FIGHTING OVER LAND

BY JEAN ZORN*

The coming of independence brought fear and uncertainty to Papua New Guinea. It also brought excitement and the reawakening of pride in things Papua New Guinean. This resurgence was expressed, in part, in the recognition that Papua New Guinean societies had possessed a viable system of customary law which had governed the people before the advent of colonial rule and which could be revitalized to serve the people's need for an effective and understandable legal system again. At the Seventh Waigani Seminar, The Hon. Michael T. Somare, who was then Chief Minister of the self-governing territory, called on Papua New Guinean lawyers "to build a framework of laws and procedures that the people of Papua New Guinea can recognize as their own -- not something imposed on them by outsiders".[1]

Though Australian-style courts in Papua New Guinea had been able to apply customary law in limited circumstances, custom had existed more in the nature of a residual category than as an integral facet of the formal legal system.[2] Its re-introduction began with the creation of Village Courts, which would be run by village leaders and would apply customary law exclusively. The renaissance has been continued by the passage of the *Land Disputes Settlement Act*, which returns the solution of arguments over land to village people.

The *Land Disputes Settlement Act* is, in many aspects, very good law. Within the limits imposed by the government's lack of funds and manpower, it succeeds in establishing a system of mediators and magistrates who may be able to solve arguments over customary land more quickly and more certainly than has been the case in the past. With a few exceptions, the Act is written in language accessible to the average educated person, rather than in the legalistic gobbledygook so beloved by Papua New Guinea's legislative draftsmen up to now. Most important, it does not depend upon foreign concepts of ownership or on judicial processes imported from the west, but instead provides that customary law shall be applied in a way that reflects traditional procedures and policies as closely as can be achieved in Papua New Guinea today.

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* Principal Projects Officer, Law Reform Commission. I should like to thank Abdul Paliwala, Jim Fingleton and W.J. Kelly for their information and assistance.

1 M.T. Somare, "Law and the Needs of Papua New Guinea's People" in Zorn and Bayne (eds.) *Lo Bilong Ol Manmeri*.

2 *Native Customs (Recognition) Act 1963*.

There are potential problems lurking in the new law, however. In its attempt to combine dispute settlement at the local level with hierarchilal control from the centre, it has built into itself an internal tension that may kill it before it begins. Moreover, the existence of two different judicial systems at village level -- the land dispute mediators for land cases and Village Court magistrates for all other cases -- is at worst an invitation to confusion and conflict, and at best needless redundancy.

I. *Customary Land in Papua New Guinea*

The customary law of land tenure in Papua New Guinea is much more sophisticated than are English common law principles of land ownership.[3] In Papua New Guinea, there is seldom a single individual with absolute rights over a tract of land. Instead, numerous groups, families and individuals simultaneously exercise different rights and responsibilities over the same land. In most Papua New Guinean societies, the clan or lineage as a unit controls access to all the residential, gardening and hunting land in and around the village. The clan or lineage is responsible for protecting the land from outsiders who might try to make gardens on it or take it by force.

Within the clan's territory, families or individuals are allotted garden and house plots. An individual may own his gardens for life and may be able to pass them on to his children, but he could not sell or give them to an outsider without the approval of the clan. In many areas, even the approval of all living clan members would not be sufficient to ratify a permanent alienation of land, for it is assumed that clan members already dead and those not yet born also hold rights in the ancestral territory.

Individuals may also have rights to hunt on the land, to draw water or catch fish in its rivers, or to gather the produce of fruit trees. And many people, in exchange for help in clearing the land, grant garden plots on their acreage to relatives and friends. Thus, a single block of land may belong to one man, in the sense that no one else could garden there without his permission. But other people might have the right to hunt on that land; his sisters or in-laws might have coconut palms or bananas growing on the land; and, his unsupported word would not be sufficient to transfer any rights in the land to an outsider.

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3 For more complete descriptions of customary land tenure and for details of the rules in different Papua New Guinean societies, see H.C. Brookfield and P. Brown, *Struggle for Land* (1963); A.L. Epstein, *Matupit: Land, Politics and Change among the Tolai of New Britain* (1969); I. Hogbin, *Studies in New Guinea Land Tenure* (1967); B. Malinowski, *Coral Gardens and their Magic*, Vol. I (1935).

Arguments over land, both within clans and between them, have been endemic, for as long as anyone can remember. It is easy to see why land causes so many disputes in Papua New Guinea. Because slash-and-burn agriculture forces villages to move periodically, people do at length forget the precise boundaries of earlier settlements; even more troublesome, the same area may have been occupied successively by different groups at different times, each of whom remembers the old boundaries all too well. Moreover, clans could base their claims to the land both on original settlement or on conquest; as a result, every war in which the original settlers were uprooted by another group led to two groups having equally valid claims to that land.

All these reasons for frequent disagreements over rights in land can be summarized in the observation that land is the most important element in the traditional Papua New Guinea economy. Disputes in any society are most frequent in the areas most important to the members of the society, and land is important to Papua New Guineans. The land supplies men not only with their livelihood, but also with their identity.

In recent years, the potential for land disputes has increased. Cash cropping, urbanisation, leases and sales to government and industry have made the land more valuable. Many land disputes among Papua New Guineans occur when one group hears that another is claiming or about to be compensated for alienated land.[4] At the same time, population growth and the more long-range use of land required by cash cropping have created land shortages and contests for land where once there was more than enough for all.[5] But, just at the time when agencies to settle land disputes are most needed, economic and social changes have undermined traditional values and rules, making people less sure about their customary rights over land and occasionally making customary dispute settlement agencies ineffective.[6]

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4 As occurred, for example, in *Gaya Nomgui v. Administration*, Full Ct. (1972) No. 36; and in the Newtown Case, *In re Era Taora*, Full Ct. (1971) No. 18.

5 Although the basic means of obtaining land in pre-colonial Papua New Guinea was through kinship ties, it was not uncommon for individuals from another clan or lineage to be given land. In return, they helped the clan or lineage with its work and wars and became, after a while, all but members of the group. When land was plentiful, customary law was used by the people to open land rights to anyone in need. Now that land is scarce, however, customary law is used by the people to close off land rights.

6 Epstein describes several examples in *Matupit*, *supra*.

Because land disputes were likely to erupt into violence, the Australian administration determined to create an agency that would be able to find rapid and long-lasting solutions to the claims and controversies over customary land. In its African colonies, Great Britain had encouraged the development of Courts for Native Matters, which applied customary law to all the disputes that villagers brought before them. Wherever possible, the British gave formal recognition to traditional dispute settlement agencies. Thus, in colonial Africa, land disputes could be brought to village-level courts which were staffed by tribal elders who understood local custom and had the respect of the litigants.[7]

This route was closed to the Australians in Papua New Guinea, however, for they had early decided that Papua New Guineans possessed no legal agencies worth preserving and were, at any rate, not to be trusted with the settlement of their own affairs.[8] Thus, in the colonial period, there were no officially recognised courts in Papua New Guinea that operated at the clan or village level and applied customary law. Therefore, when the Australians at last became convinced that land disputes could be settled only by applying customary law, they found it necessary to create specialist agencies to do so. The administration set up the Native Lands Commission, which was superseded in 1962 by the Land Titles Commission. For most of their brief sway, each was staffed almost entirely by expatriates.

The Land Titles Commission was given "exclusive jurisdiction to hear and determine all disputes concerning and claims to the ownership by native custom of, or the right by native custom to use, any land, water or reef ..."[9] It was hoped that a quasi-judicial body, devoted solely to adjudicating boundaries and settling disputes over land, would be able to settle all outstanding claims and controversies before many more large-scale

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7 P. Bohannan, *Justice and Judgement among the Tiv* (1957); W.B. Harvey, *Law and Social Change in Ghana* (1966); C.K. Meek, *Law and Authority in a Nigerian Tribe: A Study of Indirect Rule* (1937); G.F.A. Sawyerr (ed.) *East African Law and Social Change* (1967); Elias, "Evolution of Law and Government in Modern Africa", in H. Kuper and L. Kuper, *African Law; Adaptation and Development* (1965); H.F. Morris and J.S. Read, *Indirect Rule and The Search for Justice* (1972).

8 Bayne, "Legal Development in Papua New Guinea: The Place of the Common Law", 3 *Melanesian Law Journal* (1975) 9 at 17-19.

9 *Land Titles Commission Act 1962-1971*, s. 15(1).

fights broke out.[10] The Commission did not succeed in this undertaking.

Of the thousands of disputes that arose among Papua New Guineans, most were never brought to the Land Titles Commission, because people preferred traditional dispute settlement methods, even where those methods led eventually to war.[11] And those disputes that were brought to the Commission did not get speedily settled.[12] Complainants waited months for hearings to begin and years for them to be completed.[13]

However, the most important failing of the Commission was that its decisions did not satisfy Papua New Guinean litigants. The Commission's hearing procedure became complicated, frightening and confusing litigants rather than impressing them. And the Commission's decisions, though supposedly grounded in customary law, in fact mirrored western notions of land ownership. The *Land Titles Commission Act* had empowered it to determine either that one party owned the land or that various parties held different rights to its use, but the Commission chose, whenever it was faced with a controversy over the right to use land, to award absolute ownership to one of the parties.[14] Thus, while the Commission assumed it was using customary legal principles, it had in fact diverged widely from what the people knew custom to say.

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10 The Preamble to the *Land Titles Commission Act 1962-1971* provides: "... it is universally recognized that the expeditious and final determination of disputes as to rights in land and the registration of guaranteed rights to land are of basic importance to the well-being and development of all countries and especially of developing countries such as the Territory of Papua New Guinea: ... it is also universally recognized that these matters can best be dealt with by judicial authorities ..."

11 R.L. Hide, "The Land Titles Commission in Chimbu", *New Guinea Research Bulletin* No. 50 (1973) 96-101.

12 For example, a land dispute that is still causing intensive fighting between two Highlands clans first came to official attention in 1960 when it was heard by the Native Lands Commission. It reached the Supreme Court in 1970, and is still unsettled. *Re Application by Endugwa Group*, Sup. Ct. (1970) No. 604.

13 In the *Idumava* case, for example, the marathon four-year hearing was followed by a review in 1971, a Supreme Court decision in 1972, and an appeal to the Full Court which ordered in 1973 that the case be remitted to the review panel.

14 Commission of Inquiry into Land Matters, *Final Report* (1973) 111; Zorn, "The Land Titles Commission and Customary Law," 2 *Melanesian Law Journal* (1974) 151, at 140-171.

Because the Commission sought in each case for a single owner of the land, its decisions always resulted in one party winning while the other lost. This western method of deciding disputes is foreign to Papua New Guinean law which uses negotiation and compromise to ensure that everyone wins a bit. The Commission's methods invariably left the losers feeling angry and cheated, where traditional methods would have restored social harmony.

II. The Commission of Inquiry into Land Matters

By 1972, land problems in some parts of Papua New Guinea had neared crisis proportions. Although the administration was no longer taking customary land, it demonstrated great reluctance to return to the people any of the land that had been acquired earlier. The people attempted to reclaim their land through the Land Titles Commission and the courts, but the administration defended vigorously not only its own title but the titles of individual expatriates who held leases or freeholds.[15] Frustration led, in East New Britain, to the creation of the Mataungan Association and the murder of an administration official. In the Highlands, it led to numerous tribal wars.

Anxious to solve the problem of land shortages, many people also recognized that independence would bring new problems, unless the government were to enunciate a clear policy about land use and ownership. The administration had tried to impose a policy in 1971, introducting into the House of Assembly a package of land bills. However, the Members of the House refused to pass them, recognizing that the procedures outlined in the bills would lead to individual ownership, the breakdown of customary group titles, and a commercial land market that would

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15 In many *Land Titles Restoration Act* cases, which were ostensibly disputes between an expatriate land owner and Papua New Guineans who claimed the land had been taken from them unlawfully, the expatriates were represented by the Custodian for Expropriated Property, a highly-paid official specially appointed by the Australian administration to press the planters' claims. Papua New Guineans had to make do with the excellent but overtaxed services of the Public Solicitor. The Commissioner never permitted Papua New Guineans to win back their land if the faintest grounds for appeal existed. He spent government funds and exhausted the resources of his Papua New Guinean adversaries by appealing the decision in *Custodian of Expropriated Property v. Tedep* (1964) 113 CLR 318; *Tolain v. Administration* (1966) PNGLR 232; *In re Tonwalik Island* (1969-71) PNGLR 110; and many other cases. And, as the Commission of Inquiry into Land Matters has pointed out, the litigant most guilty of needlessly prolonging disputes by invoking every possible level of the appellate process was the administration, which permit a Papua New Guinean claimant to win. See, for example, the *Newtown Case, supra, and Custodian v. Tedep, supra.*

disrupt village life and cause many people to lose their land entirely.[16]

The Commission of Inquiry into Land Matters was appointed in February, 1973, and charged to report to the House of Assembly by the end of the year on a broad range of issues. It was asked to investigate the nature and extent of land disputes among Papua New Guineans, the problems associated with alienated land, and the ways in which customary land tenure systems should be either protected or modified. In pursuing these investigations, it was to keep in mind the need for economic development, the need to minimize social dislocation, and the egalitarian aims outlined in the Eight Point Improvement Programme and now in the Constitution.[17]

The Commission reported to the House of Assembly in October, 1973. Its report, which detailed procedures for solving the problems associated with both customary and alienated lands, began with a statement of basic principles. The Commission recommended that "land policy must be concerned with increasing production, but even more concerned with the kind of society Papua New Guinea should become."[18] Since the Eight Point Improvement Programme called for a society in which the benefits of development were distributed as widely and equally as possible, the Commission recommended that land should not be easily available for commercial trading. Instead, customary group ownership should be preserved though customary rules should be modified to ensure that land rights were not distributed unequally, that private landlordism would not occur, and that land would be owned by those who need it most and use it best.[19] The Commission further recommended, in pursuance of these aims, that the government maintain the opportunity to control land use by putting all *individual* landholders, both Papua New Guinean and expatriate, on a leasehold basis, with development conditions attached to the lease.[20]

The Report of the Commission of Inquiry envisages a society in which most of the land is held in common by customary groups. The groups will register their common holdings, so as to decrease the likelihood of land disputes. Within the registered customary

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16 Commission of Inquiry into Land Matters, *Final Report* (1973) 1.

17 *Ibid.*, 3-6. (The Commission of Inquiry's *Final Report* will be referred to in the footnotes that follow as "Commission of Inquiry".)

18 Commission of Inquiry, 15.

19 Commission of Inquiry, 15.

20 Commission of Inquiry, 45-73.

holding, some land will be given to individual members of the group to use for their own needs, but much of it will be used by the group as a whole, having formed itself into a village development corporation.

However, the Commission recognized that land disputes would be frequent for many years to come. It will be some time before much customary land can be registered, as the government has neither the money nor the manpower to staff the necessary agencies. In the meantime, disputes between groups will continue, and the registration process itself will stimulate more. Nor will registration reduce the number of disputes between individuals over rights to tracts of land within the group's territory. Convinced that the Land Titles Commission only exacerbated disputes by unnecessarily prolonging them, the Commission of Inquiry recommended a new dispute settlement process, based in the village and dependent on mediation and arbitration.

The recommendations of the Commission of Inquiry into Land Matters were approved by the House of Assembly in 1974, and have resulted in a package of new land bills. The *Land Acquisition Act*, which permits the government to buy land held by expatriates and return it to the people who need it, was passed 1973. The *Land Trespass Act* was passed in 1974, as were the *Land Groups Act* and the *Land Redistribution Act*. The *Land Disputes Settlement Act* was passed in 1975. Legislation dealing with land registration and control of dealings is yet to be drafted. Together, these statutes will create a new land policy for Papua New Guinea, effectuating the Eight Point Improvement Plan and the recommendations of the Commission of Inquiry into Land Matters.

III. The Land Disputes Settlement Act

The major aim of the *Land Disputes Settlement Act* is to solve disputes speedily and surely by returning dispute settlement to the people. Thus, the Act provides that hearings shall take place as near the disputed land as possible, and that there shall be only one appeal, to a land court in the district rather than to the National Court.[21] To ensure that the settlement is

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21 There is some controversy over the possible role of the National Court in the new land dispute settlement system. The *Land Disputes Settlement Act 1975* s. 61 seems quite final on the matter: "A decision of a District Land Court on an appeal under this Part is final and is not subject to appeal in any way". However, the Commission of Inquiry, while advising that the appeals process should be generally confined to the District Court level, had recommended that there might be unusual instances when appeals should lie to the National Court. And some people believe that the Act's strong wording still does not rule out prerogative writs, which would be a back-door way of reaching the National Court.

final, the Act provides that the approval of all the parties to the dispute shall be gained by concentrating on mediation and negotiation of the dispute, rather than on adversary procedures, and by empowering mediators and the courts to make orders that broadly accept customary principles in permitting numerous rights to be exercised on the land simultaneously.

At the top of the hierarchy which the Act establishes are the district land disputes committees. There will be one for each province.[22] Despite their title, the committees will not be involved in settling land disputes. Their only duties will be to divide their provinces into mediation areas, and to appoint mediators for those areas that need them.[23] Even at this level, the Act requires local participation. The committees cannot establish a mediation area until they have received a request to do so from a Local Government Council or "any other body representative of a majority of the people of the area concerned."[24] Nor does the Act intend the shortage of manpower that would result if the whole country were blanketed with mediation areas. After receiving the request to establish a mediation area, the committee shall still not do so until it has satisfied itself that a real need exists in the area for land mediators.[25]

This is, however, a point on which the Act is misleading. The arrangement and titling of sections would lead one to believe that the the drafters had intended land mediation areas to be declared and land mediators to be appointed throughout

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22 The district land disputes committees will be composed of the senior District Court magistrate in the province (who will be chairman), the Provincial Commissioner or his nominee, an officer of the Ministry of Natural Resources, and two persons appointed by the provincial government or Area Authority. *Land Disputes Settlement Act, 1975*, s. 5.

23 They will also be responsible for approving the Minister's selection of certain local land court magistrates. *Land Disputes Settlement Act 1975*, s. 21(2).

24 *Land Disputes Settlement Act 1975*, s. 8(1)(a).

25 In s. 8(1)(b) and 8(3), the *Land Disputes Settlement Act* lists the matters that the committee should consider in determining whether a need for land mediators and land courts exists in a given area.

most of the country.[26] The Land Court Secretariat has, in fact, read the Act to mean this, and has so ordered in its publications.[27] But the Act actually intends two village level systems to operate simultaneously. Those places where land disputes are frequent and intense, and where no traditional dispute settlement authority is working effectively, are to be designated land mediation areas and to have land mediators appointed. In all other parts of the country, however, land disputes will go to traditional settlement authorities or, if none exist, directly to the local land court.

Thus, the first person to hear a dispute over customary land will be a traditional leader, a local land court magistrate, or a land mediator.[28] Where land mediators are appointed, the jurisdiction of each will be limited to a single land mediation area so that no mediator will ever live far from the disputed land. Each mediator shall be appointed for a three year term by the committee, after it has consulted with the Local Government Council, the Village Court and anyone else in the area with whom the committee considers it desirable to consult in order to ascertain that the mediator will be acceptable to the people of the area.[29] Mediators *may* be Village magistrates; they *must* be familiar with the customary land law of the area.

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26 Thus, the Act has a number of sections dealing with land mediators. It is only by reading their sub-sections and sub-paragraphs and contemplating upon what they leave out that it becomes apparent that, in much of the country, there will be no land mediators. And, in discussing the ways in which local land courts get jurisdiction, the Act does not divide the matter into two sections -- one section on receiving cases from land mediators and another on receiving cases from other channels. Instead, it has just one section, entitled "limitations of jurisdiction," in which, once again, land mediators are prominently mentioned and other dispute settlement agencies are lumped into the seemingly secondary category, "where a dispute relates to land which is not located either wholly or partly within a Land Mediation area." *Land Disputes Settlement Act*, sec. 26(1) and (2).

27 Land Court Secretariat, *Land Disputes Settlement Act: Explanatory Notes & Index* (August 1975).

28 S. 3 provides that the *Land Disputes Settlement Act* applies only to customary land, and not to disputes over alienated or national land. The Land Titles Commission is still legally empowered to hear disputes over alienated or national land; it has, however, effectively disbanded, and its few remaining cases were handed over to the Ministries for Justice and Natural Resources, to be settled by informal negotiation.

29 *Land Disputes Settlement Act 1975*, s. 10(5).

Any party to a dispute may bring it before a mediator. The dispute may also come before the mediator if he himself decides that it should be mediated, or if he is requested to mediate by a Village Court, Local or District Court, or an officer of district administration.[30] Section 17 of the Act implies that the parties to a dispute can be required to bring it to mediation, even when neither wants to, provided that a mediator, magistrate or district officer has ordered that mediation begin.

If no mediator has been appointed for the area or if mediation fails to resolve the conflict, the dispute may be brought to a local land court. Local Court magistrates will function as magistrates of local land courts.[31] When his court is sitting as a local land court, the magistrate shall have up to four land mediators or local leaders sitting with him, and the court's decision will be by majority vote.[32]

Either party may appeal the local land court's decision to a district land court, which shall consist of a stipendiary or resident magistrate and, if the magistrate chooses, one or more mediators, sitting as assessors.[33] The district land court may act solely as an appellate bench, reviewing the records of the local land court's findings, or it may rehear any of the evidence that it chooses. The district land court may issue an order, by settling the dispute, or it may remit the case to the local court for another hearing.[34] It is unfortunate that the Act permits cases to be sent back to the local land court, as that merely extends the time that may elapse before the dispute is solved.

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30 S. 17(1) and (2).

31 The Minister for Justice will decide which Local Court magistrates will serve as local land court magistrates, according to s. 21(1). If no Local Court magistrates are available in an area, the Minister may appoint district officers to be local land court magistrates. To do this, however, he must gain the support of the district land disputes settlement committee, who can withdraw their support at any time. *Land Disputes Settlement Act 1975*, s. 21(2), (3), (4).

32 S. 22(3). If no land mediators are available, the magistrate may choose up to four people who live in the area to form the court; s. 22(3). According to s. 2(4), if the court's vote is a tie, the magistrate has a casting vote.

33 The stipendiary and resident magistrates chosen to be district land magistrates are to be selected by the Minister for Justice; s. 47. The mediators sitting at the district land court level will do so only at the request of the magistrate, and will be there not to vote on the case, as they do in local land court, but merely to advise the magistrate; s. 48(2).

34 *Land Disputes Settlement Act 1975*, s. 60.

One reason for the ultimate failure of the Land Titles Commission was its position as a separate and distinct agency outside the regular court system. The administration could never afford enough people to staff the commission and its demarcation and adjudication committees adequately. Further, few disputes of any consequence involve only one issue. Parties at war over land are usually angry at one another about other things as well -- such as adultery, or an unpaid bride price or a stolen pig. The dispute cannot be settled successfully until all the issues have been discussed, but the Land Titles Commission was limited to solving the argument over land only.

The *Land Disputes Settlement Act* introduces many new names and titles; terms like land mediator, local land court or district land disputes committee will become part of the judicial lexicon. But the Act has not created a structure for solving land disputes that is entirely separate from the existing system of lower courts. Land mediators are a new addition to the court system, but many of them will be Village Court magistrates or Local Government councillors. Local and District land magistrates will almost all be magistrates of Local and District Courts.

Probably, cases involving land will be heard in the same courtroom and on the same day as cases involving other issues.[35] The magistrate will merely announce that he has now taken off his Local Court wig and donned his land court wig, and will invite the panel of mediators to join him on the bench. To further integrate land cases with other kinds of disputes, the Act provides for the court to settle all the disputes between the parties if the magistrate finds that other issues are mixed up with the dispute over land.[36]

But the Act is not as forceful as it might be in ensuring that all the matters in dispute between the two parties are brought to the court's attention and settled. The local land magistrate may deal with issues other than land only if he finds that the argument over land is "so inextricably involved with another dispute or with criminal proceedings pending against some person that the Court should not proceed to deal with the [land] dispute until that other dispute ... is dealt with first."[37]

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35 District land court magistrates are supposed to hear land cases "on or near the land in dispute" whenever "in the opinion of the Court it is reasonable and practicable to do so", s. 50(2). One would suspect that magistrates will seldom find it reasonable and practicable to leave their own courtrooms, unless they are on circuit anyway. The requirement that local land court magistrates hear the dispute near the land is phrased more strongly but still leaves one wondering how often they will heed the order. See s. 24(2).

36 *Land Disputes Settlement Act 1975*, s. 29.

37 S. 29(1).

Thus, the local land magistrate cannot act on other issues merely because the parties to the land dispute happen to be involved in a dispute over these issues also; the magistrate is empowered to act on them only when he finds it would be impossible otherwise to settle the land dispute. And even when he has found that the disputes are "inextricably" interwined, he may still choose to hear only the land dispute.[38]

When the Local or District Court sits as a land court, its procedural and evidentiary rules will differ from the rules that the lower courts normally follow. In order to promote informality, the *Land Disputes Settlement Act* provides that land courts are "not bound by any law or rule of law, evidence, practice or procedure other than this Act", and the rules in the Act are very few.[39] The land court may call any witnesses it thinks necessary and may ignore hearsay rules; the only limitation on its freedom is the requirement that the parties have the opportunity to hear arguments on any information the court gathers.[40] The land court procedure will further differ from that of Local and District Courts in that the ordinary court is primarily an adjudicating body; having heard all the evidence, the magistrate makes a decision which the parties must obey. Though land court magistrates may have to make decisions and issue orders, they are to do so only when no agreement between the parties seems possible. First, they are expected to act as arbitrators rather than adjudicators. They should try, whenever possible, to get the parties to agree to a settlement between themselves, rather than imposing a verdict on them.[41] These differences in procedure between ordinary and land court hearings may not exist for long, however. The Law Reform Commission has begun a study of court practices and procedures that will probably result in recommendations bringing all courts closer to the model provided by the new land courts.

By the end of 1975, the *Land Disputes Settlement Act* had been in force for several months. The groundwork for putting

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38 The magistrate can also choose to send the other issues back to a Local or District Court for settlement before his court will hear evidence on the land dispute.

39 *Land Disputes Settlement Act 1975*, s. 36(1)(a).

40 S. 36(1)(b).

41 S. 27.

it into operation was proceeding slowly. A Land Courts Secretariat had been established in the old headquarters of the Land Titles Commission in Port Moresby to oversee the system and to train mediators and magistrates.[42] District Land Dispute Committees had been set up in every province except Gulf, Morobe, Western and the National Capital District. In the first year, the secretariat decided, energy and attention would concentrate on the provinces that had experienced the most troubles over land in the past, so land mediation areas had been declared only on the islands of Bougainville and Manus in East New Britain and Madang, and in the Highlands provinces. Local land court magistrates had been appointed for all these provinces. The secretariat was finding it difficult, however, to appoint district land court magistrates, as there were not enough Resident and Stipendiary Magistrates to go around. District land courts, therefore, had been established only on Bougainville, in the Central and Morobe provinces, in the Eastern Highlands and on New Ireland.

In most provinces, no permanent land mediators had been appointed; district land dispute committees and local magistrates preferred to appoint mediators on an *ad hoc* basis, as cases arose, until they had seen the system through its trial period. And in East New Britain, where traditional bodies have successfully dealt with land disputes, it was decided not to appoint new mediators. Only two cases were undergoing mediation in December, 1975 - one in the Western Highlands. No cases had as yet reached the local or district land courts. The Land Titles Commission had all but ceased to function; all its cases involving disputes between Papua New Guineans over customary land would be absorbed into the new system. Two onetime members of the Land Titles Commission remained in Papua New Guinea; both were involved in assisting the government to establish the new land courts.

Since wars over land still go on and the Commission of Inquiry into Land Matters found many land disputes still undecided, one may wonder why so few cases are currently in mediation under the new dispute settlement system. The blame should be shared by the Act and its administrators. In its attempt to meld local autonomy with central control, the Act displays much ambivalence. On the one hand, people involved in a land dispute can call for its settlement by a mediator, and local people are to be consulted on such things as the declaration of mediation areas and the appointment of mediators. On the other hand, the Act establishes a hierarchy of courts and committees, from the Minister (who has delegated many of his powers to the Land Court Secretariat) to the district committees to the courts and so to mediators.

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42 The Land Courts Secretariat is headed by Sinaka Goava, who chaired the Commission Inquiry into Land Matters, and William John Kelly, who was a Land Titles Commissioner.

As a result, the dispute settlement machinery can be activated from the bottom, from the village level, only with great difficulty. A request from a village for land mediators requires the appointment not only of mediators but also of local land courts, district land courts and a district disputes settlement committee. In comparison, a request for the establishment of Village Courts can be answered merely by the creation of a Village Court.

It is unlikely, however, that many villagers will make the request for land mediators, since they are hardly aware that the new dispute settlement system exists, let alone of what it consists. Village Courts were introduced with a barrage of publicity and education, making it possible for villagers to learn about them and to decide whether they wanted them. The administrators of the land machinery, however, have confined their publicity to potential committeemen and magistrates and their organizing to the same group. Had the drafters of the Act wanted to ensure power at the local level, they ought not to have built in so many opportunities for administrators to keep the control to themselves.

IV. The Act and the Commission of Inquiry

In its *Final Report*, the Commission of Inquiry into Land Matters listed the basic principles that should be followed in settling land disputes. With some exceptions, the *Land Disputes Settlement Act* adheres closely to the Commission's policies and recommendations. First, the Commission recommended, "people should be involved in the settlement of their own disputes and not able to avoid this responsibility by referring the matter to the kiaps or to the Land Titles Commission."[43] The *Land Disputes Settlement Act* ensures the involvement of people in settling their own disputes. The first step in the dispute settlement process is mediation, during which a land mediator will assist the parties to discuss their differences and to reach an agreement among themselves.[44] The parties may go to the local lands court only if mediation has proven unsuccessful:

> ... a Local Land Court has no jurisdiction over the dispute, unless a Land Mediator has certified that he has acted in relation to the dispute and that -
> ... (c) the parties have, in his opinion, made reasonable efforts to reach agreement but have been unable to do so; or
> (d) the party applying to the court has made reasonable efforts to reach agreement but has failed to do so because of some default on the part of the other party; or
> (e) in his opinion, there is no reasonable likelihood of agreement being reached through mediation and

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43 Commission of Inquiry, 113.

44 *Land Disputes Settlement Act*, s. 17.

> that there is good reason for the dispute to be dealt with without delay.[45]

Even after taking the case, the local land magistrate may decide, at any stage of the proceedings, to adjourn the hearings in favour of further attempts to mediate between the parties.[46]

And the hearing before the local land court is not termed a trial but an arbitration. In a trial, the judge hears arguments from both sides in order to decide which side is right and which wrong, which side will win and which lose. In an arbitration, on the other hand, the magistrate or arbitration panel hears arguments from both sides, and whatever other arguments the arbitrators care to invite, in order to reach a settlement that will best suit the needs of the parties or most closely effectuate their relationship and their intentions. Thus, at every stage, the Act tries to carry out the Commission of Inquiry's recommendation that the people be involved in the settlement of their own disputes.

The Commission of Inquiry also recommended that the dispute settlement process be brought closer to the people. "It must be possible for the people to have their small disputes dealt with almost immediately, before they become bigger and develop into confrontations between clans."[47] The Act may be less successful in carrying out this mandate, simply because it is impossible to keep disputes from enlarging if one side wants to go on badly enough, but the Act does establish that dispute settlement agencies will operate close to the people. The mediator chosen for each dispute is to be the one who lives closest to the disputed land, unless the local land magistrate believes another mediator better able to handle the dispute in question.[48] Local and district land court hearings are to be held on or near the disputed land, whenever possible.[49] If that

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45 S. 26(1).

46 S. 27.

47 Commission of Inquiry, 113.

48 The *Land Disputes Settlement Act*, s. 17(5) and (6), gives the reasons that should prompt a local land court magistrate to have the case mediated by someone other than the land mediator who lives closest to the disputed land:- "... the parties to the dispute prefer a land mediator from another land mediation area ... the land mediator for the land mediation area or division is personally interested or involved in the dispute ... no land mediator for the division is available ... the nature of the dispute is such that in all the circumstances it would be preferable to have the dispute mediated by a land mediator from another land mediation area or division". These provisions give the magistrate much latitude in his choice of land mediators.

49 *Land Disputes Settlement Act 1975*, s. 24(2) and 50(2).

is not possible, members of the court must visit the disputed land.[50]

In the Land Titles Commission, hearings were sometimes protracted, but the major delays occurred during the appellate process, which could drag on for years, and which invariably took place in the Supreme Court in Port Moresby, far from the claimants' land.[51] The *Land Disputes Settlement Act* attempts to remedy this by limiting the appellate process to an appeal before the district land court. Thus, there can be only one appellate review, and it must take place within the claimants' home province.[52]

The Commission of Inquiry also recommended that the government of Papua New Guinea lay down national land policy goals, just as it had established economic and social goals in the Eight Point Improvement Programme.[53] If the government did make its land policies known, then government officers would be required to adhere to these policies whenever they drafted legislation, mediated or decided land cases, bought or sold land, or considered returning land to the people. The *Land Disputes Settlement Act* foresees the creation of a national land policy by providing that Regulations can be added to the Act, establishing guidelines for magistrates to follow in deciding land cases.[54] However, no guidelines have as yet been issued, because the government has been unable or unwilling to declare its policy.

Normally, mediators and magistrates will apply customary law in deciding land disputes.[55] They are free to determine customary law in any way they choose, limited only by the evidence before them.[56] Their power to mediate disputes and

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50 S. 37.

51 See footnotes 12-15, *supra*.

52 But see footnote 21, *supra*.

53 Commission of Inquiry, 114.

54 *Land Disputes Settlement Act 1975*, s. 66(2).

55 S. 66.

56 Generally, the *Native Customs Recognition Act* defines "native custom" and details when it is to be applied and how judges and magistrates are to find it; under the *Native Customs Recognition Act*, customary law must be proven in evidence, like any other fact material to the case, and cannot be assumed as a matter for judicial notice. The *Land Disputes Settlement Act*, s. 66 (3), however, provides that the *Native Customs Recognition Act* shall not apply to land disputes, thus permitting magistrates much greater latitude in finding and applying customary law.

to issue orders reflecting the agreement reached between the parties does not conflict with the rule that they must apply customary law, for customary law has always been the result of mediation and compromise. Indeed, by requiring mediation and negotiation, the Act implements customary law more truly than did the Land Titles Commission, which incorrectly assumed that customary law consisted of immutable rules which a court need merely discover and enforce.[57]

The Act limits customary law, however, by stipulating that land courts should not apply it if it conflicts with Local Government Council rules or with the guidelines which are to be included as Regulations to the Act.[58] This provision presents problems of interpretation and manipulation for the land courts. If the guidelines and Local Government Council rules themselves conflict, which should the courts choose? Probably, they should opt for the guidelines, as the Act provides that the guidelines will "modify" custom, whereas the Local Government Council Rules are merely "evidence" of custom.[59] In fact, the courts could probably choose to apply traditional law, even when Local Government Council rules conflict with it, on the ground that the rules are merely "evidence" as to custom, which can be overcome by better evidence.

The section of the Act which permits guidelines to modify custom applies only to the land courts; it does not apply to land mediators. Thus, a mediator can continue to approve agreements even if they undermine the guidelines, and nothing in the Act permits the local or district land courts to overturn an agreement approved by a mediator on those grounds. Let us assume, for example, that guidelines were inserted in order to promote equal opportunities for women by providing that customary law shall be modified so as to allow wives and daughters to inherit shares in land. This goal would be seriously undermined in every dispute settled by a mediator, who would look only to traditional law and to the agreement research between the (male) parties to the argument, and would be under no obligation to impose the guideline's modification of traditional law on the parties.

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57 See Zorn, "The Land Titles Commission and Customary Land Law", 2 *Melanesian Law Journal* (1974) 176-177; Bayne, "The Future of Traditional Law", 2 *Melanesian Law Journal* (1974) 276, at 278; P. Gulliver, *Social Control in an African Society* (1963).

58 *Land Disputes Settlement Act 1975*, s. 66(2) and (4).

59 *Ibid.*

Although the government has not seen fit to establish land policies, the Commission of Inquiry did suggest what these policies should be. In particular, the Commission recommended that land in Papua New Guinea should go, pre-eminently, to those who would use it and to those who need it.[60] The Commission pointed out the ravages that occur when land can be so easily bought and sold that much of it ends up in the hands of absentee landlords. Fertile land, vitally needed for agricultural production and as a basis for economic development, goes to waste. It is run down by inefficient employees, or it is used merely as a holiday residence for the rich. If individuals can own vast tracts of land that they neither live on nor use, then a few people will become rich by renting land while others will become landless labourers.[61] The Commission reasoned that both equality and development are best attained by giving the land to people who need it and will work it:

> In many situations there will be several claimants to land. We feel that, all else being equal, preference should be given to those who have little land and are in need of it, and those who will live on it and use it rather than leave it idle... we feel that people who get registered titles have an obligation to use the land well, or it should be transferred to someone who will use it well.[62]

In pursuit of these policies, the Commission recommended that the government return alienated land to people who are suffering from land shortages.[63] It also recommended that no individual be allowed to own or lease more than one block of residential land and one block of agricultural or industrial land.[64]

Customary law must be modified in some respects if land is to go first to those who need it or will make use of it. In most Papua New Guinean societies, land devolves according to kinship ties, and anyone associated with the land holders by birth or marriage has some claim to the land. Before village life was interrupted by the colonial era, this, in fact, meant that the land went to those who needed it or would use it, for men lived all their lives on the land they would someday own. Social sanctions and the need to eat combined to ensure that everyone in the village worked the

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60 Commission of Inquiry, 114.

61 Commission of Inquiry, 12-13.

62 Commission of Inquiry, 13.

63 Commission of Inquiry, 45-73; Recommendations 30 and 31.

64 Commission of Inquiry, Recommendation 18.

gardens necessary for survival. Inheritance was the usual method of obtaining land. However, there were occasionally newcomers to the village, fleeing a war in their own area or impelled by a disagreement with their father's kin to seek shelter with their mother's relatives. These strangers would be allotted land on which to garden, and might eventually be considered owners of the land, able to pass it on to their sons, provided that they had acted as members of their adopted clan or village, participating in all the work of their new neighbours. Thus, in pre-colonial times, though the law was phrased in terms of ownership by the clan, in fact land was owned by those who used it and needed it.

With the economic and social changes wrought by the last decades, however, customary law has hardened into kinship rules alone. On the one hand, it is no longer possible for a stranger to a village to get gardening land as easily as once he might have done. On the other hand, villagers often migrate for years at a time, working for the police or the public service or in an Australian kitchen, and expect to take up their inherited land holdings when, in their old age, they eventually retire to the village of their birth. Migrants keep up their right to the land by going home for an occasional holiday or by sending gifts when clan members die or marry. Their continued absence makes it difficult for the remaining villagers to organize land use, to plant communal cash crops or to start village development corporations that might take up the absentees' land holdings. The Commission of Inquiry has recommended that people be prevented from inheriting customary land unless they are willing to return to it or see that it is used within twelve months from the date they inherit it.[65]

The *Land Disputes Settlement Act* makes some provisions for people who are in need of land. Thus, if the local land court finds that one of the parties to a dispute is short of land, while the other party has abundant land, it may order that some or all of the disputed acreage be given to the land-short party, but only if that party held a valid customary interest in the land within 100 years before the dispute arose.[66] Further, once a land dispute has been settled, either party may apply to re-open the case, provided that twelve years have passed since the original order was made, and provided that the party can show "that circumstances have changed so that the enforcement of the order is causing hardship".[67]

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65 Commission of Inquiry, Recommendation 59.

66 *Land Disputes Settlement Act 1975*, s. 41.

67 S. 45.

However, the *Land Disputes Settlement Act* does not contain any provisions ensuring that the land will go to people who will use it productively. This could be done through guidelines modifying the customary law, but the Minister for Justice, who has the responsibility for issuing guidelines to supplement the Act, has to date shown no interest in doing so.

V. *Dispute Settlement Machinery*

The Commission of Inquiry made detailed recommendations about agencies and procedures that should be established for settling land disputes, and the drafters of the *Land Disputes Settlement Act* have, for the most part, followed the Commission's suggestions very closely. Thus, the Commission advised that "whenever a land dispute arises compulsory mediation should be the first step towards its settlement", and further counselled that mediators should be "men of standing in the area" and should be selected by a "committee of senior District representatives of the Justice Department, Chief Minister's Department and Lands Department (all Papua New Guineans) after consultation with the Local Government Councils".[68] The Act follows these recommendations in almost every particular; mediation is a compulsory first step, under sections 17 and 25; mediators are men with authority in and knowledge of their area, according to section 10; they are appointed upon the advice of the Local Government Council, Village Court and other bodies representing area opinion; the district land disputes committee, which appoints mediators, is composed almost precisely of the membership called for by the Commission, except that there is no guarantee that all members will be Papua New Guineans.

The Act also follows the Commission's recommendations in making arbitration by "a Local Court Magistrate supported by assistants with a knowledge of the land customs of the area" the second step in the dispute settlement process.[69] The Commission recommended that mediation still be available at this stage, that the court determine its orders by majority vote, and that the court should sit on or near the land.[70] The Act complies with all these recommendations.[71]

The orders of the Land Titles Commission failed to gain acceptance by the parties to land disputes because the Land Titles Commission believed itself limited to finding a single

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68 Commission of Inquiry, 114-115.

69 Commission of Inquiry, 116.

70 Commission of Inquiry, 116 and 118.

71 *Land Disputes Settlement Act 1975*, ss. 22(3), 24, and 27.

owner for each tract of disputed land. If two groups each claimed to own the land, the Land Titles Commission felt bound to choose between them.[72] If two or more groups all claimed to hold interests in the land, the Land Titles Commission might refuse to rule in favour of any of them, since none had proven itself the sole owner.[73] The Commission of Inquiry believed that land disputes would be more securely settled if land courts were encouraged to choose from a wider-ranging set of alternatives in making their orders, thus more accurately reflecting the realities of customary land tenure. Therefore, the Commission of Inquiry listed the numerous kinds of orders that courts should be empowered to make.[74] As the following table demonstrates, the Act provides for most of them; the table lists the Commission's recommendations, followed by sections of the Act putting them into effect:-

(i) There are a number of possible rights to land and each of the disputants may be entitled to exercise some of these rights. The Local Land Court should be entitled to say who can exercise which of these rights in the land, and in appropriate cases for how long.
Land Disputes Settlement Act, section 40(5)(b),(c) and (e).

(ii) Power to award compensation where people lose the right to improvements they have put on the land or where they lose rights to use land which they have held for some time.
Land Disputes Settlement Act, section 40(5)(f).

(iii) Power to allow people to harvest tree crops on land in which others have greater possessory rights or to harvest annual crops already planted.
Land Disputes Settlement Act, section 40(3)(d) and (c) and section 40(5)(a) and (b).

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72 See, for example, *Madaha Resena v. Morea Mabi, In re Idumava Land*, Sup. Ct. (1972) No. 75, where a Motuan and a Koita clan each based their claims to a piece of land on villages and gardens that each had built there in the past. Rather than recognize that both clans had equally valid customary claims to the land, the Land Titles Commission and the courts felt it necessary to choose between them.

73 *Uriva v. Maika, In re Veakabu-Vanapa* (1969-70) PNGLR 234.

74 Commission of Inquiry, 117-118.

(iv) Power to order that people have the right to use land for gardens only, subject to the payment of a traditional tribute to people with greater possessory rights in the land.

Land Disputes Settlement Act, section 40(3)(d) and (c), and section 40(5)(a) and (b).

(v) Power to make decisions and award compensation on disputes associated with the land dispute, but only if these are essential to arriving at a workable decision in relation to the land.

Land Disputes Settlement Act, section 29 (1).

(vi) Power to include in the decision of the court any settlement or agreement between the disputants on any aspect of the dispute made at any stage of the hearing.

Land Disputes Settlement Act, sections 27 and 28.

(vii) Power to state that neither group has any substantial claim to the land.

Land Disputes Settlement Act, section 40(5)(d).

(viii) Power to make boundaries between the parties on the disputed land.

Land Disputes Settlement Act, section 40(5)(b).

(ix) Power to take into account the population of each disputing group and adjust the boundaries between them so as to help a land short group. The Court must have power to award compensation to a group which has lost land in this way.

Land Disputes Settlement Act, section 41.

(x) Power to order one group to pay compensation to, or provide a feast for another group if the Court considers this will assist in solving the land dispute.

Land Disputes Settlement Act, section 40(5)(f) and (g).

(xi) Power to order that certain land be treated as "common land" with each of the disputant groups having certain defined rights in relation to the land.

Land Disputes Settlement Act, section 40(5)(c).

(xii) Power to make any orders about the land run for set periods of time or to be subject to certain contingencies.

Land Disputes Settlement Act, section 40(4)(b).

(xiii) Power to make any other order in relation to the land that will clearly assist in bringing a lasting solution to the particular land dispute.

Land Disputes Settlement Act, section 40(5)(h).

The Commission suggested that local land courts should "settle questions about succession to land rights including disputes about wills, written and oral."[75] The Act makes no provision for this, nor, I think, should it do so. When a person dies, he leaves to his heirs not only land but personal property as well. The two kinds of property may be inter-related and inseparable, as when a person has built a cattle station or coffee plantation on his land. The personal property - a category which encompasses everything from clothing and axe blades to money, insurance benefits, trucks and company shares - may be more valuable than the land. If succession to land is determined in one court and succession to personal property in another, heirs will be put to the time and expense of two separate court appearances, and may find themselves left with conflicting judgments. The method for determining succession to property ought to be as simple for the beneficiaries as possible. At the very least, that a person's entire estate, both his land and his personal property, ought to be distributed by a single agency or court.[76]

In most common law countries, court decisions about rights in land are *in rem* judgements. Thus, the court's order does not apply only to the parties to the case; it binds anyone who ever again wishes to raise a question about rights to that land. It is wise to do away with as many common law concepts as possible in Papua New Guinea, since most of them do not suit either the traditional law or the contemporary conditions of the country. This, however, is one that ought to have remained, for, as the Commission of Inquiry pointed out, "Decisions of the Local Land Court...should stand against the world and should be conclusive evidence of the ownership

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75 *Ibid.*

76 Land mediators and land courts will, of course, have to settle many questions that relate to succession, for example whenever disputants base their rival claims to land on inheritance.

of rights in the land as at the date of the decision."[77] If land court decisions are not *in rem*, then people can continually bring cases involving the same block of land, and the Commission's main aim -- which was to find a dispute -- will be thwarted.

The Act, however, insists that land court decisions will be final only against the parties to the case.[78] Anyone else can bring a suit, claiming that he exercises the very same rights over the very same land that the court has already awarded to one of the parties. It is difficult to understand why the drafters chose to make land court orders *in personam* instead of *in rem*. They may have felt that no order about land in Papua New Guinea can be final against the world, because it is possible for many different groups to hold simultaneous but different interests in a block of land. The Act could have foreseen this likelihood, however, by declaring that, though the court's order is final and conclusive as to the interests it parcels out, a later party can claim to hold a different interest in the property.

The drafters might have been worried about the difficulty of communicating to widely-scattered rural Papua New Guineans that a court hearing was about to take place. If a group is not informed that a hearing has been scheduled, they could be deprived of an opportunity to assert their interests in the land, unless the Act left open for them the chance to appear later. However, there are ample provisions in the Act for notifying people about upcoming mediations and land court hearings. The Act is careful to recognize the barriers caused by poor roads, scattered villages and multiple languages, and attempts to overcome the communications problem in its notice provisions. Unlike the old land acts, whose notice requirements were satisfied by an English-language sign on the patrol officer's door, the *Land Disputes Settlement Act* requires that notice be given to the parties to the dispute *and* published at a Local Government Council meeting *and* forwarded to the Village Court *and* broadcast over area radio stations.[79]

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77 Commission of Inquiry, 118.

78 *Land Disputes Settlement Act 1975*, s. 44(1) and (2).

79 S. 69(1); and if the court is not satisfied that those methods are sufficient, it may also give notice by:-
"(e) posting a copy of the notice in a conspicuous place on the land concerned; or
(f) posting a copy of the notice at any appropriate meeting or gathering place throughout the area concerned; or
(g) informing all concerned, or possibly concerned, parties residing on the land concerned or in the general area surrounding the land concerned; or
(h) notifying it at any appropriate meetings throughout the area concerned; or
(i) notifying it in the area concerned by any method by which it is customary to transmit orders or news within the area; or
(j) in such other places and in such other manner as the Court considers appropriate".

This is but one example of the Act's consistent understanding that the law is useless unless and until it has been communicated to the people it is meant to aid or inhibit. At every stage in the dispute settlement process, the Act requires that the process be explained to the people concerned. Every time a land mediator is appointed, for example, his name and his duties must be "publicly promulgated" in a way "most likely to ensure that they are generally known and understood by the people residing in the Land Mediation Area."[80] Similarly, the local land court must "as soon as practicable after the conclusion of the hearing, explain the reasons for its decision, and state clearly the terms of its order, in the presence of the parties to the dispute."[81] Moreover, the court panel must then go with the parties to the disputed land and "satisfy itself that the parties and the witnesses understand the nature of the order and the scope and extent of the land over which the interests as declared in the order shall be exercised."[82] Thus, the drafters of the Act need not to have made court judgments *in personam*, if their only grounds for doing so was worry about the communications problems, because they have gone far in the Act to overcome the problem of communicating across the impassable distances of rural Papua New Guinea.

The drafters might, on the other hand, have decided against *in rem* judgements because of their recognition that land needs change over time, as crops and populations change. However, they have provided for this by making it possible for a party to re-open the case at least twelve years after the original judgement if, in that period, circumstances have changed so that enforcement of the order is causing hardship to the party.[83] But this provision does not give any rights to persons who were not parties to the original action. However, rather than make all judgements *in personam*, the drafters could simply have extended this section to cover people who were not parties to the case, provided they could show both hardship and a satisfactory reason for their failure to join the case originally.

A healthy prejudice against lawyers has grown up in Papua New Guinea. Legal counsel is seen by many as a hindrance to rapid and fair settlement of cases, rather than as an aid to ignorant or unwary clients. Therefore, the

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80 *Land Disputes Settlement Act*, s. 15(2)(a).

81 S. 42(1).

82 S. 43(1).

83 S. 45.

Commission of Inquiry recommended that lawyers be totally barred from local land courts, and be permitted to appear in district land courts "only in connection with cases involving national land, or disputes in which government or a company is involved."[84] Recognizing that lawyers can be a help when a case presents difficult and complex issues, or when one party is considerably stronger or more educated than the other, the Commission added that the district land court magistrate "should have power to request the parties to seek legal representation in a case of unusual difficulty."[85]

The Act does not follow the Commission of Inquiry's recommendation on this matter in all its particulars. It does bar lawyers from the mediation stage and from local land courts, but it says nothing about admitting lawyers in district land court in those cases where the government or a company is involved. Of course, since the Act is limited to disputes over customary title, there will be very few cases where the government or a company would be involved, but it could occur, especially as Papua New Guineans start forming their own companies. The Act follows the Commission's recommendation in permitting a magistrate to allow legal representation when the case is unusually difficult, but it requires the agreement not only of the magistrate but also of all the parties.[86] Thus, in a difficult case, the party that is stronger and better informed can deny the weaker party a fair chance to present his case by refusing to agree to legal representation.[87]

An Act is only as good as the court's ability to enforce it, and the Land Titles Commission had no power to enforce its orders. If it awarded land to Clan A, and Clan B refused to move off the territory, there was nothing the Land Titles Commission could do about it. To gain possession of its land, Clan A had to go to the Supreme Court with a writ for ejectment. The Commission of Inquiry recommended, "The decisions of the Local Land Court and the District Land Court must be clearly, easily and quickly enforceable. We think that the

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84 Commission of Inquiry, 120.

85 *Ibid.*

86 *Land Disputes Settlement Act 1975*, s. 70(3).

87 The issue of legal representation and its effectiveness is too complex to be solved by simplistic answers like getting rid of lawyers entirely or requiring them in every case. If lawyers are denied, the stronger and better informed party has an advantage. Even where they are permitted, however, the wealthier party may win merely because he was able to afford higher quality counsel. For a complicated problem, we must look for more complicated solutions, such as court-appointed representation or maximum legal fees.

lack of effective enforcement provisions is a major reason for the failure of the Land Titles Commission."[88]

The *Land Disputes Settlement Act* makes it possible for lower courts to enforce land court orders. It also creates a broad range of offences so that the courts can punish those who contest the power and authority of the land courts. It provides for prosecution in District Court of people who refuse to appear in land courts when ordered to do so, and of people who disrupt land court proceedings, who deface or move boundary marks, or who fail to comply with any land court order.[89] The District Court may prescribe fines or imprisonment, or it may order persons convicted of these offences to pay compensation.[90]

Section 63(3), which makes it an offence to refuse to comply with an order or direction given by a land court, would cover numerous activities, ranging from the refusal to attempt negotiation with the other party to refusing to move off the land after the court awarded it to someone else. The Act may not, however, provide means for ejecting people from the land. Actions for ejectment might be possible under section 40, which outlines what orders a court can make and is fairly broad, but it does not specifically mention ejectment. If section 40 is not construed to permit a court to order a person ejected from the land, then should anyone insist on staying, he can be fined, jailed, or ordered to pay compensation for refusing to obey the court's orders, but he can be physically removed only if the other party is willing and able to go to National Court.[91]

We do not yet know whether Papua New Guineans will be willing to obey orders of the new land courts, especially in disputes that have grown violent. The court's authority in these areas depends upon the ability of district officers, mediators and the police to act both decisively and delicately. The need for a careful response from government officials is particularly marked in cases that have been smouldering for some years and that erupt into violent confrontations before land mediators are on the scene. The Act makes special provisions for cases of this sort, permitting the National Executive Council to remove long-standing and potentially violent disputes from the purview of the Act and to establish special machinery for settling these disputes.[92] However, as

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88 Commission of Inquiry, 121.

89 *Land Disputes Settlement Act 1975*, ss. 62, 63.

90 S. 63(4) and (5).

91 This problem may soon be settled as redrafting has begun on problem areas in the Act, including this one.

92 *Land Disputes Settlement Act 1975*, s. 4.

far as a villager is concerned, all representatives of government power are the same. He does not distinguish between the police, other government officers and the courts. If anyone in government handles the dispute badly, villagers will lose respect for all government agencies -- including the new land courts. Thus, whilst the ultimate success of the new dispute settlement system depends on the ability of the courts to gain the respect of the people, the courts cannot do so without cooperation from the police and other agencies, for the people's respect will be determined by the fairness and compassion shown not only by mediators and magistrates, but by agencies beyond the control of the land mediators and magistrates, as well. The *Land Disputes Settlement Act* has no power over the police; it is hoped that the government and the people will.

VI. Forecasts for the Future

The government of the independent state of Papua New Guinea is trying to establish court structures that reflect the substance and method of customary law, so that the legal system will suit the needs and goals of the people. Other developing countries, too, have experimented with customary courts, but Papua New Guinea is unique in that it has established two varieties simultaneously.

Village Courts and land mediators will both work at village level. Both are supposed to apply customary law, and some Village Court magistrates will double as land mediators. But there the similarity between the two systems ends. Village Court magistrates are to find customary law and apply it as they think best; the outcome of each case will be determined by the magistrate. Land mediators, on the other hand, are to press the parties to mediate and decide their own dispute. Local land court magistrates can decide cases, but only after mediation has failed and only with the concurrence of the mediators or clan leaders who will make up the panel with them.

The opportunities for confusion are boundless, as are the possibilities for conflict between the two court systems, particularly when a local land court magistrate takes a case away from the potential jurisdiction of a Village Court on the grounds that it is "integrally related" to the land dispute under his review. Although the same people might sit on both Village Courts and land courts, the differences in procedure and style between the two systems could lead to substantive differences, so that in a single village customary law would come to mean one thing to the land courts and quite another to the Village Courts.

Had the Australian colonial administration recognized the existence of customary law and the ability of people to settle their own disputes, then authoritative customary courts would have existed in colonial Papua and New Guinea,

and there would have been no need to make special provisions for land courts. But the Australians cannot be blamed for the present government's insistence on following their bad example.

Now that the concept of Village Courts has been accepted in Papua New Guinea, there is no longer an excuse for the continuation of the dual system. But jurisdiction over land matters should not be given to the Village Courts if it means the loss of the valuable reforms contained in the *Land Disputes Settlement Act*. In its recognition that every court case should begin with mediation and proceed not to trial but to arbitration, the Act captures the essential spirit of customary law, the harmonising impulse that made it a vital component of community solidarity. And in its provision that court decisions be based on need and on the willingness of the parties to work for the development of Papua New Guinea, the Act infuses customary law with the spirit and goals of the Constitution.