

LAND DISPUTES IN PNG: A COLONIAL LEGACY
AND POST INDEPENDENCE SOLUTIONS

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John Guise, one of the first indigenous Papua New Guinean Member of the House of Assembly, in 1962 asserted in the Assembly that:

There is no area of government of Papua and New Guinea in which Public confidence, Public relations and Public trust between the government and the people are so bad as in the matter of land.

Though Guise was castigated by the Minister of Lands for his irresponsible statement, there is no doubt that he was right.¹ Disputes over land between the colonial administration and the traditional landowners was one of the most controversial issues in the country's colonial politics. The intensity of the controversy is surprising because, unlike in most other colonised territories, the administration in Papua and New Guinea acquired on the average no more than 3 per cent of the total land area in the country. The rest of the land (known as unalienated land) was left with its traditional owners held in accordance with their customary law.

Many Papua New Guinean statesmen consider the problem of land disputes a colonial legacy and they blame the colonists for failing to find satisfactory solutions. In this paper I examine the causes of the land disputes and the steps which were devised by the colonial administration and the post independent government to resolve them. It should be stressed that the scope of this study does not cover customary land which has many other causes for dispute and different legislation.

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1. Hansard L.C. of Papua New Guinea, 1962, Vol.vi, no.5, p.461 and Vol.vi, no.6, p.587.

Colonisation of Papua and New Guinea

Prior to its independence, Papua New Guinea consisted of two territories: Papua and the Territory of New Guinea, both of which were administered by the Australian Government. Papua was originally declared a British Protectorate in 1884, and annexed in 1888. In 1906 the British handed it over to the Australians. New Guinea, on the other hand, was annexed by the Germans in 1884. Following the latter's defeat in World War I, New Guinea was entrusted to the Australians to be administered by them under a mandate of the League of Nations. Thereafter the Australians repealed and replaced German Law with English Law. However, German law was retained in so far as it related to determination (*inter alia*) of land rights acquired during the Germans' administration of the territory.² A brief background of the land policies in Papua and New Guinea is necessary to put the picture in perspective.

Alienation of Land in Papua

It is generally accepted that, according to English colonial legal theory, once a territory was annexed by Britain (whether by cession, settlement, occupation or conquest) the common law feudal principles applied and the Crown assumed the radical title to the land. The local inhabitants of the territory could make good in the municipal courts established by the Crown only such rights as the Crown chose to recognise. Whatever rights or interests which they had³ prior to the annexation of their territory availed them of nothing. On the basis of this doctrine it was within the Crown's legal powers to disregard the rights of the Papuans and assume proprietary interest over their land; but the Crown did not. Commodore

2. Laws Repeal and Adopting Ordinance 1921-39, Laws of the Territory of New Guinea 1921-45 p.3003.
3. The Administration of Papua and New Guinea v. Guba and Doriga (1973) P.N.G.L.R. 621, 638; Geita Sebea v. The Territory of Papua (1940) unreported, Central Court of Papua; Amodu Tijani v. Secretary Southern Nigeria [1921] 2 A.C. 399, 404; Millirrupum et al v. Nabalco Pty Ltd and Another (1971) 17 F.L.R. 141, 200 et seq. For a different view see John Hookey, 'The Gove Land Rights Case: A Judicial Dispensation For the Taking of Aboriginal Lands in Australia', (1973) 5 F.L. Rev. 85. Also Lester and Parker 'Land Rights: The Australian Aborigines Have Lost a Legal Battle But...' [1973] Alberta Law Review 189.

Erskine, in his oft quoted speech delivered on board HMS "Nelson" before establishing the Protectorate informed those foregathered before him that, "Your lands will be secured to you", and the Proclamation establishing the Protectorate declared that, "no acquisition of land whensoever or howsoever acquired within the limits of the Protectorate hereby established will be recognised by Her Majesty". Erskine's pledge was reinforced by the Colonial Office's instructions to General Scratchley, the first Special Commissioner of the Protectorate. Scratchley was ordered to explain to the Papuans that he was sent:

[T]o secure to them the safety of their persons, the enjoyment of their property, and particularly to protect them from being deprived of their lands by force of fraud [I]f it shall be decided to allow Her Majesty's subjects or others to purchase land such transactions must in every case be conducted through ... [him] and that their wishes in these matters will be respected⁴

Under successive legislative measures this policy was implemented. The administrator was given the monopoly to acquire land by lease or purchase from the customary owners. All other persons were prohibited from dealing directly in land with the indigenous people. Any purported agreement with the native landowners was rendered illegal and void. The administrator himself was precluded from acquiring land from the people except where the owners were willing to sell upon mutually agreed terms. Even then it was unlawful for the administrator to purchase the land offered to him unless he was satisfied, after sufficient inquiry, that the persons wishing to sell had enough land to spare and were unlikely to require it.⁵ Moreover, the document under which the land was purchased or leased had to be attested by a written instrument (setting out the description of the land, its boundaries, names of the sellers and the consideration which was paid) signed and sealed by the administrator and recorded by the Registrar-General.⁶

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4. P. Quinlivan, 'Reflections On Colonialism's Record Regarding Native Land,' unpublished and undated mimeo, p.38.
 5. Land Regulations Ordinance 1888; Crown Lands Ordinance 1890; Land Ordinance 1899, 1906 and 1911-62, Laws of the Territory of Papua.
 6. The provision requiring attestation and recordation first appeared in the 1890 Crown Lands Ordinance, section 21.

Furthermore, the administrator was given the authority to take into possession any "waste and vacant" land in the territory. This was defined as land which was not required or reasonably likely to be required by native-born Papuans for building agricultural or other industrial purposes. The land so acquired had to be attested by a document under the hand of the administrator (which set forth the name, if any, by which the land was known and its description from actual survey or a sketch, and a statement indicating for how long as far as it was known the land had not been in use) and recorded in a register kept by the Registrar-General.

These provisions were intended to protect the indigenous people from land-hunting expatriates, and to ensure that they did not over-alienate their land. But protection of the traditional land-owners was not the only purpose of the legislation. Equally important the prohibition of individuals from direct dealing in land was intended to create a source of revenue for the administration through selling and leasing the land acquired.

Land Alienation in New Guinea

The situation in Germany New Guinea was in some respects similar to that in Papua. Theoretically, it would not have been unlawful for the Germany Government to disregard the indigenes' land claims. But the the Germans, like the British, chose to preserve the land rights of the inhabitants of New Guinea. The Imperial Government instead assumed the monopoly to acquire land from the natives and to occupy ownerless land. This power was delegated to the New Guinea Company, by the Imperial Charter of 17 May 1885.

Land acquisitions by the Company were governed by the "Directives Regarding the Acquisition of Land" which were issued by the Company to its agents on 10 August 1887. These Directives required the Company's agents before acquiring or occupying any land for the Company to carry out extensive investigations as to its ownership. Where the land appeared to be owned they had to identify its true owners; their customary procedure for the permanent transfer of land; and ensure that they understood and agreed to transfer their land to the Company. All land purchased or occupied as ownerless

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7. CLO, 1890, ss 23-25. Subsequent legislation refer to land which "appear to be ownerless".
 8. P. Sack, Land Between Two Laws: Early Land Acquisitions in New Guinea. (Canberra, ANU, 1972), p.132.

land had to be properly marked and recorded.⁹ The substance of this policy was maintained by the Australians.

Causes of Land Disputes

On the basis of the land legislation in both territories few could seriously argue that the legal measures taken to protect the natives' land rights were inadequate. However, enactment of laws is one thing their enforcement is another. It should be remembered that no country colonised a territory for the sake of it. Colonialism was about exploitation for the benefit of the metropolitan powers. Thus, though the colonial administrators might in good faith have intended to protect traditional land rights, they had another mission to fulfill. As the agents of their governments they were under obligation to find ways and means of economically justifying the colonies. Land had to be acquired for European settlers because it was believed that with their capital and know-how they would "develop" it to its optimum use. Perhaps it was also thought that granting the land to Europeans would even be beneficial to the indigenes. In such a dilemma a strict compliance with the letter of the regulations was unlikely to be possible at all times.

An account by Hasluck, former Australian Minister for Territories, confirms this assessment. Hasluck wrote that although the administration was strictly not supposed to acquire land from natives unless it was satisfied that they had enough for their present and future need, in practice it was not always the case. For example, on an official visit to the Highlands in 1951, he learnt of a district commissioner:

9. Ibid, at pp.128-136. When the Reich resumed the administration of the territory in 1899, it retained the Directives except where expressly repealed. Subsequent regulations enacted by the Imperial Government provided even more protection for the indigenes, Sack at pp.176-186. Also L.P. Mair, Australia in New Guinea (Melbourne, 1948) p.141.

... [W]ith the best of intentions and with an undoubted idea of bringing benefits to the native population, had become a promoter of settlement. He was urging his officers to buy land, which really meant inducing natives to sell land, as one of their main duties, he was making a rule of thumb decision of his own, and then he also decided which of the European land-seekers should have this or that block.¹⁰

The report of the 1973 Commission of Inquiry Into Land Matters also revealed that there were many communities which were land-short because of over-alienation of their land. For instance, on the Gazelle Peninsula, which was (and still is) one of the most heavily populated areas in the country, approximately 43% of the land was alienated. Another example is the Duke of York Island half of which was alienated. The Commission noted that the alienated land happened to be some of the best land in the area. The same report found that several communities' land had been taken possession of by the administration as "waste and vacant". In some cases the report said that whole villages with people living in them had been declared ownerless. If the thorough investigation required under the regulations was carried out, it is unlikely that the administration officials could have failed to realise that the land was being used by the local inhabitants. In other cases land was lost through mistake or ignorance of the administrators. European officials not being too familiar with the local ways of life failed to appreciate some of the traditional land uses. Thus, as the CILM held, some communities' traditional hunting or gathering grounds were expropriated by the administration as ownerless land.¹¹

A common grievance among the descendants of the original land owners is that the lappas, axes, tobacco and other trade goods with which their forefathers were paid in exchange for the land were insufficient consideration -- and the Europeans knew it! Another popular grievance is that the land was actually never sold to the administration. It is argued that under customary law land

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10. P. Hasluck, A Time For Building Australia's Administration in Papua New Guinea (Melbourne, 1976) p.121. See also R.B. Joyce, Sir William Macgregor, pp. 196-99, 208-230.
 11. Report of the Commission of Inquiry Into Land Matters, 1973, paragraphs 4.3 to 4.4. See also I. Wallis, "Lae Land Grabbers" Whitemans' Justice - But Who Can Afford It? (1972) 6 New Guinea 4.

is not a saleable commodity. Consequently, their forebears who purported to sale either had no authority to do so under their customary law or that, since sale of land was unknown to them, they could not have formed the necessary intention to sell the land when they accepted the trade goods.

ATTEMPTS TO RESOLVE THE DISPUTES

The Judicial Role

Inevitably the courts were in the centre of many land disputes settlements. Unfortunately, from the viewpoint of the original land claimants, most decisions were held against them. Part of the reason for this was that many of their bases for disputing the alienated land titles could not withstand the traditional judicial reasoning. For example, the claim that their forebears were underpaid was easily disposed of on the basis that it was trite law that inadequacy of consideration was not a ground for upsetting contracts. The courts refused to be drawn in arguments as to whether the price paid was fair or not because it was the parties to determine what they considered to be a fair deal. This traditional approach is clearly illustrated in the judgement of Phillips J., in Custodian of Expropriated Property v. The Commissioner of Native Affairs (Re Malala):

On natives quite unaccustomed to these things, the trade goods made a great impression... And though their value may seem trifling to Europeans, they were greatly valued at that time by natives who... wanted them "too much".¹²

It is submitted that the doctrine of freedom of contract assumes some degree of equality in bargaining power. Since in these land transactions the parties were obviously not bargaining at arms' length its application was grossly unfair to the traditional land claimants.

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12. [1971-72] PNGLR 590, 596. In the case of The Administration v. Guba and Doriga at p.603, Barwick C.J., dismissed as without substance a claim that the plaintiffs' forefathers in 1886 were un able and did not equate in their minds the relative value of the trade goods to them at the time and the outright loss of proprietorship of the land in the conditions in and under which they then and formerly used it. The Chief Justice said that their commercial experience with European traders since the 1870s should have given them enough knowledge to make an informed decision.

The original land owners were also at a serious disadvantage when it came to proving their claims in the courts. Invariably their cases were based on unwritten traditional accounts of ownership of the subject land or of transactions that took place (or did not take place) several years ago when most of the witnesses were either unborn or were too young at the time to know what was going on. Sustaining a claim on the basis of such evidence proved to be a very difficult task. Admittedly the courts sometimes sympathetically noted that evidence of social groups without written history or records should not be subjected to the same vigorous method of proof as that of groups which used writing.¹³ Even then in the event of conflict between evidence based on tradition and that of contemporary official documents from the period, they held that special weight had to be given to the official records. Obviously such an attitude was in favour of the administration. The justification was that traditional history was liable to corruption as a result of self-interest or forgetfulness of the narrator or listener. In contrast official records reflected the facts as seen by the writer and could not be changed by subsequent events.¹⁴

The need to exert caution when dealing with oral traditional evidence goes without saying. But the indigenous people might be forgiven for asking why the judiciary did not insist on exercising similar caution when handling contemporary colonial records. Evidently the courts assumed that the administrators were disinterested officials only writing the gospel truth of the events as they saw them. Colonialism, as earlier stated, was not all about protecting the local people's land rights; the administrators had a duty to secure titles for expatriate investors. Hence it was not improbable that some of the records might have been fabricated to avoid anticipated future problems. Curiously, where the administration had no records or documents to prove its title, the courts held that it was not necessarily fatal to its claim.¹⁵

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13. Gaya Nomgui et al v. The Administrator of the Territory of Papua New Guinea, [1974] PNGLR 349. Also Millirrpum, supra, p.151.
 14. Gaya Nomgui, p.446. Also Tolililu and Another v. Director of Native Affairs [1965-66] PNGLR 12, 22.
 15. Safe Lavao v. The Independent State of Papua New Guinea (In Re Kerema Town and Airstrip) [1978] PNGLR 15, 31. See also Guba and Doriga v. The Administration of Papua New Guinea. In the case of Rahonamo v. Enai and Another (Re Hitau) [1971-72] PNGLR 58, the Court held that the customary claimants had the onus to prove that the administrator in 1890 before purchasing the plaintiffs' traditional land did not carry out sufficient inquiry to satisfy himself that they had enough land as was required under the CLO, 1890.

Similarly claims that the land owners did not comprehend the nature of the transactions or that there was no sale because under the relevant customary land law was not a saleable commodity, have not been successful in the courts. The case of The Administration v Guba and Doriga is typical. It involved a claim by members of the plaintiffs' clan over land in Newtown, Port Moresby, allegedly bought by the administration from their ancestors in 1886. The High Court of Australia found as a fact that under the plaintiffs' customary law at the material time land could be sold and that the plaintiffs' forefathers understood the transaction to be an absolute transfer. The Court's decision was largely based on a newspaper article written at about the time of the alleged purchase (at the request of Special Commissioner Scratchley) by Lawes, a European Missionary living in the area.¹⁶ Lawes claimed that absolute sale of land at the coast of Papua, and probably inland, was a common practice.

It is submitted that Lawes' observations were questionable. Although customary law is dynamic and adjusts itself to developments, it is unlikely that within such a short time of European contact the concept of absolute land transfer was embraced and understood by the local people. Today many Papua New Guineans maintain that under their customary law they do not sell land.¹⁷ It could scarcely have been any different a hundred years ago. The fact that Lawes wrote the letter at the instigation of the Special Commissioner -- an interested party -- is by itself a ground for suspicion.

The Judicial Role Under the New Guinea Ordinances

The courts were much more involved in settling land disputes in New Guinea than in Papua. This was mainly due to two ordinances: New Guinea Land Registration Ordinance 1924, and New Guinea Land Titles Restoration Ordinance 1951. The former ordinance applied to New Guinea a Torrens type system of title registration while the latter made provision for the restoration of titles destroyed during the second World War. Both statutes conferred upon the courts extensive jurisdiction which enabled them to play a major role in resolving land disputes.

16. Supra, at p.618.

17. See generally R. Scaglione, (ed.), Customary Law in Papua New Guinea A Melanesian View (Waigani, Law Reform Commission of Papua New Guinea, Monograph no.2, 1983).

(i) New Guinea Land Registration Ordinance

With reference to the Land Registration Ordinance, it made provision for the registration of all private and administration land alienated prior or subsequent to its enactment. Before registration of the land the Director of Native Affairs was required either to certify to the Registrar of Titles that he was satisfied that there were no natives claiming rights over the land or else refer the matter of possible customary rights claims to the Central Court for inquiry and determination. The Director was under specific orders to refer the matter to the Court where natives other than employees occupied the subject land or were in possession or using adjacent land.¹⁸

Where a claim was referred to the Central Court, proceedings were conducted in an informal manner. Section 27B of the Ordinance dispensed with all rules of evidence and legal procedure, instead the Court was entitled to inform itself by the best evidence which it was able to procure. Moreover, under section 27C the Court was not bound by the principles and rules of the common law and equity:

[B]ut may be guided by such principles of right and good conscience as it deems to be applicable to the matters referred to it having regard to the tribal institutions, customs and usages of the natives of the Territory and to the conditions existing in the Territory since its occupation by persons other than natives.

Furthermore, section 27E empowered the Court to order compensation to be paid to a successful claimant in lieu of restoration of title if it was satisfied that:

[T]he enforcement of that right may cause undue hardship to some other person, and that it is possible adequately to recompense the claimant for the loss of the right...

18. Laws of the Territory of New Guinea 1921-1945, p.2891, ss 22 & 24. The New Guinea Ordinance was modeled upon the Real Property Ordinance 1913-1939 (Papua), Laws of the Territory of Papua, p.2593. The only difference between the two ordinances was that (a) the Papua Ordinance had no provision for the registration of Crown land under the Torrens system and (b) under the Papua Ordinance all private freeholds and leaseholds were automatically brought under the Ordinance at the time of grant.

The foregoing provisions were partly intended to protect the indigenes whose claims in most instances were based on oral traditional evidence which was inadmissible under conventional rules of evidence. However, waiver of the ordinary rules of law was also beneficial to the settlers because it enabled them to sustain transactions which were otherwise void. The case of Custodian of Expropriated Property v Commissioner of Native Affairs (Re Jomba)¹⁹ illustrates the latter point. In this case the Custodian of Expropriated Property, as successor of the New Guinea Company, sought to register 5,500 hectares of land allegedly acquired by the Company in 1887 from its traditional owners in exchange for trade goods. Various indigenous groups claimed that the subject land was theirs pre-dating the Germans' colonisation of New Guinea. They denied that they or any other persons authorised by them ever sold the land to the Company. Moreover, they contended that even if trade goods were received they were not accepted as consideration for the land but as gifts because under their custom land was not a saleable commodity. Hence they contended that there was no contract of sale.

In his judgement Phillips J., admitted that:

... [I]t may be doubted ... whether in any of the early land transactions the native parties had a full and perfect understanding of everything that those transactions involved; [for example]... that their land was gone for ever and that the purchaser could dispose of it according to his law, to other whites they had never seen or heard of. Conditions being what they were, a full and perfect understanding on the part of the native parties of the significance and all the consequences of these early transactions could hardly have been achieved: a substantial understanding, evidenced by acquiescence in the subsequent occupation, development, etc, of the land by the purchaser, would have been about all that was possible.

Interestingly Phillips J., went on to hold that cases of alleged purchase would only be set aside in event of proof of actual fraud. If the court was satisfied that the purchaser had honestly tried to discover the true native owners, genuinely tried to let them understand, and he paid them a price which they happily accepted, the court would uphold the transaction. He also warned that the courts should be mindful of the danger in upsetting agreements with natives on technical grounds because it might give them a false

19. [1971-72] PNGLR 501.

idea of contractual obligations. In this case though he found that the subject land was sold by a group which did not own the land he held, bearing in mind the forementioned provisions of the Ordinance, that the true owners' title over most of the disputed land was extinguished. He²⁰ ordered instead that compensation be paid to the original owners.

Up to 1933 the Director of Native Affairs referred several cases to the Central Court for determination of native rights and claims. In that year the Land Registration Ordinance was amended giving the Director a discretion to decide whether or not to refer a claim to the Court. Most likely the administration felt that reference of all claims to the Central Court was cumbersome, expensive and probably not always necessary. Thereafter²¹ it would seem that no further reference was made to the Court.

(ii) New Guinea Land Titles Restoration Ordinance

The judicial role in land disputes was re-introduced almost twenty years later, by the New Guinea Land Titles Restoration Ordinance 1951. The Ordinance stipulated for the re-registration of land titles destroyed or lost during the War. It also provided for the registration of titles which had not been previously registered if they satisfied the registration requirements at the appointed day. Like under the Land Registration Ordinance, the Director of Native Affairs had to certify to the Commissioner of Titles whether or not there appeared to be native claims to the land or were asserted.

If there were, it was the Director's duty to present (at the administration's expense) their claims to the Commissioner for inquiry and determination.²² Proceedings before the Commissioner were informal. Technical rules of evidence and procedure were dispensed with -- but, apparently, not the common law and principles of equity. Unlike under the New Guinea Land Registration Ordinance, the judiciary had only appellate jurisdiction. Any person aggrie-

20. Ibid., pp.573-74, 582 et seq. Section 27E was subsequently repealed, and the effect of this was that traditional claimants, if successful, were entitled to have their land restored, see The Administration of the Territory of Papua and New Guinea v The Director of District Administration [1969-70] PNGLR 26, 34-35.

21. P. Lalor, 'Land Law and Registration' in B.J. Brown (ed.), Fashion of Law in New Guinea (Sydney, Butterworth 1969) p.149.

22. Laws of the Territory of Papua and New Guinea, no.10 of 1951, s.36-38.

ved by the decision of the Commissioner (including natives who did not participate in the proceedings) could appeal to the Supreme Court by way of a re-hearing. Also the Commissioner could state a case for the Supreme Court on a point of law. Further, appeals lay to the High Court with leave of the Supreme Court.²³

Proportionately the number of disputed restoration cases which went on appeal to the Supreme Court were few. Most claims being uncontested were resolved administratively. Nevertheless, numerically this represented more than a hundred appeals filed in the Supreme Court in a space of ten years.²⁴ Once again the indigenes did not fare any better in the courts. In fact the whole exercise was dubbed a farce. One of the reasons for this was that it had been assumed that prior to restoration of titles there would be fresh re-examination of the correctness or otherwise of all registered titles. But in a leading case, Custodian of Expropriated Property & Another v Tedep,²⁵ the High Court of Australia held that the purpose of the Ordinance was to restore titles in the conditions in which it was presumed they would have been in had the registers not been destroyed. The Court stressed that it was never intended to prepare new and different registers giving effect to claims of persons who were merely unable to establish a right prior to the Statute. Thus assertions by the indigenes that the land was unlawfully acquired (etc) were regarded as legally irrelevant to the issue whether an applicant for re-registration had a registered title prior to the destruction of the registry. Nor was it relevant that the Director in breach of his duty had failed to protect native interests before the original registration of title.²⁶

Professor James charges that decisions of colonial judges were politically motivated to facilitate colonialism.²⁷ This is probably right. The courts were influenced directly or indirectly by the possible consequences of their decision. For example, if the courts were to hold that the land transactions were void because

23. Ibid., ss 54-57.

24. T. Bredmeyer, 'The Restoration of Title to Land in New Guinea (1971-72) 1(3) M.L.J. 7, p.7.

25. [1964] 113 C.L.R 318.

26. Administrator v Blasius Tirupia et al [1971-72] PNGLR 229. For a detailed discussion of the restoration cases see Bredmeyer, loc. cit.

27. Prof. James, 'The Role of the Courts in Attempts to Recover Land' (1974) 2(2) M.L.J. 270.

the indigenous people did not understand the nature of the contract (as was mostly the case) or that there was no sale because land was not a saleable commodity under traditional law, it was bound to open a floodgate of litigation. Several transactions which occurred many years previously would have been in the danger of being upset leading to uncertainty and numerous other problems. The courts in their wisdom resorted to legalism in order to put a break on these probable developments.

Land Titles Commission

In the event the courts were unsuitable forums for the task of resolving colonial land disputes. They tended to be technical, expensive and in the circumstances very slow.²⁸ To deal with the ever increasing number of land disputes the administration in 1963 established the Land Titles Commission.²⁹ The Commission was given exclusive jurisdiction to hear and determine whether any land in Papua and New Guinea was or was not native land and to make preliminary inquiries and investigations as it deemed necessary for the purpose of hearing and determining land disputes and claims. The Commission's proceedings were conducted informally and its decisions were binding upon all persons as to ownership of the subject land or interest therein.³⁰

Since its establishment the Land Titles Commission became the main forum for resolving land disputes. However, its role was hampered by a number of factors. Apart from manpower problems and the volume and complexity of some of the cases it had to deal with, many of its decisions eventually went on appeal to the Supreme Court. Under S38 of the enabling Ordinance, anybody dissatisfied with its ruling

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28. For example, by 1968 only four restoration cases had been determined out of more than one hundred appeals, see Bredmeyer, loc. cit.
29. Law of the Territory of Papua and New Guinea, no.5 of 1963. The use of an administrative tribunal to resolve land disputes actually had its origin under the Papua Land Ordinance 1906 (as amended in 1908). The Ordinance empowered the Lieutenant Governor to appoint a board to determine all land disputes in which natives were involved. But the first board was only appointed in 1954, see Quinlivan, 'Reflections on Colonialism' at p.2. As we have also seen, under the Land Title Restoration Ordinance the Commissioner of Titles had quasi-judicial powers to deal with title restoration cases.
30. Sections 15 and 29.

had a right of appeal to the Supreme Court on any of the following grounds: excess of jurisdiction; the decision was against the weight of evidence; denial of natural justice; or that the Commission was wrong in law. The Commission could also refer cases to the Supreme Court by way of case stated. Furthermore, in disputes involving the issue as to whether the subject land was or was not native land, either party was at liberty at any time before the Commission had delivered its final decision to apply to the Supreme Court to transfer the case to it. The latter could quash the Commission's decision and substitute its own or refer the matter back to the Commission or take fresh evidence.

It is submitted that the wide powers of the Court to intervene were self-defeating the main objective of employing an administrative tribunal to resolve land disputes. To make matters worse in many appeal cases the Supreme Court instead of making a final decision referred the cases back to the Commission for further or fresh hearing, thereby causing more delay and indignation among the disputants.³¹

The Land Titles Commission still functions today though some of its powers have been given to other bodies.

POST INDEPENDENCE SOLUTIONS

At the time of Papua New Guinea's self-government in 1972, the land dispute issue had reached its climax. Already there were reports of widespread protests and violence in some regions. A solution had to be found to arrest a potentially violent situation. Nationalist politicians had helped to inflame the issue in their campaign for independence by calling for the restoration of all alienated land "stolen" from its traditional owners.³²

31. The Administrator v Guba and Goriga. Also Re Fisherman's Island [1979] PNGLR 202.

32. J.S. Fingleton, 'Land Policy in Papua New Guinea' in Weisbrot et al, ed., Law and Social Change in Papua New Guinea (Sydney, Butterworth, 1982) p.105.

Ex Gratia Payments

In a desperate attempt for quick results the first self-government established a special "ex-gratia" payments fund. The purpose of the fund was to make payments to traditional land owners who were "unfairly" deprived of their land though legally there was no obligation upon the government to pay them. Payment from the fund was made almost at random depending on, as one writer put it, whoever made most noise.³³ It was naively assumed that the government would thereby buy itself out of trouble. Predictably the scheme backfired. Claims escalated in number and the amount demanded. Indeed even some of those groups which received ex-gratia payment were dissatisfied with the amount paid and claimed for more money.³⁴ The scheme was subsequently quietly abandoned.

Commission of Inquiry Into Land Matters.

Meanwhile a Commission of Inquiry Into Land Matters (hereafter referred to as "CILM") was established. The CILM was charged with a duty, among other things, to investigate the land disputes problem throughout the country and make recommendations to the government. Significantly the CILM was entirely composed of indigenous Papua New Guineans. This was partly due to the government's desire to formulate a general land policy for the independent state guided by the views of the indigenous people, and partly to inspire confidence among the traditional landowners.

Some of the findings of the Commission have already been referred to. The CILM reported that though many claims were exaggerated and/or politically motivated, there were several genuine grievances of people who were unfairly deprived of their land by the colonial administration. It warned that many of these people were desperate and if the matter was not resolved soon it was bound to lead to serious repercussions. The CILM in particular cautioned the government that the land dispute problem was bound to strain relations between the people and the self-government.

33. Ibid., p.118.

34. For example, in 1975 the government after winning an appeal in the case of The Administration v. Guba & Doriga, gave 160,000 kina in ex-gratia payment to the Tubumaga and Geakone clans as a final settlement of their claim over Eranese and Newtown. Soon thereafter their clan leaders made fresh demands for more compensation. By 1983 they were demanding 60 million kina. Post Courier, PNG, 4 September, 1981, p.19.

Although the CILM held the colonial administration responsible for the land disputes, it realised that history could not be re-written completely. On pragmatic grounds it recommended that the government should not accede to the demands to return all alienated land. Such a move in its view was impractical and was a cause for disaster as it would encourage more land claims and intergroup land disputes. Moreover, the government could not afford the huge cost of rectifying the situation. Furthermore, the CILM feared that such a policy was bound to cause anxiety amongst the expatriates especially plantation owners who were already targets of intimidation. In the circumstances the CILM opted for a compromise between the interests of the land claimants and those of the nation. It sought to achieve its objective mainly through a complicated formula which entailed returning some land to its original owners; payment of a limited compensation to some (but not all) aggrieved claimants;³⁵ acquisition by the government of some alienated land (if necessary by compulsory process); and securing the government's title to select land from any legal challenge. The CILM strongly felt that land disputes should be dealt with by a permanent Commission rather than ordinary courts which it said were slow and expensive.

THE OUTCOME OF CILM REPORT

The report of the CILM became the basis of most of the post-colonial government's land disputes settlement. Some of its proposals which have been implemented are summarised below.

(i) The Plantation Re-distribution Scheme

One of the first major outcome of the CILM's report was the establishment of the Plantation Re-Distribution Scheme. Essentially the scheme involved acquisition of plantations by the government and subsequently sell them to the people identified as the original owners of the subject land. The scheme was implemented by a package of four statutes enacted in the 1974 House of Assembly: the Land Acquisition Act, empowered the government to acquire any land by agreement or compulsory process, subject to compensation of the owners; the Land Redistribution Act, provided for the establishment of distribution authorities charged with a duty to determine how the land acquired was to be re-distributed; the Land Groups Act made provision for the incorporation of land owning groups, with power to hold and deal in land; finally, the Land Trespass Act, provided for the ejection of trespassers from land. The later Act was intended to deter self-help before the land was officially re-distributed.³⁶

35. Supra, paragraphs 4.18 - 4.39.

36. Acts nos., 66, 62, 64 and 53 of 1974.

The Plantation Re-distribution Scheme went into full gear almost right from its inception. At the time of self-government there were about 1200 plantations, most of which were located on the Gazelle Peninsula on the Island of New Britain. Between 1974 and 1979, 75 of these plantations were acquired under the scheme and re-distributed to enthusiastic claimants.³⁷ However, thereafter it apparently lost its momentum. Part of the reason was that the scheme run short of funds. The government was not prepared to commit more funds into the scheme. Expectation of financial assistance from the Australians, who everybody held responsible for the problem of land disputes, did not eventuate. Secondly, some sectors of the government were beginning to have second thoughts about the wisdom of re-distributing plantations. Many of the re-distributed farms were not performing according to expectation, indeed some were on the verge of collapsing.³⁸

However, the results of the scheme should not only be assessed in economic terms. The scheme had a social-political role: the return of land to the indigenous people many of whom felt were unfairly deprived of their land. Under the scheme some land has been returned and this must have helped to defuse the tension. Fingleton reckons that if plantations had not been returned in some areas the government would have had to maintain them with riot squads.³⁹ Hence the scheme acted as a "safety valve" to what was an explosive situation soon after the country's independence. The scheme made another indirect contribution. It provided a stimulus to Papua New Guineans to purchase plantations using their own funds outside the Plantation Re-distribution Scheme. It is submitted that in the circumstances, irrespective of its economic performance, the exercise was worthwhile. Presently the scheme's future is in doubt mainly because of lack of funds and the government's indecision.

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37. P. Eaton, 'Melanesian Land Reform: The Plantation Scheme in Papua New Guinea' 1980 8(1) M.L.J. 137.
38. Ibid. A report of the Committee of Review Into the Plantation Re-distribution Scheme, 1979, was very critical of the scheme and it recommended that it had to be scraped. This report is reproduced in Monograph no.15, 'What do we do about plantations?' (Waigani, Institute of Applied Social and Economic Research, 1981). For different assessments of the schemes' successes and failures, see the discussion papers in this monograph.
39. Fingleton, 'Plantation Re-distribution Scheme,' ibid., p.44.

(ii) National Land Registration

The second major outcome of the CILM's proposals was the policy for registration of select government land. The CILM recommended that where any government land was required for public purposes, it should be declared "national land" and registered in a special register. Its proposition was prompted by the numerous disputes over the government's title, especially, in urban areas. The CILM felt that government land which was required for public purposes needed to be protected beyond dispute in any courts of law.

To implement this recommendation the National Land Registration Act, was enacted in 1977.⁴⁰ The preamble to the Act stipulates that its object, inter alia, is to make provision for the recognition of the State's title over land required for public purposes, the title to which is doubtful or appears to be so; and to settle grievances in relation thereto by providing for certain settlement payments. The Act empowers the Minister to declare any government land acquired prior to the independence day of Papua New Guinea, national land provided the land is required for a public purpose as defined thereunder.⁴¹ Once the land has been registered in the national land register the government acquires an indefeasible title. Thereafter persons disputing its title have to lodge their claims with the National Land Commission (established under the Act) for compensation payment.⁴²

Before any compensation is paid claimants must comply with certain conditions. In the first place, the subject land must have been declared national land and registered in the national land register. Secondly, the claim must be made within six months of the declaration in the Gazette. Thirdly, the claimants must prove that before independence a previous claim to the land was made under a law by virtue of which a claim to the land might have been made.

40. Chapter 357.

41. Sections 3 and 7. Any aggrieved person may appeal to the Minister whose decision is final (s 10). Section 53 of the Constitution makes provision for the Government to declare any State land as "national land" if required for a public purpose.

42. Sections 19 and 39.

Finally they must not have received any payment (including ex-gratia payment) whether in cash or not by a pre-independence administration.⁴³ These provisions were intended to deter fresh claims from springing up, and to ensure that those which had previously been settled, however imperfectly, were not brought up again. Nevertheless, apart from the first condition the rest are flexible. The Commission at its discretion may allow claims which do not comply with these requirements. For example, if there are special reasons for not lodging a claim prior to independence and the Commission is of the opinion that non enforcement would be unfair, it may admit the claim. Also if the purchase price which was originally paid was, in its view, insignificant, it may allow the claim.

In its proceedings the Commission is not bound by technical rules of procedure and evidence. Section 34(4) of the Act states that the Commission shall investigate and inform itself on any matter before it in such manner as it thinks proper and admit and consider such relevant information as is available for purposes of determining the matter. Its only obligation is to comply with the rules of natural justice. Where the Commission is satisfied that the claimants are the owners of a customary right in the subject land, if it had not been acquired by the colonial administration, it must make an order for the payment by the state of a settlement payment. The amount of compensation payable is limited as prescribed in the schedule to the Act.⁴⁴ Unlike proceedings before the Land Titles Commission, there is no right of appeal to the Court except on the grounds of denial of natural justice.⁴⁵

43. Section 40.

44. Sections 44 and 45, and schedule 2. The scale ranges from a minimum of 500 to a maximum of 28,300 kina for urban areas and between 100 and 750 kina (plus 10 kina per hectare in excess of 10 hectares) for rural areas. The Minister may at his discretion increase the payment in individual cases by up to 50 per cent section 45(4).

45. Toare Kakakara v. The Independent State of Papua New Guinea, (Unreported) 1985, N556.

Has the National Land Commission made a substantial contribution towards resolving land disputes? Since its establishment very few claims have been admitted for compensation.⁴⁶ Moreover, successful claimants are usually left dissatisfied with the sum paid, especially, after it is distributed amongst several members of the group. The result is that many groups immediately make fresh claims against the government running into millions of kina.⁴⁷ Some officials of the National Land Commission privately concede that the Commission's contribution has been minimal, if at all. They attribute this to a number of grounds. In the first place, contrary to the political rhetoric at the time of the enactment of the National Land Registration Act, its main object was not so much to provide a mechanism for resolving land disputes as to protect the government's title to land. Because of the manner the Act was projected it created a false hope in the minds of the land claimants that all of them would be generously compensated. Secondly, many claimants do not meet the stringent conditions imposed under the Act. In the opinion of the present National Land Commissioner, the discretion to waive these conditions must only be used in exceptional circumstances. Thirdly, many claimants have been frustrated by the delay the Commission takes to resolve the disputes. Part of this delay is attributed to the presence of lawyers who tend to drag the hearings with "technical" arguments. The other main reason for the delay is the requirement under Section 43 that in the event of rival claims over the subject land, the matter should first be referred to the local land court to determine which group is the rightful claimant, before the claim against the government can be considered. This in most cases means several years of delay before the matter is settled. In the meantime the tension builds as the claimants get more and more frustrated.

In spite of the foregoing, it is submitted that the Act provides a balanced solution between the interests of the grieved customary groups and the public. The Act makes it clear to the customary claimants that certain land, irrespective of the circumstances of its acquisition, in the interests of the general public cannot be

46. For example, between 1979 and 1983, out of a total of 103 claims, only 17 were admitted, the government paying a total of 145,8000 kina (Information obtained from the National Land Commission).

47. Between 1981 and 1982, the total claims for compensation made against the Government exceeded 182 million kina, Post Courier, PNG, 1 February 1982, p.2.

returned to its alleged traditional owners. Secondly, whilst the Act recognises that there might be a need to compensate those whose land was acquired in an unfair manner, it limits the amount of compensation which is payable and the circumstances under which claims would be admitted. Inevitably some people miss out and others get much less than what they think they deserve. However, it is submitted that there must be a cut-off somewhere otherwise there will be perpetual claims. Finally, the scope for judicial intervention is much more restricted than under the Land Titles Commission Act. Experience shows that these disputes involve more than legal consideration, hence the courts are in the worst position to resolve them.

(iii) Re-distribution of Unused State Land

The final outcome of the CILM's report was the return of some unused and disputed (and not so wanted) government land to its original owners who were land-short or to other indigenous people without sufficient land. The implementation of this recommendation did not entail any fresh enactment because under the Land Act the power already existed. Section 76 of the Act empower the Minister to declare in the National Gazette any state land as customary land. The land so declared is deemed for all purposes to be and to have always been customary land. The effect of the latter provision is that the land thereupon becomes the property of its traditional owners. Presumably where there is more than one group claiming title thereto the special procedure specified in the Land Redistribution Act may be invoked to identify the rightful claimants. However, it would seem that the Minister has the authority to announce any customary group to be the owner of the converted land. His declaration of ownership is deemed to be conclusive.

Since 1973, a total of 150,000 hectares of unused government land have been converted into customary land.⁴⁸ There can be no doubt that where the land was returned it played a very important role in healing some of the colonial wounds. Occasionally one hears of demands by traditional groups for more allegedly unused government

48. R.W. James, Land Law and Policy in Papua New Guinea (Waigani, Law Reform Commission of Papua New Guinea, Monograph, no.5, 1985) p.135.

land to be returned to the traditional owners. Such demands are of course not unexpected, but the amount of unused government land must by now be fairly small. In any case since the decision is practically irreversible the government needs to act with caution before it decides that it does not need the land.

SUMMARY AND CONCLUSION

To many people the land dispute problem in Papua New Guinea is a concomitant of colonialism. The Anglo-Australians and the Germans might genuinely have wanted to protect the indigenous peoples' land rights, but this desire had to be balanced with the object of colonialism. Though the actual amount of land acquired by the colonial regime was on the average quite small, the manner of its acquisition subsequently caused disputes which became a legacy for the independent government. In fairness to the colonial regime early acquisitions of land were bound to be challenged by the descendants of the original owners. Land disputes were not only about unfair deprivation of land but assumed a social, political and economic dimension. At the time of Papua New Guinea's self-government, no real solutions had been devised to rectify the problem. The country's judicial system proved to be an inappropriate forum partly because some of the bases of the indigenous peoples' land claims were unsustainable in the courts of law, and partly the courts, mindful of the consequences of their decisions, were unsympathetic to their cases. The establishment of the Land Titles Commission to deal with the land disputes was obviously a good move except that its advantages were minimised because there was so much scope for judicial intervention that inevitably many of its decisions ended up in the courts. Evidently, the colonial administration was fearful of entrusting this duty to an administrative tribunal without extensive judicial control. In our view this was self-defeating the objective of setting up the Land Titles Commission.

The independent government's decision not to attempt to re-write history was laudable. Its policy of returning land through the plantation re-distribution scheme and state owned land converted into customary land has gone some way towards resolving the land disputes problem, especially, in the most volatile areas. Obviously there has to be a limit to this policy. Returning of land to its original owners on social-political grounds has to be carefully balanced with the country's economic needs. The government has rightly resisted, and continues to resist, returning land required for public purposes. Instead limited payment is made to the successful claimants as provided under the National Land Registration Act.

Land dispute is a very complicated problem. It is submitted that the National Land Registration Act provides a viable and balanced solution to this problem between the aggrieved traditional land claimants and the interest of the state generally. Indeed I would propose for the provision of the Act to be made applicable to all state land and not limited to land which has specifically been declared as national land. The effect will be that no land over which the state claims title could be challenged in the courts by alleged traditional owners. Secondly, the cut-off date for admission of claims prescribed in the Act will thereby apply. Thirdly, the compensation payable will be very drastically limited - as it should be. Disputes will of course continue as well as some ridiculous claims. But the government should resist any temptation to pay more as it has refused to return select alienated land. Hopefully gradually the problem will recede. Finally, the government, if possible, should not award cash payments which in any case once the money has been divided amongst several persons becomes negligible. Instead the government should compensate the aggrieved persons by investing in community projects.