Third Waigani Seminar

CALL FOR CHANGE IN LAWS ON BUSINESS

Professor Gerard Nash this week called for a wide-ranging review of the Territory's legislation relating to indigenous business enterprises.

"We must stop the indiscriminate transplanting of Australian laws to the Territory," he told the seminar.

"In deciding what to transplant we must recognise the differences in the social, economic, and educational climate of the Territory."

Professor Nash, who is Dean of the Faculty of Law at the University of Papua and New Guinea, was addressing the group enterprise section of the seminar on the need for change on the legal structure of indigenous business enterprise.

He said the development of indigenous business enterprises in the Territory had been retarded because the laws governing them had never been adapted.

He suggested immediate remedial legislation to correct the position.

The Government could begin by legislating so that indigenous groups carrying on business in accordance with native custom could register as corporations.

Other legislation could provide for the limited liability of those members of the group not taking an active part in managing the business, and unlimited liability for the managers.

Professor Nash suggested a number of other changes that could be made which would take more account of native customs.

"It is appreciated that alterations in the law are not going to perform miracles overnight," he said.

"But, it is false to assume that the problems are only educational and that time will remedy them.

remedy them."

WARNING BY CROBOMBE

Pressure on expatriates "to give up land"

During the next decade a lot of pressure would be placed on expatriate landholders to relinquish their land, Dr R. Crocombe predicted.

This pressure would come from two main sources — political changes and an insistence by the Government on increasing the local participation in rural developments.

Dr Crocombe, the executive officer of the New Guinea Research Unit, was delivering a paper comparing the land tenure developments in Papua-New Guinea, with those in the Pacific area generally.

He attempted to make some predictions about likely future developments.

END OF ERA

Dr Crocombe said that New Guinea was at the end of an era in land development — what had happened in the past 60 years would now start to change.

"In the 1970's, the sources of ideas on land policy will be quite different from what they have been," he said.

There would be more local participation in future decisions and indigenes would be given opportunities to gain knowledge from specialist organisations, such as the U.N.

In the past, the people most concerned had never been as involved in the determination of policy as they should have been.

Nor had the Administration taken much notice of what had evolved in other developing countries.

In future years, greater notice would have to be taken of what the land laws were supposed to accomplish.

"It can be said that here, none of these things has ever been noted when determining policy," he said.

ASSUMPTIONS

In fact, New Guinea's land policies had been based on a number of assumptions which had proved to be completely fallacious.

"We are now at the stage where the people will become more involved in policy," Dr Crocombe said.

"It is inevitable that they will make some of the mistakes that the colonial governments have made".

He envisaged heavy pressures being placed on the expatriate landholders.

"In the long-term, the holdings of the expatriates in this country will depend on political pressure," he said.

"It will be a strong pressure and there will have to be a lot of 'give' to this pressure.

"But, provided the Government hands back the lands that it is not using and forces the expatriates to do the same, and insists on increasing local participation in rural developments, the plantations here will survive through the '70s".

● Dr Crocombe

KENYA PROGRAM BENEFITS LAND

Kenya's revolutionary land reform program had resulted in increased productivity, greater investment in the land and increased social stability, a guest speaker said.

Mr J. K. Kinyanjui, officer in charge of the Department of Land Adjudication in Kenya, was giving a special lecture on the country's land reform program on Wednesday night.

He said Kenya's land reform had been based on the transferring of communally-owned tribal land into individually-owned properties.

Kenya was an agricultural country with little or no mineral wealth.

Therefore, great importance was attached to land development.

After independence in 1963, the process of land consolidation and registration had been introduced in Kenya as part of an overall plan to intensify agricultural development.

"Our basic policy of land tenure is quite straightforward," he said.

"The Government believes that the prime requisite for increased productivity and development generally is security of tenure.

"Without wishing to appear unduly confident there is ample evidence to show that this works.

"Individual tenure has resulted in increased productivity, a greater investment in the land, and increased social stability."

South Pacific Post

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A INTRODUCTION

1. I have decided to write this Opinion because there appear to have been some misconceptions about rights to timber resources, fish, water, gravels, minerals, petroleum and gold. The exploitation and trading of all these resources are subject to the various legislations dealing especially with the same. These legislation are:

- Forestry Act Ch No 216
- Forestry (Private Dealings) Act Ch No 217
- Fisheries Act Ch No 214
- Water Resources Act Ch No 205
- Land Act Ch No 185
- Land Acquisition (Development Purposes) Act Ch No 192
- Mining Act Ch No 195
- Petroleum Act Ch No 198

As rights to land are determined according to Custom I have decided also to look at Customs Recognition Act Ch No 19.

2. Many foreigners in Papua New Guinea, including lawyers have concluded that the system of property rights in Papua New Guinea are similar to those in Australia and other Commonwealth countries. Many of these foreigners have advised the Government of Papua New Guinea on one or all of these resource areas since Independence. They have on occasions (possibly unknowingly) misled the politicians of Papua New Guinea and the Ministers, so that the ultimate beneficiaries will remain foreign controlled corporations in the business of exploiting these valuable, mostly non-renewable, resources of Papua New Guineans. A Papua New Guinean friend once told me that someone ought to do a survey on the number of senior expatriate advisers to Government who have subsequently obtained employment with some of these foreign companies in other parts of the world. He believes the result may be staggering.

3. I remember having discussions with several expatriate lawyers and at least two expatriate Government advisers involved in one of these resource areas. The common response from them all to my statement that the Government of PNG has no legal rights to any "property" situated on, above or below customary land in Papua New Guinea, so that it could legally pass those rights on to foreign companies, is -

"That couldn't be so. It is stated in the Constitution that the Government owns property rights to minerals, petroleum etc."

4. It is imperative therefore that these misconceptions be laid to rest, once and for all. If my Opinion is not acceptable then perhaps it should set the basis for someone to challenge the Government in Court.

B. THE CONSTITUTION - SOVEREIGNTY

5. I have perused various sections of the Constitution in my varied capacities since its adoption in 1975. I have represented clients in Court and relied on various sections of the Constitution in the presentation of my cases. I must say that the response from the expatriate lawyers have me confounded. I have actually gone through the Constitution cover to cover several times and have yet to find a provision saying that all land in Papua New Guinea belongs to the State.

6. The only provision which makes a reference to "natural resources" is Section 2(2) of the Constitution. Maybe, it is this Section that has led to the general misunderstanding. It says -

"The sovereignty of Papua New Guinea over its territory, and over the natural resources of its territory, is and shall remain absolute, subject only to such obligations at international law as are freely accepted by Papua New Guinea in accordance with this Constitution."

7. This Section does not say that "the natural resources within the territory of Papua New Guinea shall be the property of the Independent State of Papua New Guinea." Nor could it have meant that as those schooled in International Law and Constitutional Law would say otherwise. Section 2(2) is merely declaratory of international law which is recognised in the United Nations Charter. It is declaratory of the fact that in its relations with other countries Papua New Guinea as a nation has liberty of action within its territorial boundaries and over the natural resources within those boundaries. That is to say, that no other nation can claim the right to legislate over property or to exercise sovereign jurisdiction over natural resources in Papua New Guinea.

8. Although this Section uses the word "absolute" there are certain limitations to the exercise of sovereign jurisdiction even within Papua New Guinea. These limitations are recognised at international law and I do not wish to dwell on those here, as the issues are complex and could be a subject of a separate paper - a simple example is that the diplomatic representative of another country in Papua New Guinea although required to observe the laws of Papua New Guinea , is not subject to the laws of Papua New Guinea and the place where his office is situated called "the Chancery" is inviolable.

11. I therefore contend that Section 2(2) of the Constitution does not give the Government of Papua New Guinea "property" rights over all natural resources.

C. THE CONSTITUTION - PROPERTY RIGHTS

12. Having established that there is no provision in the Constitution which states that the State has property rights over the natural resources in Papua New Guinea, the next question is, are there any provisions dealing with property rights? The answer is, yes. Section 53(1) states explicitly that possession may not be compulsorily taken of any property, and no interest in or right over property may be compulsorily acquired except by Act of Parliament. Even then the legislation may be challenged if it can be established that:

(a) the property acquired was not for a public purposes, or

(b) the reason for the acquisition is not reasonably justifiable in a democratic society, and

(c) the purpose and the reasons were not stated in the legislation, and

(d) the necessity for the acquisition does not afford a reasonable justification for the resultant hardship to any person affected.

13. Further Section 53(2) provided that just compensation must be made on just terms by the expropriating authority. By Subsection 3, payment can be deferred, or can be by instalments or can be by cash or otherwise. By Subsection 4, the taking of possession of property or the acquisition of an interest in or right over property includes, forfeiture, or the extinction or determination of any right or interest to property. This Section only applies to property rights of citizens as Subsection 7 thereof provides that the property of non-citizens may be compulsorily taken or acquired in accordance with an Act of Parliament.

14. It is imperative that the effect of Section 53(1) is understood before we look at each individual legislation outlined above to determine whether or not these legislations or certain of their provisions are constitutional or otherwise. By constitutional, I mean, whether or not they do comply with Section 53(1) of the Constitution.

15. Leaving aside the question of the public purpose and reasons for the acquisition, the important part of Section 53(1) is twofold, as follows:-

(a) possession may not be compulsorily taken of any property, and

(b) no interest in or right over property may be compulsorily acquired.

16. What do they mean? The first part deals with actual physical possession of tangible property (something you can physically touch) e.g.. cars, houses, animals or defined piece of real estate. The second part deals with property rights or interests, the intangible property (something you cannot touch physically) which cannot be physically taken. Thus the use of the words "taken" and "acquired". In one instance, you can take physical possession of a property. In another, you can't take property, e.g. a percentage interest in a Prospecting Authority or a petroleum Prospecting Licence.

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AUTHOR'S FOREWARD

IN MY speech at the Law Society lunch to commemorate the opening of the 1988 legal year, I said that lawyers in this country must be seen to be dynamically involved in nation building and must be heard on matters involving the "government " of this nation. For it is only through dialogue and open forum discussions that a "consensus" could be reached for the benefits of all Papua New Guineans.

The following opinion is mine and mine alone. It has not been tested in a Court of Law. The question of ownership is dear to the hearts of Papua New Guineans. Those of us who are educated must protect these rights. We must not be accused by future generations of being imbeciles, unable to protect what is rightfully theirs. We must not be like the Canadian or American Indians or the Australian Aboriginals. Our rights are protected under the Constitution. Let us uphold them, not allow them to be confisicated for the benefits of non-citizens. What I have written will shock both the government and the private sector . My conscience however is clear. It is for the good of Papua New Guinea and the future generations.

Those in the private sector who are truly genuine in assisting Papua New Guinea to develop will stay on and attempt to arrive at an amicable solution with the landowners. Those who are bent on making a quick return will not bother to continue. It is the latter group who will attempt to "black list" the country internationally. To those in government, I say, so what, your role under the present constitutional scheme of events is to protect the nation's wealth so that future generations may also become beneficiaries of your actions.

I pledge this paper to the memory of my ancestors who protect the resoures in order to pass them on to me and to the future generations who no doubt will sit in judgement over our actions.

THE AUTHOR

PETER DICKSON DONIGI is a partner in the law firm of Warner Shand Wilson Donigi Reiner. He is currently the President of the Law Society and the Senior Vice President of the Port Moresby Rugby Football League Inc. He has held various positions in the public service before joining the private sector in 1981.

The views contained in this Memorandum of Opinion are personal and do not reflect that of the partners of Warner Shand Wilson Donigi Reiner.

The firm however continues to support the freedom to hold opinions and the publication of the same in the interests of "good government" of the country.

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ty" can be either tangible or intangible. Section 53(1) in effect explains the difference between the two (as above). Property however is that which belongs to a person exclusively of others, and can be the subject of bargain or sale.

D. ADOPTION OF PRE-INDEPENDENCE LAWS

18. Schedule 2 of the Constitution provides for adoption of certain pre-independence laws. It allows for recognition and adoption of the customary laws of Papua New Guinea, the principles and the rules of the Common Law and equity as they exist in England on 16th September 1975, the development of the underlying laws of Papua New Guinea by the National Judicial System, the adoption of certain pre-Independence Status or Acts of Parliament (of House of Assembly, Australia and England), the doctrines of judicial precedent, and the creation of the Law Reform Commission.

19. Schedule 2.1 of the Constitution which deals with the adoption of custom provided that custom is adopted and is to be enforced as part of the underlying law of Papua New Guinea to the extent that it is not inconsistent with a Constitutional law, a Statue or repugnant to general principles of humanity. I believe any customary law which provides that the landowners rights to land includes anything on, in or under the land (including the subsoil of the land) would be consistent with the intent of Section 53(1) of the Constitution.

20. Schedule 2.2 adopted the Common Law of England as at Independence day only to the extent that -

(a) they are consistent with a Constitutional law or a statue; or

(b) they are not inapplicable or inappropriate to the circumstances of the Country from time to time ; or

(c) in their application to any particular matter they are inconsistent with custom.

21. In so far as property rights are concerned, any Common Law of England which vests rights to gold, silver and petroleum to the Crown (the State?) would be inconsistent with the intention of Section 53(1) of the Constitution and with custom.

22. Schedule 2.6(2) provided that -

"Subject to any Constitutional Law, all pre-Independence laws are, by virtue of this Section, adopted as Acts of the Parliament ... and applied to the extent to which they applied ... immediately before Independence Day...."

I contend that those pre-Independence Legislations were adopted only in so far as they are not inconsistent with any Constitutional Law. This is so because Schedule 2.7(1), also says that such a law"... takes effect subject to ... the Constitutional Laws." Accordingly, any provisions of a pre-Independence legislation which vests property rights in the Crown or the State will cease to take effect as at 16 September 1975, because it would be contrary to the intent of Section 53(1) of the Constitution.

23. The above is relevant when we discuss the operations of certain provisions in the Mining and Petroleum Legislations, which vested property rights in gold, minerals, petroleum and helium to the State.

E. WATER RESOURCES ACT CH NO 205

24. This legislation was specifically passed by Parliament to provide for the protection of water and to provide for its management. It considers water to be a national resource. By Section 5(1), the right to the use, flow and control of water is vested in the State. This right however is subject to the customary rights to the use of water by citizens resident in the area in which the customary rights are exercised (Section 5(2).

25. The scheme envisaged therefore by Section 5 is that the State can use water in conjunction with the customary land owners. It recognises the rights of land owners to the use of water. For the purposes of Section 53(1) of the Constitution, the vesting of the right to use and control water in the state, amounts to compulsory acquisition of the interests in or right over water.

26. Section 6 of the Act outlines works which could be undertaken by the officers of the Water Resources Board. These works were declared to be for public purposes for the purpose of Section 53(1) of the Constitution and the Land Act. They are:

(a) the conducting of official investigations into water resources;

(b) the construction of works for the use, flow or control of water;

(c) the construction of works for the generation of hydro-electric power;

(d) the conveyance of water or electricity;

(e) the accommodation of officers, agents, and employees of a permit holder and in connection with the above, and

(f) the disposal of waste materials from operations connected with the above purposes.

27. The effect of Section 6 is that the Water Resources Board can take possession compulsorily of any land for the purposes stated above subject however to payment of compensation to the customary land owners. Section 6 of the Act, therefore legitimises the compulsory acquisition process so as to comply with Section 53(1) of the Constitution. The actual acquisition of the land however will have to be done in accordance with the provisions of the Land Act.

28. The necessary implication of the Act is that, the State is the only authority that can authorise the conduct of investigations as to the use, flow and control of water; construct waterworks for the use, flow or control of water, construct facilities for the generation of hydro electric power etc. Is this correct? In my view, such is not the case.

29, In my view, the customary landowners can enter into any contracts with a constructing firm to investigate and construct water works on their own customary land. They can even sell the resource to residents living in the area. I cannot find a provision in the Water Resources Act which prohibits the customary landowners to use their land to carry out works which are within the ambit of the Water Resources Board. Accordingly, I conclude that customary landowners need not apply to the Director of Water Resources for a permit to investigate or construct works in relation to the use, flow or control of water on their land.

30. The Water Resources Act is distinguishable from the Mining Act and the Petroleum Act. Under the Water Resources Act, the works specified in Section 6, are to be carried out by the Water Resources Board or the Electricity Commission, both Government Instrumentalities. The Mining and the petroleum legislations however authorise the Minister responsible to grant licences of authority to their parties to undertake the activities specified in those legislations as being for public purpose. This distinction is important as you will realise when I discuss those legislations.

F. LAND ACT CH NO 185

31. We have now seen that under the Water Resources Act construction works cannot be undertaken on customary or private land without the the process of compulsory acquisition of rights to land initially and subsequently physically. Whilst that legislation authorises such compulsory acquisition process, the mechanics of land acquisition is governed by the provisions of the Land Act.

32. It should first be noted that the Land Act only applies to land other than customary land which is about 3 per cent of the land mass of Papua New Guinea. This is by virtue of Section 4(1) of the Act which states:

"All land in the country other than customary land is the property of the State subject to any estates, rights, titles, or interests in force under any law."

Subsection (2) thereof provides that all estate, right, title and interest other than customary rights in land at any time held by a person are held under the State. "Customary rights" is defined as "rights of a proprietary or possessory kind in relation to land that arise from and are regulated by custom."

33. Proprietary rights can simply be defined as rights to property or rights of ownership. Possessory rights are rights to possession of the land. 'Possession' is not easily defined in law. It is normally defined in terms of the thing possessed. As being in possession of a house may not be the same as being in possession of a wrist watch. Nevertheless for the purpose of the exercise, I prefer the definition by Professor Salmond, which is -

"The continuing exercise of a claim to the exclusive use of a material object."

Possession in effect, has two elements:

(a) the material object to be possessed, and

(b) the intention to appropriate to oneself the exclusive use of the material object.

34. Accordingly, when the Act refers to customary land, it means land which is subject to proprietary or possessory ownership and that ownership arises from or is regulated by custom. Since time immemorial, tribal warfare in Papua New Guinea, was and are started and fought to the bitter end over two (2) things - land and women. It therefore cannot be said that any landowning group in Papua New Guinea has possession of any land but has no intention to appropriate itself to the exclusive use of the land. There are of course usuary rights granted by the landowning group to another group - this is part and parcel of village society, but this does not mean that the landowning group had dispossessed itself of the land.

35. I have concentrated on the explanation of various definitions because they will become useful later when we consider how other legislations are drafted to make use of the provisions in the Land Act. As we have seen in Water Resources Act, the acquisition of land to further the purposes of that Act have to be done through the Land Act.

36. Acquisition of land under the Land Act is done either by agreement between the Government and the customary landowners or by compulsory process. I believe it is Government policy that wherever possible, the Government prefers to acquire customary land by agreement rather than by compulsory process. The Land Act then sets out the procedures for determining the landowners and who could sign the documents transferring the land to the State.

37. Compulsory acquisition of land under the Land Act can only be effected for a public purpose. The legislation defined 24 purposes which are deemed to be public purposes. It is not necessary to specify them here; suffice it to say, that the Minister for Lands cannot acquire land for purposes other than those specified in the legislation. You will note by now that the Water Resources Act merely declared certain activities as activities to be undertaken by the Water Resources Board for public purpose. Accordingly in addition to the purposes specified under the Land Act, the Minister for Lands can also compulsorily acquire land for any public purpose specified in other legislations including Water Resources Act.

Continued next week

Productivity and Land Tenure in Some Areas of Papua-New Guinea

David P. Elliott

I Productivity, Resource Inputs and Land Tenure

Productivity, defined as efficiency, is useful output per unit of useful input. In this paper, that is crops or livestock produced per unit of land. However, capital and labor inputs must also be considered. In the Erap area, the land considered was originally used infrequently for subsistence agriculture. The Erap Mechanical Farming Projedt (#1) began using a tractor and farm laborers for commercial production of sweet potatoes. The increased use of capital and labor, greatly increased the productivity. It is not possible to compare productivity in the former time with that in the latter time, without also considering capital and labor inputs.

Similarly, it is important to note that in comparing the productivities of two areas, the capital and labor inputs of the one area must also be compared to the capital and labor inputs of the other area. This is difficult because some very small implements have had a great effect on productivity, for example the steel axe. "Salisbury has estimated that the implement (the axe) reduced by one-third the amount of time spent on subsistence activities by men in a subsistence economy..." (#8,6). The implication here for the productivity of land, is that the time or labor freed is available for cash cropping, which in turn increases the productivity of the land held.

Land tenure is important for the productivity of a unit of land, because the tenurial system sets limits on the size of the operation. Size of operation affects productivity by what are called "economies of scale". At Erap, it was not possible to have a tractor on a small farm, nor was it possible to employ farm laborers on a small farm.

In technical terms, the product that the capital or labor would add is not sufficient to command its use from alternative employment. That is, the extra sweet potatoes produced by using a tractor, multiplied by the price of sweet potatoes, is not sufficient to cover the cost of a tractor. The same could be said of employing farm laborers on a small farm. But, on the Mechanical Farming Project, with greater size the contributions to product that are made by the tractor, are sufficient to cover the cost of the tractor. This is so because the tractor formerly had excess capacity, or was unused much of the time. In the latter case, with greater size, the tractor can be used more and make greater contributions, thus covering its cost. By using the tractor, productivity per unit of land is increased by the contribution that the tractor makes to the unit of land. The same can be said of employing farm laborers.

The question still remains of how to get the money to buy a tractor, or in general the problem of capital accumulation or capital formation. Land tenure is important in capital accumulation. The tenurial system must allow cash cropping or time away from subsistence for outside paid employment. With the "money in hand", the people then had the choice of consumption or investment, which may be defined as foregoing present consumption for future greater consumption afforded by returns on the investment. Capital formation at Erap mostly followed this course. Another method of acquiring capital also used, was borrowing, or using another's capital with the obligation of returning greater capital in the future, but in the end having some retained earnings from the use of the capital.

Land tenure is affected by technological change. At the Erap Project, the land must be fallowed for several years after use, to

restore fertility. To maintain size of operation, there is now an acute for more land because of the need to fallow some of the land being used. By using the new technique of commercial fertilizer, all the land held could be used. With the use of fertilizer, there would be sufficient land held and perhaps even a surplus of land which could be reallocated to another group or for another use. Technological change is thus an important influence on the allocation of rights in land. Where presently the Erap Project is endeavoring to acquire rights to more land, after using fertilizer they could be offering rights in some land to other individuals.

The classical economist, David Ricardo, maintained that the fixed quantity of land would eventually limit development in the United States. However, as technology has advance, more food has been grown on less land, and now there is a surplus of agricultural land beyond requirements for U.S. consumption. The importance for land tenure is that technological advances have changed the tenurial system from what Ricardo saw as agricultural land holdings, to the present varied industrial holdings. Technological change can be expected to exert a similar influence in Papua-New Guinea. The new miracle rice (IR-5 and IR-8) which yields five to seven times normal yields, and the new miracle wheat, could have similar influence on land tenure in South-East Asia and India, after their introduction.

Copra production at the M'buke Cooperative Plantation (#7) does not seem to be greatly affected by economies of scale. Experienced management and skilled supervisors have helped produce high quality copra (#7,17), which receives a slightly higher price. Inept drying could have resulted in a poorer grade a lower price. But, it is not certain just what quality would have been produced without the management and skilled labor. Rather, the importance of the

M'buke Cooperative is that it provided the psychological incentive to produce copra. This could have been through the prestige associated with belonging or because of the income derived. Of special interest is the accepted norm that the group should work for 3-4 months and then a new group is formed. This gives the first group time off for travel, building houses, making canoes and other things. (#7,13-14) Whatever the psychological explanation, it is doubtful whether any copra would be produced if the Cooperative were disbanded. (#7,37) This is so even though the returns to the worker for producing copra would be approximately the same whether working in the Cooperative or alone. Thus, the presence or absence of the institution determines the presence or absence of productivity. For land tenure, the presence or absence of the Cooperative determines whether there shall be active or residual coconut gathering rights and by whom. This illustrates the importance of an institution for productivity and for land tenure.

Rubber production in the Kerema Bay Area (#5), has few if any economies of scale. The rubber trees per unit of land yield the same amount of latex regardless of the size of the operation. However, the smallholding was found to be psychologically more attractive to the laborers than the group collection where distribution of income was a source of dissension. Thus, the form of tenure affects labor used and in turn, productivity.

Coffee productivity is affected by economies of scale. Coffee prices vary widely with different quality. The contribution of skilled management and the specialization of labor is therefore highly valued. Since alternative employment on large scale operations is available, the cost of the labor is high. This necessitates large size of operation so that the contributions can cover the cost. This is especially important in coffee production, since if the coffee is

below a certain quality, the buyers will refuse to buy it at any price. In the Orokaiva area discussed below, the government agricultural officer was important in advising smallholders on coffee production.

It should not be assumed that all enterprise innovations or technological changes will nesessarily improve productivity. The Wain people (#8) could increase productivity by raising cattle on some unused land. But, to have cattle on all land in the village of Gaimren, would provide a reasonable income for only one family by white Australian standards. The land presently provides a subsistence standard for 30 Wain families. (#8,65) Most likely, the income from cattle would not provide a standard of living equivalent to subsistence.

A study of four Orokaiva entrepeneurs (#16) showed that all prefered to establish cash crops on unoccupied bush land. "Each stated that the reason was to avoid claims by kin to their land, produce or income."(#16,6) This tenurial form increases the productivity of the region. In addition by maintaining ties to the village labor can be recruited for employment on the land. This shows the economic incentive for individualization of land holdings. At the same time there is an ambivalence toward independence due to labor needs.

II Orokaiva Land Tenure and Productivity

There are some economic differences within the Orokaiva area. However, there appears to be sufficiently homogeneous conditions to make some useful comparisons.

In the customary tenurial system, land rights were concentrated at the sub-clan and individual levels. (#2,33;#11,37-38;#17,4;#11,97) The parcels of land in which an individual had rights, were generally

spread around the tribal area. Rights to extend in back of the garden area were recognized and were important in the system of shifting agriculture, where shifting garden area is necessary to maintain fertility and maximize yields. Communal clearing of bush was done, but planting was a household task. (#17,2-4) Inter-village coffee gardens and village rubber blocks were tried, but ended up in low productivity due to disputes. (#11,84;91-92) This parallels other communal enterprise failures among the Orokaiva (#4). Land was used for subsistence gardens. Some livestock was raised and products from trees used, as well as products from hunting fishing and foraging (#2,#11). In addition small quantities of rubber and coffee were produced. (#2,30;#11,86,93)

Under the Government Ordinances (#17,4) three alternatives were offered: customary tenure, communally owned land or individually registered title. (#17,4) There were certain incentives to convert tenure to individual registered title. They are given as: benefits of consolidating holdings, security of title to allow long term cash crops and desire to "live like Europeans". (#17,17-19)

The new land system converted 800 acres into 40, 20-acre blocks. Each individual taking part then claimed a single block. "Since the conversion the blockholders have each planted an average of three and a half acres of high yielding rubber and some have cleared a further two or three acres in preparation for further planting. Most households are interplanting their food crops with the rubber seedlings as they say it saves time and effort if all crops are on one plot instead of scattered as before conversion." (#17,21) This exemplifies a vital fact that with the change in tenure, there is a very significant change in productivity.

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THE REGISTRATION OF NATIVE LAND IN THE TERRITORY OF PAPUA AND NEW GUINEA

INTRODUCTION

In its recent report the Mission from the International Bank of Reconstruction and Development referred to the slow progress which had been made by the Native Land Commission in inquiring into and recording rights to land according to native custom, and drew the conclusion that little progress would be made in implementing the Mission's recommendations for agricultural development, if administrative assistance to natives for the planting of cash crops or for cattle raising was to be limited to natives with lands, for which title had been recorded.

In this paper I am examining the reasons for this slow progress with the object of establishing that progress was much slower than it need have been, largely because the Commission was hampered in its work by other duties, was inadequately staffed, and was given a task that was quite beyond any possibility of completion within a reasonable time.

The Native Land Commission was established in 1952: but the first proposals for native land registration appear to have been made about 1950 in connection with the search for suitable land for settlement. In that year the Minister for External Territories, Mr Spender, raised the subject in a speech to the House of Representatives at Canberra on 5th January. He said "the present procedures for obtaining land in the territories and the machinery for the administration of the laws of the Territory will be overhauled with a view to facilitating the taking up of land by people who wish to settle in the Territories. Land in the Territories belongs to the native inhabitants who may only dispose of it when the administration officials are satisfied that the disposal of it will not be detrimental to the interests of the natives. It is proposed to carry out an investigation of the land holdings of the natives with a view to determining what future areas could be made available for non-native development without injury to the natives".

This proposal developed into a plan for land registration and in 1951 the first Native Land Registration Ordinance 1951 was passed, but not brought into operation. It was replaced by an almost identical ordinance, the Native Land Registration Ordinance, 1952, which came into force in that year, together with the Native Land Registration Regulations and the Native Land Commission Rules. The Native Land Commission was then set up, the Chief Commissioner starting work in July, 1952.

Progress towards the registration of native land under the Ordinance was very slow. In fact, although many claims for the ownership of native land were investigated and orders made, none of those orders were followed by the registration of titles. The reasons for this are not clear, but eventually it was decided to give up the attempt to get all native land registered and instead to concentrate on the conversion of title from native customary tenure to individual registered titles in areas where indigenes, who had rights to land, wished to plant commercial crops. The Commission was also to continue with its other tasks of settling disputes and inquiring into ownership of land in connection with compulsory acquisition or claims by the Administration to vacant land.

In accordance with this change of policy the Native Land Registration Ordinance was repealed in 1963. It was replaced by the Land Titles Commission Ordinance 1962, which followed the Native Land Registration Ordinance in providing means for deciding claims and settling disputes and provision for more systematic adjudication of title, but did not deal very specifically with registration. This was dealt with by the Land (Tenure Conversion) Ordinance 1963, which provided for the conversion of title from native tenure to individual tenure and registration after conversion, and by the Lands Registration (Communally-owned Land) Ordinance 1962, which provided for a very limited form of registration for the titles to native land, for which conversion of tenure was not desired. These two Ordinances did not come into operation until the 3rd December, 1964.

METHODS OF REGISTRATION

Although the Commission started on the registration of native land in 1952, no titles for native land had been registered before the repeal of the Native Land Registration Ordinance in 1963, nor had any been registered under the Lands Registration (Communally-owned Land) Ordinance by January 1965.

The Commission, however, had concentrated on the preliminary work, inquiring into claims and disputes, demarcating and surveying land, and making adjudications. Details of the progress made in this preliminary work are not available, but it is said to have been very slow. Even if figures of claims and disputes settled or orders made were available, this would not provide much of an indication of progress, as the amount of work involved in settling claims would vary very considerably between claim and claim.

A disputed claim involving two clans over a common boundary might involve inquiries and surveys taking months to complete and necessitate evidence from numerous witnesses. Only five disputes, for instance, are said to have been settled in three years prior to 1963 in the Northern District of Papua and must, therefore, have been disputes of this nature. On the other hand, disputes between two individuals should usually be settled well within a day.

It is not difficult to see why the progress in registration under the Native Land Registration Ordinance was so slow. The reason was primarily that the Ordinance did not merely provide machinery for the registration of native land, but it also gave exclusive jurisdiction to the Native Land Commission to hear disputes over land. Whether this was the intention when the Ordinance was drafted and passed, is not clear: but the Appeal Court in 1952 in the Appeal Bumin alias Levin of Lemankoa (appellant) v Havini of Lemamanu (respondent) decided that the Commission had this exclusive jurisdiction and that this removed land disputes from the jurisdiction of the Courts of Native Affairs.

The effect of this decision was to impose work on the Commission, which had hitherto been dealt with by the much larger staff of the Native Courts, and also to give the Commission two incompatible functions to perform, that of a special tribunal set up to hear all disputes over land, as they occurred, and that of investigating all claims to land, disputed or undisputed, and adjudicating on them as the first stage in registration.

These two functions are incompatible because they necessitate different forms of organisation. For the land tribunal work it is essential that disputes should be settled as quickly as possible. This is especially so, when disputes, with which the Commission has to deal, are disputes between tribes or clans or other groups, which would have been settled by war in the past and which even now are likely to lead to fighting, if not settled. This means that this side of the work of the Commission has to be organised in order of time, priority being given to disputes which may lead to trouble: and it also means that the Commissioners and their staff have to be continuously travelling round their districts either in circuit or making special expeditions to try urgent cases. If hearing disputes in this way is to be combined with registration, registration is sporadic and slow.

Registration work, on the other hand, is done most efficiently and expeditiously, if it is done in order of place, systematically and continuously. Registration starts in an area and deals with all the holdings in that area, including all interests in land, even although the parties concerned may have failed to apply for registration. When the first area is finished, the registering team moves on to the next one, preferably to an adjacent area, dealing with it in the same systematic fashion, and in this way works through the country, village by village, tribe by tribe, district by district. This order of working is necessary not merely to save the team from wasting time and effort in unnecessary travel, but also because the success of the operation depends largely on the co-operation

of the prople of each area, and this is easiest to arrange, if all the land and all the owners in one area are dealt with at the same time.

It is also necessary because the settlement of the boundaries and title of any holding contributes towards the settlement of the boundaries and titles of the neighbouring holdings. Consequently it is far easier to deal with a group of holdings, if they are all dealt with at one time than if they are dealt with individually, as and when their owners apply for registration or disputes over ownership occur.

It can be seen therefore, that in arranging their work the Commissioners have always had to decide between settling as many disputes as possible, as quickly as possible, combining this with sporadic registration, or preventing disputes arising by doing as much registration work as possible, working to a regular programme of registration and postponing the settlement of disputes outside the area of registration, wherever possible. As there have been so many urgent disputes, they can have had little choice and must have found it difficult to do registration at all systematically. It is not surprising that in these circumstances registration has not progressed as it should.

A second difference in working arrangements between a land tribunal and a land registration team arises, because the former has to deal almost entirely with disputed claims, where the latter deals with all claims, disputed or not, of which disputed claims are likely to be only a small proportion. It is difficult to estimate how long disputed claims, which are usually troublesome, will take to settle, and it is, therefore, difficult for a tribunal, hearing disputed cases, to keep to a programme.

On the other hand, it is very necessary for a registering team to keep to a programme when engaged in systematic registration, and it is, therefore, desirable to do as much as

possible to reduce the time spent on disputes. To a certain extent the adoption of the device of the possessory or presumptive title may reduce the number of disputes during the registration programme. Such titles are not final and only become conclusive with the lapse of a period of years: and, therefore, it is not necessary to be too meticulour in searching out claims and giving long periods of notice, as genuine claimants will still have time to make claims later. Presumptive titles were provided for in Section 24 of the Native Land Registration Ordinance, and titles become conclusive five years after registration, if not challenged, but this provision has not been carried forward to the Land Titles Commission Ordinance. This device also makes it easier to accept claims from claimants claiming on the grounds of occupation only.

Inter-community disputes are particularly difficult to fit into a plan of systematic registration dealing mainly with individual holdings. This is primarily because they must take considerably longer to settle than disputes between individuals. More people are involved as parties, more witnesses have to be called, and the boundaries to be demarcated and surveyed are much more lengthy than those of individual holdings and therefore more difficult to deal with. To make arrangements has also probably been more difficult as Patrol Officers and other Officers are usually brought in to represent the two sides, and have to be released from their normal work for investigations and hearings, which may be extremely lengthy. Special arrangements, therefore, probably require to be made for hearing such cases and this might well have inhibited the hearing of individual cases.

If special arrangements are made, the method of handling these disputes may require reconsideration. According to Section 8 of the Native Land Registration Ordinance, the Commission had to inquire into claims and determine what land in each district was the rightful and hereditary property of natives or native communities by <u>native customary right</u>, and now under Section 15 of the Land Titles Commission Ordinance the Commission

has exclusive jurisdiction to hear and determine all disputes concerning to the ownership by <u>native customs</u> of any land. This leaves no doubt about the law, which has to be applied between members of the same tribe or same community; but is there any common customary law to be applied, when there are disputes between autonomous communities? In the past such disputes were settled by force, but it is a method of settlement which is now obviously inapplicable.

The Commissioners cannot, therefore, have had fixed judicial principles to guide them in settling inter-community disputes. They are reported to have decided such cases in accordance with common sense principles, such as taking rivers or ridges or other natural features as boundary lines between communities or by sharing intervening land equally or in proportion to the relative populations. This subject deserves further investigation, but, if reasons of law cannot be followed in such disputes, would it not be better to cease to try to settle such cases judically with all the delays and troubles of judicial procedure, and remove such disputes from the jurisdiction of the Commission. Would they not be better settled by the District Administration so that the general interests of all the parties concerned and those of the country can be taken into account without being hampered by a search for non-existent legal reasons for decisions.

<u>STAFF</u>

If the staff required to implement a more rapid and worthwhile programme of registration is to be estimated, it is impossible to do this from existing figures of the rate at which the Commission has disposed of claims. This is because it did not distinguish between the different requirements of a Land Tribunal and Court on the one hand or of a Land Registration Organisation on the other, and because it did not use the best methods for registration. In 1964 the number of outstanding claims was given in a reply to a House of Assembly question as 1,384 and were estimated to represent two to three years work for the

conversion. These claims would have been scattered all over the districts dealt with by the Commissioners, would mostly have been disputed, and probably included a large number of inter-clan and inter-tribe disputes, which would take far more time to deal with than disputes over individual holdings. A rate of 200 to 400 claims a year may well be all that the Commission can manage, dealing with claims in this way, but it would be an extremely low figure for systematic registration.

This rate was calculated in relation to a staff in 1964 of ten Commissioner, three expatriate field officers, ten field assistants (some still in training), six labourers and twelve members of the office staff. No survey staff was attached to the Commission and very little work, if any, had been done for the Commission by the surveyors of the Department of Lands, Mines and Surveys. In addition to their staff the Commission has had to rely for help on Patrol Officers and other District staff in collecting genealogies, making investigations and surveys and for representing parties in disputes, particularly those between communities. The subsidiary staff available, which in the early years of the Commission was less than the 1964 figure, has been far from sufficient, and the Commissioners, whose work should have been mainly that of adjudication and organisation, also had to make investigations and surveys, prepare plans and do other work, which should, and could have been done by Government officers of less experience and lower qualifications.

The problem now would be to decide what proportion of the Commission's staff should be allocated to Land Tribunal work and what to the rеgistration, and then to work out the subsidiary staff required to enable tye Commissioners left for registration to concentrate on their proper duties of adjudication and organisation. They would also perhaps still need some help from District staff, but, if so, this must be made available when required, and this work must either have priority over other district work or the district staff must be supplemented so that the Commission can get help without delay.

What subsidiary staff would be required is difficult to estimate and must be found out by experience. In Malaya a team of three officers, two hearing cases daily, and a third in reserve handling office work and general organisation, required about 36 settlement officers, the equivalent of field officers or assistants, to do preliminary investigations etc. for them and also to assist 12 survey teams in their title surveys after adjudication. This team dealt with between 15,000 and 20,000 individual holdings a year. New Guinea conditions are more difficult than those met with in this Malayan scheme, but the figures perhaps indicate how many more claims for individual holdings can be dealt with if registration is systematic than if it is sporadic.

In addition to field staff a much larger office staff would be required as there would be more work coming through, and also for the preparation of the registers. It would also be necessary to provide some survey staff, as the chain and compass surveys used so far should at least be supplemented by a frame work of more accurate surveys done by qualified survgors.

ORGANISATION

The compilation of land registers and the preparations for this can be divided into a number of stages, which may be distributed between different departments and different groups of people. This necessitates careful planning and co-ordination so that the various stages are fitted together, and time and effort are not wasted, when the staff dealing with one stage cannot start their work until work on the previous stages has been completed.

In New Guinea this work has been divided between the Commission, the Department of Native Affairs, the Department of Lands, Mines and Surveys and the Registrar of Titles (the Department of Law). Until now the bulk of the responsibility and work has fallen to the Commission, assisted in their investigations from time to time by patrol officers and other District staff. This assistance has been provided by administrative arrangement, but the Department of Native Affairs under section 22 of the Native Land Registration Ordinance and under section 50 of the Land Titles Commission Ordinance has had the responsibility of providing assistance to native claimants in preparing and presenting their cases. It has also had the responsibility of serving notices on claimants and their witnesses and on other parties and of providing publicity for hearings. The Department would also have had the responsibility of inquiring into changes of ownership under the Native Land Registrations, had proceedings ever reached this stage.

The Registrar of Titles was responsible for the registration of titles to native land under the Native Land Registration Ordinance and is now responsible for the registration of titles to native land under the Native Land Registration Ordinance and is now responsible for the registration of titles to native land after conversion of title and also for the maintenance of the Registers of Communal Land: but at least until January 1965 has had no Natove Land registration to do.

The Survey branch of the Department of Lands, Mines and Surveys has done little if any work, in connection with the Registration of Native Land. It has been given no statutory duties

under the Land Titles Commission Ordinance or the Land (Tenure Conversion) Ordinance or the Lands Registration (Communally Owned Land) Ordinance, but will no doubt be required to make some surveys, when titles are issued after conversion. The Department should also provide the basic surveys, to which the chain and compass surveys of the Commission should be linked, although it is not clear how far this has been done.

If systematic registration is to be attempted, then closer co-ordination between the Commission and the other Departments would seem to be required. Registration is a continuous process, and if delays occur at any stage, this, as I have said, holds up the work at later stages and leads to waste of effort and money. It is also necessary, once the registers are prepared, for the arrangements for the registrations of dealing and other changes in title to be ready so that the registers are kept up to date.

It would seem that until now no one person or department has had the responsibility of planning and producing a functioning registration system: and this may well be another reason why registration under the Native Land Registration Ordinance made so little progress and why the attempt to register native land was given up. It does not look, for instance, as if the survey requirements of native land registration have ever been properly thought out: survey was tacked on to the registration parts of the Native Land Registration Ordinance and is not mentioned in the subsequent legislation, whereas survey should form an organic part of registration, and the chain and compass surveys and plans of the Commission cannot be adequate, if they are not properly related to the general survey of the country, and, if provision is not made for surveys to be made by qualified surveyors, when required. With the present shortage of trained surveyors it is often inevitable that accurate surveys cannot be made, when they are really necessary, and if any one had the duty of co-ordinating the whole operation, he would be able to work

out the survey planning with the Surveyor General so as to minimise any trouble that might arise from inadequate surveys, not merely during the registration process but also later, when the registration system was in operation.

In the same way this co-ordinating authority would be responsible for planning the registration system. Investigation and adjudication have been in progress since 1952: much information has been collected, boundaries demarcated and many others made. The value of much of this work will have been lost because it has not been followed up by registration and accurate survey. If registers are stated now, the results of the old inquiries will have to be brought up to date, as registers which are not up to date cannot be used: and boundaries may not be easy to locate again for accurate survey.

It seems likely that because there has been no overall authority that these points have been forgotten and that the value of completed registration has been lost sight of, because of the division of responsibility between so many people and departments.

CONCLUSION

For the reasons just given the slow progress of the native land registration operation is due to the inability of the Commission, as a result of the tasks imposed on it, to apply the methods suited to large scale registration, and also to the inadequate staff and inappropriate organization for such a task.

These are defects, which can be put right and if they are put right and the present policy of government, which is to go slow on registration, revised, progress can be far more rapid and can produce tangible and worth while results.

At this point, however, the aims of registration should be reconsidered. There seems to have been some vagueness about these initially. In the beginning the only objective given was that of finding land for settlement after presumably locating all the land not available for this purpose in the registration process, and later on, when it was decided to abandon the attempt to register native land other than through conversion and the natural registration of communal land, the Minister for the Territories spoke as if the original aim had been to get the lands of the whole territory registered, saying rightly that it would take generations before this could be done.

If this was the original aim, it was, however, quite unrealistic, even had other methods been followed and were staff made available. Moreover, registration of land in the more isolated parts of the Territory has no immediate importance. Had realistic objectives been adopted in the first place, and areas chosen in which to complete registration in a definite time (i.e. areas, in which registration would help development, reduce tribal disputes, or produce other advantages,) it would have been possible to check progress against attainable targets.

Completion of registration in the Gazelle Peninsula, in say, four years would have been a reasonable target to start with and from the progress made towards it, it would have been possible to work out what the requirements would be for other areas. It would still be of advantage to fix a target for the

completion of registration in the Gazelle Peninsula as so much work has already been done there; if the work were to be continued as far as registration of title, and registration of dealings started, it should demonstrate the value of registration and make it easier to estimate how far it would be worth while proceeding with registration in other areas.

In reconsidering plans for registration, attention should be paid to all the advantages of registration, both for government and for the people. At the moment the main official reasons for going on with action under the Land Titles Ordinance are that it can be used to provide progressive cultivatárs, after conversion of title, with a more satisfactory form of tenure, and that it will help discover unclaimed land, which can be then used for resettlement and other purposes.

Throughout the argument for registration, the most important reason, that it provides security of tenure, seems largely to have been ignored. Insecurity is not really a feature of most customary tenures, and in New Guinea it seems to be largely the result of inter-tribal or inter-clan quarrels or arises because ownership is uncertain (which it could not be, if registration were provided). It is possible, therefore, that registration might remove most of the reason for the cumbrous procedure of concersion. At any rate, if registration takes place in any of the areas were cash crops are being grown, it should be possible to see whether this assists the spread of cash cropping or whether there are still other reasons which inhibit this.

Security of tenure is one objective. Another is that of improving the supply of land for cash cropping, house building, or commercial and industrial purposes. If land registers are set up and satisfactory provision made for registration of dealings, a market in land should develop. Initially this might be for dealings within clans or sub-clans, but in due course dealings should develop between members of different clans or tribes or between people from different parts of the

Territory. Already there is a demand for land for houses in the vicinity of towns like Port Moresby and Rabaul from immigrants from outside; and this demand cannot be satisfied because there is no machinery for purchasing land from local owners and obtaining a secure title for this. In such areas, where most preliminary work for negotiations has been done, the completion of registration would be an easily obtained objective and be justified by obvious and worthwhile results. In such cases other advantages would accrue from registration, as the registers could be used for local government rating or to facilitate the extension of town planning.

With objectives such as these, realistic plans for land registration can be made, and substantial progress in work of registration should be achieved.

Modern Mining and Melanesian Society.
T. Miriung, M. Togolo, J. Dove

INTRODUCTION

The development of Bougainville Copper remains as one of the greatest colonial legacies of this country. The way land resumption took place - a woman grappling with the police, the teargassing of the mass of people, police poised above the ground to watch the demarcation pegs - will always be poignant reminders to what happened behind the so-called negotiations between the people and the administration. What it failed to achieve through peaceful means, it determined to achieve through a resort to force. It is almost difficult to rationalise that, in an age of democracy, decolonization and advanced technology, an administration could resort to crude forms of demands from simple, defenceless people whose very livelihood was at stake.

The administration's actions gave a lie to its role as a protector of the rights and interests of the indigenous people. It was all too clear that economic expediency was uppermost in the administration's thinking; the welfare of the people was to be accorded a token consideration. Among a people who make decisions through discussion and concensus, the administration was using dictates unknown to their reasoning. To those who love peace and harmony and who prefer orderly and peaceful development, the administration seemed a merciless intruder into the lives of the people. It aroused bitterness, apprehension and disorder. Any approaches to development not conducive to human development and economic development (that is, improving the welfare of the people) should be discouraged in this country.

This paper is prepared to bring to the readers the views of the indigenous people regarding the land resumption for the copper project. The administration could not have thought the people so stubborn, ignorant and irrational in their stand, had it prepared them adequately to understand the situation before negotiations took place. Had it done so, the people would have been flexible. However, as it turned out, the process seemed nothing other than pure colonial suppression. In the following pages we discuss all matters relevant to the land resumptions from the point of view of the people.

Land Resumption - The Views of the Indigenous People

In Bougainville land is private property usually owned by a clan. The acquisition of such land must necessarily lead to long and careful negotiations and every member of the clan concerned made well aware of the whole matter. Decisions on any land is made with the consensus of the whole clan. Land is everything to our people and this can be explained from a translation of what land is and why it is most important. Our people say,

> "Land is our life. Land is our physical life - food and sustenance. Land is our social life; it is marriage; it is status; it is security; it is politics; in fact, it is our only world. When you (government) take our land, you cut away the very heart of our existence. We have little or no experience of social survival detached from the land. For us to be completely landless is a nightmare which no dollar in the pocket or dollar in the bank will allay; we are a threatened people."

When land is very important to a group of people, it is useless for a government to tell those people that it acquires land to solve a national financial problem. How can the government make a group suffer for a myth that is called a "nation". For those of us who are immediately affected, the concept of a "nation" is a myth. The land and those of us who own rights to the land should be the nation. There was no prior consultation before land was acquired even before the prospecting authority was granted to C.R.A. over the land of the Nasioi people of Panguna. Did the administration also consult the people of Rorovana before allowing C.R.A. to occupy the land - in an attempt to fulfil its commitments under the Mining (Bougainville Copper Agreement) Ordinance, the existence of which we had no knowledge whatsoever?

Our people's feeling for the land and their identification with it is something that cannot be well-expressed in literature. The western concept of land is different from that which we hold. To the westerner land is a natural resource, a factor of production and something objective and used as such. In other words, there is no intimacy between the land and the owner. Our people conceive land not only as a factor of production but something more. Our political, social and economic life depends on land. Our involvement with the land is both physical and emotional. Land-ownership has prestige attachment, not only in terms of what it is producing

or can produce but also in terms of just owning the land whether it is productive or not. Unless the western kiap understands this he is not in the position to negotiate for land. The lack of this knowledge was shown clearly by the fact that the kiaps were automatically prone to put forward blatant arguments of "economic development" and fast "economic growth", as if achieving these ends would solve the difficult land problems that were being created by them.

Land is not only so sacred that no hard cash can buy it but the people's concepts in relation to land transfer are radically different from those of the imported system of property law. Land bought by money can never constitute an out-and-out transfer of the traditional title regardless of the amount bargained for. To the people, any dealing in land which purports to annihilate their customary rights to land is unacceptable and must be opposed at all costs.

We tend too often to assume, prima facie, that economic development concerned with heavy investment is necessary for the improvement in the living standard of the people. In our country this assumption should be rigorously examined before being applied and, if applied, modifications should be made to it. We speak in particular about the type of investment alienating large areas of land from the people. It is not very easy - as it was shown in the Kieta area of Bougainville - to try and convince people to part with their land, without causing social and even psychological upsets to them.

Though hindsight thinking may not be very effective, we like to air views from the point of view of our people of what should have been done and how some problems could have been avoided quite easily. At that time the administration was a colonial power. Our people hardly understood the western land laws and their harsh implications. The administration simply took advantage of our people's ignorance on land laws. Secondly, it was negotiating from the position of superiority solely conferred by virtue of it being the only government. It assumed a contemptuous air and was not prepared to come down to the level of the people. This made communication to either side almost impossible. Because of the administration's contemptuous behaviour, the people resort to apathy and stubbornness. Thirdly, the administration employed brute force to subjugate the people and force compliance upon them. It was simply suppression, the motives behind which mystifies the imagination. Moreover, such a queer attitude was exhibited by a supposedly "liberal" administration under the patronage of a democratic government.

Behind the people's grievances were basically two complaints, both involving how the administration approached the task of land resumption. First, there was inadequate prior consultation or, more accurately, no consultations. The decision was made in Konedobu, the administrative headquarters, and was meant to be implemented quickly. "Thy will be done." The second complaint involved the question of compensation which the people regarded as crudely unfair and an injustice to them. The land, being what it is to them, unfair compensation further precipitated the already existing problems. The deals could have been salutary and the people would have been prepared to incline to a progressive attitude had the administration made a considerate approach, warning the landowners of the probable consequences to their life and property in the process of land resumption. Again and again the people wished and told the administration to delay negotiations. Many commentators say that the blame is on the administration's shoulders. We do not wish to refute this claim but to point out that the hardships faced by the people, the troubles and costs to the administration, the delays to the company and the vexatious confrontation between the three parties, the administration and the company on the one side and the people on the other were avoidable had there been more cautious approach.

It was obvious to our people that the administration's approach was not cautious; in fact, it was contemptuous of the rights they possessed as the (legal and) traditional owners of the land. A delicate approach was what was needed; however, a delicate approach was time consuming and time is money and therefore economic development must not be retarded. The administration was flagrantly dishonouring the obligation which it undertook at the beginning of the colonial phase to protect the indigenous inhabitants, their land and social milieu against the malevolent western greedy capitalistic development. This high-handed and misguided approach instigated a grave suspicion among the land owners; for this reason such an approach should be condemned as doing gross injustice to the people. If the proposed "economic development" was for the good of the people of Papua New Guinea then a certain people should not have been made a focus of injustice: in terms of unjust compensation, brutal axing away of their land, turning a deaf ear to their grievances and threatening to use force against them. More open clashes between the people and the police were avoided partly because the people restrained themselves and also due to the calibre and leadership of such people as Paul Lapun and Raphael Bele who adopted a strategy that any trouble would only have to be incited by the police. Moreover,

many of the policemen who were employed in that strange situation seemed sympathetic towards the people who were clearly putting up a just fight for their land. The administration through its network of radios lauded the police for great restraint and tact. If it conferred all the merit for the evasion of more open clashes on the police, then its implications were that the people were putting up a barbaric fight, that they were pigheaded and trouble-makers. If the administration was acting upon a principle, then the situation whereby that principle could be applied was rendered dangerous by its savage approach. That principle, no matter of what type or nature, whether it rested upon a basis of law, whether it was supported by the Australian government or whether it arose from economic contingencies, was doing something to the people by which they were aggrieved. For is it not that people based everything they did on land and is it not that deprivation of their land was tantamount to killing them? The action of the administration was an infringement of the basic moral and ethical principle. It refused to honour the people's rights as human beings and as citizens of the country by dictating to them in terms clearly unjust.

The colonial administration, in the first place, was not prepared to gauge whether the people were at all disposed to part with their land. Having failed in this objective, it put a blanket-cover over the problems implicit in the people's relationship with their land. The refusal to admit that land was valuable to the people meant ostensibly that it was trying to kill the very fabric of the indigenous society. In trying to achieve a certain end, whatever that amy be, the administration was using actions that were savage and these were used to the detriment of the people's cultures. With the moral support of the company, the administration all the time assumed that land given to the company to be used for economic development would be "good for the people." When examined closely, the so-called "benefits" oozing out from the mining development seemed very superficial. The concentration of many thousands of workers into a single area has brought home many social problems unknown to the Bougainville people. The industrial profanities were concealed from the people; all that they were told about were the "benefits" that the mining project would bring them. Life along the coastal villages, once peaceful, can never be the same again. There is even a graver problem brought about by the new way of life that cannot be easily remedied. The people are experiencing a deep psychological trauma in their efforts to formulate a definition of developments taking place around them and to structure a new set of values that seek

to embody these changes. Not all the outward strivings of the people are favourable and some even seem morally to be on the down-turn. These dilemmas are a re-creation of what has happened elsewhere where rapid development has uprooted and gravely disturbed the indigenous societies. Yet it seems that the administration refused to be guided by these examples. Men have been thrown into wage employment to the detriment of the life in the villages and their family and tribal obligations. Because life in their traditional societies was so different, the sudden release and exposure into a completely new life has sometimes had tragic conseuqneces in relation to the whole way of life.

Economic development that is foreign and takes its roots from external sources should try to uphold and protect the way of life that is local. It should try as much as possible to adapt itself to the local thinking and espouse some of the local practices. What seems to be happening in Bougainville is that a handful of people will have velvet positions and lead an affluent existence in the midst of semi-subsistence local population. The new highly privileged economic class will have little to share with the local people. With respect to real development on the rural side there is none. The nature of the mine is such that it feeds on local resources but does not stimulate development of new industries. As such it cannot promote a progressive economic development. Business expertise is concentrated to the development of new enterprises in the urban area. Expertise that could very well be used in the development of village economies is drained away in the mining project. There is no provision made to promote light village industries. In effect economic development is geared towards sustaining the relative affluence of the urban dwellers who will perhaps turn out to be the exploiters of the rural dwellers. The benefits mentioned earlier should not be construed to mean a substantial uplifting in the standard of living of the people. The village people will still live in the villages while the profits from their land is repatriated to other countries. To the villagers the position is clear that land has been compulsorily taken by the company through the government. Since the company is the immediate institution of the white man, their attitude toward it is a very irritating one. This attitude culminates to an irrefutable proof when they see the real benefits the company is extracting from their land, the social problems created by the company and the many evils arising from such development. This is economic development of the western type based on the absurd philosophy of "rat-race development." There

was little consideration given to the long term lethal effects of the mine. It is not wise to anaesthetize a real problem in the short-term because the repercussions of such a treatment may recur and perhaps in a much more detrimental form.

In respect to the use of force there has never been a more outrageous case in the history of this country of a government trying to use force against people who did not deserve such treatment. It was clearly dehumanizing to watch the administration take the liberty to subjugate and dispossess the people. There has been no more bizarre case in the history of Australian colonialism than this one. People were being thumbed and suppressed because they stood for their rights, for their values and dignity, and for the principles which they held deeply. It was not a case in which the administration was reacting against a threat to protect the public interest but rather it was the administration threatening the public welfare. Did the administration, the rubber stamp of the Australian government, have any right to intimidate the people to comply to its terms? Did the Australian government have the mandate to go against the sacred rights of the people - the rights they possess as part of their culture and tradition and a way of life to which they belonged? Did it have the right to put before the people an exploitative economic system? These were the hard facts which the administration decided to ignore.

The administration's decision was implemented by white officialdom. It was no surprise that many of them had a vague idea about the people of Bougainville and about the official policy they were implementing. Yet they put up a front to deceive the people that major decisions should be arrived at by discussion and consensus. No one has yet questioned what moral, psychological and cultural wreckage the mining development will cause. The so-called "progress" pertaining to the company is to be questioned. Is not the company basically extractive? Who will benefit most? Is it not the white men? Is it not the handful of the people working on the mining site? The company is there to feed the financial pool of the international mining megacorporations and it employs an elaborate public relations system to placate the angry voices and preserve a good face. Our people had no idea and no knowledge of why the company went to Bougainville in areas forbidden to them, and why the administration was so determined to protect the activities of the company with police escort. The people rightly saw the administration and the company as conspirators in a plot to rid them of their land. The indigenous landowners were alarmed just

as anyone would be if someone went and started clearing and felling trees in an area without the knowledge of the owner. Our people felt left out because they were called in for discussion only when there was an obvious problem. This was indeed strange when our people considered themselves as the real landowners. It was mystifying for them to feel and hear the loud voice of the administration taking many things for granted. It was even more confusing to see the company, with the use of heavy equipment, bulldoze the confiscated land areas non-discriminately.

In conclusion it must be emphasised that behind the people's complaints were two important reasons: first, they were given no prior consultation and any explanation given was inadequate and biased towards the administration. The people were told only of the "benefits" and the side effects of the mining was concealed from them. Secondly, compensation was unfair and inadequate. Seeing the large profits that is going to be accrued to the company, the claim by the people that they were unfairly compensated for is quite justified. Again two facts must be remembered - the administration was operating in a colonial situation which meant that it had the sole power which it abused by mishandling the people; secondly, the administration did not learn from its past actions and inefficiencies of handling certain matters the result of which people held it in deep suspicion. Its reliance on its misused powers on land confiscation only increased the existing gulf of suspicion and mistrust. The administration who the people thought was their "protector" disowned them by employing repressive measures to alienate land from them. Batons, shields, teargas and all the modern police paraphernalia used could have been more profitably deployed against a street revolt in some modern city and not on the edge of a palm-fringed village. It was simply a display of the strength of the administration. Again the western law was upon them, men were jailed for pulling out the demarcation pegs. Concerning land laws the people were in a dilemma which was not their creation. To the administration the land it envied was termed "crown land", which was not the case even in the foreign law. The people could not say "yes" or "no". They would lose either way. We feel it was a bad deal and we hope it does nothappen again. The administration and its co-worker, the company, have their land-mark on the Island of Bougainville.

FINAL DRAFT.

CUSTOMIZING THE LAND LAW OF PAPUA NEW GUINEA.

C.J. Lynch.

What do I mean by the obviously-invented word customizing? Put simply, I mean bringing the land law into line with general Papua New Guinea attitudes to land. Here, I draw a distinction throughout between "law" (meaning the received Anglo-Australian law) and "custom". This distinction is not strictly correct for, as will be seen, technically land custom is part of the law of Papua New Guinea, but is very much correct for practical purposes, since all land in Papua New Guinea is either "native" (*i.e.*, "custom" - regulated) land or non-native (*i.e.*, "law" - regulated) land.

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The first thing is to see how far, if at all, the land law has been customized in any sense in any field.

In strictly legal terms, of course, one might say that there is no problem. In Papua, customary rights to land were recognized in the famous Erskine proclamation of 1884 and by consistent administrative and legal policy ever since; in the Territory of New Guinea such rights were specifically recognized in Sections 9 and 10 of the *Laws Repeal and Adopting Ordinance* 1921, the first Ordinance made by the Australian Administration of what had been the Colony of German New Guinea; finally, the *Native Customs (Recognition) Ordinance* 1963 recognized land custom *as law*. Furthermore, customary rights are

determinable and enforceable through the same judicial organization as are other rights. But such an analysis ignores the obvious facts of the situation - there is customary land (technically native land - i.e., land other than land taken out of custom by alienation to the Government or by conversion to individualized legal tenure under the Land (Tenure Conversion) Ordinance 1963-1970) and non-customary land, and the rules governing each are markedly different.

A real difficulty in trying to discuss the customizing of land law is, of course, the fact that so little is known of the general rules, of significance to lawyers, relating to land - or perhaps it might be more accurate to say that a lot is known but it has never been assembled in a form and analysed in a manner that is particularly useful or meaningful to a lawyer.

Thus, in the field of the importation of customary concepts into the area already occupied by law it seems that the Roman Law doctrine that ownership of the land automatically carries with it things on and under the land has no part in popular thinking here (if, indeed, it has any real part in popular thinking anywhere), and it and other unnecessarily technical rules could quite readily be abolished - if we could be certain where the conflict with customary thinking lay.

In something of the same area, it seems that the rights of the owner of land do not in general automatically override the rights of the owner of, say, trees on the land, so that the owner of the trees may well have, in certain circumstances, a better claim to the land itself

than the owner of the land has to the trees. In other words, a dispute between the owner of the land and the owner of the trees might well be settled either by giving the trees to the owner of the land or by giving the land to the owner of the trees - in either case, of course, with compensatory payments. Incidentally, a somewhat analogous provision was formerly made by Section 27E (now repealed) of the Lands Registration Ordinance 1924-1939 of the Territory of New Guinea.

In such cases, if we knew the customary situation, it would not be difficult, as a matter of law, to bring the law into line with customary attitudes, but this may well not be the end of the matter. It would be quite possible, for instance, to provide that on the death of the owner of an Administration-leasehold property the subject land would devolve in accordance with custom in the same way as would customary land - but this might conflict with a Government economic policy in relation to the non-fragmentation of holdings, such as that enshrined in Part III. of the Land (Tenure Conversion) Ordinance 1963-1970.

At a much more fundamental level, the basic customary approach to land ownership may well be so very different from the "European" approach that we might expect different reactions to and results from much the same type of transaction. In the Gove Land Case (Milirrpum v. Nabalco Pty. Ltd. and The Commonwealth ((1970-71) 17 Federal Law Reports, p. 141 at 270-1) Mr. Justice Blackburn is reported as saying of Aboriginal attitudes to land that -

> ".... it seems easier, on the evidence, to say that the clan belongs to the land than that the land belongs to the clan".

Without wishing in any way to suggest that that unpalatable judgement forms part, or should form part, of the law of Papua New Guinea, it seems to me that Mr. Justice Blackburn was describing an attitude that prevails here just as much as in Arnhemland, and one that is totally opposed to the commodity theory of land that now generally prevails in Australia. But there is nothing peculiar to Arnhemland or to Papua New Guinea in such an attitude to land. I well remember, as a child, my grandfather's attitude being very much the same. His was one of the first white families to cross the Great Dividing Range in New South Wales and I remember his attitude as being that certain paddocks were "our" paddocks that we had sold. Admittedly, we had no legal rights to them but that did not mean that they were not still "ours", in some sense. Probably this is an almost universal attitude of people who are farmers first and sellers of commodities second - an attitude that predominantly citified and commodity-orientated administrators and experts have forgotten or never knew.

Now, what might this approach mean for the land law? It suggests strongly that there may well be in the minds of Papua New Guineans a concept of ultimate general inalienability of land (at any rate outside the social group), and that residual rights may always remain. Bearing in mind that the various meanings of the word "my" in the expression "my land" discussed by Mr. Justice Blackburn may well not be distinguished in much, if not all, traditional thinking, it could well be that many of the recent claims to Administration land in Papua New Guinea are based to a

large extent on just such an attitude. It is with some timidity that I make a suggestion contrary to the weighty legal and anthropological statements that land transactions such as those under Tolai ikulia are recognizable as the English absolute "transfer" : however, I am fortified by a personal communication by Senior Land Titles Commissioner S.S. Smith that his belief is the same as mine.

If I am correct, what does this in turn suggest for the development of our land law? Firstly, it suggests that we may be on dangerous ground from the point of view of popular acceptability if we continue to base our land law on a commodity attitude. Secondly, it suggests that the Papua New Guinea Government and the Australian Government may have to recognize this defect in land acquisitions (at least those at the relatively early stages of culture-contact) and make appropriate adjustments. Thirdly, it suggests that freehold transactions are inappropriate and that provision should be made for recognition of the continuing "very close relationship" between owners and land (Mr. Justice Blackburn's phrase). Fourthly, it suggests that certain land with a particularly close relationship with a certain group should be and be deemed always to have been inalienable, or alienable only subject to a continuing right of association in some way with the land. Fifthly, it suggests that if perpetual alienability is required for some purpose (whether it is perpetual in law or in practice) there should be some ceremonial attached to it to impress this fact on the minds of the participants and witnesses - something like the old English custom of feoffment with livery of seisin, in which the conveyance

of land was symbolically but forcefully evidenced, for instance, by the handing of a clod of earth by the vendor to the purchaser (for a brief description of this custom see Theo Ruoff, "Links with London" : 1961 Australian Law Journal, Vol.34,p.358). Lastly, it suggests that if we must use English legal precedents we ought to tend to use precedents from an age earlier than the present commercial one.

In a more fundamental way, this attitude to land suggests that the English doctrine that all land is held, under the Crown (or the Administration) is untenable here even though Section 7 of the Land Ordinance 1962-1971 applies the doctrine only to non-customary land. Indeed, except to the extent that there may be unowned land in Papua New Guinea, the legitimacy of the position of the Crown or the Administration as in a sense the owner of the basic underlying title to land must be open to question - possibly if there is no-one to whom the ownership of land can pass on death the land ought to revert to the existing customary group that last exercised rights of ownership over it: this may be a difficult concept to define in legally meaningful terms, but that is no excuse for not making the attempt.

Another Western idea that may well not apply in customary thinking, or may apply in a very different way to the way in which it applies in Australia, is the idea that there is only a limited number of kinds of interests in land that should be legally recognized, and that these in turn ought to be fettered in some manner (for

example, so that they can be granted only by deed).
There seems, to take just one example, no logical reason why what are technically known as "easements in gross" should not be created, and why certain rights can be granted as easements and others only as licences (with differing incidents). It may be said that such limitations add certainty and convenience, but let us face it - the certainty is only for the lawyers, and convenience is not necessarily visible to the outsider.

In fact, the whole of the Common Law classification of property into real property and personal property, with chattels real occupying a sort of middle position, needs thinking out again in customary terms, and may prove to be really meaningless here.

Once we start to challenge Western preconceptions as to the basis of land law, it is difficult to know where to stop. The very structure of traditional society itself dictates change. Western concepts are essentially individualistic, whereas Papua New Guinea customary ones are essentially corporate : land owned by a customary group is not owned simply by the living members of the group but by the past, present and future members at the one time. This suggests two possibilities - firstly, that since such a group already has a real corporate nature, why does not the law simply recognize it as such? secondly, that since the interests of the ancestors seem to predominate in relation to certain land, why should not this be recognized by setting aside such areas as being sacred to, or controlled by, the ancestors? Possibly we need not go as far as in India where "idols"

Problem of description

are recognized as legal persons with the right to own land (D.F. Mulla, Principles of Hindu Law, 12th Edn. Bombay, N.M. Tripathi Private Limited, 1959), but still there is no need for an alien, completely materialistic approach.[1]

If, however, we are to ask ourselves where we should stop, it seems inevitable that we must at least try to answer the question, why we ought to customize the land law. This I attempt to do in the next section of this paper.

When I ask myself, why should one want to customize our land law, what sort of answer do I get?

Firstly, certain reasons for customizing the land law are the same as those that are applicable to any body of law. There is the natural desire of any nation to have a legal system that is home-grown and adapted to national needs and aspirations, and that is not merely an import - witness the Australian move to abolish appeals to the Privy Council. More important, however, is the quite fundamental fact that the essence of viable law is acceptability combined with at least a degree of general comprehensibility. In a colonial situation, and to a limited degree even under independence, the law can be deliberately educative, but the more it fails to agree with the general idea of what is right and wrong the less likely it is to be obeyed or to last.

But these considerations apply above all to substantive land law. Land law is not like criminal law, compelling people to do or refrain from doing certain acts. Nor is it like the Western law of civil wrongs, laying down rules by which personal disputes must be

settled. It is basically descriptive and only secondarily regulatory.

In addition, there is the crucial role that land plays and always has played in the lives and social organization of the peoples of Papua New Guinea. The body of land law and custom is organic (in the sense of being a living part of everyday life) to a degree that probably no other body of law or custom attains to. This is true, I think, not only in the social and economic fields, but also in the religious, metaphysical and psychological ones. To be without one's land or land rights is more than just an economic loss - it is an important psychological trauma.[2] Probably it is in this sense that we should read the statement by Paul Lapun, now Minister for Mines, that "Land is the precious thing. Land is our life" and the other Bougainville sayings "Money goes. The land lasts forever" and "the land is like our skin", reported by Kim Beasley ("The Future of Papua New Guinea", *World Review*, Vol. II. No. 2, July 1972, p.3 at pp.7 and 5).[3]

Be that as it may, however, these divergencies between land "law" and land "custom" are far more than just differences between codes of law - they are differences between ways of, and attitudes to, life. Therefore, on the one hand the lawyer as a social engineer must be concerned to ensure that the differences are no greater and no other than are needed, and on the other in practical terms the more the land law is a distortion of the way of life the more it becomes irrelevant.

Both of these aspects - law as based on acceptance and the law as reflecting a way of life and an attitude to life-combine to produce a third practical reason for customizing the land law. If the land law is not reasonably

acceptable and does not reflect the realities of land usage, it rapidly ceases to have any but the most formal characteristics of law: it is simply ignored in favour of rules with more claim to legitimacy.

This is almost precisely what happened with the Land(Tenure Conversion) Ordinance 1963-1970, under which, by agreement of the customary owners, customary land can in theory be totally alienated from custom and vested by law in an individual. At the start, it was acclaimed as an answer to the problems of the emerging village entrepreneur and of rural village economic production. In practice, the result of ten years' work is negligible. More to the point, however, in one case that I know of (I have no reason at all to suspect that it is unique, but rather the reverse) the people officially agreeing to a conversion to a title held in the name of one man made it unofficially quite clear that while they appreciated the "legal" position the "real" position would continue to be as before, with the traditional controls remaining unaffected. What sort of tenure conversion was that?

The real point of all this, and a real justification for customizing, is that in fundamentals society moulds the law and not vice versa -- to change the law you first change society.

None of this, of course, means that the custom by reference to which we might customize the land law should be the custom of 100 years ago, or of 50 years ago, or of first foreign contact, or of the present. There must be room for new development in response to new needs, and in fact there must be such development. But what is

needed is the development of a known theme - not the imposition of an alien one which natural forces will inevitably twist into a form unimagined by the original imposer. English legal history alone offers numerous examples of laws that worked in their time and are closer (because of the simple logic of land use) to our own practices. Let us look at some examples, starting in each case with an example of the usual sort of dogmatic statement against customizing.

We must have certainty of tenure, which involves registration, which is impracticable with traditional tenures and shifting cultivation. Is it? To this day there remain in England, admittedly in vestigial form, patterns of shifting cultivation in which the fee simple (I use the technical expression advisedly) changes its physical position from year to year but is still registrable (see Theo Ruoff, "Links with London": (1961) Australian Law Journal Vol. 34, p.539). In any event, shifting cultivation occurs within a group-ownership pattern, and if the individual ownership is not registrable, why should not the group ownership be?

For economic production we need individualized tenure, which is incompatible with traditional tenure. Is it? The English economy seems to survive with a doctrine of the Crown as the basic owner; with perpetual or long-term leases, perhaps at a pepper-corn rental (i.e., a rental that is primarily only a recognition of residual ownership); with a system of impersonalized communal tenure by corporations. I leave out of account the fact that a very large part of the world seems to get along very well indeed - as far as the land law and economic production are concerned -