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A new approach to customary land tenure

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Any local situation is, of course, unique and the Niue proposals will not be directly applicable to any other place, but a number of the suggestions and principles may nevertheless be of considerable interest.

Niue is a largely self-governing island of 64,000 acres and 5,500 people who are also citizens of New Zealand. One of the important land problems results from the fact that about one-third of all Niueans reside permanently on the mainland of New Zealand but are, nevertheless, reluctant to relinquish their rights to land on Niue.

Traditionally, it was possible for children to inherit the land rights of both parents, although they usually only inherited rights in lands they occupied. With the introduction of the Land Court, however, "the important element of occupation has dropped out of the picture" and now everybody inherits rights in all the lands of all his recognised ancestors. Fortunately, the Land Court has done little work on Niue, and it was because of the problems that followed the Land Courts in New Zealand and the Cook Islands that McEwen, when Resident Commissioner, decided that Niue needed a different system. He instituted some brief studies of Niuean land tenure and involved the local legislature over a number of years in thinking through

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the consequences of alternate approaches to tenure change. There has probably been no colonial people in the Pacific who have been more fully consulted on the tenure legislation to be adopted, though such extensive consultation would hardly have been possible in a large territory.

The principles on which the Niue people have decided to base their tenure merit much wider consideration in other parts of the Pacific. They have decided that there shall be two main levels - firstly, that of the manafaga or lineage, and secondly, that of the individual man within the lineage. All rural lands will belong to existing lineages and will be demarcated and registered in the name of those lineages, each of which will have an elected head as its trustee.

Within each lineage, however, occupation rights will be granted to individual men for such land as they are farming or intend to farm. A man with an individual occupation right has security of tenure guaranteed for himself and his children indefinitely, provided he continues to use the land. If he ceases to use it for a given number of years, it reverts to the lineage as a whole. All unallocated land rests with the lineage, but can be allocated as required to men who need it for farming.

The recommendations in the McEwen report are now being incorporated into legislation which will be enacted during 1969.

(R.G. Crocombe)

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(R.G. Crocombe)

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8 The Niue alternative

R. G. Crocombe

Rights to most lands in the Pacific were traditionally held by groups. But no single group held all rights to a particular area of land. Various levels of groupings were associated with each plot. One can think of groups of people radiating out from a piece of land and having different and more or less intensive connections with it. Rights and obligations varied at each level, but the largest units tended to have rights relating to the defence of a given territory and to those areas within it which were not intensively used; medium-scale units were usually associated with larger areas of highly productive land, whereas the smallest units (including individuals) held rights to particular gardens, trees, and the like.

The nature and the extent of these rights depended not only on certain general customary principles but also on the ever-changing social and political realities in each individual case. Colonial governments understandably tried to reduce this complexity and flexibility in the hope of encouraging a more productive use of the land. They usually aimed at reducing the number of levels at which rights could be held, at a more precise definition of the types of rights that were to be recognised, and at making these rights independent of changing circumstances by recording them in a register. They frequently succeeded, but often by throwing out the baby with the bathwater. At the end of the colonial era the introduced laws generally recognised too few levels of rightholding and did not provide enough ways of adjusting the rules to the realities of people's lives. The goal of higher agricultural production, however, was almost never achieved.

This was also the case in Niue, a small, now self-governing territory of about a hundred square miles, inhabited by less than 5000 people, lying between Tonga, Samoa, and the Cook Islands. The land law introduced by New Zealand in 1902 provided (below the level of government itself) for only one level of rights—that of the individual. By prohibiting the selling, giving, willing, or even abandoning of land rights, it replaced a possibly excessive flexibility with a certainly

excessive rigidity; under the colonial law rights to land could be acquired only by accidents of birth—that is by compulsory inheritance. Fortunately for Niue this law remained largely theoretical. In French Polynesia and the Cook Islands, where similar legislation was put into effect, it had most serious and rather unexpected results. The price for the simplification of the traditional land tenure system was a quite fantastic fragmentation of the few recognised rights at the one accepted level. In some cases the rights to a single house-site are now shared by hundreds of individuals.

Most colonial governments in the Pacific tried to individualise land rights and disregarded rights held by groups as such, but some, especially Great Britain in Fiji, chose a different approach; they focused on one level of groupings and neglected the rights of larger or smaller groups as well as those of individuals. The new land laws introduced in Niue in 1969 are based on a policy which tries to steer a middle course. They provide for both individual and group interests in the same land, but they use, at the insistence of the people of Niue and their elected representatives, the traditional descent group as the basic land holding unit. (For details see Crocombe 1971a, and McEwen 1968.) For this reason they form an interesting alternative to the 1971 land bills in Papua New Guinea which were modelled on the essentially individualistic Kenyan legislation.

The main unit of land holding in Niue is the *mangafaoa*. As with any descent group, this term has no precise meaning. Rather, it has a range of related meanings which vary with the context. The same applies to the English term 'family', which also refers to a form of descent group, though such terms can never be translated exactly into other languages, because the shades of meaning alter with the culture in which the term is used. Nevertheless it is possible to distinguish certain common features of customary descent group tenures which are widespread in the Pacific in various forms.

First, the membership of any descent group is and must be continually changing. New members come in by birth, adoption, and in some situations also by other processes. Other members go out by death and (in varying degrees and circumstances) by emigration, marriage, adoption, banishment, and the like. Second, the rights of group members are not equal. This important fact is often misunderstood. The rights, powers, benefits, and obligations of each member change with age, seniority, sex, personal capacities, number of offspring, place of residence, relationship to other groups, physical need for land, and various other factors. Third, each person has rights in a number of descent groups. His strongest links are usually with the group of his father, the next strongest with that of his mother's father, the next strongest with that of his father's mother, and so on. But the comparative strength of these links is modified by other principles. In traditional practice, then, there is no exact number of members of a group; rather each group consists of an ever-changing range of persons with altering actual or potential rights.

This practice must be drastically changed if rights of groups to land are registered as under the new legislation in Niue. Any registration of group rights involves (as the result of decisions which must be partly arbitrary) the exclusion of distant members, the confirmation of the rights of a core of members, and the replacing of the unique and flexible rights of individual members by a uniform and stable (or at least more uniform and stable) set of rights.

It is important to note that Niue's descent groups are defined only in terms of land, not vice versa. Hence the registration procedures start with the court announcing that it will determine which group has title to a certain named and surveyed piece of land. It does not attempts to determine who the members of a certain *mangafaoa* are or what lands they are entitled to. This is the only sensible way, for there is no such thing as a *mangafaoa* in the abstract. The law requires each *mangafaoa* to have a name, but the court has often to adjourn and request claimants to give a name to their *mangafaoa*—sometimes it even has to choose a name for them. In either case this name is usually that of a 'source' ancestor.

In theory the term *mangafaoa* refers to an endless network of relatives tracing from a common ancestor, but as soon as it is applied in practice this endless network is found to be limited by a range of other criteria, which are different for each situation. In other words, the general idea of *mangafaoa* is based on blood relationship—a biological reality—but the *mangafaoa* as a social reality is shaped by a set of selective principles within this biological framework.

Descent group ideology traces descent from a single ancestor. The biological reality, on the other hand, is that everyone is descended not from one but a large number of ancestors—two parents, four grandparents, and 256 direct ancestors only eight generations ago. This is about the time of Captain Cook's arrival in Niue, but it was probably settled at least a thousand years before that. In fact almost nobody in Niue traces his claim to land from even one *mangafaoa* existing eight generations ago or claims membership of more than a few of those existing today. If it were otherwise the whole system would long have collapsed. No group land tenure can work if each individual is effectively the member of hundreds of descent groups. Descent group ideology, supported by the shortness of human memory, tries to reconcile biological reality with social necessity. The *mangafaoa* are named after an ancestor, but only one out of many. Moreover, this 'source' ancestor is not the same for all time. It is a moving source, changing every generation or two. The people remember that person who happens to be the common ancestor of the core of living members of a *mangafaoa* at any particular time.

The Niue legislation has adopted this ideological approach. It requires the court to determine 'ownership' primarily by 'ascertaining and declaring the *mangafaoa* by reference to the common ancestor thereof'—thus clearly implying that there is only one common ancestor (who counts). To ensure that the system will work in the future, the court has to go further than that. It is not enough to accept the selectivity implied in the descent group ideology for the past; a similar process of selection must continue. For instance, in the traditional context the concept of the 'source' ancestor did not mean that his descendants had automatically effective rights to the land associated with him. A connection with the 'source' ancestor was only one of several criteria. For this reason the law requires the court to collect information on who was buried on the land, who used it or had other connections with it. But some of these other criteria are in the process of becoming obsolete or being lost. If adequate substitute provisions are made this is no problem, but as yet this does not seem to have happened.

Further, the 'source' ancestor has to be kept moving so that more

distant branches of the descent group continually phase out. In some cases the court has acknowledged this and awarded land to claimants who named themselves or their fathers as the 'source', although they were well aware of earlier 'sources'. But the land records can change this process because they remember details which would be customarily long forgotten. This can have very serious effects. If the 'source' is not kept moving or alternative selective criteria are applied, the system will become hopelessly congested because hundreds of 'owners' will have tiny fragmented rights in any one plot of land—and it will worsen instead of improving the lot of the people.

So far this has not happened in Niue, but there is clearly the danger that it may. Whether this danger will become real depends mainly on how the court interprets 'custom and usage' and how this interpretation will influence the attitude of the people. 'Custom and usage' is a flexible pattern of tendencies, priorities and probabilities, and the records suggest that claimants are being guided by the court's action in previous cases as to how they will present theirs. The following example will illustrate the danger.

It concerns a plot (Anakale, Section 45) of about one acre. An earlier agreed 'source' of this land was Tifaulu, who had seven children. Three generations later two of the lines disputed the ownership of part of the land which was to be rented to a European. One party was a man of the blood line and he challenged two women who were adopted children of the former occupying line. The court gave rights to all three and the land was leased as intended. This was in 1939. In the terminology of today's legislation, the *mangafaoa* consisted of three adults: a man and two women. The rights vested in these three claimants, and they were the effective 'source' of the *mangafaoa* from then on. (If one had investigated the matter last century, Tifaulu would probably not have been the sole person with rights, but only one of a group which was the then effective *mangafaoa*.) On 17 August 1970 the court reheard this case under the new laws. The disagreement between the two parties of 1939 still existed, but instead of giving it to either or both parties jointly or by partition, the court ruled that the *mangafaoa* consisted of all the descendants of Tifaulu—thus legally bringing back in people who by

customary process had left the effective *mangafaoa* two to three generations ago.

This is an easy, but in my view bad, solution to a problem of conflict—to go back to a common 'source' a generation or two before it arose and to give joint rights to all the conflicting parties, plus a lot who never even claimed, and tell them to 'live in harmony' and 'resolve their differences'—even worse, tell them to do so 'according to custom'. The court in such cases creates the very kind of problem it was set up to solve. It leaves disputing parties in a state of smouldering conflict. The effect of the court's work in cases like this is to change a system in which people inherited rights selectively from some ancestors to one in which they inherit all rights from all ancestors. If that is allowed to happen on any significant scale, it would have been better never to have established the court. Land courts and registration systems are very expensive in money, time and skills. That expense can only be justified if they contribute at least an equivalent value in improvements over the previous situation. All land courts have been set up to do this, but not many have achieved it. The actual results need frequent evaluation to ensure that the intended results are being obtained. Papua New Guinea needs to be well aware of this coming problem.

One difficulty is that biological facts are so much easier to record than social facts and that recorded facts assume a greater weight than those which are not. Once the 'source' has been determined by the court and registered, there seems to be a tendency to disregard all other traditional selective criteria. This is particularly serious as descent was in traditional practice probably not even the most important of them. Evidence suggests that in Niue after only one or two generations, undisturbed occupation began to outweigh any claim based on descent. It is therefore doubtful whether it remains appropriate to describe a system of registered descent group tenure as 'customary', or whether it is possible to take 'custom and usage' as a basis for deciding disputes under such a system.

The crucial point, which is frequently not clearly understood, is that land registration and land courts change 'custom and usage', even if they were introduced to preserve them. Depending on the aims and

the context, this may be a good thing, but if the problems are not appreciated the results can be disastrous.

Descent was traditionally a channel for acquiring land rights, whereas many of the other criteria provided means of reducing them and of transferring them directly or indirectly to those most closely connected with the land. If the legal system only strengthens the channels for acquiring rights, but does not provide equally effective channels for redistributing them, problems of multiple ownership will accumulate quickly. If this is combined with growing land consciousness and rapid population increase, the problems will soon get out of hand. Niue has foreseen these problems and taken steps to guard against them. But my impression is that they may not be determined enough to meet the nature of the problem. Papua New Guinea is only just beginning to grapple with it.

To contain or to reduce the number of persons legally recognised as having rights to land is probably the most important but not the only problem facing a system of registered descent group tenure. Another problem is, who should act on behalf of the group?

Traditionally, the leader of a *mangafaoa* was known as the *pule mangafaoa*. But as the term *pule* implied greater control and authority than Niueans wanted in the new legislation, they chose the term *leveki* or trustee instead. The court appoints a trustee for the *mangafaoa* of each piece of land. He is supposed to be chosen by the majority of members, whether residents or not. In practice, however, this usually means only adult members, and generally only resident members, and if there is no application, or if only a few express an opinion, the court can, and does, appoint a trustee. A person who is not a member of the descent may be appointed its trustee, but he does not acquire any rights to the land except as trustee. The husband of a woman member, or a senior respected blood relative, or in some cases the Registrar, is appointed.

The trustee's powers are to control the occupation and use of the land in accordance with Niuean custom and to 'alienate' it, but in exercising either power he must 'as far as practicable', consult with members of the *mangafaoa*. If land is leased, the rent is paid to the court and by the court to the trustee—it is his job to share it as he

thinks best with other members of the *mangafaoa*. The trustee may be removed by the court if it is shown that he has not carried out his duties or cannot do so with 'equity' or 'in accordance with custom'. No dispute about this has yet to come to court, but it is an open question how equity or custom will be defined, or even whether they may not conflict in some aspects.

The ways of selecting a trustee and of defining his powers are important issues for Papua New Guinea to consider. It is not just a case of deciding how much power to give him; the more important question is how much power (and money) can he take, whether the Government or his followers want him to or not. Where only gardening land for members of the descent group is concerned, this is usually not difficult, but when it comes to leasing or selling to outsiders, big problems can arise. The main duty of a leader is to guard the interests of his people, but history is full of examples (in the Pacific islands as elsewhere) where they have looked more after their own personal interests—and these are often contrary to the interests of their people.

This is a difficult problem. The Government can instead deal with each member of the descent group direct (as for example in Fiji, the Cook Islands, Guam or Tahiti), but that is unbelievably expensive of money, time and staff—and it is sometimes very inefficient. It also implies that the government officials will look after the people's land rights impartially—but that does not always happen either. I see no easy answer. Many governments have tried to find solutions, but all have their drawbacks. Perhaps the main principle which seems to emerge is that the less the value of the land and the fewer the external dealings the more responsibility should be given to a group representative, and the greater the volume and value of dealings, the more governments should supervise or control. But this is not necessarily what has been done in practice, nor has it necessarily been successful where it has been done.

Protecting the user is a problem everywhere, for one of the problems often unintentionally caused when group rights are registered is that the rights of each person are made the same, or at least closer to the same than they were traditionally. Customary systems gave some protection to that member of the group who was actually using the land. Registered tenures in the Pacific have usually failed, in practice, to

provide equivalent protection. Niue aims to overcome this problem by giving occupation rights to individuals within the *mangafaoa*. Such a right is normally granted to an individual for his personal use for his lifetime (or in some cases for a stated number of years). No rent or other payment is made because the person it is granted to is almost always a member of the owning group.

Occupation rights can be cancelled if the rightholder does not make adequate use of the land for a year or more. A difficult problem here is to define 'adequacy' of use or the period of non-use, especially in an agricultural system where land normally lies fallow for some years between plantings. This is not much of a problem for Niue which has plenty of land, but evaluative limitations of this kind can cause tremendous administrative difficulties, and do so in many parts of the Pacific. Papua New Guinea has already had a lot of difficulty applying rules of this kind to land leased from the Government. Occupation rights may also be cancelled if the holder is absent from Niue for more than a year (except for education or other training). This may be easy to administer in Niue where one can leave only by air and only once a week. But for Papua New Guinea, where people can leave their home area by walking, driving, or frequent shipping and air services, the problem of the rights of absentees is very important.

Other forms of transfer of land rights are necessary too. In Niue land cannot be sold (even to Niueans) except to the Government for public purposes. Land can be leased, divided between co-owners, exchanged, reserved for public purposes, or vested in church communities. These transfers must be made through the court, except for minor rights (including leases) which are granted for less than two years. The court must be satisfied that the rent or other payment for the transfer is adequate, and may require the trustee to prove that the majority of members of the *mangafaoa* have agreed in writing to any proposed alienation. There are not yet enough cases to reveal any principles adopted by the court in determining 'adequacy'. This is unlikely to be a problem in Niue, but the absence of more detailed criteria of adequacy has led to abuse in many countries with similar provisions.

Leases are usually for a maximum of sixty years. Leases for public and church purposes are an exception and may include a perpetual

right of renewal, provided the land continues to be used for those purposes. (A provision of this kind would help overcome a significant current problem in Papua New Guinea.) If it does not, the lease is cancelled. Another exception applies to land used for forestry, or for commercial and industrial buildings. Longer leases for these purposes are subject to special conditions about their use and the maintenance of assets.

Partitions may be approved by the court if a *mangafaoa* becomes too big or torn by internal dispute, but it is required to avoid subdivision into plots too small for convenient use by individuals. Partitioning and combining land (which is also provided for) are necessary provisions to meet changing numbers in the group or major changes in land use. If experience elsewhere is any guide, these provisions will probably not be used much. Exchange of land is also provided for, though it is not expected to be used in many instances.

Reserves may be created by the court if the majority of the *mangafaoa* want them, for common use by a church or other institution, or for all residents of a village, or for community purposes. If the reserve is no longer used for the intended purposes, or if the agreed period ends, land reverts to the owning *mangafaoa*. This provision is very simple to operate and could well be considered in Papua New Guinea where unnecessarily cumbersome, protracted, and often acrimonious procedures (including alienation to the Government) are necessary for people to set aside land with legal security for schools, churches, and other community facilities.

Land being used as security for credit leaves it open to alienation if the debt is not paid. The ultimate title to land in Niue cannot be mortgaged or used as security for credit, but rents or other income from land may be in approved cases (for instance, for loans from the Niue Development Board).

Very little land on Niue belongs to the Government, yet there is increasing resistance to sale of land to the Government for public purposes, even though Niue is self-governing. It is interesting to note that under the new legislation, even government land must show the name of the *mangafaoa* from which it was bought. This suggests a residual right of the *mangafaoa* if the Government later finds that it no longer needs the land.

Survey is required for all registration of *mangafaoa* boundaries, and for occupation rights except those for a house site (one-eighth of an acre) in a village, or up to two acres of farming land. Even for this small population and a total area of 100 square miles, most of which is flat, survey is going to be a task of many years. So far only about one-fifth of the *mangafaoa* lands on Niue have been surveyed.

For a small, isolated territory borrowing short-term surveyors from outside, survey costs, including all overheads are inevitably high.[1] It is difficult to estimate registration and administration costs, but being small, the Niue case is certainly expensive per unit of land handled. The records have cost a great deal of time and money to assemble. They include detailed genealogical records, over several generations, of almost every person born on Niue: a more complete record than almost any other territory in the Pacific possesses.

A very rough estimate of the total staff time and overhead costs in Niue and New Zealand of merely preparing the legislation, the manual, forms, etc. for the introduction of the new system suggests that it would have been of the order of $100,000—a lot of money for a population of less than 5000. This was not a problem for Niue, as New Zealand paid the main costs, but it is an important question for Papua New Guinea (with its larger and much more diverse populations and tenure systems), which will have to pay for such a system increasingly from local taxation.

The complexity of this relatively simple system, even for a very small and uniform society, is shown by the fact that the Niue Land Ordinance 1969 runs to fifty-four sections, and the manual of instructions to 276 foolscap pages. (This includes 186 pages of a multitude of different forms which have been designed to implement the Ordinance.) Again, places with relatively fewer staff or less finance would probably need to reduce this complexity considerably.

All income from rent or sale of land is paid to the Registrar, who may deduct up to 5 per cent for administrative costs, and then distributes the rest to the trustee or other persons entitled. This is much less than the actual costs. In Fiji, the Native Land Trust Board, even

1 A recent report on the survey of Niue (Berrill 1968) does not give details of real costs.

with its huge scale of operations, takes 25 per cent of income for administrative costs and finds that even this does not meet its actual expenses.

In Niue, land registration is free. Again, if it can be afforded this is advantageous. But it is doubtful whether Papua New Guinea could manage without fees to cover at least part of the costs. Accurate estimates of the real costs involved are essential (but have seldom been made in fact) before any plans to introduce new systems are decided upon.

All documents are drawn up in English, but a Niuean translation is provided. In Papua New Guinea with its hundreds of different languages the problem is vast, though the use of Pidgin and Motu may be possible. Effective communication is essential, and if it cannot be achieved this may be a valid reason for postponing land registration where the need is not urgent. Forced registration, and registration which was not well understood, has not achieved its goals elsewhere in the Pacific. It is better to reduce the goals or postpone their attainment than to invest in expensive failures.

Land law must be reasonably consistent with political realities or it will not be accepted as law. But it must also be reasonably consistent with social reality or it will not work in the way intended. The land laws of the colonial era were consistent with the overriding political reality that all major decisions lay with the colonial power. But few were consistent with the social realities of the island societies. They were intended to be, but the persons who drafted the laws had little experience to draw on except their own European cultures, and they had an oversimplified view both of the nature of islands tenure systems and of the extent to which they could be changed by law. The political reality of the 1970s is of self-governing and independent countries which want fuller recognition and implementation of local values and principles. To use the traditional group as the basis of a modern land tenure system may be a promising way of achieving this. But it must be realised that it may involve just as many problems, changes, and expenses as an individualisation of tenure.

other

THE REGISTRATION OF CUSTOMARY LAND:

THE RELEVANCE OF THE NIUE EXPERIMENT TO NEW GUINEA [1]

Ron Crocombe

Like any human society, Niue is unique, so parts of its tenure system have no relevance elsewhere. But some ~~questions of~~ principles are very relevant to New Guinea.

Rights in most lands in the Pacific were traditionally held by groups. But one group did not hold all the rights to one area of land. There were various levels of grouping associated with each area of land. In other words, one can think of groups of people radiating out from each piece of land and having varying degrees of connection to it. One kind of connection was by blood, and the closer the blood relationship to ~~the~~ an accepted ancestral right-holder, the closer the connection to the land. ~~The other~~ Another kind of connection was use and occupation. The longer, and ~~the~~ more ~~ex~~tensively ~~one used the land~~ the land was used, the stronger ones right to it became.

Rights and obligations at each level varied, but the largest ~~units~~ groups (e.g. tribes) tended to have rights relating to defense, hunting land, and to

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Footnote 1. Niue is a small (area 100 square miles, population about 4,500) self-governing territory lying between Tonga, Samoa and the Cook Islands. This chapter is based on a brief stay there in January-February 1973. I only had time to look at a limited number of genealogical, survey, registration, court and administration records. My previous contact with Niue has only been confined to one-day calls by ship, and the reading of reports. I hope that a comprehensive study of land tenure on Niue will be undertaken by a Niuean or other Polynesian student before too long.

Dr. Enetama Lipitoa (Member for Justice, who deals with the Land Court, land registration, etc.), the Executive Committee, and the Acting Resident Commissioner generously gave their respective approvals to full access to records and other facilities. Mr. Solomon Kalauni, whose department maintains all land, birth, survey, court and related records, generously gave every possible assistance despite being constantly burdened with visiting national and international civil servants and academics. Alas, official visitors threaten to become as much of an occupational hazard in isolated Niue as they are in the larger centres.

other areas of low intensity usage (particularly uses which were little related to personal effort ~~and~~ or were difficult to identify long-term). Medium-~~scale~~ sized groups ~~units~~ (clans, sub-clans, lineages, etc) were associated with the larger areas of ~~highly~~ more productive land and water. The smallest ~~units~~ groups (sub-lineages, ~~groups~~ sets of brothers, families and individuals) held rights to gardens, valuable trees, and other scarce plant, animal and mineral resources.

The nature of each kind of right depended not only on customary principles, but also on ever-changing social and political relations. This flexibility has both advantages and disadvantages. Colonial governments understandably tried to reduce this flexibility in the hope of encouraging long-term cash cropping and increasing the amount of work and capital put into particular farms. They wanted:

(a) to reduce the number of levels at which rights existed, (e.g. tribe, clan, family, individual)

(b) to define more precisely the rights ~~what~~ that were to be recognised, and

(c) to make rights dependent on registration and legislation rather than on social relations (i.e. on relationships fixed at the time of registration rather than changing with circumstances).

They usually succeeded, but often by throwing out the baby with the bath-water. So by the end of the colonial era, the legal tenure systems generally recognised too few levels of right-holding. And they did not provide enough ways to adjust land law to the realities of peoples' lives. Their aim for higher productivity was almost never achieved.

The same was true in Niue. The land law introduced by the New Zealand government in 1902 provided (below the level of the government itself) for only one level of rights - that of the individual. It replaced excessive flexibility by excessive rigidity when it prohibited sales, gifts, wills or even the abandonment of land rights. Under the New Zealand law, proprietary rights[1] could be acquired only by accidents of birth (that is, by compulsory inheritance from one's parents).

1. What may be roughly called 'ownership'.

Fortunately for Niue the legislation was little used owing to shortage of staff. But in French Polynesia and the Cook Islands similar legislation was implemented. In both places the law insisted on equality of right-holders. This led to an unintended and unexpected fragmentation of rights, so much so that dozens, even hundreds, of individuals now ~~have~~ share legal rights to a single house-site.

Most colonial governments tried to individualise land rights, and did not recognise rights held by groups as such. French Polynesia, the Cook Islands, Hawaii, New Zealand, Guam, the Marianas (and the Caroline Islands during the German colonial period there) all used this approach. Hawaii was the only case where the land could be sold without any restriction, and so the Hawaiians lost almost all their land in less than two generations. In the other cases the goal of individualisation was not achieved in practice (though it was in law). This was because the ~~application of the law~~ way the law was implemented in practice resulted in multiple rights being held by large numbers of individuals in single blocks of land. The "individualising" policies created (quite contrary to the expectations and intentions of those who made the policies) much more fragmentary interests than the rights of the groups they replaced. One reason, of course, was that to successfully individualise you must provide other land (or jobs) for all but one child of the previous owner. But in these countries they allowed all children to inherit, which they did!

The other extreme was to focus on one level of grouping and register land rights in the name of that group, cancelling or reducing the rights of larger and smaller groups, and of individuals. Fiji took this approach furthest, and chose the mataqali (a particular kind of descent group) as the focus of rights. It did not give formal legal recognition to larger units which included several mataqali (yavusa), nor to the several branches of mataqali (usually i tokatoka), nor to rights of individuals.

~~One reason for interest in~~ The recent Niue legislation is interesting because ~~that~~ it aimed to give fuller legal recognition both to individual use rights and to one level of group rights. By the 1950s, when the government had the motivation and resources to act on land matters in Niue, it was aware of the problems ~~that~~ caused in the Cook Islands by the existing legislation.[1] Land Court work was delayed, therefore, until more suitable legislation could be prepared. This was developed during the 1960s through a series of government proposals and public discussions.[2] It was formalised as The Land Ordinance 1969.[3]

The policy tried to provide for both individual and group interests in the same land. The main aims were to:

(a) register all rural land in the name of a descent group (mangafaoa),[4]

(b) to provide a single elected trustee or guardian (leveki) for each mangafaoa, and

(c) to provide for individual holdings with the maximum individual security and freedom of action, while retaining the ultimate rights for the mangafaoa as a whole.

The political situation within which the legislation was developed must be recognised. The Niue people and their elected representatives insisted that the descent group must be the basic right-holding unit. The other political reality was the New Zealand government, which drafts and approves the legislation. There is little point in considering any of the many other possible approaches which would not have been politically acceptable to either Niue or New Zealand.

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1 For details see Crocombe, 1964.

2 For details see McEwen, 1968, and Crocombe, 1970, 68-84.

3 The Niue Amendment Act (No.2) 1968, section 6, and the Niue Land Registration Regulations 1969 contain other details of tne new policy.

4 Defined as "the family or group of persons descended from a common ancestor", plus or minus legally adopted children.

A Land Court was established, and it was intended that its judge would be loaned (from the Maori Land Court in New Zealand) to settle disputes and decide applications for land registration. The Niue Registrar's office handles all other land matters.

The main unit of land-holding in Niue is the mangafaoa. As with any descent group (i.e. group of persons descended from common ancestor) the term mangafaoa has no precise meaning. Rather, it has a range of related meanings which vary with the context. The same applies to the English word "family", which also refers to a form of descent group, though such terms can never be translated exactly in other languages, because the shades of meaning vary with the culture in which the term is used. In Niue, as in many other parts of the Pacific, governments and lawyers have tried to define in a single English word or phrase the "precise" or "true" meaning of mangafaoa or other kinds of descent group. But it is impossible, for the meaning of the word differs with the context in which it is used. Three features of customary descent group tenures, which are widespread in the Pacific in various forms are that:

1. the membership of the descent group is and must be continually changing. New members come in by birth, adoption and in some situations by other processes. Other members go out by death and (in varying degrees and circumstances) by emigration, marriage, adoption, non-use, eviction or other processes.

2. membership is not equal. This important fact is often misunderstood. The rights, powers, influence, benefits and obligations of each member of the group vary with age, seniority (which is distinct from age), sex, legitimacy, personal capacities, number of offspring, place of residence, relationship to other groups, physical need for land, and various other factors.[1]

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[1] One of the most important research tasks is to measure more accurately the relative significance of each of these factors in various contexts. The changes taking place in the system today are largely changes of relative emphasis rather than absolute changes.

3. each person has varying rights to a number of descent groups. His strongest connection is usually to the group of his father (or in matrilineal societies to the group of the mother) the next strongest to that of his mother's father, the next strongest to that of his father's mother. But those are modified by a number of other principles. One also sometimes has certain rights in the lands of a husband or wife (though these are of a different kind). But the nature of membership in (or connection to) each group, and one's position in it, varies over time.

In traditional practice, then, there is no exact number of members of a group. There is, rather, an ever-changing range of persons with varying actual or potential rights.

Registration of land involves (by decisions which must be partly arbitrary) excluding the more distant members, confirming the rights of the more closely related members, and replacing (or at least reducing) the varied, unique and flexible rights of individual members by a uniform (or at least more uniform) and stable set of rights.

It is important to note that Niue's descent groups are defined only in terms of land, not vice-versa. That is, the Court starts each case by saying it is hearing title to a particular named, surveyed piece of land. It does not try to determine who the members of a descent group (mangafaoa) are and then find out what lands that group are entitled to. And the Court is right, for there is no such thing as a mangafaoa in the abstract. Each mangafaoa is required by law to have a name. In practice, the Court has often had to adjourn and request claimants to give a name to their mangafaoa. Sometimes the Court chose a name for them. In either case it was normally the name of the "source" ancestor at whatever level of segmentation was agreed on.[1] Niue descent groups do not have the degree of continuity of those in Samoa, which have a fixed title and name.

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[1] That is, the number of generations they decided to go back to wok out the rights.

In theory the term mangafaoa refers to an endless network of relatives tracing from a common ancestor, but as soon as it is applied in any practical situation such as a marriage, death, adoption, building project or land dispute, the endless network is found to be limited by a range of other criteria, which are different for each situation. Most of these criteria are fairly obvious, but their relative significance merits detailed research.

In other words, the general idea of mangafaoa is based on blood relationship - a biological reality. (But if all genealogies were known over a long enough period, all Niueans are related to one another). The social reality is of a set of selective principles within the biological framework. It is important to realise that the biological reality and the social reality are quite different.

Three very simple but very important points about Niue mangafaoa (and similar principles are found in many parts of New Guinea and elsewhere in the Pacific) are that:

(a) Descent group ideology traces descent from a single ancestor (known as "the source"). This ideology is different from historical reality.

(b) The "source" ancestor is usually one to five generations before the present adult claimants.

(c) Each adult person claims membership in one to three mangafaoa.[1] These three factors reflect the social reality.

The biological reality, on the other hand, is that everyone is descended not from one ancestor, but from an enormous number of them - i.e. 2 parents, 4 grandparents, 8 g/g/parents, 16 g/g/g/parents, then 32 in the next generation, then 64, then 128, and 256 direct ancestors eight generations ago. Eight generations ago is about the time of Captain Cook's arrival in Niue, but Niue was probably settled at least a thousand years before that. But even if we only go back for ~~a~~ two hundred years, most young Niueans today ~~is~~ are descended from 256

[1] These are estimates based on a very limited number of cases. If a full study of the system is carried out, these are some of the factors which should be measured in detail.

mangafaoa (though there would be many instances of overlap due to descent by different lines from common sources).

In fact, almost nobody in Niue (at least not in any of the records I saw) traces his claim from even one mangafaoa eight generations ago. Most Mangafaoa are named after an ancestor, but only after one out of many. He is referred to as the ancestor, which implies that he was the only one. The reason the biological reality of many differs from the social reality of one or a few, is that for practical purposes the others don't matter. Individuals tend to know all their brothers and sisters and first cousins (and many of their second and third cousins); they tend to know some of their parents' first cousins (and very few of their parents' second and third cousins); they know few of their grandparents' cousins (and often none of their grandparents' second or third cousins). In each older generation, the individual tends to know fewer people, and often none at all more than two or three generations older than oneself. A few specialists know more, but the average person could not go much beyond this, and many could not go that far. This was one of the key features of custom and usage.

The Court determines the "ownership" of Niuean Land "by ascertaining and declaring the mangafaoa of the land by reference to the common ancestor thereof and by other means". Note the clear implication of the one common ancestor. This is not because land on Niue used to be owned by single individuals - quite the contrary. Moreover, the "common ancestor" or "source" is not the same person for all time. It is a moving source, changing every generation or two. The people remember that person who comes to be the senior (usually male) effective ancestor for the living claimants at any particular time.

To make an effective claim to land, a person must have at least a two-stage connection with it. The first connection is between the claimant and the "source". This connection is by blood relationship and there is a set of priorities which favour certain relations over others (subject to other circumstances). The second connection is between the "source" and the land. This is usually long occupation (accepted or assumed), but sometimes conquest or gift.

It is clear from the actual cases that the concept of "source" does not imply that all persons descended from that source have effective rights to the land now associated with that "source" ancestor. Quite the contrary, for although one criterion for land claims is in terms of the "source" ancestor, it was only one of several. For this reason the Court is required to collect information on who was buried in that land, who used it or had other connections with it. Some of the other criteria are in the process of being lost. If adequate substitute provisions are made, this is no problem, but as yet they seem not to be.

Moreover, the "source" ancestor, being a moving source, moves down each generation and the more distant branches phase out. Thus some claimants named themselves or their fathers as the "source" (and were awarded the land accordingly) even though they were well aware of earlier "sources" before them. These processes must continue if the system is to work effectively. Land Court records can change the process because they remember details which would customarily be forgotten. This can lead to very different effects. A Land Court in this situation must ensure either that the "source" does keep moving or that alternative selective criteria are in fact applied.

These two principles (i.e. keeping the source moving and ensuring that other selective criteria also operate) are essential if the system is not to become (as it already has become in French Polynesia and the Cook Islands for example) a constipated cess-pool of hundreds of "owners" having tiny fragmented shared rights in any one plot of land.[1] ~~The reason it didn't happen on Niue before is that although it had similar laws, the laws were not applied in practice.~~

~~But if it starts to happen now, and~~ there is a danger of ~~it~~ the same thing happening on Niue, ~~if~~ If it does, the new system will worsen rather than improve the lot of the people.

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[1] The Niue Court is required not to define the relative shares of co-owners except for the allocation of money from rent, land compensation, etc. This is intended to allow more flexibility within the owning group.

Whether or not it will happen depends on how the Court interprets and influences "custom and usage", how it defines "sources", and the selective criteria it recognises. "Custom and usage" is a flexible pattern of tendencies, priorities and probabilities. It seems from the records that claimants are being guided by the Court's actions in previous cases as to how they will present theirs. The Court is at present one of the main influences on custom and usage in practice.

A vital function of any tenure system is to impose rules and restrictions to stop individuals from pressing their own interests too far where this is to the disadvantage of others. We all want to have our cake and eat it too, to have the best of all worlds, but individual gain must not be to the disadvantage of others. In Niue it will also be to the disadvantage of the individual who wants to hold on to every potential right - he will be left with many useless fragments, and the island with lots of unused unproductive land, made unusable by a multiplicity of rightholders, far more than in the customary system.

Let us take two examples which illustrate the problem. A plot of land of less than half an acre (Sisi, section 56/1) was traced from an ancestor five generations ago. No information was given of the number of descendants from that ancestor, but it could be a hundred or more (this would be about average given Niue's population growth rates). There is now a major problem for either the trustee (leveki), or the Court, to decide who among them should have what rights. This cannot, in my view, be validly described as "Niue custom and usage". Nor is it justifiable on any non-Niuean grounds - the land is leased for $96 per year and the lease rental is paid to the trustee (leveki) for "distribution". There will almost inevitably be dissatisfaction with the distribution, and the time and inconvenience of sharing $96 each year among so many people spread over Niue and New Zealand and possibly elsewhere, raises a problem of ridiculous proportions. It is not an isolated case.

The second example concerns a plot (Anakale, section 45) of about one acre. An earlier agreed source of this land was Tifaulu, who had seven children. Some married elsewhere and their descendants took land rights elsewhere. Three generations later two of the lines disputed the ownership of the part of the land which was to be rented to a European. One party was a man of the blood line and he challenged two women who were adopted children of the former occupying line. The Court gave rights to all three and the land was leased as intended. This was in 1939. In the terminology of today's legislation, the mangafaoa consisted of three adults: a man and two women. The rights vested in these three claimants. In today's terminology they were the effective source of the

mangafaoa from then on - other branches of the mangafaoa as it had been last century had got rights elsewhere. If one had investigated the matter last century, Tifaulu would probably not have been the sole person with rights, but one of a group which was the then effective mangafaoa.

On 17 August 1970 the Court reheard this case under the new laws. The disagreement between the two parties of 1939 still existed, but instead of giving it to either or both parties jointly or by partition, the Court went back to the new claimant's father's father's father's father (i.e. of the late 1800s) and ruled that the mangafaoa would consist of the descendants of Tifaulu. Assuming that the other branches continued to have offspring, this legally brings back in people who by customary process left the effective mangafaoa, as far as this land is concerned, two to three generations ago.

An obvious reply could be that this is what the claimants asked for. But it is not what the main claimant asked for originally. (He simply claimed from his father only). It is what they settled for after they had been unable to agree before the Court and after the Court had required them to discuss the matter and come to some arrangement among themselves.

It is the easy, but in my view bad, solution to a problem of conflict - to go back to a common source a generation or two before the present conflict and give joint rights to all the conflicting parties, plus a lot who never even claimed, and tell them to "live in harmony" and "resolve their differences" - even worse, tell them to do so "according to custom". The Court in such cases creates the very kind of problem it was set up to solve. It reminds me of Peter France's quote of a Fijian chief who said of land disputes, "our custom was to fight about it". It leaves disputing parties in a probably stage of smouldering conflict. Beyond a workable number, the more people in the mangafaoa the more likely it is that they will have troubles among themselves. Too many "owners" creates conflict in this type of system. One way to avoid conflict is to become apathetic and appear indifferent. Both reactions occur.

The effect of the Court's work in cases like this is to allow a system in which people inherited rights selectively from some ancestors, to become one in which they inherit all rights from all ancestors. If that is allowed to happen on any significant scale, it would have been better never to have set up the Court up. Land Courts and registration systems are very expensive in money, time and skills. That expense can only be justified if they contribute at least an equivalent value in improvements over the previous situation. All land courts have been set up to do this, but not many have achieved it in practice. The actual results need frequent evaluation to ensure that the

intended results are being achieved. New Guinea needs to be well aware of this coming problem.

How far can "custom and usage" be an effective basis for land legislation? "Niuean land" is defined in the legislation as land "vested in the Crown but held by Niueans according to the customs and usages of Niue...." Rights to land are also to be determined "according to the customs and usages".

Much will depend on how those words are applied in practice. If too rigidly applied, these requirements could restrict change, for any new pattern is neither a custom nor a usage when it begins. This may not be an issue for Niue (though it may be more significant there in the long run that is generally realised), but for New Guinea it is a very important point of principle to be decided. In other words, how far and in what ways do they want to continue or to rigidify a system which evolved to suit subsistence farming in a situation of little population growth and little population movement; and how far and in what ways do they wish to open the way for changes to suit present and future circumstances?

One problem is that biological facts are easier to record than social facts, and Europeans are more used to working in biological terms as it is closer to European custom. Once the "source" is decided by the Court, biological facts seem to be given much more weight than social facts. To collect the biological facts, even for this population of 5,000, the government had to employ a full-time specialist to work for many years, checking and cross-checking genealogical connections, and piecing together the fragmented bits of information that various old people remembered. For recent years, the compulsory registration of births has provided detailed information. Both these factors are radical changes <u>from</u> "custom and usage". They are not changes <u>in</u> custom and usage. They are changes of practice introduced by government action. There is nothing wrong with that in principle, but it is increasingly doubtful how far it remains appropriate to describe the system as based on custom and usage, or to attempt to use custom and usage as the basis for Land Court decisions.

Once in the record, the tendency seems to be increasingly to include <u>all</u> descendants irrespective of sex, legitimacy, residence, need, use or other criteria.

It is clear from cases I did study that descent was only one of many criteria traditionally. Moreover, in many cases descent was not a criterion at all. Where persons proved long-term occupation, and others claimed that it was only by permission, gift or sufferance, the long-term occupiers were usually given the title to the land. Evidence by the Registrar and other witnesses

~~makes it clear~~ indicates that long-term undisturbed occupation was perhaps the greatest single criterion in Niue. Though no exact period was fixed, the areas occupied for under one generation generally go the person who permitted the occupation, those two generations or more to the occupier. The disputes usually involve the area of transition in between. In other words, Niuean "custom and usage" clearly provides for genealogical connection (i.e. blood relationship) to be of greater force than occupation in the short term, but the importance of occupation constantly increases, to the extent that after a generation or two, occupation outweighs blood relationship. Other factors modify these in particular cases, but that basic principle is clear. Occupation is more important in New Guinea than many people realise.

Every person everywhere (or at least most people in most places) is usually trying to advance his own interests (and those whose interests are closest to his - his wife, his children, his brothers etc). He can only advance his own interests if he feels (or claims to feel) that his claim to the land is right and proper according to the customary or other principles accepted by the society he lives in. Otherwise nobody will take any notice of his claims.

Most disputes are the result of two or more people claiming rights to the same land by different principles. For this reason it is necessary to study land disputes in detail if one wants to understand the tenure system. The frequency and outcome of disputes and the relationship between persons who are in dispute, gives ~~very~~ valuable insights into the principles which govern the system - that is, into what are accepted as right and proper bases for claims. I did not have time to do this in any depth in Niue, though it merits a full study.

The reason a customary system is usually more flexible than a registered one is that it does not depend on a fixed right, but on the extent to which connections with the land and with the descent group are exercised. In other words, you cannot benefit from land unless you have a recognised connection to it, but that is not enough by itself. Most people had potential rights to lots more land than they could ever use. The extent to which you can exercise the connection to gain benefit from it (whether material or psychological benefit) will depend on the kind of connection, and on what you think you can get away with in the light of the complex and ever-changing weight of the claims of other relatives. Those who push harder generally get more - but there are limits. Personal "pushing" could only be by ~~xx~~ using accepted methods and by the accepted criteria of blood relationship, seniority, residential

proximity, past and intended use of the land and other sources of land. These matters were not laid down precisely, but the principles became apparent only in action - in people trying to improve their own advantage and resist that of others. When the difference between the two was substantial, a dispute arose.

The advantage of compiling a single written record of all genealogies and having it accepted by the Court (and usually by the public) is that it reduces future disputes about rights which follow from blood relationships. The disadvantage is that it tends to preserve the rights of many people who, by the normal limits of memory and the operation of the other selective criteria, would (and should) slowly fade away.

How many persons did an average mangafaoa contain traditionally? And how many mangafaoa did the average person exercise effective land rights within? There are no precise details, but the total population has been less than 5,000 for most of Niue's history. It is estimated that 6,000 separate plots of land are recognised and that any particular mangafaoa claimed say three to six plots. The number of mangafaoa in which a man actually exercised rights seems to have ranged from one to three. If the average was two (though I'd expect it probably averaged less than two traditionally, and a little higher today owing to greater movement), then the average number of persons per mangafaoa as an effective land-holding unit would be between about five and twenty, or say one to five men plus their children. These are very rough figures and could be made much more precise by detailed study of available records. But they give some indication of the nature of Niuean "custom and usage". Many of the Court's rulings are in accord with these principles, but some are not.

I have heard it said that the Court allows large numbers of relatives to hold rights in any one plot of land and "puts it back to the mangafaoa" to make allocations within themselves. If this is done very much, the Court will be avoiding one of the jobs it was set up to carry out. One of the main

purposes of land registration in a descent group tenure system is to contain or reduce, not to expand, the number of persons legally recognised as having rights. Again, some of the Court's decisions achieve this aim, but some have the opposite effect.

Niue has probably been inhabited for 50 or more generations, but effective land claims ~~before~~ in the court usually start with an ancestor one to three generations before the claimant. This is consistent with other evidence, particularly with the numbers of persons in each land-holding mangafaoa. In other words, even from the source, all descendants do not have equal rights. The law and the Court clearly recognise this in principle. But I am not sure that it is being fully applied in practice.

There is a constant growth process of branching or segmentation in any descent group. Each different branch or segment of the family continuously grows as its members marry and have children and grandchildren. As they do so, the new branches they form differentiate themselves increasingly from related branches.

One big question is how far back is a source is to be recognised, for this determines how many people could be included. One of the potential problems created by registration is that the process of segmentation is slowed down, because registration may in practice usually increase rather than decrease the number of effective claimants.

The most important point may sound strange, or even contradictory. It is that land registration and Land Courts actually change "custom and usage" greatly, even if they were set up to preserve it. I am not suggesting that this is good or bad - that will vary with the aims and the context - but that it is a basic fact to be understood anywhere in the Pacific that is considering these matters.

Custom and usage were based on a number of criteria of which blood

relationship was only one. Registration changes this for several reasons:

1. Blood relationship is fixed and fairly easily recorded, but other criteria such as intensity of use, need, extent of help given to others in the group, status, place(s) of ~~resistance~~ dence etc, vary all the time and are difficult to record.

2. In most descent group systems blood relationship is much more important as an <u>ideology</u> than as a <u>reality</u>. The facts tend to be adjusted to accord with the ideal. Therefore if I was particularly close, helpful and friendly to you we could become regarded as brothers when/we were actually cousins, and our descendants would often believe us to have been true brothers. Or if I am childless I may feed a relative's child who will become accepted in future generations as having been my son. This tendency often leads observers to think of <u>blood</u> relationship as more important than it really was.

3. With faster transport and communication, blood ties which would previously have withered because of distance and lack of contact, can now be kept active.

4. Land Courts and the laws on which they are based are usually designed and run by, on criteria acceptable to, European lawyers and administrators. European custom\ regards blood ties as generally more important than other criteria recognised in these societies.

The important fact ~~fo~~ to face, then, is that once land registration has been firmly established, custom and usage will change. One of the main changes is that blood relationships were channels for <u>acquiring</u> land rights, whereas many of the other criteria were ways of reducing them and directly or indirectly transferring them to those most closely connected with the land. If the legal system strengthens the channels for acquiring rights but does not provide equally <u>effective</u> channels for transferring them, problems of multiple ownership get bad, quickly. If this is combined with rapid population increase, the

problem gets worse, faster. And if at the same time there is a lot of movement of people, it gets worstest, fastest! And this is what has happened in several parts of the Pacific. Niue has foreseen these problems and taken steps to guard against them. But my impressions are that the steps may not be big enough to meet the nature of the problem. Stronger steps could be taken administratively or judicially (i.e. by the administration or the Court) but they will probably need firmer legislation before that is brought about. New Guinea is just beginning to grapple with this vast problem.

A problem for any system involving group rights is, who should act on behalf of the group? Traditionally, the leader of a mangafaoa was known as the pule mangafaoa. He was usually the senior resident man of the group. But as the term pule implied greater control and authority than Niueans wanted in the new legislation, they chose the term leveki or trustee instead.

The Court appoints a trustee for the mangafaoa of each piece of land. He is supposed to be chosen by the majority of members, whether resident or not. In practice, however, this usually means only adult members, and generally only resident members, and if there is no application, or if only a few express an opinion, the Court can, and does, appoint a trustee.

A person who is not a member of the descent group may be appointed its trustee, but he does not acquire any rights to the land except as trustee. The husband of a woman member, or a senior respected blood relative, or in some cases the Registrar, is appointed. I did not collect information on criteria of selection, but the Registrar thought that about one quarter of all trustees are women, and perhaps five per cent are not members of the mangafaoa.

The trustee's powers are:

" (a) To control the occupation and use of the land in accordance with Niuean custom; and

(b) To alienate.....",

but in exercising either power he must "as far as practicable", consult

with members of the mangafaoa. If land is leased, the rent is ~~payed~~ paid to the Court and by the Court to the trustee. It is his job to share it as he thinks best with other members of the mangafaoa.

The trustee may be removed by the Court if it is shown that he has not or cannot carry out his duties with "equity" or "in accordance with custom". No dispute about this has yet come to Court, but it is an open question how equity or custom would be defined, or even whether they may not conflict in some aspects.

The ways of selecting a head or trustee, and the powers to give him, are important issues for New Guinea to consider. It is not just a case of deciding how much power to give the head or trustee, the more important question is how much power (and money) can he take, whether the government or his followers want him to or not. For gardening land for members of the descent group this is not usually difficult, but when it comes to leasing or selling to strangers, big problems can arise. The main job of the head is to guard the interests of his people, but history is full of examples (in the Pacific islands as elsewhere) where they have looked more after their own personal interests - and these are often contrary to the interests of their people.

This is a difficult problem. The government can deal with each member of the descent group direct (as in Fiji, the Cook Islands, Guam or Tahiti for example) but that is unbelievably expensive of money, time and government staff - and it is sometimes very inefficient. It also implies that the government officials will look after the people's land rights impartially - but that does not always happen either. Or dealings with governments and others outside the group can be done by a chief, trustee or other head or representative of the group.

I see no easy answer to this problem - many governments have tried to find solutions, but all have their drawbacks. Perhaps the main principle which seems to emerge is that the less the value of the land and the fewer the

external dealings, the more the responsibility should be passed to (or through) a group representative, and the greater the volume and value of dealings, the more governments should supervise or control. But this is not necessarily what has been done in practice, nor has it necessarily been successful where it has been done.

Protecting the user is a problem everywhere, for one of the problems which is often unintentionally caused when group rights are registered, is that the rights of each person are made the same, or at least closer to the same than they were traditionally. Customary systems gave some protection to that member of the group who was actually using the land. Registered tenures in the Pacific have usually failed, in practice, to provide equivalent protection. The Niue provision for Occupation Rights to overcome this problem, is important, though the issuing of these rights has not yet begun there.

In any land tenure system, different rights must be held at different levels. Many laws which were introduced to reduce the flexibility of customary tenure practices, have often gone too far the other way and reduced it to an extreme rigidity. In particular, there has not been enough provision for effective rights at more than one level, nor for the transfer of rights.

The Occupation Rights law in Niue aims to overcome the first problem by giving effective rights to individuals within the mangafaoa. An Occupation Right is normally to be granted to an individual for his personal use for his life-time (or in some cases for a stated number of years). These Rights may be inherited by one's children.

No rent or other payment is made for Occupation Rights, because the person they are granted to is almost always a member of the owning group.

Two useful additional provisions in Niue, that are worth considering in other parts of the Pacific are that Occupation Rights for house sites are to be granted, wherever possible, to husband and wife jointly; and that there is a lower size limit (of one-eigth of an acre for house sites and two acres for

other land) below which an Occupation Right cannot be granted.

Occupation Rights can be cancelled, and the land then goes back to the group as a whole, if the right-holder does not make adequate use of the land for a year or more. A difficult problem here is to define "adequacy" of use or period of non-use, especially in an agricultural system where land normally lies fallow for some years between plantings. This is not much of a problem for Niue which has plenty of land, but evaluative limitations of this kind can cause tremendous administrative difficulties, and do so in many parts of the Pacific. New Guinea has already had a lot of difficulty applying rules of this kind to land leased from the government.

Occupation Rights may also be cancelled if the holder is absent from Niue for more than a year (except for education or other training). This may be easy to administer in Niue with its small population, the fact one can leave only by air and only once a week. But for New Guinea, where people can leave their home area by walking, driving, or frequent shipping and air services, this problem of the rights of absentees is very important. We return to it below.

Other forms of transfer of land rights are necessary too. In Niue land cannot be sold (even to Niueans) except to the government for public purposes. Land can be leased, divided between co-owners, exchanged, reserved for public purposes or vested in church communities. These transfers must be made through the Land Court, except minor rights (including leases) which are for less than two years.

The Court must be satisfied that the rent or other payment for the transfer is adequate, and may require the trustee to prove that the majority of members of the <u>mangafaoa</u> have agreed in writing to any proposed alienation. There are not yet enough cases to reveal any principles adopted by the Court in determining "adequacy". It will probably not be a problem in Niue, but

the absence of more detailed criteria of adequacy has led to abuse in many countries with similar provisions.

Leases are usually for a maximum of 60 years. Public purposes and churches are an exception and may be given leases with perpetual rights of renewal provided the land continues to be used for those purposes. (A provision of this kind would help overcome a significant current problem in New Guinea). If it does not, the lease is cancelled. Another exception applies to land used for forestry, or for commercial and industrial buildings. Longer leases for these purposes are subject to special conditions about their use and the maintainance of assets.

Partitions may be approved by the Land Court if a mangafaoa becomes too big or torn by internal dispute, but it is required to avoid sub-division into plots too small for convenient use by individuals. Partitioning, ~~and~~ combining, and exchanging land (which ~~is~~ are also provided for) are necessary provisions to meet changing numbers in the group or major changes in land use, but if ~~If~~ experience elsewhere is any guide, these provisions will probably not be used much. ~~Exchange of land is also provided for, though it is not expected to be used in many instances.~~

Reserves may be created by the Court if the majority of the mangafaoa want them, for common use by a church or other institution, or for all residents of a village, or for community purposes. If the reserve is no longer used for the intended purposes, or if the agreed period ends, land reverts to the owning mangafaoa. This provision is very simple to operate and could well be considered in Papua ~~New Guinea~~ where unnecessarily cumbersome, protracted and often acrimonious procedures (including alienation to the government) are necessary for people to set aside land with legal security for schools, churches and other community facilities.

Land being used as security for credit leaves it open to alienation if the debt is not paid. The ultimate title to land in Niue cannot be mortgaged or used as security for credit, but rents or other income from land may be in approved cases (e.g. for loans from the Niue Development Board).

Very little land on Niue belongs to the government, but there is increasing resistance to sale of land to the government for public purposes, even though Niue is self-governing. It is interesting to note that under the new legislation, even government land must show the name of the mangafaoa from which it was bought. This suggests a residual right or priority of that mangafaoa if the government later finds that it no longer needs the land.

Survey is required for all registration of mangafaoa boundaries, and for occupation rights except those for a house site (one eighth of an acre) in a village, or up to two acres of farming land. Even for this small population and a total area of 100 square miles, most of which is flat, survey is going to be a task of many years. So far only about one fifth of the mangafaoa lands on Niue have been surveyed.

For a small, isolated territory borrowing short-term surveyors from outside, survey costs, including all overheads, are inevitably high. Time did not permit an assessment of survey costs per acre, per unit of land, per unit of value, or otherwise, but such a costing would be of interest for other places considering the Niue system.[1]

I did not estimate registration and administration costs, but being small, the Niue case is inevitably expensive per unit of land handled. The records have cost a great deal of time and money to assemble, and include detailed genealogical records, over several generations, of almost every person born on Niue: a more complete record that almost any other territory in the Pacific possesses.

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[1] A recent report on the survey of Niue (P.M. Berrill, 1968) does not give details of real costs.

Two questions for New Guinea to consider are whether they have the money or the number of skilled staff to introduce such a system on a national scale; and secondly whether or not the advantages of having detailed genealogies outweigh their disadvantages. Once they exist, they tend to play a bigger role than was usually intended, and they often (though not necessarily) lead to fossilization and rigidity at a time when increased movement of people creates a need for greater flexibility.

A very rough estimate of the total staff time and overhead costs in Niue and New Zealand of preparing the legislation, the manual, forms etc. for the introduction of the new system suggests that it would have been of the order of $100,000 - a lot of money for a population of less than 5,000. This was not a problem for Niue, as New Zealand paid the main costs, but it is an important question for New Guinea ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ with ~~vested~~ vastly larger and much more diverse populations and tenure systems, and having to be paid for more ~~xxxx~~ from local taxation.

The complexity of this relatively simple system for a very small and uniform society, is shown by the fact that the Niue Land Ordinance 1969 runs to 54 sections, and the manual of instructions to 276 foolscap pages. (This includes 186 pages of the multitude of different forms, in both English and Niuean, which have been designed to implement the Ordinance). Again, places with relatively fewer staff or less finance would probably need to reduce this complexity considerably.

All income from rent or sale of land is paid to the Registrar, who may deduct up to 5% for administrative costs, and then distributes the rest to the trustee or other persons entitled. This is much less than the actual costs. In Fiji, the Native Land Trust Board, even with its huge scale of operations, takes 25% of income for administrative costs and finds that even this does not meet its actual expenses.

In Niue, land registration is free. Again, if it can be afforded this is advantageous. But it is doubtful whether New Guinea could afford ~~to do so~~ registration

without fees to cover at least part of the costs. Accurate estimates of the real costs involved are essential (but have seldom been made in fact) before any plans to introduce new systems are decided on.

English is used in all documents, with a Niuean translation.[1] In Polynesia, with one indigenous language per country or territory, this is achieveable. In Melanesia, with hundreds of different languages per country or territory the problem is vast, though there the use of Neo-Melanesian (Pidgin) may have many advantages - though it also has some drawbacks. No comprehensive solution is possible. Using a foreign language which local people do not understand is likely to lead to the system being unused or under-used; and leaves it vulnerable to being misused. Yet the legislation cannot effectively be translated into a hundred languages, and any translation is likely to be expensive and inaccurate.

Effective communication is essential, and to the extent that it is not achievable, this may be a valid reason for postponing land registration where the need for it is not urgent. Forced registration, and registration which was not well understood, has not achieved its goals elsewhere in the Pacific. It is better to reduce the goals or postpone their attainment than to invest in expensive failures.

Land law must be reasonably consistent with political realities or it will not be accepted as law. But it must also be reasonably consistent with social reality or it will not work in the way intended. The land laws of the colonial era were consistent with the over-riding political reality that all major decisions lay with the colonial power. But few were consistent with the social realities of the island societies. They were intended to be, but the persons who drafted the laws had little experience to draw on except their own European cultures, and had an oversimplified view both of the nature of islands tenure system, and of the extent to which they could be changed by law.

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[1] The person presenting the document (usually the trustee of the land) is given a copy.

The political reality of the 1970s is of self-governing and independent countries which want fuller recognition and implementation of local values and principles.

In Niue, ~~and in other places considering this approach,~~ as in New Guinea, several questions merit further consideration. These include:

Absent trustees. A trustee needs to be present to exercise his trust. If he leaves for any length of time he is supposed to advise the Registrar and arrange someone else to exercise his trust. But even on isolated Niue, and with the system so recently established, many trustees leave without doing either. The movement of persons in New Guinea is becoming so frequent that if trusteeship is used, automatic alternative provisions probably need to be applied if the trustee is absent for any significant period.

Absent members. More Niueans live in New Zealand than on Niue. ~~This is an extreme case, but,~~ Likewise, in many parts of New Guinea more men live away from home working in towns, mines or plantations, or have gone to live in other villages, than remain on their inherited lands. Customary processes tended to cope with these absentees better than laws which guarantee continual rights which may never be exercised. This is a very sensitive topic, both at a political and at a personal level, for there is a conflict between the desire to retain identification and provide security for absentees on the one hand, while increasing production and the rights of the users on the other. These conflicts can be reconciled, but detailed planning is needed to achieve it.

Multiple ownership. This results not from "custom and usage" but from registration without adequate alternative cut-off mechanisms. Perhaps the biggest test of the system in Niue is whether the Court (or additional laws) will reinforce or substitute for customary cut-off mechanisms. If it does not, the whole exercise ~~will~~ may turn out to have been an expensive failure.

Need for some individual holdings. Although Niue people want to retain the mangafaoa as the basic land-holding unit, there is also scope for some kinds of land (e.g. house sites and intensively cultivated family farms) to be granted to individuals as individuals. In other words, as people's needs become more complex, more different kinds of provision are needed to satisfy those needs. One way to increase the rights of individuals could be through the existing Occupation Rights legislation, such that a person who held an Occupation Right and used it for say, twenty years, could convert it as of right and without payment, to an individual holding as personal freehold land. New Guineans too seem to want individual holdings as well as group holdings, and provision for both seems to be essential.

Need for more flexible transfer facilities. The present transfer facilities are suited to a situation in which everyone needed rural land, in which population movement was slight, and in which blood relationship was the main determinant of where one lived and worked. None of these features apply today, at least as fully as in the past. There are understandable objections to sale, but the range of possible ways of increasing land transfer needs detailed planning. More and more New Guineans live outside the area they were born in. As so many come from isolated areas with little economic potential, provision must be made for more of them to do so, and to be given security in their new environment.

It is to be hoped that New Guinea will not repeat the mistakes of other countries. Careful study of what is going on in New Guinea needs to go hand in hand with an awareness of what has happened elsewhere, if the planning of future land policy is to be of maximum benefit.

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Adjourned cases excluded

SECTION	BLOCK	NAME	ACRES AREA	DISTRICT	CLAIMANT	SEX	AGE	STATUS	SOURCE CLAIMED	DETERMINED	① claimant	② F	M	③ FF	FM	MF	MM	④ Son	⑤ Grandson	LEVEKI
2nd																				
X 45	II	Anakoli	1 $	Alofi	Fakahula Funaki	f	40		F.	F.F.F.F.									FFFF	Claimant.
45	I	✓	5	✓	✓ [illegible] ✓				FFFF because of [illegible]	Claimant	✓	She claimed F [illegible]							Same [illegible]	✓
53	I	Mikahehoke	$\frac{1}{4}$	✓	Matalanefe	f			Self alone	✓	✓									✓
48	I part	✓	$\frac{1}{2}$	✓	✓	f			✓	✓	✓									Says "My brother's share is elsewhere. The lands were apportioned long ago."
36	4	Hamula	$\frac{1}{4}$	✓	✓	f			✓	✓	✓									✓ — ditto"
36	II	Utuko	$\frac{1}{2}$	✓	Joe Fealo	m			✓ from g/father	F.		F								✓
x 26	I	Patuati	$\frac{1}{10}$	✓	Linapa				✓ ([illegible])	Hangafau						✓				✓ Extension [illegible] perhaps 20 family.
x 39	I	✓	$\frac{3}{4}$	✓	Linapa				✓ ?	"						✓				✓
32B	II	Tuluaiva	3	✓	✓				✓ "	"						✓				✓
47	II	Karnifi	5	✓	Patricia Rex	f			adjourned											
20	IV	Tunapupa		✓	Tukuitonga															
24	I	Kavatiki	76	✓	Fane															✓
23	I	Kalakela	75	✓	Fane															✓
37	III	Fualahi	3	✓	Vahoi															(f)
31	I	Kavata	19	✓	✓															
X 47	I	Patiati	$\frac{1}{3}$	✓	Foini has grandchildren	f	60s		Self											Hangafau To, Molia, Foini's g/gdr
9	I	✓	$1\frac{1}{2}$	✓	✓	f			?											
~~4~~	~~I~~	~~Haune~~	~~$1\frac{3}{4}$~~	~~✓~~	~~Monomai~~															
X 1	I	Matalolahe	$\frac{1}{4}$	✓	Viliko									F(A)F						"These [illegible] grandchildren" — [illegible]
56	I	✓	$\frac{1}{3}$	✓	A. KAULIMA m															

continue to demonstrate adhesion to the group by keeping up cor-
respondence or sending gifts from time to time. It's not easy
to draw a line in these matters. An added danger is that the
leaders of local councils, who may have the greatest influence
in shaping local land rules, are not infrequently entrepreneurs
pre-disposed to "operate" on "custom and usage" to their particular
advantage.

COMMISSION OF INQUIRY INTO LAND MATTERS

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Our reference 11/29
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P.O. Box 2459,
Konedobu.

19th April, 1973.

Where is Robin Hide?
Through Rarotonga.
Recommend research programme

Professor R. Crocombe,
University of the South Pacific,
P.O. Box 1168,
SUVA, Fiji.

Dear Ron,

We're still adjusting here to a world without Jim Davidson. He'd got into the habit of spending Sundays with us and was actually driving my small boy and a friend to go sailing a small dinghy we'd jointly purchased, when he collapsed and died. He was at that point enjoying life to the fullest, in a way he was particularly fond of. That, I suppose, is something; but he had so much more of it to look forward to, we thought.

Thank you for your paper on Niue. It's a beauty. The peculiar subtlety of the influence of the Land Court on custom hasn't been revealed so strikingly before, and you've done a real service in drawing attention to it so early in the application of the new law in Niue.

You ask for comments. Here are some initial ones, most of them trivial:-

1. Page 3, Note 4:
Does this mean that some mangafaoa can include adoptees and others exclude them? for - a question of degree + category to be understood in NT.

2. Page 4, Note 5:
I'm not sure about this. Some of the changes sought by villagers in Papua New Guinea, while said to have a precedent in custom, are such radical extensions of it as possibly to constitute departures from custom and usage, ~~as~~ in the way you describe changes induced by Government action on page 8. I'm sure your comment (p. 4, note 5) should stand, especially with the qualifications "largely", but the ~~act~~ cut-off point between a change in emphasis and a radical departure is hard to make.

3. Page 5, Paragraph 5:
"The biological reality ... etc.?" It doesn't seem to follow that each Niuean today would be descended from 256 mangafaoa simply because he had 256 g/g/g, etc. parents 8 generations back. Or have I misunderstood?

4. Page 7, Paragraph 3 (middle):
Should it read: "In the terminology of today's legislation, the mangafaoa consisted of three adults: a man and two women"?

.../2

continue to demonstrate adhesion to the group by keeping up correspondence or sending gifts from time to time. It's not easy to draw a line in these matters. An added danger is that the leaders of local councils, who may have the greatest influence in shaping local land rules, are not infrequently entrepeneurs pre-disposed to "operate" on "custom and usage" to their particular advantage.

5. Page 8, Line 2:
After a certain point, does not size create apathy and indifference rather than conflict?

6. Page 10, Second Half:
The points are slightly repetitive of points made earlier in a slightly different context. They bear repetition, but is it worth stating directly that at this point you are drawing certain threads together? (Page 12, paragraph 4 also slightly repetitive).

7. Page 11, Line 15:
Are you inclined at this stage to suggest what those "stronger steps" might be?

8. Page 15, Paragraph 4 - Question of language:
Use of Pidgin as a lingua franca is an easy counter-proposal. May pay to anticipate it and note that it still does not overcome the difficulty completely.

9. A major point that we will have to take up in Papua New Guinea (to which your comments on page 6 refer) is how are the criteria for ordering priorities in land claims to be determined, if not by the tribunal making the decision? In New Ireland recently we discovered a very confused situation where, in a generally matrilineal system, men were buying individual landholdings from their own matriline, or from other clans, very extensively. There were traditional precedents for this, but the practice had become greatly extended, partly because groups brought down to the coast in German times still held only conditional rights and were getting tired of it, and partly because of the widespread desire among the men to cultivate cash crops and pass the inheritance to their sons. There are other variations as well. Villagers proposed contrasting solutions, from a return to strict matrilineal successions, to formalisation of the "buying" process, with a number of subtle variations in between. They wanted these regarded as local rules to guide the dispute-settling authority - generally a committee including both local leaders and trained representatives of the central or district government, obliged to hear the views of the elders in public meetings.

In short, the people themselves wanted to select the criteria by which a dispute would be decided, recognizing that their own situation was one of flux and that they might want to make a different selection.

The problem, of course, is that the promulgation of land rules comes close to formal codification, with the tendency to rigidity - or to mounting confusion if amendments are too frequent.

However, Harold Luckham, whom you probably know, wrote to me after 1971 to tell me about a system of land customs in Rembau District, interpreted by a system of case law and local land rules, which he claims to work well. I've got some papers on it and written for more. You may know of it, or of similar situations.

The tendency for over-emphasis on biological descent, which you demonstrate so clearly in your paper, will certainly be a problem here A student witness from Kwikila told us how his father, a third son resident on the land, was disinherited by the Land Titles Commission in favour of a first-born son, not resident on the land. On the other hand we find that people are reluctant to exclude absent kinsmen from rights of succession, provided they continue to demonstrate adhesion to the group by keeping up correspondence or sending gifts from time to time. It's not easy to draw a line in these matters. An added danger is that the leaders of local councils, who may have the greatest influence in shaping local land rules, are not infrequently entrepreneurs pre-disposed to "operate" on "custom and usage" to their particular advantage.

I mention these random thoughts, only to suggest that in considering alternatives to allowing courts to select the criteria for determining succession, we run into all sorts of difficulties - though the problem will have to be squarely faced; and to give you a glimpse of what we are discovering. (Further samples enclosed). We will be glad of many a long conclave with you on the customary land question and formalisation thereof. Alienated lands problems are not of the same order - much more a <u>political</u> question.

Best wishes,

Alan W

She was referring to a formal statement by the elders in the Hanuabada Council, that while patrilineal principles would still have priority, as a Christian people, they would not disqualify a woman from inheritance if she had need or good reason to use the land. It <u>was</u> clearly only an alteration of the emphasis, but all, particularly the women, were and are conscious that it was a definite turning-point. Seriaka also regards it as such.

Was it?

In this case, where the man in the dispute violated the woman's gardens, the Local Court held her to have the rightful usage (not 'ownership' in the sense of registrable interest) and ordered the man to pay damages.

This appears to be a very fruitful ~~[illegible]~~ recognition of changing values both in formal pronouncement and by the court. It will be difficult though to ensure (a) that such formal pronouncements are made as ably and sensitively (b) that they are given just the right amount of weight in the courts. The problem is greater where, with registrable interests in commercial land, rather

Binaka Goava tells of a further interesting illustration of changing emphasis in Nanumaboda recently. A young woman, an only child, inherited the use of a house and house site from her mother (who herself had no brothers). A male neighbour who had prior ~~xx~~ was senior in descent (tracing from a brother, while the women were tracing from a sister) challenged the young woman's occupancy. She replied that 'all that had been fixed up long ago' and defied him. She was referring to a formal statement by the elders in the Nanumaboda council, that while patrilineal principles would still have priority, as a Christian people, they would not disqualify a woman from inheritance if she had need or good reason to use the land. It was clearly only an alternative of the ~~xx~~ places, but all, particularly the women, are and are conscious that it was a definite turning-point. Binaka also regards it as such.

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In this case, when the man in the dispute wrecked the woman's garden, the Local Court held her to have the rightful usage (not 'ownership' in the sense of registrable interest) and ordered the man to pay damages.

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than house-sites, and where occupancy was not so well established or clearcut.

Your paper emphasises the need for research on custom and usage at certain points. I certainly agree, especially if this is interpreted to ~~mean~~ encompass particularly the rapid changes that are taking place, as well as the 'original' emphasis. With regard to successions at intermediate societies we have had vehement reports at this meeting, to return to the stricter patrilineality of early times and to admit female descendants equally with males!

Has it really?

AH.

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Department of Law.

27 April 1973.

Professor R.G. Crocombe,
The University of the South Pacific,
P.O. Box 1168,
Suva,
FIJI.

Dear Ron,

Thank you very much for your two letters and the draft of the Niue-Report which I found very interesting, especially the central point, the need for modern equivalents for traditional cut-off mechanisms.

I am sending you copies of three further draft contributions for the book: Bredmeyer's paper on the 'Kenyan model' and Kimmorley's and Fenbury's views on the future role of 'traditional land tenure institutions'. They will probably give you a sufficient idea of the context in which your paper has to fit.

I am quite happy with the idea to confront the 'Niue-alternative' with the 'Kenyan model', although the comparison should be implicit rather than explicit. On the one hand individualisation and Westernisation, on the other an attempt to modernise traditional tenure without destroying its base.

As far as the general design of your paper is concerned, the best starting point is probably to remember that you are not writing for experts and that most of your readers will not be keen to look up references. (even if the relevant literature is available to them). In other words a layman of some intelligence and interest should be able to read the book with ease and get some idea of the problems involved without having to consult any other literature.

Your chapter will conclude the first, general part of the book, which will begin with short sketches of the historical, psychological and economic background (unfortunately none of these three papers is as yet ready for distribution). Then follows Bredmeyer's Kenya paper and yours. I am still not sure whether the papers dealing with the general structure of the future land tenure system (modernisation versus traditional Melanesian values) - or those dealing with specific problem areas (land disputes in the Highlands, Bougainville Copper etc.) will form the second or third part respectively.

Bredmeyer adopted the rough plan I suggested: general introduction, description of the Kenyan situation, implications for Papua New Guinea (he started off with a much longer and more technical and historical draft). Looking at your draft report, it already contains the introduction (last paragraph on p.1 to first paragraph on p.3) and the main body. Could you spell out the implications for Papua New Guinea and briefly take up the argument about individualisation and economic

progress you already mention in the introduction? (It has many sides, the fact that individualisation did rarely bring about economic progress does not invalidate the argument that 'communal tenure' hampers it.)

The main body of the paper probably only requires general tidying up. Some details could be left out, some points are discussed several times, some sections still read too much like an inventory, headings are sometimes still used as crutches - or, to put it differently: the skeleton still shows too much and interrupts the natural flow of the text. It might be a good idea to sketch the entire legislation first of all and then to discuss your four or five main points in more detail.

Two specific points:

a) the position of the leveki:
What were the traditional rights of the pule? Why is the head of a descent group now given lesser rights? I take it that a sale of land by the leveki binds his group, even if he has not fulfilled his internal duty, to consult other members or has acted against their wishes etc. This is an old problem, but it remains possibly the crucial aspect of 'group incorporation' or any trusteeship arrangements.

b) the protection of outsiders using land with permission of the owning group:
Does the Niue legislation protect them? (Comparison with the position of acceptees in Kenya.) This might not be a problem in Niue, but it could be of great practical importance in Papua New Guinea. You only mention the protection of individual group members and their 'rights' of occupation.

Another two points in passing which could be important for Papua New Guinea:

a) is conquest regarded as a good basis of title? (Have any time limits been worked out?)

b) is there a problem of buffer-zones or 'no-man's lands' and their division among adjoining groups?

For both points see Orken's paper.

Unfortunately I am rather in a hurry since I am leaving for the Waigani Seminar this afternoon and wanted to write to you before then. If you have any specific questions please write.

Thank you very much for your offer to contribute a chapter on the history of the Native Lands - and Land Titles Commissions. It would be a bit too specific to fit into the book.

Kind regards,

Peter G. Sack

mp Peter G. Sack

16

Land and the Future of Papua New Guinea

Conclusion: Land in Papua New Guinea: The Last and the Next 25 Years

P. Chatterton

M.I.A. 110

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23 July 1973

Dear Ron,

As you anticipated, my views on the Niuean title system certainly don't coincide with yours. In fact, I think your paper shows that you have got the pig entirely by the wrong ear. Mind you, I would not be entirely sure that everyone would hold the same views about the effects of the present law as I do. But I am quite clear what was intended and am also quite clear what I tried to do in the Court.

Although the Mangafaoa for a block of land is declared in terms of named ancestor or ancestors, this is merely a description or an identification, not a definition. By this, I mean that not all the descendants of the named ancestors (and note that in quite a few cases contrary to what is said in your paper, more than one ancestor was named) would necessarily be members of a Mangafaoa for the land at any given time. The declaration indicates the range of people within which custom may operate to sort out those entitled as members at any time. I am doubtful now whether custom can add people to the Mangafaoa, since customary adoption is now out, but the statutory adoption will of course add people.

It is not intended, and as far as I know has not been done, that individual members of the Mangafaoa should be defined and any shares specified, save for the most necessary purposes, e.g. when there is a fight about money. I can see no inconsistency in any case in defining owners at different times with different results - a second definition need not be based hard and fast on the first.

All this turns I suppose on "What is Niuean custom?" We say this is left to the local undisputed Mangafaoa members to decide and we do not exclude the possibility of it developing and altering.

The rocks upon which flexible Niuean custom (which I should say was probably never terribly uniform or well developed) may shipwreck are dishonesty or feuding amongst owners. Already there have been cases of Levekis pocketing the cash belonging to Mangafaoa.

I will not defend my decisions in the Court beyond saying that although it perhaps should not be, the giving of decisions

/in

in land cases is sometimes a bit like politics. It must have regard to what is ultimately and practically acceptable to the people generally.

This letter has been delayed unreasonably because (sad to say) I put yours on one side and forgot it.

Best regards,

Yours sincerely,

Ted Williams

~~Ted Williams~~

(E. W. Williams)

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