineage, a place where drums, weapons, religious masks, emblems and so on were kept, under the leadership of the lineage leader, usually the senior man within it.

III. Difficulties in the Use of These Institutions

Objections are often raised to the use of traditional forms of land tenure on technical grounds by surveyors for instance, who think in terms of access roads, evenly shaped blocks and so on, or agricultural officers who have assimilated similar ideas to those of the surveyors, with additional ones concerning ease of inspection of plantations, and of pest control, by having them all grouped together.

Apart from such objections, the main protest offered to the suggestion that native institutions be used is that using them would "crystalize" or perpetuate them, and with them, tribalism. But this is unlikely. Indeed it is more probable that there will be an opposite effect. Tribalism flourishes among people with low incomes and little diversity of occupation. If the rate of economic development can be increased, and with them diversity of occupation, and there will also be a tendency for persons from many different ethnic groups to go to towns or other central places, where it is most likely that ideas of national unity will develop.

This is happening under existing conditions in Papua New Guinea. Professor R.G. Ward, formerly of the Department of Geography of the University of Papua New Guinea, said in his Inaugural Lecture in 1968 that "The change to cash production in rural areas may not encourage people to return from the towns. Experience elsewhere suggests that the reverse is often true - higher commercial production in rural areas is frequently associated with declining rural populations".

Another objection - a valid one - to the use of lineage lands is that there are many disputes about their ownership. At present there is no need for anyone to hesitate to claim land as it costs nothing to have a case heard at first instance, and to appeal it through higher courts. Even if one's claim has little merit it

could with luck succeed. Legislation to empower courts to award costs against an unsuccessful applicant should it appear from the evidence that the claim was vexatious or of little or no merit, and the fixing of fees for appeals might stop many people from commencing and pursuing doubtful actions.

Another reason for litigation is that at present most native people feel that they have a bona fide claim of right to land if their ancestors dwelt upon it, and particularly if some of them were buried on it, whoever may have lived upon and used it later. Because the pattern of native life was, and still is in places, one of much movement, caused by the necessity of a system of shifting agriculture, by raids of enemies, and by the belief that it was necessary to leave any place where there had been much illness, or some deaths, it is often the case that there has been a succession of occupations of an area of land by different clans or peoples. Each of these clans or peoples, if still in existence, believes that it has a good claim to this land, even though it may be at present unoccupied.

To avoid many claims to the same land because of this belief it will have to be made known to the people that only proof of fairly recent occupation will establish a good title. The law must "fix upon a definite date since which the plaintiff's cause of action must have arisen". The situation in Papua New Guinea is now similar to that existing in England in the Middle Ages when people sought to prove title by alluding to transactions in the land in much earlier times. It became necessary by successive acts of Parliament to set the limits of legal memory so as to prevent to much delving into the doubtful past. The last of these dates, for purposes of actions on Writs of Entry as a means of trying title to land, was the year 1189, set in 1275 by the Statute of Westminster. Presumably

this date eight hundred years ago, is still, under existing law, the limit of legal memory concerning events in customary land matters in Papua New Guinea. It is not the limit for custom itself. Under the Native Custom (Recognition) Ordinance the custom in relation to any matter in question is the custom at the time when and the place in relation to which that custom arises, ascertained as a matter of fact. The Land Titles Commission in deciding ownership of rights to native land however, usually uses the date of the Assumption of Sovereignty by Australia or Germany, or the date of effective control over an area as the time which it does not look beyond. But this is a "rule of thumb" and has not had the approval of a higher court, or of the legislature. The setting down, and making known to the people, some such limit, is very necessary.

IV. Possible Uses of these Institutions in Economic Developments

The policy for indigenous agricultural economic development which has been followed in the past has had two main objectives. First the purchase of land for resettlement and its division into blocks for leasing, to create a rural community of freeholders, each residing on his own holding, and second, the encouragement of village people to plant cash crops near their villages. Attempts to achieve both these ends have in many instances been objectionable to the natives in various ways.

In the first the policy of using small-holder blocks has gone against the native preference for living in a community of some kind. There seems to be no reason why communities surrounded by fields or holdings could not be used in Papua and New Guinea as in Malaysia and Ceylon, except that the idea of the individual on his own land is an Australian idea, dear to Australian politics, which has been

used in the past by Australian policy makers.

Secondly, many of the settlers are superstitious. They believe in spirits such as the masalai, which is associated with some place, such as a large tree, an outcropping rock or a hole. In his own community a person knows the attributes of the local masalai - their malignancy or harmlessness, and where they abide - and is able to deal with them by avoiding or placating them. But he does not know them in strange surroundings. He does not even know if there are any in his vicinity, and finding an odd looking stone on his holding, where a masalai may lurk, he will be anxious and will barricade himself and family into his lonely house at night.

Thirdly, many of the people removed from their own ethnic groups to resettlement blocks on land purchased from strangers are unhappy there, because they are lonely and they feel like interlopers on someone else's land.

Last, the settlement of people on small-holder blocks is a complete break with tradition and methods of work, which are based on reciprocal aid in the lineage. This means that in clearing land, building a house, making a canoe, hunting, preparing a feast or ceremony, and in other activities, a person or group within the lineage was aided by other members, and thereby became obliged to help those others to the same extent that they had helped him. This is not to say that the people should not be able to take up blocks if they wish to. In many instances it is probably necessary that they do so, as in tea growing and palm oil extraction, where the crop must be produced close to a central factory; or where large areas are needed for cattle runs. But even here people could live in communities instead of in isolation. Alternatively, where there

is no land shortage, lineages could set aside some of the lineage land for economic development and work it as a group. An objection to both of these plans is that the proceeds might not be fairly distributed, but this could be overcome. One way to do this would be to make the lineage a corporate body for the purpose of working certain of its lands.

The policy of getting cash crops planted near villages has not worked well in practice up to the present. A number of the government officers encouraging this form of planting have had little knowledge of native land tenure. They have assumed that land around a village is communal land and that anyone in the village may plant on it. In some instances people have been ordered to do so, and the resulting "village plantations" and "government plantations", some dating from the days of German sovereignty, most from the period between the two world wars, are a prolific source of dispute. In these plantations persons of many clans and lineages have planted on the land of only one or two clans. The trees belong to the planter, making the land they are on useless to those having ownership rights to it.

In Buka in the early twenties, (and possibly elsewhere) the people were suspicious about this type of planting. They thought that possibly the land would be leased to an alien after being cleared and planted, and therefore contrived to plant on land belonging to someone else. If their fears proved correct, they would only lose their labour and the trees, if groundless, they would still own the palms, although they were not on their own land. In doing this they were helped by the fact that the German administration had marked lengths of road or track for each village to keep clean. These lengths were proportionate to the population of the village

at that time, to ensure an equal distribution of work. After the Germans had gone these lengths came to be regarded as indicating the extent of "village land" along the road. Latterly, instead of being ordered to, people have been advised to plant village groves, or that each adult person should plant in a compact area near the village. Again many lineages have had to plant trees on anothers land. Often the advice has been taken as an order - "agriculture law". Sometimes a lineage has no available land near the village, and has the alternative of planting in an inaccessible place on its own land, or planting on some other lineage ground. It takes the second choice, with the land owners' reluctant assent, given only because they thought that they would be in trouble with the government if they refused.

Because of the strong tie to one's lineage, (and its sacred place if any), a possible method of resettlement of lineage members when growing population and the use of land for economic crops has led to land shortage, might be for the Government to buy land as it does now, but instead of subdividing it into individual plots, to break it up into larger areas for specified lineages, to the regarded as "extensions of lineage lands". Groups of lineage members could alternate in working these for cash cropping, and the whole lineage would benefit. For this to succeed however, the resettlement area would have to be fairly close to, and readily accessible from the place where the lineages using it lived. Another way of using existing lineage lands for individual use is to allocate plots within them, using the traditional boundaries, either by converting the tenure to freehold under the Land Tenure Conversion Ordinance, or retaining it under native custom.

These methods can only be used effectively where there is ample

land available. They have the advantages sought in the schemes for placing the freeholder on a resettlement block, with the additional ones that because many people of the same lineage thereby have contiguous blocks within the lineage's home area, familiar work patterns can be used; and that the plot owners know that they are working their own lineage or clan land. The disadvantage is that the plots are irregular, but this does not greatly matter if by using such plots an acceleration of economic growth is achieved. Land boundaries can be straightened later if necessary - in Papua New Guinea with its rugged terrain and the use of natural features such as creek and ridges as boundaries, it may not be necessary. The traditional boundaries may be the best ones.

On the west coast of Bougainville in 1962 two schemes were proposed to, and agreed to by the native people. In both cases, irregularly shaped plots within clan or lineage holdings were given to individuals. In one the tenure of these blocks was converted to freehold, in the other the blocks remained as native land. Both these projects have been successful, with about a quarter of a million each of coconut palms and cacao trees planted in the project areas and vacinity. One of the reasons for the success of these schemes is that roads to coastal loading places were built before the bush was cleared, so that the people knew that they would be able to get their produce out if they grew and processed it. The Marist Mission did much of this road work, or provided equipment for it. Prerequisites to any successful attempt to get people to work on developmental schemes are roads and accessibility to market. Following the building of a road round Buka in 1963 there was a

great increase in planting. On the other hand, a projected scheme in Manus languished for years because no road was built. The official thinking in the Manus case seemed to be that there had to be an existing economic production in the area to justify the making of a road. This attitude can only lead to delay in development.

V. Use of these Institutions in a Uniform Land Law

The land law of Papua New Guinea consists of two parts - the statute and common law introduced by Europeans and the customary unwritten law of the indigenous people. The first of these, except for a few differences between Papua and New Guinea, is uniform throughout the territory, but there are differences in the second from place to place. Whether these differences are greater than the similarities or vice versa is a matter often discussed, and it appears to be generally believed that the first of these alternatives is true. Another dissimilarity between the introduced land law and custom is that the first is law which is intended to apply to land alone, while the second is a system in which every aspect of native life is involved. This means in practice that the first, applied to customarily held land, does not affect land alone. When any dealing is done or decision made over land held under customary tenure, not only is the land affected, but social, personal, religious and other aspects of the lives of the people in the group owning the land and groups closely associated with it are also affected.

When land is not held under custom, but has been alienated, it is brought under the introduced system, and future dealings in such land are governed by a uniform law throughout the country. For this legal reason and for other reasons, many people think that the

sooner all land can be brought in some way, by registration or otherwise, under the introduced law, and customary tenure done away with, the better the land law will be.

But this is not so. Customary land tenure systems could be incorporated in the written law so as to enable dealings in customarily held land to take place in a uniform way throughout the country. This would avoid the disruption of all the inter-related aspects of native life which a complete break from customary tenure would cause. There is no need to do away with customary systems of tenure and replace them, either for legal or economic purposes. The main reason for this is that the dissimilarity in the land tenure systems of the hundreds of ethnic groups in Papua New Guinea are not great. They are mainly matters of detail. The similarities in the systems are far greater than the dissimilarities. Each land tenure system is very like the other.

It may be objected that this cannot be so because the "kinship and inheritance" systems of some of the peoples of Papua New Guinea are organised on a matrilineal, and some on a patrilineal basis. This does not mean that there is a different method of inheriting rights to land in a patrilineal society to that in a matrilineal one. It means that there is a different method of acquiring membership in a lineage. In both these types of society the lineage members inherit rights to land, regardless of whether or not individuals acquired membership of the lineage because their mother belonged to it, or because their father did, and the lineage, as an entity is the effective owner of pieces of land. It can exclude people from, or admit them to, its lands.

Inheritance in this way does not mean that the land passes from

one person or group to another as it can in Australia for instance. Under native customs trees on land do not necessarily go with the land as fixtures as in English law. They are owned by the planter, who often does not belong to the land owning group. Portable personal property is often inherited within the simple family and not in the way that land is. The lineage owns land much as a corporate body does. Persons join the corporate body, or are born into the lineage; they leave the corporate body in a number of ways, or leave the lineage by death, but their coming and departure does not affect the corporate body or lineage as far as ownership of its lands is concerned, except that during the time of their membership they have a share in it. The lineage resembles a joint tonancy in that there is a right of survivorship. When someone dies the survivors are the owners, and they are joined from time to time by those who are born into the lineage. In fact the lineage members regard their dead as still having an interest. They are usually buried on their clan or lineage land, and their spirits are concerned about the use and fate of it. People also consider that they are somewhat in the position of trustees for those yet to be born into their lineage.

In any legislation to bring custom into the written law, uniform throughout the country (or to control use of lineage lands), many of the varying details and some of the secondary rights to land could probably be better regarded as contractual rights rather than possessory or proprietary rights, which the primary rights acquired by membership of a lineage certainly are. For example, the primary rights of a man in a matrilineal society are to the land of his mother's lineage, but he may have secondary rights in his father's lineage, because of certain events having taken place. If

the latter were denied him, possibly the most effective way to give him a remedy at law would be for him to be regarded as having contractual rights in his father's clan because of these events, and for these rights to be enforceable in the Local Court. His only remedy now is to claim possessory or proprietary rights in land, leading often to lengthy litigation about a minor matter.

VI. Conclusion

This article dealt broadly with a number of subjects. It was mainly directed to the use of native institutions as they affect land.

It attempts to show that the customs governing the institution of clan and lineage could be used for economic development and the formulation of a uniform land law.

Lawyers, geographers, persons understanding native custom, and others, working together in the shaping of policy, could try to discover from the native people how to use existing native institutions, or to modify them for use where necessary, or to comprehend them so as to be able to formulate new institutions in a way which will appear familiar and understandable to the people, and therefore acceptable to them.

African Comparisons: The Kenyan Model

T. Bredmeyer

Land tenure conversion was introduced in Papua New Guinea in 1964 with the aim of translating customary rights to land into freehold title and lesser interests known to English law, because it was considered that customary tenure gave inadequate security to a person wanting to plant cash crops. This policy was taken from Kenya, but the procedures for carrying it out differed markedly from the Kenyan procedures. A little earlier, Papua New Guinea had already introduced legislation for the ascertainment of existing rights in customary land as an end in itself, that is, without tenure conversion, although it was hoped that some land owners would then want to go further and convert their tenure. This policy had no counterpart in Kenya, where existing customary rights are ascertained only in the process of tenure conversion, but in this case the relevant Kenyan procedures were copied.

Both policies, the ascertainment and the conversion of customary land rights, have been in operation in Papua New Guinea for nearly ten years. It is therefore opportune to ask how successful have they been. Was the Kenyan policy of tenure conversion appropriate to Papua New Guinea? Were the procedures adopted in Papua New Guinea effective for carrying out that policy? If not, would the Kenyan procedures have been better? Even if the Kenyan policy of tenure conversion is not appropriate, are the Kenyan procedures for ascertaining the ownership of customary plots effective and can they be applied without tenure conversion?

The policy of tenure conversion has never been vigorously implemented in Papua New Guinea despite the belief expressed in the preamble to the Land (Tenure Conversion) Ordinance 1963 that

the provision of a method of giving guaranteed individual titles to land was a most efficacious way of promoting the agricultural development of the country and the economic well-being of its agricultural population. Systematic tenure conversion was confined to the Northern District and at the end of 1972 conversion orders had been made in respect of only 595 plots. The process was entrusted to the Land Titles Commission which was a judicial tribunal, independent of government, with a small staff and limited budget. None of its staff visited Kenya and no Kenyan officials visited Papua New Guinea. It was carried out as an exercise in land tenure reform and - in contrast to Kenya - not as part of a many-sided attack on the agricultural problems of the area. The government even decided against using loans as an incentive; a farmer who had converted the tenure of his land could not expect to get a government loan or, at least, to have a better chance of getting a loan than a farmer unwilling to convert.

In one typical scheme, the farmers converted about one quarter of their total customary land into forty, individually owned blocks of twenty acres each and planted rubber trees and food gardens on those blocks. The development on the blocks has not been significantly better than on nearby customary land, partly because rubber is not a particularly successful cash crop and partly because the owners have spent much of their time on paid employment on the roads, leaving them insufficient time to work on their blocks (see: Morawetz, 1967).

In Kenya, on the other hand, government and people support 'land registration' (as the whole tenure conversion scheme is called) with the fervour of a religion. They claim that it has transformed agriculture: that within a few years mud huts and

scattered subsistence patches have been replaced by small farms with good houses and neatly prepared fields. Most farmers keep quality cattle for meat and milk, use their manure as a fertilizer and rotate grazing with cropping. Farmers have doubled or trebled their incomes, and in some cases the increase has been twentyfold. The Kenyan government gives a very high priority to 'land registration'. It aims at 'registering' all the arable land in the country and should have 15 million acres 'registered' by 1974. The government department in charge of 'registration' has a staff of 3,000 and will spend $15 million in the period 1970-74.[1]

The limited success of tenure conversion in Papua New Guinea compared to its evident success in Kenya might suggest that the process was unsuitable or unnecessary in Papua New Guinea. Yet, in 1969, Mr S. Rowton Simpson, one of the architects of the Kenyan scheme, examined tenure conversion in Papua New Guinea and reported that the Kenyan system was eminently suitable in selected areas, but that it had never been properly applied (1971).

This advice was supported by a party of local land officials who visited Kenya in 1970 and accepted by the government of the day. Legislation was subsequently prepared to apply the Kenyan procedures more closely to Papua New Guinea but this was strongly attacked by the private legal profession, who preferred the Torrens system of registered conveyancing to the Kenyan system, and by a historian, Dr A.D. Ward, who claimed that conversion

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[1] For detailed information on the Kenyan Scheme see: Clayton, 1964 and 1970; Fleming 1968; Kinyanjui, 1971; Lawrance, 1966, Sorrenson, 1967, Swynnerton, 1954; Taylor, 1969.

could lead to many indigenous people losing their land (as the Maoris had done in New Zealand) and that its emphasis on individualism was not necessarily good in a country where people valued communal action (1972). In the House of Assembly the legislation was not so much opposed for these reasons but rather because it had been prepared by experts without adequate consultation with the people. The bills were withdrawn, and in 1973 a Commission of Inquiry into Land Matters was established, which, in examining the value of tenure conversion, will of necessity have to consider the Kenyan model and the Simpson report.

The term 'land registration' is used in Kenya to describe a process which involves the adjudication of all customary rights to land within a declared area, the consolidation of scattered fragments where appropriate, the setting aside of land for new roads, schools, village areas and the like, and the registration of titles. Upon registration, a local land control board (with a majority of local land owners) and a local registry are established, and all major dealings in registered land must be approved by the land control board and registered to be legally valid. The conversion procedure differs depending on whether or not consolidation of scattered fragments is required. Since 1968 the procedures are contained in separate statutes, the Land Adjudication Act and the Land Consolidation Act.

The adjudication process can be summarised as follows. The Minister for Lands and Settlement declares an adjudication area when this has been requested by the county council and after satisfying himself that the majority of land owners support this request. A team of officials is then formed and the area broken

up into adjudication sections of about 6,000 acres each. Public meetings are held to explain the process. A committee of not less than ten land owners is appointed for each adjudication section and provided with an official as its clerk. The boundaries of all plots within a section are then cut and marked by stakes by the land owners and/demarcation officer, and rights of ownership as well as all subsidiary rights are recorded by a recording officer. Disputes are decided by the adjudication committee. Appeals are heard by an arbitration board which also consists of land owners. In addition to hearing disputes, the adjudication committee must safeguard the interests of absent persons and persons under a disability, such as infants and lunatics. Absent persons can also assert their rights through an authorised representative.

When all plots have been demarcated, all rights recorded, and all disputes and appeals determined, a record of existing rights is prepared and two months are allowed for any person to challenge the accuracy of that record. Any objections are determined by the adjudication officer who is the official in charge of the adjudication. Then a committee of land owners and officials set aside land needed for new roads, schools and other community purposes which is bought by the county council. Access is provided to all blocks and where a block does not adjoin a road this is often done by marking a laneway along the common boundary of two blocks that do front the road. All the land owners are required to erect cattle-proof fences or to plant cattle-proof boundary hedges. The land is then surveyed either by aerial photography (the hedges and fences are essential for this) or by ground methods.

When the adjudication is complete, the record of it is sent to the land registrar for registration. He can register an individual or not more than five co-owners or the elected representatives of a group as the absolute owner of the land. Some of the other customary rights recorded can be registered as a lease, charge, easement, restrictive agreement or profit. A lease for less than two years need not be registered but is nevertheless binding on the absolute owner. A licence is binding on the absolute owner who gave it without registration and the registrar can protect it by a caution which binds the owner's successors in title as well. The registrar can note on the register that an owner is a trustee. Any customary rights that do not fit into these categories are protected without registration as overriding interests.

The procedure in a consolidation area is a little more complicated. As with an adjudication scheme, all the plots are first demarcated, all existing rights recorded and disputes determined by a committee. All the plots are measured and the areas calculated; thus a farmer may have ten plots totalling three acres scattered over an area of two miles' radius. As with the other scheme, a record of existing rights is prepared and two months are allowed for objections to it to be made to the adjudication officer. Land is then set aside for roads and community purposes. This area is measured and converted into a percentage of the total area of the consolidation section and every owner suffers the like 'percentage cut' from his area. If for instance, 200 acres or 3.3 per cent of a consolidation section of 6,000 acres are set aside for community purposes, each landowner will suffer a 3.3 per cent cut in his acreage. That is to say, land required for community purposes is not purchased as in an

adjudication scheme but the loss is spread evenly among all owners.

When the community land has been set aside, a consolidation committee of land owners and officials (the land owners in the majority) mark out the new, consolidated farms. The aim is to give each farmer land of equivalent area and value to his former scattered plots and sited to include, if possible, his most valuable or important fragment. If an owner gains improvements by this process, he must compensate the former owner for them. This may be done in cash or, if the improvements are coffee trees, by the owner planting an equivalent number of coffee trees on the former owner's new farm and allowing him to harvest the present trees until the new ones are bearing. It is also quite common for fully grown coffee trees to be transplanted without any apparent ill-effect.

In a consolidation scheme, land is set aside for village gardens where all those whose land is not large enough to support them fully as farmers, get their plot. The small land owners gain by this for they are closer to the village amenities and possible alternative or supplementary employment. People who are found to have no land at all, may also get a small plot in the village. These people are normally acceptees from a foreign tribe who farm under permissive occupancy from land owners in return for a small tribute. Frequently on consolidation their permission to farm is withdrawn because consolidation allows a land owner to use all his land effectively, instead of lending some of his more remote and least desirable fragments to acceptees. Some committees have given these acceptees a small plot in the village area and deducted it from the area of their host land

owner, but other committees have not recognised their needs and the acceptees either have to purchase or lease land from the owners or become landless. Some farmers choose to take their land in two plots, a quarter acre house plot in the village and the balance as a farming block, and build a house on each block.

When consolidation is completed, two months are allowed for appeals after which no further appeals can be entertained. The land owners are required to enclose their properties by hedges or fences, and the papers are sent to the registrar for registration.

In considering the benefits of 'land registration' it is convenient to separate the various stages in the process. The first stage, the adjudication of existing rights, was greatly valued by the African land owners because it ended litigation which hitherto was endemic. The Kikuyu in 1952, for example, spent $220,000 on court fees for land cases, let alone the money spent on bribing witnesses and the many man-hours lost that could have been devoted to more productive agriculture. The Kikuyu had been dealing in customary land for several decades before land registration began in the mid-1950s, and as land became short people challenged transactions entered into by their fathers. There was much litigation over former sales, for instance, over whether they were outright or redeemable - which meant that the vendor or his heir could repossess the land at any time by tendering the original purchase price to the purchaser. Clearly, redeemable sales hindered economic development for the more a purchaser developed his land the more likely it was that it would be taken back from him. There was also much litigation over the status of acceptees, such as whether a man was an acceptee who

could be easily dispossessed, or the recipient of a legally valid gift of the land who could not be dispossessed. Population growth produced a land shortage which in turn prompted land owners to evict acceptees who had been allowed to farm often twenty or thirty years before, when land was plentiful.

The systematic adjudication of all competing claims at the one time was appreciated by the land owners. Further, the fact that a man had to support his claim before a committee of his peers discouraged frivolous and spurious claims that would have been made if an outside judge had determined them. The process allowed compromises to be reached; an owner would concede a little on one boundary if he gained a little on another. Adjudication by committees was also much quicker than if an outside judge had been used, for he would have taken much longer to learn the customs of the area and to assess the reliability of the many claimants and witnesses.

The land owners accepted adjudication as final even in areas where some of the owners were away in detention camps when the process was carried out and the protection of their interests had been entrusted to the committees. It would have been easy for a pro-government committee to have ignored the rights of an absent Mau Mau detainee, or for the detainee on his return to allege that his rights had been ignored, but in fact this did not happen. The Mau Mau extremists and leading national politicians alike enthusiastically supported 'land registration' sponsored by the colonial government before Independence in 1963 and expanded it after Independence. In law and in practice adjudication ended litigation and the only disputes that now occur in registered

areas are over boundaries which are claimed to have been subsequently and illegaly altered.

The Kenyan government claims that adjudication, in ending litigation and establishing visible boundaries, produced better agriculture because the owners saved resources formerly devoted to litigation and gained physical and psychological security of tenure. This claim is justified for, as already noted, redeemable sales hindered development, but it is a difficult claim to quantify. Certainly, money formerly spent on land litigation was saved but this may not have been invested in better farming and, more importantly, adjudication was merely one part of a series of improvements introduced at the same time, including new crops, better marketing facilities, the establishment of a dairy industry, cattle dips and artificial insemination, land-use planning according to slope and fertility and excellent farmer education.

On the other hand, the benefits of consolidation, especially in the Kikuyu area are obvious. The average farmer had previously ten fragments and this hindered good farming. Consolidation saved much unproductive time, spent walking between fragments. It also enabled a farmer to enclose his land, to buy good cattle without fear of disease or intrusion on his pasture from his neighbour's poorer cattle, and, by penning the cattle at night, allowed him to collect the manure and use it to fertilise his crops. Hitherto it had only been feasible to keep cattle on the homestead plot and difficult to transport the manure to other fragments. Further, after consolidation agricultural officers could plan the layout of farms with the owners. Thus in areas where farms ran from ridge top to valley bottom, the steeper slopes were reserved for grazing, the better drained slopes for coffee and tea, and food

crops were planted on the heavy soil at the valley bottom. Consolidation also reduced inspection time, so that agricultural officers could assist a larger number of farmers.

Consolidation was applied in some areas without the full support of the farmers and had to be abandoned due to their opposition. The process causes great social disruption and requires the land owners to work hard cutting boundaries, serving on committees, planting hedges, building new houses (in some cases) and planting new tree crops. It can therefore only be applied to an area if the people strongly support it, and is only justified if a prior study has shown that the existing fragmentation is agriculturally wasteful.

Adjudication as well as consolidation produced two additional general benefits. The first was that all the work required of the land owners kindled their interest in better land use, and where agricultural advice and assistance was available, this interest was directed to new crops, stock or fences. Most farmers had some capital to invest at the time of adjudication or consolidation, though often in the form of labour rather than cash, and with good agricultural advice and due to the availability of quality seeds and livestock, they were able to invest wisely. In the few areas where this help could not be given, the agricultural results were correspondingly poorer.

Secondly, either scheme involved the land owners together with councillors and government officials in setting aside land for community needs. The setting aside of areas for markets, shops and houses has been particularly successful. As the population grew and the farming diversified, a substantial local trade in vegetables developed between the different agricultural zones.

And instead of the few poorly stocked village stores, run by land owners on a part-time basis, there are now a large number of specialised shops, run by butchers, shoemakers and the like, which have greatly improved the quality of rural life. Village areas for which ten or fifteen years ago only an ambitious plan existed, are now small flourishing urban centres.

What were the benefits of the registration of interests in land which followed adjudication and consolidation? First, it was a method of recording the adjudication or consolidation so that it could not be legally challenged. This reason alone, however, is no sufficient justification for registration, for the law could have made adjudication and consolidation final without registration, in the same way in which the judgment of a court is final. Second, registration made all future dealings in the land easy, public and legally safe. The registry provides simple forms for all the common transactions such as transfer, sale, lease, mortgage and the granting of a profit, and the land owners can complete these forms at the registry without the aid of lawyers. But again even if dealings are not registered, it is possible to ascertain changes of ownership by periodic re-adjudications, every ten years or so. This would be a comparatively minor operation, since not very many blocks would have changed hands since the previous adjudication and only few of these changes would be disputed. Still, it is undoubtedly cheaper to register dealings as and when they occur. Registration, finally, allowed dealings to be controlled by the land control boards.

All major dealings in registered land are subject to approval by a local land control board which is required to refuse approval if the transaction is markedly unfair to one of the parties, or

if the transferee already has sufficient agricultural land or is unlikely to farm it well. Where the transaction is a subdivision, the board is required to refuse approval if the subdivision is likely to reduce the productivity of the land. Transactions to non-citizens are prohibited. In addition to these official criteria the board is free to use its discretion as it likes and its decisions are immune from judicial review although subject to appeal to a provincial control board and ultimately to a central appeals board comprised of government ministers. The majority of local land owners on the board ensures that general interests are fully considered. It is, for instance, common for a board to refuse a transfer to a stranger who is unacceptable to the local community. The 'freedom' of a registered owner to deal with his land is thus subject to similar community scrutiny as were dealings in customary land.

Very few Kenyan farmers have lost their land through foolish sales or mortgages but cultural factors have probably been more important than the boards in securing this result. Kenyans value their land enormously as economic and social security and are reluctant to part with it. Although many registered owners are absent, away working in the towns, their land is farmed by wives and relatives.

The major problem of land control is the high number of subdivisions, especially those between the heirs of a registered owner, which are not submitted for approval because the applicants fear that the board will refuse approval on the ground that the productivity of the land will be reduced. This criterion is an attempt to keep holdings at an 'economic size', defined as the size necessary to give an average farming family subsistence plus

a certain cash income from crops currently planted in that area using the farming methods commonly employed. The concept is fraught with difficulty, for family size can vary, aspirations can differ, soil fertility can vary, market prices can fluctuate and crops and farming methods can change quickly. But unregistered dealings are legally not as dangerous as they might appear, because the Registered Land Act requires a prudent purchaser to inspect the land in any event because licences, short-term leases and overriding interest are valid without registration.

The government and the people in Kenya believe that they owe much of their economic progress to their 'registration' scheme. How relevant is their experience for the future of Papua New Guinea? It would appear that this depended first of all on how similar the economic and social development aims of this country are to those which Kenya has adopted. But this is not entirely true. The Kenyan 'registration' scheme is flexible enough to be of assistence in implementing a wide range of policies. Further, even if the scheme as a whole should prove unsuitable for Papua New Guinea, some of its features or some of the experiences made during its operation could be of considerable help in devising a different scheme for this country. It may be more useful, however, to compare the Kenyan scheme briefly with the present needs and problems in this country than to speculate about the future.

Leaving the difficulties caused by the alienation of customary land to past administrations out of account, the frequent disputes over customary land clearly form the most serious land problem.

As far as disputes between large (tribal) groups are concerned, the Kenyan experience is probably of little help. These disputes will almost certainly have to be resolved by an outside authority, since it is unlikely that the disputing parties would agree on the composition of an adjudication committee which could work out a solution both sides would accept. But most other land disputes could be resolved by a committee of land owners. And it would be much cheaper and more effective to determine the ownership of all plots in a certain area at the same time than to deal only with plots when a dispute arises. Systematic adjudication by a committee of land owners, apart from all other possible advantages is a better way of dealing with the present flood of active and latent minor land disputes than the ad hoc determination of individual disputes by an outside judicial body.

Besides, adjudication of existing rights is already valued for a number of reasons in areas of extensive cash cropping like the Gazelle Peninsula and parts of the New Ireland and Madang Districts. This is shown by the fact that two million acres of customary land have been demarcated in these areas by demarcation committees since 1965. Unfortunately, the adjudication process, so well begun, has not been completed. Due to shortage of staff and funds the Land Titles Commission has only legally determined the ownership and surveyed a few thousand acres of this area. Nevertheless, the initial progress shows that adjudication is needed and valued by the land owners, who are willing to do the work involved - and the Kenyan adjudication procedures would certainly be more effective than the existing ones.

In these areas adjudication should be followed by the compulsory registration of all subsequent dealings in adjudicated land if dealings are likely to be numerous, otherwise the adjudication record could be brought up to date by periodic re-adjudications. Generally speaking in the three areas mentioned the very factors that make adjudication desired - the extensive cash cropping, dense population and reasonably good land use - also mean that dealings are numerous and likely to be disputed and hence registries should be established.

An adjudication should record all existing rights which are recognised by customary law, but should they be registered as such or translated into rights known to English law such as absolute ownership, leases, profits and the like, as in Kenya? It appears to be immaterial which system or terminology is adopted so long as the contents of the rights - what a rightholder can and cannot do in relation to the land - are clearly expressed. Under some customary laws in Papua New Guinea, for example, a pledge of land is known whereby a lender is allowed to use land until the borrower repays the money or fulfils other obligations owing to the lender. The rights of the lender could be expressed in customary law terms or in the Kenyan terminology by saying that the lender has a lease of the land determinable when the borrower repays the loan or debt.

The prime aim of registered dealings is to make them safe from legal challenge. However in the case of urban land they could produce enormous economic benefits as well. Most of customary land around the major towns such as Port Moresby and Lae is not used by the customary owners. The owners do not have the capital to develop it, are unable to borrow money on the security of customary land, and there are few sales or leases at

customary law which would produce its development. At present the customary owners can sell or lease the land to the government but are reluctant to do so because they regard the returns as inadequate. They are prevented by law from selling, leasing, or mortgaging the land to expatriates, but even if this law were changed, it is extremely unlikely that expatriates or anyone else would invest on the security of unregistered land when land litigation and trespass on land are so common. Adjudication and registration would allow the land owners to subdivide, plan the use of the land with the assistance of the town planner, lease or sell some of the blocks and retain others for their own use and businesses to be financed out of the rents or purchase moneys received or from money borrowed on mortgage. Some of the blocks could be leased to migrants many of whom have no traditional ties with the land owners and pay no rent at present for their use of the land.

Adjudication and registration would also be valuable in the New Guinea Highlands. Adjudication would reveal that people have planted coffee trees which are perennial on land to which they hold only usufructuary rights. On registration the conflict between the land owner, usually a clan, and the planter, usually an individual, could be resolved by registering the planter as owner of the land and trees subject to a payment of compensation to the clan, or by registering the clan as owner of the land and trees subject to a payment of compensation to the planter, or by registering the clan as owner subject to a lease to the planter.

Also in the highlands most individual coffee farmers own scattered groves of coffee trees which are uneconomic and require consolidation. Bearing in mind the Kenyan experience, consolidation

should only be introduced where the people fully understand and support the process. Second, consolidation is more likely to be supported by the people and the agricultural benefits will be much greater if it is part of a comprehensive agricultural plan for the area. According to noted agriculturalist Rene Dumont (1972), such a plan should include soil conservation measures, the introduction of ley farming (cropping followed by grazing on improved pasture), much higher coffee yields per tree and improved farmer education - a plan remarkably similar to the Swynnerton Plan implemented in Kenya in the 1950s (Swynnerton, 1954). Any study of Kenya's land registration system should also include a study of its concomitant agricultural policies.

Finally dealings in adjudicated or registered land should be subject to control to prevent exploitation of the unsophisticated. At present the Minister for External Territories must approve all transfers of tenure-converted land and the Cabinet must approve all leases and mortgages. This control is adequate but far too cumbersome. The Kenyan system of control goes to the opposite extreme: power is vested in local land owners rather than at the very head of government. The Kenyan system may not be a good model to copy, for it may give too much power to local land owners and too little power to central or local government.

Kenya has had a long, extensive and fairly successful experience of the various processes involved in land adjudication, consolidation and registration as well as in the control of subsequent dealings. Papua New Guinea's government would be wise to study that experience carefully before revising or replacing its present policies and procedures.

Changing Traditional Institutions

C.W. Kimmorley

There are people who will assert that native society in Papua New Guinea has few institutions, and that those which do exist should be done away with and replaced by better ones. By better ones such persons usually mean institutions familiar and acceptable to them. Even if this attitude is not consciously held, in practice something very much like it must have prompted the makers of government policy for this country, for administration officers have often been intent on introducing new institutions and ways of life, with little regard for those already in existence. They have mostly done this with the best of intentions 'for the good of the people' - and because existing institutions have been considered of small value, it has been assumed that they can be discarded with little effect on the lives of the natives.

But native institutions affecting land tenure, marriage, sanctions for maintaining order and so on are not things of little worth, and the people are loath to let them go. They are only not well understood by Europeans, because they differ from their own ideas and so are not readily apparent to them. This is unfortunate since it has been known for a long time that in governing people, whether the government is an outside one or of the people themselves, the greatest degree of acceptance of new ideas will be achieved if they seem familiar.

In The Discourses Niccolo Machiavelli wrote: 'He who desires or attempts to reform the government of a state, and wishes to have it accepted and capable of maintaining itself to the satisfaction of everybody, must at least maintain the

semblance of the old forms: so that it may seem to the people that there has been no change in the institutions, even though in fact they are entirely different from the old ones". Many of those concerned with government in Papua New Guinea appear to have largely overlooked this principle and to have acted as though the destruction of existing institutions is better than their adaptation. They thought that the mere assertion that a new institution is superior to an old one should make the people immediately adopt the new institution although they themselves would strongly resist new doctrines, no matter how often they were assured that they were for their own good.

It is unusual to find a piece of land in Papua New Guinea which is owned by a single person, except in some places, such as the Tolai area near Rabaul, where native custom has been modified so as to let individuals have plots of their own for the planting of permanent cash crops. As long as land is used for the traditional shifting subsistance agriculture, which necessitates leaving old gardens and making new, individual ownership offers no advantages. But it may become desirable when tree crops are planted on a larger scale, and the planter and his family wish to retain the land on which they grow for at least the period over which they will bear crops.

Land is usually said to be owned by clans. A clan's land consists of irregularly shaped plots, varying considerably in size, interspersed among the plots of other clans. Within the clan there are lineages which are similar in form to clans but smaller. Both clans and lineages consist of persons believed to be descended from a common ancestor. In the case of a clan

this person is sometimes mythical, or the acts of several historical ancestors have become attributed to a 'composite person' who is regarded as the founder of the clan. The founder of a lineage is usually a real person, a man or woman only four to six generations removed. The land holdings of a clan are usually divided between its lineages, each controlling the plots which it occupies. This control is so strong that a lineage can even exclude members of other lineages belonging to the same clan from using such land. Should a lineage die out, its clan has a reversionary right to the plots it controlled.

This is the pattern in matrilineal as well as patrilineal societies. The lineage is the basic unit of a native society in all its aspects, including the ownership of land. The affairs of a lineage are, or were, decided upon in the 'man's' or 'club house' of that lineage, a place where drums, weapons, masks and emblems etc. were kept, under the leadership of the lineage head, usually the senior male within it.

The policy for indigenous agricultural development in the past has had two main objectives:

1. the purchase of land for resettlement and its division into blocks for leasing, and
2. the encouragement of village people to plant cash crops near their villages.

Attempts to achieve both these ends have in many instances been objectionable to the natives in various ways.

The policy of using small-holder blocks, each settler residing on his own holding, has first of all gone against the native preference for living in a community of some kind. There appears to be no reason why new villages surrounded by fields or

holdings could not be used as in Malaysia and Ceylon, except that the individual on his own land is an Australian ideal, dear to Australian policy makers, who have naively assumed that it must also be good for Papua New Guinea.

The settlement of people on small-holder blocks is also a complete break with the traditional work patterns which are based on reciprocal aid within the lineage. In clearing or fencing land, building a house, making a canoe, preparing a feast or a ceremony as well as in many other activities, a person was aided by other members of his lineage and thereby became obliged to help those others to the same extent as they had helped him. This is not to say that individuals should not be allowed to work their holdings on their own, but resettlement schemes should also be designed in such a way that settlers can, with the least inconvenience, continue their traditional style of life and work if they so wish.

But there are other additional reasons why resettlement schemes have not been too popular and successful in the past. Many of the people removed from their own ethnic groups to resettlement blocks on land purchased from strangers are unhappy there because they are isolated and feel like interlopers on someone else's land. Moreover, many of the settlers are superstitious. They believe in spirits such as the masalai, which are associated with particular landmarks, for instance large trees, rock outcrops or caves. In his own area a person knows the abodes and attributes of the local masalai - their malignancy or harmlessness - and is able to deal with them by avoiding or placating them. But he does not know them in foreign surroundings. He does not even know whether there are

any in his vicinity, and finding an odd looking stone on his holding, where a masalai may lurk, he will be frightened and barricade himself and his family in his lonely house at night.

The policy of getting cash crops planted near villages, where these difficulties do not exist, has also not worked well up to the present. A number of government officers encouraging this form of planting have had little knowledge of native land tenure. They have assumed that land around a village is communal land and that anyone in the village may plant on it. In some instances people have been ordered to do so, and the resulting 'village' or 'government plantations', some dating from the days of German sovereignty, most from the period between the two world wars, are a prolific source of dispute. In these plantations members of many clans have planted on land belonging to one or two lineages. The trees belong to the planter, making the land they grow on useless to those having ownership rights to it.

On Buka Island (and probably elsewhere) the people were suspicious about this type of planting. They feared that the land would be leased to a European after being cleared and planted and therefore contrived to plant on land belonging to someone else. If their fears proved true, they would only lose their labour and the trees, if groundless, they would still own the palms, although they were not on their own land. In doing this they were helped by the fact that the German administration had marked lengths of roads or tracks for each village to keep clean. These lengths were proportionate to the population of the village at that time, to ensure an equal distribution of work. After the Germans had gone these lengths came to be regarded as indicating the extent of 'village land' along the road.

Latterly, instead of being ordered, the people have been advised to plant village groves, or that each adult person should plant in a compact area near the village. Often this advice was taken as an order, and again many lineages had to plant on another's land, because they had no suitable land near the village - with the land owners reluctant assent, given only because they thought they would be in trouble with the government if they refused.

On the other hand, on the west coast of Bougainville in 1962 two schemes were started by the native people on a purely voluntary basis. In both cases, irregularly shaped plots within lineage holdings were given to individuals. In one the tenure of these blocks was converted to freehold under the Land Tenure Conversion Ordinance, in the other they remained governed by custom. Both these projects have been successful, with about a quarter of a million each of coconut palms and cacao trees planted. One of the reasons for their success is that roads to coastal landing places were built before the bush was cleared, so that the people knew that they would be able to get their produce out if they grew and processed it. The Marist Mission did much of this road work, or provided equipment for it. Prerequisites to any successful attempt to get people to work on developmental schemes are roads and accessibility to market. Following the building of a road around Buka Island in 1963 there was a great increase in planting. In contrast, a projected scheme on Manus Island languished for years because no road was built. The official thinking in this case seemed to be that there had to be an existing economic production in the area to justify the making of a road. This attitude can only lead to delay in development.

There is still a great deal of arable land left in most parts of Papua New Guinea which could be developed if road and marketing facilities were extended. The problem is to design development schemes which will be supported by the people. It may for instance be more promising to break up land acquired for resettlement purposes into larger areas, defined by natural boundaries, for specific lineages which are short of land, instead of dividing them into little square blocks for individuals, and to treat them as native land governed by custom rather than to convert them to freehold. Groups of lineage members could alternate in working these 'extensions of lineage lands' for cash cropping and the whole lineage would benefit. A scheme of this kind would have a very good chance of success if the resettlement area were fairly close to and readily accessible from the place where the lineages using it traditionally live. But even if this is not possible, this scheme would still combine the advantages of the usual individual small-holder schemes with the additional ones that many members of the same lineage can have contiguous plantations, that familiar work patterns can be used and that the settlers can identify with the land as a group which would overcome their isolation and give them a far greater psychological and practical security.

The main disadvantage would be that the plots would be irregularly shaped, but this does not greatly matter if by using such blocks an acceleration of economic growth is achieved. Land boundaries can be straightened later if required - in Papua New Guinea with its rugged terrain and the use of natural features such as watercourses and ridges as boundaries, it may not be necessary; in fact, the traditional boundaries may prove to be

superior to any straight lines drawn by trained surveyors, which brings us to the objections raised to the use of traditional forms of land tenure.

Objections are often based on technical grounds, for instance by surveyors who think in terms of access roads, evenly shaped blocks and so on; or by agricultural officers who have adopted these prejudices and supplement them with their own regarding the ease of inspection of plantations and of pest control by having them all grouped together; or by bankers who believe that only land which has been surveyed and title to which is guaranteed by European law, offers sufficient security for a loan. I will not discuss the strength of these objections, although at least some of them have obvious merits, since none of them, however strong, should be allowed to dominate decisions regarding the future land tenure system of this country, simply because a technically ideal system is useless if it is not acceptable to the people. There are, however, other kinds of objections which deserve greater attention.

Possibly the most serious protest offered is that the use of traditional institutions would "crystalise" or perpetuate them, and with them, tribalism, and thus jeopardize the entire future of this country. But this is unlikely. Indeed it is more probable that there will be an opposite effect. Tribalism flourishes among people with low incomes and little diversity of occupation. If the rate of economic development in rural areas can be increased by the use of traditional institutions (and this is far more likely than if they were replaced by imposed alien institutions) there will also be a tendency for persons from

many different ethnic groups to go to towns or other central places to take up a diversity of occupations - and it is in these multitribal urban centres where ideas of national unity have the best chance of developing. This is already happening under the existing conditions in Papua New Guinea. Professor R.G. Ward, formerly of the Department of Geography of the University of Papua New Guinea, said in his Inaugural Lecture in 1968 that "[t]he change to cash production in rural areas may not encourage people to return from the towns. Experience elsewhere suggests that the reverse is often true - higher commercial production in rural areas is frequently associated with declining rural populations". Moreover, traditional institutions in themselves may well be the only unifying force powerful enough to overcome the dangers of tribalism.

The most important practical difference between the two parts of the land law of Papua New Guinea - the law introduced by Europeans and the customs of the indigenous people - it is often said, is the fact that the former is uniform throughout the country whereas the latter differs from place to place. Since a uniform law is surely needed, the argument continues, it is clearly impossible to use traditional institutions, because there are hundreds of different traditional institutions in different parts of the country. This argument is very persuasive but the assumption on which it is built does in fact not exist.

Customary land tenure systems could be incorporated in the introduced law so as to enable dealings in customarily held land to take place in a uniform way throughout the country. This would avoid the disruption of native life which a complete break

from customary tenure would cause. There is no need to do away with customary systems of tenure, either for economic or for legal purposes. The differences between the land tenure systems of the hundreds of ethnic groups in Papua New Guinea are only of minor importance. They are mainly matters of detail. The similarities in the systems are far greater than the dissimilarities. Each land tenure system is essentially very much like the other.

It may be objected that this cannot be so because the 'kinship and inheritance' systems of some of the peoples of Papua New Guinea are organised along matrilineal lines and those of others along patrilineal lines. But this does not mean that the methods of inheriting land rights in patrilineal societies are different from those in matrilineal societies. It only means that there are different methods in acquiring membership in a lineage. In both these types of societies the lineage (and not its individual members) is the effective owner of the land. Its members have land rights because they are part of this lineage and it makes little difference whether membership has been acquired because the individual's father or mother belonged to it. The land belongs to the lineage which can exclude people from or admit them to its land.

Neither in patrilineal nor in matrilineal societies does 'inheritance' therefore mean that land passes from one person or one group to another. The lineage owns the land as much as a corporate body does. Individuals join a corporate body or are born into the lineage; they leave the corporate body in a number of ways or leave the lineage by death, but their coming and going does not affect the corporate body or the lineage as far as the ownership of its land is concerned - except that during the time

of their membership they have a share in it. The lineage resembles a joint tenancy in that there is a right of survivorship. When someone dies the survivors are the owners, and they are joined from time to time by those who are born into the lineage. In fact the lineage members regard their dead as still having an interest. They are usually buried on their lineage land, and their spirits are concerned about the use and fate of it. People also consider that they are somewhat in the position of trustees for those yet to be born into their lineage.

The local variations mainly relate to what is frequently called secondary rights to land which are in any case better regarded as contractual rights rather than as possessory or proprietary rights - which the primary rights attached to membership of a lineage certainly are.[1] For example, the primary rights of a man in a matrilineal society are to the land of his mother's lineage, but he may also have secondary rights in his father's lineage because of certain (not unusual) events having taken place. If the latter were denied him, possibly the most appropriate way to give him a remedy at law would be to treat him as having contractual rights against his father's lineage because of these events and to make these rights enforceable in the Local Court. His only remedy now is to claim possessory or proprietary rights in land which often leads to lengthy litigation about a minor matter.

This raises a second issue which is often used as an objection against the continuation of traditional institutions.

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[1] Trees and crops are customarily regarded as property of the planter and not as parts of the land. They were also, at least in the days of subsistence agriculture, treated as the personal property of individuals rather than groups.

It is claimed that there are many disputes about the rights to lineage lands which would only disappear if the tenure of these lands would be converted into individual European type titles. It is true that there is a great deal of litigation at present, but the reasons for this situation are complex and it is unlikely that it would dramatically improve if the traditional system of land tenure were legally abolished.

One important reason for the frequency of litigation is that there is at present no need for anyone to hesitate to claim land as it costs nothing to have a case heard at first instance and to appeal it through higher courts. Even if one's claim has little merit it could with luck succeed. Legislation to empower courts to award costs against an unsuccessful plaintiff should it appear from the evidence that the claim was vexatious or of little merit, and the fixing of fees for appeals might stop many people from commencing and pursuing doubtful actions.

Another reason for litigation, and one which is indeed closely connected with traditional ideas, is that most native people feel that they have a <u>bona fide</u> claim to all land on which their ancestors have dwelt (particularly if some of them were buried on it) - whoever may have lived upon and used it later. Because the pattern of native life was, and still is in places, one of much movement, caused by the system of shifting agriculture, by raids of enemies, and by the belief that it was necessary to leave any place where there had been much illness or some deaths, there has often been a successinn of occupations of an area of land by different lineages. Each of these lineages (or clans), if still in existence, now believes that it has a good claim to this land, no matter who occupies it at present.

To avoid multiple claims of the same land because of this belief, it will have to be made known to the people that only proof of fairly recent occupation will establish a good customary title. The law must 'fix upon a definite date since which the plaintiff's cause of action must have arisen'. The situation in Papua New Guinea is similar to that existing in England in the Middle Ages when people sought to prove title by alluding to transactions in the land in much earlier times. It became necessary by successive acts of Parliament to set the limits of legal memory so as to prevent too much delving into the doubtful past. The last of these dates, for purposes of actions on Writs of Entry as a means of trying title to land, was the year 1189, set in 1275 by the Statute of Westminster.

Presumably this date eight hundred years ago, is, under existing law, also the limit of legal memory concerning events in customary land matters in Papua New Guinea.[1] The Land Titles Commission, however, usually uses the date of the assumption of sovereignty by Australia or Germany, or the date of effective administrative control over an area, as the time which it does not look beyond. But this is a 'rule of thumb' and has not had the approval of a higher court, or of the legislature. The setting down, and the making known to the people, of some such limit is very necessary.

There are many causes for disputes, but the main type of dispute which the use of traditional institutions would help to

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[1] It is not the decisive date according to which relevant custom itself has to be determined. Under the Native Custom (Recognition) Ordinance 1963 the relevant custom is the custom at the time when a particular issue arises.

stop, is that which arises when the amount of accessible land is not sufficient for the amount of cash-cropping being undertaken. Disputes of this kind occur within the lineage when individual members use more than their share of lineage land for such crops. If cash-cropping were encouraged not as an individual but a group enterprise, many of these disputes would not arise. Disputes also occur when one lineage encroaches on the land of another. But the setting aside of lineage areas distant from the village and gardening areas for cash-cropping would eliminate many of these disputes. As indicated before, these disputes usually arise not because there is an overall shortage of arable land but because everyone tries to plant in readily accessible areas. The building of roads, negotiable by tractor and trailer, to areas selected for cash-cropping by the lineages, before these areas are planted, is a prerequisite for success. It would be a more promising course of action than to blame traditional institutions for ills which can only be cured by land reforms (as opposed to land tenure reforms) and by providing better road and marketing facilities - and to wait instead for a legal miracle.

Even the imposition of ideal new European type land laws will not bring about such miracles, mainly because they are designed to regulate merely the rights to land whereas the traditional institutions they want to replace are part of a system involving every aspect of native life. This means in practice that these new laws, applied to native land, do not affect rights to land alone. Any transaction or decision also influences the social, religious and other aspects of the lives of every member of the land owning lineage as well as lineages closely associated with it.

Under these circumstances, the use of traditional institutions is not merely better politics but a matter of sheer necessity. Politicians and experts, working together in the shaping of policy, must try to learn from the ordinary village people how to use existing institutions, how to modify them where necessary or how to develop new institutions in a way which will appear familiar and understandable to the people and will therefore be acceptable to them.