THE REGISTRATION OF CUSTOMARY LAND IN PAPUA NEW GUINEA

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This Article was delivered as a paper at the Seventh Waigani Seminar in 1973 on "Law and Development in Melanesia". Since then important developments have taken place.

The Commission of Inquiry into Land Matters published its Report in October, 1973 proposing a thoroughgoing reform of the land law of Papua New Guinea. A particular feature of the Report is its cautious and selective approach to land registration, and its emphasis on group titles as opposed to individual titles. The Land Acquisitions Act 1973, the Land Groups Act 1974, the Land Redistribution Act 1974, the Land Trespass Act 1974 and the Land Disputes Settlement Act 1975 have been enacted to give effect to some of the Report's recommendations. The recommendations on land registration have not as yet, been enacted. However, the Land Titles Commission has in practice, though not in theory, largely ceased to function.

The other important change has been that appeals to the High Court of Australia have been abolished by the Papua New Guinea Act (No.2) 1974, s.9.

The history of customary land registration examined in this paper is of importance for understanding the changes taking place today in the land law of Papua New Guinea

- Editors' Note.

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Papua New Guinea has tried three systems of land registration since 1952 and the two current systems are now under review by a *Commission of Inquiry into Land Matters*. It is therefore an appropriate time to examine these systems and consider their successes and failures in the light of their economic and social objectives. Ninety seven per cent of the land in Papua New Guinea is customary land owned in accordance with native custom which varies from place to place. Customary land rights have been protected since the beginning of colonial rule in the late nineteenth century. Dealings in customary land with non-natives are prohibited. The owners can sell or lease their land to the government or to other Papuans and New Guineans in accordance with native custom. Three per cent of the land is 'alienated' (so called because it has been taken out of customary tenure) and is owned by the government and its lessees or freehold grantees.

The Native Land Commission 1952-1962

The registration of customary land or 'native land' began with the *Native Land Registration Act 1952* which was based on Fijian legislation. The Act established a Native Land Commission and gave it the twofold task of systematically recording the ownership of all customary land in the country and determining the ownership of individual plots when owners applied to the Commission. The Commission had power to determine disputes over ownership and an appeal lay from its decisions to the Supreme Court. Following the Commission's decision and the resolution of any appeals the land was to be registered in the Native Land Register in the name of the persons or groups found to be the owners. Such registration conferred a presumptive title on the holder which matured into conclusive title if unchallenged for five years. The registration of subsequent dealings in registered land was permitted but was not compulsory. Thus the register would eventually get out of date. Registration conferred no additional powers on the landowner

The objectives of the Act were economic and social. The economic objective was that the record of ownership compiled by the Commission would provide a good basis for economic planning. It was hoped, too, that the recording exercise would incidentally reveal areas of land not claimed by Papuans and New Guineans which the government had power to acquire under the Land Acts in force in Papua and New Guinea. The landowners would not gain any immediate economic benefit from registration because it conferred no additional powers on them. The Act differed in this from the Fijian precendent which enabled the registered of Fijian landowners to lease their land to Indian farmers.

The determination of disputes and the prevention of future disputes by the registration of owners and the marking of boundaries were obvious social objectives of the Act. Hitherto, the power to determine disputes over the ownership of customary land was vested in the Supreme Court (there is no record of it ever having determined a dispute), and the power to determine disputes over the right to use or occupy customary land was vested on the Courts for Native Matters. The latter courts were staffed by field officers as part-time magistrates and were unable to determine all the land disputes referred to them. The jurisdiction of the Supreme Court remained but it was hoped that the replacement of the Courts for Native Matters by the *Native Land Commission*, a specialist land court, would achieve better results.

The Act was in operation for ten years and largely failed to reach its objectives. The Commission, consisting of only eight commissioners, was unable to even begin the task of systematically recording the ownership of 183,000 square miles of land. Instead, it concentrated on individual applications for registration; 472 applications were received and the Commission decided 176 of them. Only a few plots were later surveyed and none was registered. The determination of the ownership of the 176 plots did not reveal any ownerless land. After 1960, the Commission concentrated on determining the ownership of plots which the government proposed to acquire, but it was unable to keep pace with the number of plots involved. As a result the government purchased many plots without first obtaining the Commission's decision that the vendors were the true customary owners.

The low number of decisions made by the Commission can be attributed to insufficient commissioners and the fact that the customary systems of ownership, occupancy and use were more complex than the framers of the legislation had supposed.[1] Most of the decisions were in favour of communal bodies rather than individuals and the Commission ascertained the members of those bodies by compiling genealogies. The genealogies went back three or four generations and in some areas amounted to sixty typed pages containing hundreds of names. They were much prized by the landowners as a written

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1 P.M.C. Hasluck, *Hansard, House of Representatives (Australia)*, 7 April 1960, Vol. 26, 1019.

history. But their defect was that they preserved claims that would otherwise have lapsed with the passing of time.[2] Moreover, experience elsewhere in the Pacific suggests that inheritance as a means of acquiring land rights can be overstressed and that active use of the land and participation in kin obligations are also important but that these factors are seldom revealed by informants. In truth, inheritance in most customary systems gives potential land rights only.[3]

Policy of encouraging individual titles, 1960

In 1960, the Minister for Territories, Mr Paul Hasluck, as he then was, announced a new policy, namely, that the ultimate and long-term objective in Papua New Guinea was to introduce a single system of individual registered titles to land after the Australian pattern.[4] He said that there was very little individual ownership (in the Australian sense) of customary land. Customary ownership was generally by a tribe, clan or family group and individuals held rights to use parts of the land for various purposes. Such customary tenure was adequate for subsistence agriculture but was unsuitable for cash crops like coconuts, cocoa and coffee. He said it sometimes happened, for example, that a young man planted trees on customary land to which he had rights, but that his rights were not sufficient to ensure his continued enjoyment of those trees.

This policy was an acceptance by the Minister of the recommendations of the *East African Royal Commission 1953-1955* that customary tenure should be changed to individual registered titles.[5] But the Commission's reasons were somewhat different. It considered that registration would stimulate the production of cash crops in two ways: by ending disputes (which were then endemic in the Kikuyu part of Kenya which the Commission had most in mind) it would remove

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2 N.D. Oram, "Land and Race in Port Moresby" (1970) *Journal of the Papua New Guinea Society* Vol. 4, No. 1, 20.

3 R. Crocombe, *Land Tenure in the Pacific* (1971) 389.

4 Hasluck, *op. cit.*, at 1019.

5 East African Royal Commission 1953-55, *Report* (1955) Command 9475.

the landowner's fear that if he did improve his land someone would try and deprive him of it through litigation; and by allowing landowners to mortgage their land. Although the policy was taken from the *East African Royal Commission*, no close study was made of the implementation of that policy in Kenya. No Papua New Guinea officials visited Kenya and no Kenyan officials visited Papua New Guinea and the legislation which resulted from the Minister's policy statement owed little to the Kenyan legislation.

The Minister set up three study groups in 1960 comprised of Native Land Commissioners, officials and leading Papuans and New Guineans to consider his policy and ways of implementing it. These groups considered that customary tenure had not hitherto inhibited cash cropping in Papua New Guinea but accepted the Minister's view that experience elsewhere suggested that eventually it would. Three Acts, which established two registration systems were subsequently enacted and brought into force in 1963 and 1964.[6] The first, for the adjudication and registration of customary land, was but a modified version of the old native land registration scheme and indicated that the new policy of individualisation was designed to supplement the old policy of registering native land, and not to replace it. The second carried out the 1960 policy of converting customary land into individual titles. The two systems were distinct but it was hoped that many landowners would initially register their land as customary land and later have it converted into individual titles.

The adjudication of customary land 1963-1972

The Land Titles Commission Act 1962 replaced the *Native Land Commission* with the *Land Titles Commission*, which, like its predecessor, had power to determine the ownership of land in a systematic fashion or as and when applications were received. An appeal lay from its decisions to the Supreme Court. The process of systematically recording the ownership of customary land, called 'adjudication', differed from the previous process in that it was restricted to 'adjudication areas' selected by the Commission, and the Commission was to be assisted by advisory 'demarcation commit-

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6 *Land Titles Commission Act 1962*, in operation on 23 May 1963; *Lands Registration (Communally Owned Land) Act 1962* and *Land (Tenure Conversion) Act 1963*, both in operation on 3 Dec. 1964.

tees' comprised of landowners. These two changes came partly from local experience and partly from Kenya. In 1957 the government had directed the *Native Land Commission* to give priority to registration in areas where cash crops had been planted or were planned, and the *Native Land Commission* had successfully used committees of landowners on an informal basis. The committees in Kenya, on the other hand, actually decided ownership and an appeal lay from their decisions to the officer in charge of the adjudication scheme.

When the Commission had given its decision the land was to be registered on the Register of Communally Owned Land, which like its predecessor conferred no additional powers on the landowners but was simply a means of recording the decision. The register was to be kept in Port Moresby and copies of the titles on it were to be sent to the landowners and to the nearest sub-district office for the convenience of landowners, government officials and members of the public who might wish to consult them. The name of the register suggested that only communal landholding groups could be registered, but in fact individual owners could be registered too. No provision was made for registering dealings in registered land.

Although the Act intended a selective choice of areas for systematic adjudication, the Chief Commissioner of the *Land Titles Commission* adopted the contrary approach and in 1965 divided the whole of the country into 500 adjudication areas and appointed demarcation committees for each area. The Chief Commissioner had high hopes for the committees and thought that with their assistance he could succeed where the previous *Native Land Commission* had failed in adjudicating the whole country within a reasonable time. In this matter the Chief Commissioner was able to act contrary to the intention of the legislation as he had the independent status of a magistrate and was not subject to government direction.

Predictably, the 'all-at-once' approach failed. The eight to ten commissioners were too few to instruct the committees in their tasks and hear the thousands of disputes revealed by the committees. Some committees did not meet at all; others met a few times and disbanded because they were unsure of their functions. The chairmen of the committees were paid and this cost the government about $30,000 a year although some of this was recouped when the chairmen, perhaps unaware or unclear of their appointment, failed to collect their cheques. The number of committees was reduced progressively until at the end of 1972 only 130 remained

active mostly in the East New Britain, New Ireland and Madang Districts.[7] Those committees which did function demarcated much more land than the Commission could adjudicate and survey.

The failure to adjudicate the whole country was an instructive one for it showed which areas were suitable for adjudication and which were not. Leaving aside the quality of instruction given to committees which varied from place to place, the committees functioned well in areas of high population density where cash crops had been planted or were planned and less well in sparsely populated areas with little or no cash crops, or in areas where major disputes between large groups occurred. In the Gazelle Peninsula of the East New Britain District, for example, the committees functioned well and were keenly valued by the landowners. The area had a dense population, intensive land use and the boundaries of plots used by individuals, clans or families were well known. On the other hand, the committees did not function well in Papua. Most of the area had little cash cropping and low population density, boundaries were vague and the people showed little interest in adjudication. There are now no committees active in Papua.

The committees failed to make headway in parts of the highlands where large groups disputed land ownership. One attempt by several committees jointly to make a boundary resulted in two deaths by fighting.[8] It seems that a judge of the Supreme Court or a Land Titles Commissioner is needed to decide the ownership of large areas disputed by large groups. Once that decision has been given, and enforced where necessary by court and police action against those who disobey it, there is scope for a committee to determine the ownership of smaller plots within that area.

In areas the committees have operated successfully, they have gone beyond their statutory functions. Although their task is limited by law to the marking of plots of undisputed land, they have not hesitated to settle disputes. Their 'decisions' have no legal force and a party objecting thereto can have the dispute determined by the Commission but in practice most of their decisions which are the result of mediation are accepted by the parties. There are two reasons

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7 G.P.M. Dabb, *Papua New Guinea Post-Courier* 6 Feb. 1974.

8 R.L. Hide, "Land demarcation and disputes in the Chimbu District of the New Guinea Highlands" in M.W. Ward (ed), "Land Tenure and Economic Development: Problems and Polic' in Papua New Guinea" (1971) *New Guinea Research Bulletin* No. 40, 40.

for this: the committees are comprised of influential local men who mediated land disputes long before demarcation committees were set up; and there are insufficient commissioners to determine all the disputes that would have been referred to them if the committees had kept to their official task.

One of the unfortunate consequences of the 'all-at-once' approach to adjudication in 1965 and 1966 has been that over two million acres have now been demarcated by committees but only a tiny fraction of this has been adjudicated by the Commission due to insufficient commissioners and survey problems.[9] The Act makes the committee responsible for the preparation of a plan showing the plots of land claimed within an adjudication area in such a way that they can be located on the ground. Later, when the Commission has determined the ownership of all the plots, the committee has to amend the plan to conform with the Commission's adjudication. Some survey is required, however simple and approximate, if a plan is to be prepared from which the plots can be located on the ground. The cost of surveying over two million acres was beyond the resources of the government or of the landowners, and to date only a few thousand plots have been surveyed, at the government's expense.

Although surveys were too expensive, the landowners nevertheless value cemment pegs without survey. The committees have distributed many thousands of pegs which have been eagerly put in by landowners as boundary markers in addition to shrubs, trees and the like. The pegs are not supported by plans of any kind with the result that the removal of a peg can only be proved by oral evidence which is open to dispute instead of by a surveyor who can locate the correct position of a peg from the plan. Thus the permanent ending of boundary disputes, which was one objective of adjudication, has not been achieved by pegs without plans.

Due to lack of survey, no titles were registered on the Communally Owned Land Register up to 1970 when the register was suspended on the advice of a visiting land expert, Mr S. Rowton Simpson.[10] At that time a number of titles were about to be registered in the names of individuals; that is, the

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9 D.S. Grove, "Land use and land tenure - the new legislation" in M.W. Ward (ed), *Change and Development in Rural Melanesia* (1972) 71.

10 S.R. Simpson, "Report on land problems in Papua New Guinea" in M.W. Ward, "Land Tenure and Economic Development: Problems and Policies in Papua New Guinea" *op. cit.* at 10-11.

Commission found that individuals held the sole beneficial rights to the land by native custom. Simpson thought that a registered, individual customary title was a contradiction in terms and that registration on the Communally Owned Land Register conferred no benefit because dealings in that land could not be registered. He thought that this land should clearly have been tenure converted.

In addition to systematic adjudication, the *Land Titles Commission* determines the ownership of plots upon application by individuals or groups. Some applications are disputed and in dealing with them the Commission acts as a land court. Its jurisdiction is co-extensive with that of the Supreme Court but in practice most disputes are determined initially by the Commission. The Commission has done excellent work in this regard but has been unable to deal with the volume of cases before it and the ideal that a case and any appeals should be determined within twelve months of the making of the application, is seldom achieved. Extensive amendments were made to the act in 1972 to improve the Commission's performance as a land court. Assessors can now be appointed to assist the commissioners and compensation can be awarded to a party who is in occupation but found to have no rights to the land. Fees can be charged, and costs awarded against an unsuccessful party, for the first time.

Appeals are very common; most major decisions - in the sense of the value of the land or the number of disputants involved - are appealed against because Papuan and New Guinean litigants will seldom accept a losing decision and legal aid is virtually free. In an effort to discourage too many appeals and to speed up their determination, the 1972 amendments require an appellant to lodge a deposit with his appeal which he loses if unsuccessful but recovers if successful. They also enable the Chief Commissioner or his deputy to hear reviews (the first kind of appeal). Formerly the review was heard by a panel of three commissioners which proved difficult to convene. Appeals should be further simplified. At present there are four levels of appeal from the decision of a commissioner although levels one and two can be jumped: a review to the Chief Commissioner or the deputy, then an appeal from his decision to a single judge of the Supreme Court, then a further appeal to the Full Court of the Supreme Court constituted by three judges, and a final appeal to the High Court of Australia. Levels one and two are alternatives though they may also be successive; they should be made simply alternatives. The final appeal to the High Court will no doubt be abolished on the country's independence. These steps would reduce the number of successive appeals to two.

Some of the applications made to the Commission are undisputed and are made because the applicant wants documentary title in the event of future disputes, especially those which may occur after his death, or in the case of the Bougainville copper land, to enable the royalties to be paid to the correct landowners. These undisputed applications can be dealt with expeditiously and at least one commissioner groups applications in a given area and deals with them systematically and even uses an advisory demarcation committee although the Act does not contemplate either process for sporadic adjudication. Landowners in the Gazelle Peninsular appear to regard a decision that they are the customary owners of land to be equally as good as a tenure converted title apart from the fact that it does not allow a mortgage to a bank or a sale or lease to non-natives.

Tenure conversion 1964-1972

The Land (Tenure Conversion) Act 1963 enabled the *Land Titles Commission* to convert customary tenure into an estate in fee simple. All persons interested in the land must agree to the conversion and adequate compensation must be paid to those whose customary rights would be abolished or reduced by the making of a conversion order. Land cannot be converted if it is needed by the owners for food gardens. The fee simple estate can be vested in not more than six co-owners and usufructuary and other subsidiary rights can be registered as encumbrances. If it is not desired to convert all the land the subject of an application into fee simple, part of it can be left as customary land and registered in the Register of Communally Owned Land. After a conversion order has been made and any appeal determined the title is registered on the Torrens register and all future dealings in the land require registration.

Tenure conversion normally gave a land owner only one advantage over customary ownership, namely, that he could mortgage the land subject to the approval of the Administrator and to the restrictions that on default in the repayment of the loan the mortgagee could not remain in possession for longer than three years nor sell the land. But the Commission could at any time grant to the registered proprietor full power to sell, lease and mortgage the land without restriction, to natives and non-natives alike, subject to the prior approval of the Administrator to each transaction, if the Commission was satisfied that the registered proprietor no longer needed the full protection of the Act. The idea here was that the new unsophisticated title-holder needed protection in the early days of registered ownership but that the restrictions could be lifted when they were no

longer required. But the Chief Commissioner adopted the practice of lifting the restrictions whenever he made a conversion order with the result that the Act was amended in 1968 so that every sale required the consent of the Minister of External Territories, every lease or mortgage required the consent of the Administrator's Executive Council (that is, the Cabinet) and the restrictions on the mortgagee's powers were mandatory in every case.

The tenure conversion process was to be commenced by application from an individual landowner but the application could be deferred if it was likely that other applications in the area would be made so that all the applications could be dealt with together. If a number of applications was dealt with together this still required separate advertisements of the applications calling for objections and separate decisions on each application. Unlike the adjudication process, it was not possible to avoid individual applications and declare a tenure conversion area, and convert the ownership of all the plots within that area. If the tenure conversion applications came from an area which had previously been adjudicated, the Commission could ask the demarcation committee to prepare a draft conversion plan setting out the proposed lay-out of the new plots.

Although the *Land Titles Commission* had power to make conversion orders it had inadequate staff or funds to carry out the whole process. Thus it relied on district administration officers to assist the landowners to complete the application forms, agricultural officers to plan the best use of land, and surveyors to survey it. It was for these reasons that an Administration policy direction was given to the Commission in 1965 that conversion was to be limited, whereas no direction was given, nor legally could have been given, to the Commission on land adjudication. The direction confined systematic conversion to the Northern District in order to iron out any difficulties in the procedures but isolated applications from elsewhere could be dealt with also. The direction also stated that conversion should not be linked with the granting of credit; that is, that credit should not be used as an incentive to get tenure conversion.

Thirty four schemes were commenced in the Northern District involving a total of 33,566 acres divided into 1,725

holdings.[11] Six years later only 427 conversion orders had been made and the schemes had not been extended beyond the Northern District.[12] It can be seen from this small number of conversion orders that the schemes were pilot projects and that the bold policy expressed in the preamble to the *Land (Tenure Conversion) Act 1963* that 'the most efficacious method of promoting agricultural development' was by giving landowners 'guaranteed individual titles', was never vigourously implemented.[13]

The Northern District was a fair choice of an area for systematic tenure conversion for the landowners held clearly defined individual rights by native custom and had good quality land suitable for cash crops. Also, they had seen the relative prosperity of native ex-servicemen on a planned re-settlement scheme in their district.

In a typical scheme, the landowners agreed to convert one quarter of their total holdings into forty individually owned blocks. This had the advantage that the three quarters of their land which remained under customary tenure was available for future needs. The forty rectangular blocks of 20 acres each were situated on either side of a road and, since conversion, have been partly cleared and planted with rubber trees and food gardens. Few of the landowners resided on the blocks and the availability of work on the roads nearby retarded the development of the blocks. The landowners said the main benefit of the scheme was that it consolidated their scattered garden plots. Scattered food gardens were advantageous in that some lay fallow whilst others were being used but it would have been inconvenient to tend rubber trees planted on scattered plots. The scheme was not motivated by the need for security of tenure, for the landowners said they could have planted cash crops on their plots.[14]

Although valued by the landowners, systematic tenure

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11 D. Morawetz, "Land tenure conversion in the Northern District of Papua" (1967) *New Guinea Research Bulletin* No. 17, 7.

12 Grove, *op. cit.*, 70.

13 As at 31 Dec. 1972, 595 conversion orders, systematic and sporadic, had been made, and 340 applications were pending. Of the latter, 126 were systematic and 214 were sporadic. Figures kindly supplied by the Land Titles Commission, Port Moresby.

14 D. Morawetz, *op. cit.*, 18.

conversion in the Northern District has probably not produced economic benefits which have justified its cost of $6 per acre, and the government has not thought the schemes sufficiently successful to warrant their extension to other districts.

There has been a limited demand for sporadic tenure conversion. Eighteen sporadic conversion orders had been made by 1970 and by the end of 1972, 214 applications were pending. Most of the conversion orders have been made in respect of urban plots. One enterprising woman in Rabaul, for example, tenure converted a large plot and has leased it to expatriates for houses and businesses. There have been no appeals from tenure conversion orders but in one case, a claimant who did not contest a conversion application nor appeal against the conversion order, later attempted to use his position on the local government council to prevent the landowner from getting a trade-store licence for the store he had erected on the block.

The land control procedure has been adequate to prevent unwise dealings but long delays have occurred before a dealing is approved. In practice, a dealing is not approved until a thorough investigation has been made into the circumstances surrounding it and a valuation of the land has been obtained.

Other registers

Since 1968, eight local government councils have passed a *Land Use Record Rule* under which a person who claims individual rights to occupy or use customary land or trees thereon can have his rights recorded in a 'Land Use Record Book'. Such recording is merely a written record of the claimed rights; it confers no title on the claimant. The procedure is for a claimant to apply to the council for entry in the book, his application is advertised and objections to it are called for. If no objections are received and the council is satisfied that there are no adverse claims, the council records the rights in its book. If an objection is received or the council considers that there may be adverse claims, it must refer the dispute or possible dispute through the appropriate demarcation committee - if there is one in that area - to the *Land Titles Commission*, for decision. When the Commission has given its decision it can recommend that the council enter in its record book any right which the Commission has found to exist. The council's Land Use Record Book has two advantages. It gives a written record of a claimed right which is important for landowners who are partially or totally illiterate, and it gives publicity to a claimed right, both of which are important if a future dispute arises.

An informal practice with similar objectives has arisen in

Rabaul for recording land sales. Many sales from unsophisticated Bainings to more astute Tolais have taken place or been recorded in the *Land Titles Commission* office. A typical entry reads as follows:

> L.T.C. office 3/12/71.
> Present TOWARTOVO, ELISA NGASAPSI, TURMUT ISAC.
> Name of land DAMIGE - location KAINAGUNAN in Gaulim adjudication area marked with sticks.
> The land known as DAMIGE was bought from ELISA by TOWARTOVO with $400. Only half of this money has been given. This $200 was given on 3/12/71 and the other half will be given later on.
> Towartovo said that if he dies his son William Wartovo will be taking over. Elisa agrees that Towartovo can buy this land.
>
> Emlie
> John Vuia.

Many of the entries are not as complete as this one. The land the subject of these entries is greatly disputed and it is clear that the aim of the entry is to get documentary evidence of the sale. Also, the 'ceremony' of handing over the purchase money in the *Land Titles Commission* office may replace whatever ceremony was appropriate for evidencing a customary transaction in land. The record is also of value to the government for it shows how much customary land is being bought, by whom from whom, and the prices paid. These particular entries show purchases by sophisticated people from unsophisticated vendors without the benefit of any scrutiny by an independent authority. The price per acre may appear low but then the purchasers are not getting secure titles.

The Simpson Report 1969

In 1969, the government engaged Mr S. Rowton Simpson to review its adjudication and tenure conversion programme.[15] Mr Simpson who was attached to the British Ministry of Overseas Development had an encyclopaedic knowledge of land tenure and registration systems in many countries and had first-hand experience of the registration of urban land in the Sudan and of agricultural land in Kenya.

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15 S.R. Simpson, *op. cit.*

He stated that the thesis behind the 1960 policy - that individual registered titles were essential for cash cropping - was unproved. Kenya, with much experience, swore by that policy although it introduced group registration too in 1968; but other countries had achieved good economic development on customary land. He noted that the Papua New Guinea policy had never been seriously implemented under suitable procedures; that the tenure conversion schemes had not gone beyond the pilot projects in the Northern District; and that the latest Five Year Economic Plan made no mention of tenure conversion at all.

Nevertheless, he considered that registration involving the ascertainment of customary owners by adjudication, the survey of plots and registration of all dealings in land, was valuable in selected areas in that it ended disputes and allowed for simple and safe dealings in land. Most of Papua New Guinea did not need registration but it was needed in areas of high population density and intensive cash cropping, and areas surrounding the major towns. The selection of appropriate areas for registration was all important and this had to be removed from the *Land Titles Commission* and vested in the government. He recommended that the two processes of land adjudication and tenure conversion be combined and that plots within an adjudication area be registered in the names of individuals or groups subject to minor rights such as leases, licences, easements, rights of way, profits, trusts and unspecified customary rights (such as the right to use a sacred place), or be left unregistered as customary land. A market place, cemetary playing field, sago swamp or spare virgin land used for foraging and hunting, for example, could be given a plot number but remain customary land.

Simpson strongly favoured systematic over sporadic adjudication not only because the former was cheaper per acre but because sporadic adjudication was 'vicious in principle' for it enabled an individual to have his rights determined in isolation from the possible competing claims of his fellows and without the much greater publicity which systematic adjudication brings. Simpson urged the adjudication of urban customary land to enable the landowners to develop it by borrowing capital secured by mortgage or by leasing it to others.

He considered that the encumbrances on registered titles, limiting the powers of mortgagees and the like, and the current form of control of dealings by the Minister and the Administrator's Executive Council, should be abolished. He recommended that control should be decentralised and vested in land control boards, some of which should contain a majority

of local landholders on them. The aims of such control should be fourfold: to protect the new titleholder, to secure good land use, to implement the government's land policies (such as discrimination for or against a certain class), and to take into account local parochial considerations. As an example of the latter aim, the land control board could prevent a sale to a stranger who was unacceptable to the local community.

He recommended a *Registered Land Act* to be borrowed from the Kenyan Act of the same name to replace the Torrens Acts which have been inforce in relation to alienated land, without substantial amendment, for 50 years in New Guinea and for 60 years in Papua. He thought that the Kenyan Act was superior to the Torrens system in that it more clearly defined the kinds of interests that could be held in registered land and the effect of registration. Also, he considered its register was cheaper and simpler to operate; the register consisted of an index card containing details of the title and not a copy of the title itself. Thus a new owner could be shown by simply adding his name in the appropriate space and crossing out the former name, and a title could easily be drawn up from the details on the register card. Simpson recommended the repeal of the Register of Communally Owned Land because he considered that to register an individual owner on that register, as was proposed, was a contradiction in terms and that such land should have been tenure converted. He likewise recommended the repeal of the local government Land Use Record Rules because by creating a new 'register' they merely confused an already confused situation.

Finally, Simpson considered that these recommendations could be best implemented by closely adapting the Kenyan legislation to Papua New Guinea.

The Simpson report was accepted by the government and tabled in the House of Assembly where it was not debated. In January, 1970, a party of three officials led by the Director of Lands, Surveys and Mines, Mr D.S. Grove, visited Kenya and made a detailed and favourable report on its registration scheme. Later a Kenyan official, Mr J. Fleming, visited Papua and New Guinea and assisted in the preparation of draft legislation. Under the draft legislation, adjudication was to be carried out in areas selected by the Administrator's Executive Council after a careful assessment that the landowners wanted it. It was proposed to adjudicate only one area of from 500 to 1,000 acres initially as a demonstration scheme and a training project for adjudication staff.[16]

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16 D.S. Grove, *op. cit.*, 85.

The legislation was presented to the House of Assembly in June, 1971, but withdrawn after strong opposition came from three sources. The politicians opposed it because they said it was prepared without adequate consultation with the people of Papua New Guinea. The expatriate legal profession opposed it because they preferred the familiar Torrens system of registered conveyancing to the borrowed Kenyan system; they favoured the retention of the registers in Port Moresby rather than decentralised registers, and they favoured control of dealings by the Ministers, the Administrator and the Administrator's Executive Council rather than by decentralised land control boards comprised of officials and landowners. Most of all, they were alarmed by the radical proposal to abolish duplicate titles.

The most trenchant criticism came from Dr A.D. Ward a New Zealand historian then a visiting teacher at the University of Papua and New Guinea.[17] On the eve of the second reading debate on the government's bills he circulated a paper to the members of the House of Assembly which was largely responsible for the withdrawal of the bills. He strongly criticised what he said were two assumptions behind the bills, namely, that individual titles and enterprise were economically and socially superior to group titles and group endeavour, and that an agrarian revolution could be achieved by the bills without disastrious social disruption. He thought that the legislation was inadequate to protect against landlessness (for example, in the provision that mortgages to banks did not need approval of a control board), and to prevent excessive accumulation of land by a few unscrupulous men. He argued that many registered titleholders could lose their land through unwise sales and mortgages as the New Zealand Maoris had done.

The bills were withdrawn in June, 1971, and the government has not sought to re-introduce them. Instead the House of Assembly called for the appointment of a *Commission of Inquiry into Land Matters* which was appointed and began work in 1973, and Dr. Ward has been engaged as a consultant to this Commission. The Commission will undoubtedly want to evaluate land registration to date in Papua New Guinea as well as seeking the views of the people and examining land systems in other countries. What are the lessons that can fairly be drawn from land registration in Papua New Guinea in 1972 leaving aside the admittedly valuable experience of other countries?

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17 A.D. Ward, "Agrarian Revolution: Handle with Care" (1972) *New Guinea* Vol. 6, No. 1, 25-34.

Conclusions

There is no evidence in Papua New Guinea that individual ownership leads to better economic development than communal ownership. But it is true that intensive cash cropping enhances individual rights at the expense of group rights. In most customary systems trees belong to the person or family who plants them. Thus a man who plants a coconut tree which will last 60 years has greater rights to the land on which the tree is planted than if he merely planted food gardens on that land from time to time followed by periods of fallow. Similarly, in most customary systems, the group allocates or approves the choice of garden plots. However, when shifting subsistence agriculture is replaced by intensive cash cropping, which requires a much greater acreage, and there is no more spare land to be allocated for garden plots, the group rights are diminished.

Should the government encourage individual or group rights to land? This is an important policy question for the government to decide. On the one hand, as noted, cash cropping has enhanced individual rights but the functions of landholding groups have not entirely disappeared. It is possible to recognise land rights at two levels: absolute ownership or residual rights vested in a group subject to leases, licences or usufructuary rights vested in individuals.[18] In the Highlands, for example, coffee trees (which are perennial) have been planted on land to which the owner held only usufructuary rights and this has produced conflict between the owners of the land.[19] This conflict could be resolved by the landowners granting a lease to the planter, or by vesting ownership of the land and trees in the planter subject to a payment of compensation to the landowners, or in the landowners subject to a payment of compensation to the planter. Where subsistence agriculture is practised and rights are held by a group and individuals there is little point in formalising the legal relationships between the two as most individual clan members have adequate security of tenure without a lease or licence document. It may be that, given the great diversity of customary systems in the country and the fact that these are rapidly changing with population movements and new land uses, the Papua New Guinea government will decide not to favour individual group rights but rather to recognise both and

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18 R. Crocombe, *op. cit.*, 383-386.

19 *ibid.*, 321.

various combinations of the two. The government may decide to recognise legally the rights which actually exist rather than to attempt to mould them towards a defined goal.

There is no evidence in Papua New Guinea that registered titles have produced better agricultural development than unregistered customary titles. Certainly, the agricultural development on customary land in the Gazelle Peninsular of the East New Britain District, for example, is superior to that on tenure-converted land in the Northern District but the difference in land tenure is but one of the many factors, economic and social, contributing to this different level of development. The development in customary land in the Gazelle is also much better than the development of customary land in the Northern District. But, although cash cropping has been successfully conducted on customary land, some ration rationalisation of customary tenure may be necessary, such as in the already noted example of the owners of coffee trees and of land in the Highlands. Also, in the highlands, the scattering of an individual's coffee holdings over a wide area is uneconomic and requires consolidation.[20]

Although the economic case for the registration of agricultural land may be weak, the social case for registration in selected areas is very strong. Adjudication of existing rights is needed to resolve disputes, and valued as such by the landowners, in areas of high population density and good agricultural use. The fairest, cheapest and quickest way of adjudicating existing rights is by committees of landowners. Adjudication of existing rights need not be followed by registration of future dealings in land. The adjuciation could be a final and conclusive declaration of ownership as at the date of completion and it would be a relatively easy task to re-adjudicate the land every ten or twenty years to record changes of ownership which had occurred during that period. Alternatively, adjudication could be followed by the optional or compulsory registration of all major dealings in adjudicated land. Whether adjudication should be followed by registration of dealings depends on the likely number of dealings and the likelihood of them being disputed. Dealings are so common and potentially disputatious in the Gazelle Peninsula, for example, that compulsory registration of dealings should follow adjudication there.

There is a strong economic case for the registration of urban customary land as Simpson recommended. Most of the

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20 *ibid.*

valuable customary land around the major towns in Papua New Guinea is undeveloped. The customary owners do not have the capital to develop the land and are unable to borrow money on the security of customary land. There are few sales or leases at customary law which would produce its development. At present the customary owners can sell or lease land to the government but are reluctant to do so because they regard the returns as inadequate. They are prevented by law from selling, leasing or mortgaging the land to expatriates but even if this law was changed, it is extremely unlikely that expatriates or anyone else would invest capital on the security of unregistered land when land litigation and trespass on land are so common. Adjudication, registration and the control of dealings would enable the landowners to deal in the land which would lead to its development at a handsome profit to themselves. They could plan the use of the land and retain some of the best sites for stores, service stations, cinemas and the like for their own businesses to be financed out of the rents or purchase moneys received.

Upon adjudication, some of the plots could be leased to migrant groups. In the past the customary owners generously allowed migrant groups to settle on their land for nominal payment but the great influx of migrants from rural areas, including many who have no traditional links with the customary owners, has produced tensions.[21] Urban land was formerly worth very little but now that it is worth thousands of dollars per acre the customary owners clearly deserve to receive proper rents from the migrants. Adjudication, followed by leases to the migrants would give greater security of tenure to the migrants and a better return to the customary owners.

The urban land actually occupied by the landowners is badly developed but it has been cogently argued that this land could be improved without registration. The government could plan the layout of settlements with the co-operation of the landowners and could provide water, electricity and sewerage services and charge the householders rather than the landowners for these services.[22]

In areas where systematic adjudication is not needed or cannot be provided, provision should be made for the public recording of dealings in customary land at the option of the

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21 O.D. Oram, *op. cit.*, 17-19.

22 *ibid.*, 21-27.

landowner. The local government council Land Use Record Books cater for illiterate or semi-literate landowners who want some documentary evidence of a transaction which can be produced in the event of a future dispute. The unofficial register in Rabaul gives the Tolai purchasers some 'official' looking documentary evidence of title. Certainly, in neither case does such documentary evidence give the landowner the protection of an indefeasible, registered Torrens title, but it is better than a purely verbal transaction.

Finally, given the tremendous cultural, psychological and economic importance of land to customary owners, no adjudication, consolidation, registration of land or dealings or any other interference with customary rights should be made in an area without the full understanding and support of the landowners.