THE ROLE OF THE COURTS IN ATTEMPTS TO RECOVER ALIENATED LAND

Administration of the Territory of Papua New Guinea v. Guba (the Newtown case)[1] is but one of many suits brought by groups of indigenous people in Papua New Guinea to recover lands which were alienated during the colonial era to the administration, missions and settlers.[2] These actions are indicative of the growing political awareness of Papua New Guineans whose forbears were in many instances uncomprehending and apprehensive spectators to the original alienations.[3] The High Court's decision in the Newtown case is undoubtedly of interest to students of colonialism and is best explicable in the context of imperialism. It is first, necessary to refer to the facts of the case and the judgment before discussing the significance of the decision in terms of imperial policies.

Representatives of the Tubumaga and Gaikone clans in Port Moresby each claimed to be the descendants of the original owners of the disputed lands. The applications also raised a contest with the administration as to ownership of the land, the administration claiming that officers of the British Crown had purchased the land on behalf of the Crown in 1886, two years after the formal declaration of protectorship over Papua. Other issues raised by the administration to support its claim to ownership were based on acts subsequent to the alleged alienation, which formed the main issue in the case. Each Papuan group argued that its forbears, who owned the land at the time of the declaration of protectorship, had no capacity to dispose of land absolutely to strangers under the customary law of the time.

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1 (1973) 47 A.L.J. 621.

2 Various unsuccessful attempts to recover their land through the courts were made by groups in New Guinea under the *Land Titles Restoration Act*. See Bredmeyer, "The Restoration of Titles to Land in New Guinea" (1972) 1 *M.L.J.* 5 at 10-12; the most recent case is *Simbali v. Sacred Heart Mission Trust* (1973) 47 A.L.J. 666.

3 Sack, "Early Land Acquisitions in New Guinea: The Native Version" (1969) 3 *J PNG Society* 75; Wilson, "Land Grabbers of Lae" (1972) *6 New Guinea 4*.

The Newtown case has had a chequered history, with a different decision emerging each time it has been heard. The Chief Land Titles Commissioner, who heard the case at first instance, found for the Tubumaga people, holding that the purported sale by the Gaikone clan was ineffectual as they were not the owners of the land. On appeal to the Supreme Court, his judgment was reversed in favour of the administration and the cross appeal of the Gaikone clan dismissed. A subsequent appeal to the Full Court reinstated the commissioner's original decision in favour of the Tubumaga. But, on the final appeal to the High Court of Australia, the decision of the Full Court was set aside and judgment again given for the administration, the High Court finding that the Crown acquired the land by purchase for value, the value being "'trade' mutually agreed" between the representatives of the Crown and the clan (though it was held that it was unnecessary to decide which clan).[4]

The High Court's decision falls within that genus of colonial precedents which assert that a "primitive" or "savage" people (to use favourite expressions of colonial judges)[5] recognise a conception of "ownership" of land and have a legal system enabling the outright transfer of their lands by sale to colonial administrators, missions and settlers in consideration of "trade goods," e.g., beads, guns, etc. In contrast, another line of decisions has explicitly denied indigenous subject groups any notion of "ownership of land" as distinct from "ownership of usufruct," on the basis that such peoples are so low in the scale of social organisation that their usages and conceptions cannot be equated with the sophisticated institutions of civilised societies.[6]

The Privy Council has placed the Mashona and Matabel of Zimbabwe in the latter category, and in the famous *Barth's* case, the land rights of Kenya tribes were interpreted as approximating only a licence.[7] The aborigines in the Northern Territory of Australia were denied any ownership to their land, on the basis of the feudal principle that the Crown's ownership in demesne cannot accommodate any title in indigenous people.[8]

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4 *Newtown* case, 635.

5 *Ibid.*, 631, 622.

6 *Re Southern Rhodesia* [1919] A.C.211 at 233.

7 *Gathorno v. Murito* [1921] 9 E.A.P.L.R. 102.

8 *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141.

Despite the seeming incompatibilities, both categories of cases are complimentary, and the end result consistent. The dichotomy is explained by an analysis of imperial policies. The economic and historical components of imperialism were described by Lenin in *Imperialism: the Highest Stage of Capitalism*, and more recently by a number of Third World scholars.[9] The legal component is dictated by the colonial policy of the territory in question. In Kenya, Rhodesia and other Southern African territories the colonisers aimed to establish large-scale white settlement and settlers' involvement in the production of primary commodities for the metropolis. Their policy emphasised the "paramountcy of settlers' interests." At best, they favoured "dualism," but this tended in practice to merge into protection of the interests of settlers. In Nigeria, Tanganyika and British New Guinea, on the other hand, where the climate and terrain were considered inhospitable to Europeans, the aim was to maintain the territories as "black men's countries" ("paramountcy of natives' interests").

These political decisions were reflected in colonial legal systems and implemented by colonial judges. "Paramountcy of settlers' interests" was reflected in the denial to indigenous people of ownership of their lands, so that the total land area would be at the disposal of the administration. Autocratic and pompous colonial courts achieved this objective by referring to the people as "primitives" or "savages" who could not have a conception of land ownership. On the other hand, the colonial powers in British New Guinea had always expressed a pledge to protect the right of "natives" to their lands.[10] But conflicts of interest continually arose, from the needs of the administration for land, either for immediate government use or for later sale to settlers in order to defray the costs of administering the territory. In furtherance of these objectives compulsory powers of acquisition, sales and "declarations" of "waste and vacant" became a part of the legal system.

This colonial significance is the only important legal issue in the *Newtown* case, and at independance the case will

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9 E. Williams, *Capitalism & Slavery* (1967); W. Rodney, *How Europe Underdeveloped Africa* (1972); P. Jalee, *The Pillage of the Third World* (1968).

10 Oram, "Land and Race in Port Moresby" (1970) 4 *J PNG Society* at 9 *et. seq.*

become irrelevant. Upon independence, decolonisation encompasses a principle of land redistribution, of returning alienated lands to the people. This has occurred in the White Highlands of Kenya through the million acre scheme; Zambia repudiated the concessions of the Copperbelt and divested ownership from the British South African Company.[11] In Papua New Guinea, the Commission of Enquiry into Land Matters recommended compulsory re-acquisition of some alienated lands and their redistribution to the descendants of the original owners.[12] Legislation to achieve these goals, the *Land Acquisition* and *Land Redistribution Acts*, were prepared for the June 1974 session of the House of Assembly. Since the acts provide for the return of alienated land, they render moot arguments as to the legality of the original alienation. Implicit in such acts is the realisation that colonialism was a political and economic monstrosity, and that decolonisation cannot be realised through courts with a vested interest in reiterating colonial legalisms.

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11 Zambian Government Printer, "The British South Africa Company's Claims to Mineral Royalties in Nothern Rhodesia" (1964).

12 Commission of Enquiry Into Land Matters, *Final Report* (1973) chap. 4.