'UNALIENATED' LAND POLICIES

By

R.W. James*

I. 'STATUS QUO' POLICY

1. Introduction

THE British government in declaring a protectorate over British New Guinea had expressed the desire of protecting the land rights and traditional land tenure systems of the indigenous communities. This '**status quo**' policy implied respect for existing land ownership and the land tenure systems. Successive Australian administrations in Papua and, subsequently, in New Guinea (after the declaration of the mandate) stated a commitment to these principles. Consequently, whereas at the time of the first settlement of the Australian colonies all lands were deemed ownerless and hence the property of the Crown, in Papua New Guinea, the assumption was that all land except that which was truly waste and vacant and so declared, belonged to the people under traditional tenure.[1]

The earliest property legislation was in accord with this policy by prohibiting any dispositions of land by 'natives' to 'non-natives'. The government was, however, allowed to purchase land provided it was established by an enquiry that the piece of land in question was not required nor likely to be required by the owners for their existing or future use. This power on the part of the government was justified on the ground that the government needed to hold a pool of land for public and governmental purposes.

The policy was strenuously pursued until the 1960s. As a consequence less than three percent of the total land area was alienated. Of the alienated lands, less than one percent was owned by non-natives in freehold at independence in 1975. However, alienated lands comprised some of the best lands for agricultural and business purposes.

2. Recording Ownership

The policy of preserving traditional land tenure was however the subject of close scrutiny by the Colonial Administration during the 1950s. It was generally felt that customary land tenure did not promote rapid economic progress and could not accommodate changes arising out of the planting of permanent crops on the land, and was in general incompatible with a cash economy. It was thought that the solution was one of securing individuals rights in land, including land boundaries. A start in creating a formal system of recognised ownership was made in 1952 when a Native Land Commission was established to enquire into the ownership of each tract of unalienated land and record the rights of traditional owners in a land

---

* Formerly Professor of Law at the University of Papua New Guinea.

1. See **Safe Lavao v. The Independent State of Papua New Guinea** [1978] P.N.G.L.R. 15; and see **Milirrpum v. Nabalco Ltd.** [1971] F.L.R. 141; **Calder v. A.G. British Columbia** (1971) 13 D.L.R. (3d) 80.

register.[2] The ultimate aim was the creation of a kind of Domesday book of record of titles to land. 'Ownerless lands' could then be declared to be Administration land.[3]

There were various obstacles to the implementation of this objective. It was viewed with grave suspicion by traditional owners who did not co-operate; they thought that this was a preliminary step to the compulsory acquisition of their land as 'ownerless lands'. Initial enquiries soon revealed to the Administration that the traditional system was complex and it would take generations before ownership throughout the country could be recorded. On reviewing the principle in the early 1960s it became very apparent that a system which merely recorded rights, could not give the desired certainty and security of tenure, for the register could only be presumptive evidence of ownership. In time the land register would lose all authenticity, as subsequent dealings were not required to be recorded under the system of titles' recordation which was established.

The programme was pursued for ten years with few practical results. Four hundred and seventy-two (472) **applications** for adjudication of land rights were recorded, but only 176 were completed. Few plots were surveyed but none was actually registered. The compilation of family genealogies in the process of adjudging the applications has provided those landowners with a written statement of their history. This is probably the only achievement of the programme.

Notwithstanding the failure at compiling a national record of traditional land ownership and rights therein, various local authorities attempted to record land rights in their areas under powers contained in the local government enactment. These initiatives were viewed with suspicion at a time when the policy of recording titles was being abandoned in favour of that of transformation (discussed immediately below). The view was expressed by the Land Titles Commission which was entrusted with the task of implementing the transformation process, that Councils were appropriating its functions. Thus the Land Use Record Books were totally disregarded by that Commission in adjudicating land rights. S. Rowton Simpson who came to Papua New Guinea in 1969 to enquire into the land tenure system was critical of this process as likely to create confusion, and he recommended that it should be discontinued. This recommendation was adopted.

II. TRANSFORMATION POLICY

1. Introduction

Following the recommendations of the East African Royal Commission, the policy of individualising traditional land tenure by converting titles into fees simple gained much prominence as a means of reforming traditional land tenure. The objective was to introduce and extend commercial agriculture to and among Papua New Guineans.[4] The

2. **Native Land Registration Act** 1952, s. 23.

3. **Ibid.**, s. 27.

4. For a comprehensive account of the arguments for the transformation process as an instrument of socio-economic change, see J. Fingleton, 'Customary Land

arguments in favour of the transformation scheme were expressed in terms of the defects of the traditional system which it was claimed hindered land acquisition and utilisation by the enterprising farmer. At the same time numerous advantages of a secured negotiable title to land which could be used as security for loans were claimed as justifying individualisation. The Australian administration in adopting this policy in 1960, argued that it was inevitable that measures be taken to convert a respect for native land ownership into the reality of making land available to people who needed it and wanted to use it. As a consequence it laid down a number of new commitments. These were **inter alia**:[5]

(i) A long-term objective to introduce throughout the Territory of Papua New Guinea a single system of land holding regulated by the Central Government, administered by the Department of Lands of the Central Government, and providing for secured individual registered titles after the pattern of the Australian system.

(ii) Land subject to native custom should remain subject to native custom only until it was taken out of custom either by acquisition by the Administration or by a process, to be provided for by legislation, of conversion of title to an individual registered title.

(iii) Upon either acquisition or conversion of title compensation would be paid in respect of the extinction of rights held under native custom.

The transformation policy thus involved the substitution of individual registered titles (freeholds) for the traditional communal forms of land holding, and the replacement of custom as the future operational law, by English real property law. At the same time it was strenuously argued that the first Five Year Development Plan which emphasised agricultural and pastoral developments and the establishment of secondary industries, implied massive land purchases by government in order to make land available to expatriate firms and individuals who desired to invest in the country.

The latter programme never got off the ground; the former had been the major concern of the colonial administration up to the time of internal self government. It meant the passage of the **Land Titles Commission Act** 1962,[6] which replaced the Native Land Commission with the Land Titles Commission, but with a positive mandate. The **Land Titles Commission Act** was passed to provide the machinery to adjudicate land rights by a Land Titles Commission and to demarcate the boundaries of the adjudicated lands. Conversion of the adjudicated title from traditional tenure to freehold estates then became possible under the procedures set out in the **Land (Tenure Conversion)**

---

4 ctd. Registration as an Instrument of Socio-Economic Change' paper presented at the 1981 Waigani Seminar (mimeographed, July, 1981)

5. P. Hasluck, Statements in the Australian House of Representatives, 7 April, 1960.

6. Act No.5 of 1962 as amended.

Act.[7] Registration under the **Real Property Act**[8] in Papua, the **Lands Registration Act**[9] in New Guinea, and now the unified and consolidated **Land Registration Act**,[10] was intended to give a secured title to the converted freehold estates.

In the first ten years of implementing this policy very slow progress was realised; only 595 conversion orders were made though another 340 applications for adjudication were pending.[11] The slowness of the process was blamed on the machinery which was established to effect the programme, i.e. sporadic rather than systematic adjudication. The adjudicated title remained subject to customary tenurial practices unless converted.

The government engaged the services of Mr S. Rowton Simpson to review the programme and recommend changes to increase its efficiency. The Simpson Report[12] contained many recommendations to speed up the adjudication, conversion and registration processes. The main ones were that the adjudication process should be under the overall control of the Department of Lands and should be undertaken by committees drawn from the local people who had intimate knowledge of land rights in the area; the emphasis should be on **systematic,** not sporadic adjudication; conversion should follow automatically on registration without the need for a separate application; the incorporation of representatives of groups as trustees in cases where there was opposition to individualisation; and finally a uniform simple register of titles and a system of control of land transactions by local land controlling bodies should replace the fragmented system.

New legislation incorporating the recommendations made by Simpson were prepared to replace the existing Acts. An integrated package of four Bills - Customary Land Adjudication, Registered Land, Land Titles Commission and Land Control - was introduced in the House of Assembly in 1971, but had to be withdrawn because of opposition to the proposed changes by the Papua New Guinea members of the House.[13] We can now turn to the details of the programme, which involved the application of appropriate Western forms and concepts which were proposed to effect the transformation.

2. Individual Titles

The machinery for the transformation of traditional to received tenure was devised in Africa mainly on the recommendation of Rowton Simpson. He revived and reconstructed a standard machinery which was applied in the Sudan in 1898. It involved an adjudication process, which determined existing rights in the land and provided for the renunciation by rights' holders of their land rights in favour of a single person; a consolidation of scattered plots into economically workable units; and registration in an official register of title as

7. Act No.15 of 1964 as amended.
8. 1913 as amended.
9. 1924 as amended.
10. Act No.2 of 1981.
11. Fingleton **op.cit.** has reported that 737 titles were issued by October, 1978.
12. **Report on Land Problems in Papua New Guinea.**
13. For the subsequent history of the Bills, see A.D. Ward, 'Agrarian Revolution: Handle with Care' (1972) **New Guinea** 6: 25.

fee simple. It was envisaged that the plots thus registered would be enclosed. The machinery was introduced into Kenya in the 1950s.[14] Pilot schemes were introduced in Uganda in the early 1960s[15] and similar legislation was enacted in Nigeria.[16] The 1964 Land Commission Report of Zambia recommended the introduction of a similar machinery in that country.

'Tenure Conversion' legislation was enacted in Papua New Guinea in the early 1960s at a time which was the era of the conversion mania. The adjudication and registration processes were introduced as pilot projects mainly in the Northern District and in the Highlands.[17] The new system was intended to be buttressed by the reception of English property legislation governing the quality of interests in land and their disposition. It was claimed that to transplant English real property laws to developing countries was to substitute for uncertain customs, English laws which were 'certain, proven, well tried and accepted'.

However, a registration system assumes that dispositions and dealings in land would be faithfully recorded on the register, if not the register would soon cease to reflect the true state of things. Experience in Uganda and Kenya, for example, has shown that the register tended to lose its efficacy because of unregistered (or 'paper') dealings. Consequently, the programme of registration of individual holdings tended to be largely nullified and the considerable sums of money invested in the system, wasted. Customs tended to persist and the traditional rules of succession tended towards the fragmentation of holdings. These are some of the major difficulties contributing to defeat the process of individualisation.[18]

Fingleton's study of the New Warisola scheme of systematic tenure conversion and registration in the Northern Province in Papua New Guinea attests to similar patterns. **Doa Minch's case**[19] is a reminder of the tenacity of custom. Fingleton has highlighted a new danger which characterised the United Nations' sponsored Village Settlement programme implemented in Tanzania in the 1960s, i.e. massive governmental inputs in the form of seedlings, fertilisers, pest and weed controls and infrastructures followed by close supervision as the **quid pro quo**, reduced the blockholders to being virtually labourers on their lands. This was accompanied by a feeling of alienation.

---

14. The implementation of the pilot scheme in Kigezi, Uganda is discussed by J. Obol-Ochola, **Customary Land Law and Economic Development in Uganda** unpublished LL.M. dissertation (University of Dar es Salaam, 1971).
15. **Registered Land Act** (No.4/1965 of Law of Federation); see P. Willoughby, 'Land Registration in Nigeria' (1965) **Nig. L.J.** 260.
16. See the **Land (Tenure Conversion) Act** 1963; Act No.15 of 1964.
17. See **The Simpson Report**; R. Hide, **The Land Titles Commission in Chimbu,** New Guinea Research Bulletin No.50; see also Fingleton, **op.cit.**, 21 **et.seq.**
18. See **Land Reform in Papua New Guinea, Report on a visit to Kenya,** (mimeographed, 1970) known as the **Grove Report**; and New Guinea Research Bulletin No.40; A.D. Ward, **op.cit.; Post Courier,** 7 June,1971.
19. [1973] P.N.G.L.R. 558

3. Joint Tenancy and Tenancy in Common[20]

The scheme allowed two or more persons (up to a maximum of six) who might be members of the lineage to be registered as joint owners of the fee simple. Comparisons have been made of the lineage system and the joint tenancy on the one hand, and the lineage and tenancy in common on the other. Similarities between them have been assumed. However, the Western institutions despite a superficial resemblance to the lineage holding are fundamentally different from the latter.

A joint tenancy recognises a law of survivorship by virtue of which co-ownership inevitably becomes sole ownership of the last surviving joint owner. On the other hand, a tenant in common has a disposable share. In the lineage system, new members acquire land rights at birth and sole ownership will not normally eventuate. No member has an identifiable share in the ownership of the land. Other differences are founded on the fact that in Western philosophy, law is based on an individualistic assumption whilst traditional jurisprudence reflects a collectivist organisation.

The common law institutions were totally unsuitable where more than six members of the landowning group required to be registered jointly, for under the enactment, no group or community could be registered, and the maximum number of individuals allowed as joint owners or tenants in common was stated to be six.[21] The registered proprietors were the only ones recognised as owning the land and they were given the much recommended powers of disposition. This model did not, therefore, give security to the extended group for they would be bound by the disposition of their land by the registered proprietors even though they had not given their approval to the transfer.

4. Trust Institution

There has been an increasing volume of literature explaining the lineage system in terms of the Anglo-American trust.[22] The **Communal Land Rights (Vesting in Trustees) Law** of Western Nigeria 1959,[23] is the first but isolated attempt made in Africa to engraft the trust institution on traditional arrangements over clan and tribal lands. However, following the Lawrence Report in Kenya in 1966,[24] this model has gained popularity as a method of tackling the problem of registering lineage and pastoral tribes to their lands and as being superior to the joint tenancy.[25] Both the Kenya **Land (Group Representatives) Act** 1968,[26] and the Simpson inspired Bills for Papua New Guinea, provided for the incorporation of leaders of traditional groups as trustees and the vesting in them of land in trust for the group. Elsewhere in the Pacific, Niue for example, the

---

20. See further, ch.7 Megarry and Wade, **The Law of Real Property** (4th ed.).
21. See **Land (Tenure Conversion) Act,** ss. 24,25 and 27.
22. (1965) **I.C.L.Q.** 1144; K. Bentsi-Enchill, **Ghana Land Law** (Sweet & Maxwell, 1964) 236-7.
23. Cap. 287 (Western Nigeria).
24. **Report of the Mission on Land Consolidation and Registration in Kenya.**
25. Cap. 287 Laws of Kenya.
26. **Registered Land Bill,** ss. 142-144.

land of the **Mangafaoa** (family groups or clan) is vested in a **leviki mangafao** (or head) in trust for the group.[27]

The trustee model, as does the co-ownership one, is unsatisfactory for as Ron Crocombe observed with particular reference to the Niue legislation:[28]

> '[H]istory is full of examples ... where they [trustees] have looked after their own personal interests - and these are often contrary to the interests of the people.'

The Nigerian experience of the trusteeship model is not reassuring. In the first few years after introduction of the system there was need for a number of Commissions of Inquiry to look into breaches and abuses of powers by trustees. Everywhere the Commissioners found that trustees were most irresponsible and frittered away the funds of the Trust in merriment, and entertainment of friends.[29] Governments reacted by either imposing more stringent duties on trustees or making the exercise of their powers dependent on the approval of the State's bureaucracy. Making their duties more stringent is introducing a solution, which though it might be effective in Western countries where trustees are professional people and have legal advice at hand, is doomed to failure in developing countries where the trustees are the elders in the society and tend to be illiterate in the English language and concepts. Moreover the trust concept is foreign to them and traditional societies, unlike Western countries, still treasure participatory democracy. To make the bureaucracy the watch-dog of the trustees as is done in Kenya, is to vest powers which naturally belonged to the lineage members in the Registrar, and is a source of promoting long-standing disappointments and conflicts. The paradoxes are much too sharp to be legislated away.

III. THE IMPROVEMENT APPROACH

1. Introduction

There has been no official statement totally rejecting the transformation model in Papua New Guinea and it continues unobtrusively. The **Constitution** has, however, adopted as a National Goal the principle that development should be achieved primarily through the use of Papua New Guinean forms of social, political and economic organisation.[30] To this end it directs that the traditional villages and communities should remain as viable units of the society and steps should be taken to improve their cultural, social, economic and ethical quality. This ideal was foreshadowed in some of the proposals of basic principles for land reform made by the

---

27. **Report on Land Tenure in Niue** (Government Printer, Wellington, 1968); R. Crocombe 'The Niue Alternative' in P. Sack (ed.) **Problems of Choice: Land in Papua New Guinea's Future** (A.N.U. Press, 1974); R. Crocombe (ed.), **Land Tenure in the Pacific** (O.U.P. 1971).
28. Crocombe, 'The Niue Alternative' **op.cit.** 82.
29. Ch.3 R.W. James, **Modern Land Law of Nigeria** (University of Ife Press, 1973).
30. Goal No.5.

Commission of Inquiry into Land Matters (CILM). These include **inter alia** a guideline that 'land policy should be an evolution from a customary base and not a sweeping agrarian revolution or total transformation of society'. This ideal ruled out the individualisation of land ownership and tenure option.

In interpreting these principles and guidelines emphasis came to be placed on the lineage as the basic land owing entity, but the lineage clothed with legal personality in the nature of a land group corporation. In this way many of the elements of the traditional system were sought to be retained; e.g., collective ownership, mass participation in the decision making processes, traditional disputes settlement philosophy and a distribution system based on one's interest in the land.

There is a growing body of literature on traditional group corporations. The main comments have been on the legislation facilitating 'Maori land group corporations'[31] and 'agricultural communities' of Ethiopia.[32] We will first consider the theoretical basis of this model before examining the legislation enacted to effect it in Papua New Guinea.

2. Corporate Personality in Traditional law

Anthropologists referred to the lineage as a body corporate for land-holding purposes. As early as 1925, a French administrator, M Delafose, made a passing reference to the system of family holding as being one of corporate ownership.[33] Lawyers, notwithstanding their concern with the co-ownership analogy, made reference also to the fact that title to group land is vested in the collectivity as a unit and not in any one member or members individually.[34] The group was perceived as having legal personality, but the ramifications were not considered important enough for discussion.

Peter Lloyd, in an article written in 1959[35] on Yoruba land tenure, made a crucial observation when he joined issue with lawyers over the question of succession to group land. He rightly observed that there is no element of inheritance to lineage lands as new members acquire rights therein at birth and not by succession at the death of their parents. The validity of the argument is based on the corporate personality view of the group.

In the last decade there have been a number of elaborations of the attributes of corporateness.[36] Some of these researchers,

---

31. Norman Smith, **Maori Land Corporation** (A.H. & A.W. Reed, Wellington, 1962).
32. B. Mandefro, 'Agricultural Communities and the Civil Code - A Commentary' **Journal of Ethiopian Law** 6(1): 145.
33. **Les Civilisations Negro-Africanes** (Paris, 1925).
34. T.O. Elias, **The Nature of African Customary Law** (Manchester University Press, 1956) 162-64; Bentsi-Enchill, **op.cit.**, 41-2.
35. P.C. Lloyd, 'Some Notes on the Yoruba Rules of Succession and on Family Property' (1959) **J.A.L.** 105; 'The Yoruba Lineage' (1955) **Africa** 25: 135-51.
36. See for example, James, **op.cit.**; Mandefro, **op.cit.**; A.N. Allott, 'Legal **African** Personality in African Customary Law' in M. Gluckman (ed.) **Ideas and Procedures in African Law** (O.U.P. 1969) 1; G. Woodman, 'The Family as a Corporation in Ghanian

however, incorrectly ascribed the concept of corporate personality in traditional law to borrowings from the 'unique development of English law',[37] and have therefore failed to appreciate the contribution of traditional juridical principles to the subject of legal personality. Professor Allott, a well known authority on traditional law, refers to the 'legal personality' concept in traditional law as being a 'misapplied parallelism'.[38]

Personality for legal purposes implies that the person or collectivity can be the subject of rights and duties in the legal system. That the lineage can, will be obvious to anyone in Melanesia, who must be familiar with the system of group responsibility to an outsider for wrongs perpetrated by a group member, and the responsibility of group leaders for the acts of their members. The **Inter Group Fighting Act** is premised on this concept. The Supreme Court has, however, held that the imposition of criminal liability on group leaders for the wrongs of their members is unconstitutional because:[39]

(i) the accused if found guilty would be convicted for offences not defined by 'written law' contrary to s. 37(2) of the **Constitution;** and

(ii) the procedures provided for in the Act being essentially inquisitorial do not afford the accused persons the 'due process' protection of the **Constitution.**[39]

Case law illustrates the attribution of other duties and rights in the legal entity or collectivity. The expressions that 'a lineage is one person' or, 'we are one person', commonly used among clan members in Papua New Guinea and Africa are popular expressions of the oneness of the collective. Corporateness is a signification of the durability or permanence of the group as a distinct and independent entity from its members. The individuals come and go but the entity goes on forever.

Neither Roman nor common law has a monopoly of the ideas of corporateness. The traditional corporation is **sui generis** and differs from its Western counterpart in terms of being evolutionary without a formal act of incorporation. It has a defined membership of persons who are blood-relations in fact or in fiction. At common law members of the corporation may be unrelated in blood and usually are.

3. Corporate Personality: Model for Land Reform

Although the corporate personality theory has been elaborated in the literature with references to traditional African societies and

---

36 ctd. and Nigerian Law' seminar paper presented in the Law and Modernisation programme, Yale University (mimeographed, 1974); P.C. Lloyd, 'Agnatic and Cognatic Descent Among the Yoruba' (1966) **Man** 484.

37. Glynn Cockrane, 'Use of the Concept of the 'Corporation' - A Choice between Colloquialism or Distortion' (1971) **American Anthropologist** 73: 1144; Gluckman (ed.) **op.cit.,** 39 **et.seq.**

38. Gluckman, **op.cit.,** 39.

39. **In the Matter of a Reference under s.18 of the Constitution (Reference S.C.R. No.1 of 1981)** (1981) **S.C.** 200).

only quite lately to societies in the Pacific region,[40] it is in the latter that attempts have first been made to modernise the land tenure system by the formal recognition of traditional groups. In Africa there are only two isolated attempts. These were made in the 1960s to provide the machinery for group recognition as corporate entities. The **Range Development and Management Act**[41] implemented the 'Fallon Report' to allow the incorporation of pastoral groups as ranching associations in Tanzania. The Ethiopian Civil Code, (Articles 1489-1500)[42] sets out a machinery for the recognition of ownership of land in abstract entities called 'agricultural communities'. The former is limited in application to pastoral tribes; the latter has not gone beyond the state of being an expression of intention.

The **Maori Affairs Ordinance** is the first attempt at statutory recognition of traditional landholding groups. It dates back to 1953. The aim was not for a total land reform but to provide a means to facilitate the disposition of traditionally-owned lands to Europeans. By incorporating the group and vesting in the body corporate powers of disposition, an identifiable machinery was provided thereby avoiding the difficulties surrounding any purported disposition of land by traditional groups as was experienced in West Africa. Traditional law allows the impeachment of dispositions of land for want of consent of essential members whose approvals are necessary for the validity of the disposition. They might be absent or unknown to the purchaser. Absence or ignorance is no excuse.[43]

The objective of the Maori Land Corporation was to avoid these complexities; therefore its application was very limited. This model has had very little influence on the group corporation in Papua New Guinea.

4. Land Group Corporations

For an appreciation of the concept of land group corporations in Papua New Guinea one would need to go to the CILM Report which recounted numerous requests of the people for recognition of their corporateness and their desire for secured boundaries to their lands. The Commission in turn recommended registrable group titles. The Department of Business Development proposed legislation to establish 'general purpose corporations' to facilitate the incorporation of traditional groups with powers, **inter alia,** to hold group title and engage in business ventures. The draft Bill for the general purpose corporation, even without the regulations, ran into one hundred and fifteen sections. Its size was an indication that the 'general purpose corporation' concept had lost any claim to provide a 'simple' and 'flexible' structure for group ventures. The notion was discarded and in its place legislation was enacted to permit the

---

40. See Smith, **op.cit.**
41. Act 51/1964 (Tanzania).
42. See Mandefro, **op.cit.**
43. In West Africa the norm is 'buying family land is buying a Land dispute'; see R.W. James and A. Kasunmu, **Alienation of Family Property in Southern Nigeria,** (University of Ibadan Press, 1966).

incorporation of recognised land groups,[44] business groups,[45] and companies with Division 4 or a privileged status.[46] It is with the former, the **Land Groups Incorporation Act** that we are mainly concerned.

The Act provides for the recognition of traditional groups and their statutory incorporation. Incorporation is by registering the constitution of the group[47] with the Registrar[48] who is required to then issue a certificate of recognition,[49] and to maintain a register of such incorporated land groups. In order to qualify for registration the members must regard themselves and must be regarded by others as bound by common customs. Upon incorporation the land group is deemed a corporation with perpetual succession and with such attributes of a legal person as are prescribed by law[50] i.e. powers to sue and be sued, to be registered as owner of land, acquire hold and dispose of land and generally regulate the use of and manage its lands.

The Committee which drafted the legislation adopted as a guiding principle that the machinery must provide for recognition of customary practices, not their modification. The aim was simply to improve the chances of people participating in the process of economic activities with registrable group titles. The group would, however, regulate the management of and dealings in their lands and resolve their disputes in the traditional informal manner.

Because of the absence of accounting obligations on the group, the corporation is allowed only limited land use activities. Therefore for any proposed elaborate business ventures, there would be need to promote, in addition, a company with Division 4 status or a business group organisation to own the business. In this way the corporation would enjoy a number of advantages in conducting its business not enjoyed by ordinary companies e.g. tax holiday and exemptions from payment of certain fees. Within the context of the land reform programme, therefore, the land group incorporation concept presents certain distinct advantages e.g. the registration of group titles to land and the avoidance of fragmentation.

IV. REGISTRATION OF GROUP TITLES

1. Introduction

Whilst the **Land Groups Incorporation Act** provides for the recognition of the corporate nature of customary groups, the CILM proposed legislation to provide for the registration of group titles. It argued that such titles are based on typical Papua New Guinean forms

---

44. **Land Groups Incorporation Act;** Act No.64 of 1974; Ch.No 147. The original title of the Bill was **Land (Recognised Groups) Bill.** The title was changed because of fear of possible confusion with recognised groups under the Village Courts Act.
45. **Business Groups Incorporation Act;** Act No.59 of 1974; Ch.No 144.
46. **Companies (Amendment) Act** 1974; see ss. 368-72 **Companies Act,** Ch.No 146.
47. See **Lands Groups Incorporation Act,** s.8 on the contents of the Constitution.
48. **Ibid.,** s. 5.
49. **Ibid.,** s. 11.
50. Part 4.

of organisation so far as land rights are concerned.[51] The nature and extent of group membership could vary from that of a whole village, which might comprise a number of clans, to the nuclear family.

The advantages of group titles would be the recognition of the group's control and boundaries of its land. Registration would lessen the chances of inter-group disputes over the ownership of land. Once established as a legal entity with a registered title, the group could raise loans on an give occupation rights to land on the basis of legal arrangements which defined the rights of all parties in the event of disputes. Generally there will be greater certainty of title, rights and obligations in group land than at present exist.

The advantages of group ownership over individual titles is the protection of rights of the majority of people. In contrast individualisation causes landlessness. Registration of group titles would complement the improvement model of land reform thereby concretising group rights.

2. Derivative Interests

The creation of group title would allow recognition and protection of a number of derivative rights known to customary law.[52] These are occupational rights of individuals or other groups, leases and subsidiary rights.

An occupational right is an exclusive right to occupy and use an area of group land. Under the proposed terms, the occupational right would be granted to the rightholder for either a fixed or an indefinite term. It is heritable but otherwise non-transferable. It is conditional on utilisation of the land, but not on the payment of rent other than payments of a customary nature.[53] On the other hand a lease is the grant of land for a fixed term with an obligation on the part of the lessee to pay rent which is a necessary incident of the interest. The concept of 'ownership of improvements' which characterise the 'occupational right' entity is absent from the leasehold system.

Subsidiary rights are rights held by individuals or groups in another person's land i.e. rights **in alieno solo.** These include the right to gather fruits or building materials, to hunt, or rights of way.

V. PERPETUAL ESTATES

The CILM proposed the 'conditional freehold' estate as a type of estate that is suitable for very small families and individuals who have acquired complete control over customary land to the exclusion of the clan. It is conditional on the proper utilisation of the land and there are restrictions on alienation through restriction on the

51. **Report of the Commission of Inquiry into Land Matters, op.cit.,** Para. 3.22.
52. **Ibid.,** Para. 3.39.
53. **Ibid.,** Para. 3.40.

title. Such an estate would be held from the State which will hold the reversionary interest thereover. It was felt by the Policy Committee in the Department of Natural Resources that the expression 'freehold' had foreign and colonial connotations and therefore the better expression for the proposed estate was 'perpetual estate'. The perpetual estate was intended to be the exception not the norm and its recognition was not to be used as an opportunity to carve up group land into individually owned land.

VI. GROUP TITLES AND LAND POLICIES

The CILM proposed the adoption of National land policies governing the utilisation and disposition of land. These policies include the principles that 'land security should depend on land use', and 'the law should favour those who needed land most and were prepared to use it'.

The implementation of these principles can best be achieved by the imposition of limitations on the title of the rightholders and the reservation of a power of revocation in the initial grant for infringement of the conditions contained therein. The proposed group title is, however, not a conditional or restricted one and is moreover protected by constitutional provisions.

Land rights derived therefrom are restricted and conditional upon the utilisation of the land. The CILM proposed that if the derivative interest holder failed to use the land for two years or to make arrangements for its use, the group should have power to revoke the interest by making an application to the Local Land Court for an order of forfeiture.[54]

54. **Ibid.**, Para. 3.45.