



**Land Law And Policy  
In  
Papua New Guinea**

**LAW**  
**REFORM**  
**COMMISSION**  
PAPUA NEW GUINEA

Monograph No.5

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LAND LAW AND POLICY

IN

PAPUA NEW GUINEA

by

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## FOREWORD

Professor Rudi James has demonstrated once again his thesis that, in a developing country, the path to land studies is to address the subject of land policy. Land policy is best distilled from the political economy of that country. So his two most important works, *Land Tenure and Policy in Tanzania* (1973) and *Land Law and Policy in Papua New Guinea* (1985), may be categorised as studies in 'law and economic and political development'.

Clear statements of policy (in this case derived from the Report of the Commission of Inquiry into Land Matters, the Eight Point Plan and the Constitution) provided the bases of much of the author's analyses, critiques and proposals for reform. The book combines these methodologies in a simple and convincing manner.

The section on the Constitution and land laws (Chapters 8 to 10) argues the need for a total review of our laws in the context of our Constitution. It draws our attention to the fact that much of our law (written and unwritten) could, on the tenth anniversary of our Independence Day, be void due to inconsistency with Constitutional enjoinders.

I commend this book as being indispensable to students studying the land laws of Papua New Guinea and to all concerned with the administration of land law and its reform.

WILLIAM KAPUTIN  
Chairman, Law Reform Commission  
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## PREFACE

The land tenure structure in developing countries in the African and South Pacific regions is complex. Upon contact there were imposed in these countries new systems such as state ownership and freehold estates. These tenurial systems which regulated 'alienated' lands existed side by side with the traditional systems. Alienated lands came to be regulated by statutes, the received common law and principles of equity. The greater portion of the land area (in most cases over ninety percent), however, continued to be 'unalienated' and regulated by customary or unwritten laws. The independent governments inherited all the problems arising from land alienation and faced the challenging task of resolving these and substituting national land policies for sectorial interests and diverse customs.

Two models of land reform are usually presented to the national government: one based on the western system of individual freehold estates and the other on the socialist system of state ownership. There is a third approach, expressed in the National Goals of the Papua New Guinean Constitution and adopted by the Commission of Inquiry Into Land Matters (CILM) of that country: development primarily through the use of Papua New Guinean forms of social, political and economic organisation (Goal Five). Therefore, land policies should be an evolution from a customary base - collective and individualist extremes should be avoided.

Tanzania at the initial stages attempted to implement a socialist ideology without discarding the customary tenurial system (1967-74). The attempt was unsuccessful. Would Papua New Guinea, which has adopted a free enterprise strategy to development, have any more success in her attempt to retain the fundamental values of her traditional land tenure system, or, more pertinently, could the values of the traditional society survive in a capitalist economy by the adaptation of traditional forms of organisation?

This monograph is a continuation of the author's interest in examining law in the context of policies and ideologies in developing countries. It is also intended to present the improvement model as an alternative to those of transformation, implemented in Kenya, and ujamaa, tried in Tanzania. Those are, in the phraseology of the CILM, individualist and collective extremes to be avoided.

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The first draft of this manuscript was completed in 1978 and printed by the University of Papua New Guinea Printery. It formed the basic text for students at the University and the Administrative College studying introductory land law courses. It was reprinted in 1980, 1983 and 1985. Substantial rewriting of the text was undertaken by me during my stay in the Law Faculty as Visiting Professor in 1985. I benefitted from the further researches of Mr. C.E.P. Haynes, who taught the land law courses in that Faculty between 1980-84 and, in particular, his invaluable notes, which elucidated many obscurities in the original manuscript.

This publication is in response to numerous requests to make the work accessible to a wider audience inside and outside Papua New Guinea. Many thanks go to Ms. Joyce Kasokason for typing the revised manuscript with her usual skill and patience, and to Ari Heai of the Law Reform Commission for typing the final version into camera-ready form.

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CHAPTER ONE  
CONSTITUTIONAL AND LEGAL STRUCTURES

1. CONSTITUTIONAL DEVELOPMENTS

Papua New Guinea became an independent nation within the Commonwealth of Nations on September 16 1975. Historically, Papua was declared a British Protectorate by proclamation issued by the British Crown on November 6 1884. It was formally annexed as a Crown possession under the name of British New Guinea on September 4 1888, and was subsequently placed under the authority of the Commonwealth of Australia in 1902 and accepted by that government as the Territory of Papua in 1905.

German New Guinea was annexed by Germany in the year following that of the annexation of Papua. In 1921 it became a Mandated Territory of the League of Nations administered by Australia and later, in 1946, a Trust Territory. The administration of the two territories, Papua and New Guinea, was unified in 1947 and, since 1962, representative and then responsible self-government was developed. A substantial transfer of power from the Australian Commonwealth Parliament to the Papua New Guinea Legislative Assembly occurred in 1973. On Papua New Guinea's assumption of Independence in 1975, Australia relinquished all legal forms of and claims to power in respect of Papua New Guinea.

The Independence Constitution was adopted by a resolution of the Members of the Legislative Assembly which had existed immediately before Independence. The Assembly sat as a Constituent Assembly representing the people for that purpose.

2. TERRITORIAL STRUCTURE AND GOVERNMENT

Papua New Guinea is a unitary state which, for administrative political and development purposes, is divided into nineteen provinces<sup>1</sup> and a National

Capital District,<sup>2</sup> with a local government system: city councils and local government councils.

The local government system is not intended to be a permanent feature of government, but to give way to alternative systems of local-level governments. Already some provincial governments are moving towards the establishment of community governments in their provinces.

A major problem of the nation is to maintain its unity and at the same time preserve, as the Constitution requires, a respect for the traditional cultures of the various communities, and overcome extreme divisive tendencies which threaten its nationhood. It was thought that the right balance could be realised through the establishment of provincial governments.<sup>3</sup>

This problem of forging a nation from diverse tribal groups has plagued the post-independence history of many African nations. In some countries, strong central government as a unifying element has been advocated, in others a federal structure with state autonomy, whilst in others a form of regional assemblies and regional governments within a unitary state. In the latter constitutional arrangement regional governments have either been abolished gradually or suppressed by force on the pretext that regionalism encourages ethnocentric prejudices and militates against rapid unification of the nation. The experience has been personality conflicts between the leadership of national and regional governments and a heavy burden on the country's scarce financial and manpower resources. A case in point is Kenya during the period of experiment with the Majimbo Constitution. Tanzania, on the other hand, sought to decentralise its administration and planning by establishing regional and district corporations and vesting many of the central government's administrative powers in them. The purpose was to increase participation and decision-making in administration at the local level and to ensure that the people at that level were involved in the process of economic planning.<sup>4</sup> This model of decentralisation costs far less to run than provincial governments, but it also has a more limited role.

In Papua New Guinea the Provincial Government (Preparatory Arrangements) Act was passed in 1975<sup>5</sup> as an interim measure to provide for the recognition of provincial governmental bodies. It was the intention that the Independence Constitution would make more complete and permanent arrangements for their structure and functions and detailed provisions relating to their powers and finance. With the development of a strong secessionist movement in Bougainville,

however, the Provincial Government (Suspension and Abolition) Act<sup>6</sup> was passed to amend the former enactment so as to give the central government power to suspend or abolish provincial governmental bodies if, inter alia, it was in the national interest to do so.

The Constituent Assembly which adopted the Independence Constitution voted against any provisions in that Constitution for establishing Provincial Governments. Subsequently, the Bougainville Provincial Government was suspended.<sup>7</sup> In response to continued pressures from the provinces for decentralisation of power, and as a means of placating various secessionist regional movements in the country, the Constitution was amended<sup>8</sup> in order to provide for the establishment, structure and functions of provincial governments. The detailed provisions, including those relating to the legislative and financial powers of provincial governments, are to be found in the Organic Law on Provincial Governments.<sup>9</sup>

### 3. STATE ORGANS

#### (a) General Structure

The Constitution embodies parliamentary government with a representative legislature called the National Parliament; a responsible executive authority, the National Executive Council, drawn from the National Parliament; and an independent judiciary. All powers of the nation are declared in the Constitution to be vested in the people. The executive power is formally vested by the people in the Queen of Great Britain and Northern Ireland<sup>10</sup> as Head of State of Papua New Guinea, and is exercisable by a Governor-General appointed by the Queen on the recommendation of the National Parliament. However, the judicial authority of the people is not vested in the Head of State but in the National Judicial System.<sup>11</sup>

#### (b) Head of State

The Queen was appointed Head of State, and the Constitution provided for the appointment of a Governor-General to act as her representative. The appointee must be a citizen of Papua New Guinea who is qualified to be a Member of Parliament. His appointment is by the Head of State, acting upon the advice of the National Executive Council (NEC) or of some other body or authority prescribed by a constitutional law or an Act of Parliament.<sup>12</sup>

Where an Act of Parliament requires the Head of State or her representative to act in accordance with the advice of a certain authority, then any action undertaken must be in accordance with that advice. If legislation does not require that the advice of any authority be sought, then the Head of State or her representative must act in accordance with the advice of the National Executive Council. In the former case, the advice of the NEC does not have to be sought.<sup>13</sup>

Under various acts, the Governor-General may take decisions on, and/or make regulations prescribing various matters permitted therein. For example, under section 11 of the Land Act he hears appeals from unsuccessful applicants for state lands; and by section 43 of the Land Acquisition (Development Purposes) Act, 1974,<sup>14</sup> he is required to prescribe the factors to be used in determining compensation payments to the expropriated owner of land.

#### (c) Legislature

The National Parliament is unicameral and elected by citizens of eighteen years and over. It is vested with a general legislative power. This is in some cases subject to specific restrictions contained in the Constitution, in particular, those concerning basic rights of citizens. The National Parliament can only legislate on subjects in the concurrent list with provincial legislatures in circumstances of 'national interest' and is circumscribed in legislating on those matters which are 'primarily provincial subjects'. Legislation of the National Parliament is referred to as an 'Act', whilst that of the provincial legislature is called a 'law'.

#### (d) Executive

The National Executive Council consists of a Prime Minister and Ministers who must be members of Parliament. The Prime Minister nominates the other Ministers. Responsible government is clearly established and is not left to convention.

### 4. PROVINCIAL GOVERNMENTAL ORGANS

#### (a) Provincial Assembly

Where a provincial government is established in a province, there is the requirement for a legislature entitled the 'Provincial Assembly'.<sup>15</sup> The Assembly

is vested with law-making powers on matters of concern to the province.

Section 24 of the Organic Law on Provincial Government sets out a list of 'primarily provincial subjects'. This includes primary education, housing (other than housing owned or to be owned by the state), village courts and local government. Though a provincial legislature may legislate on any or all of the subjects on that list, if it has not made an exhaustive law on a matter, an Act of Parliament on the subject would have effect in the province to the extent that it is not inconsistent with any provincial law.<sup>16</sup>

The second list of matters upon which the provincial legislature has power to legislate are those subjects set out in the list of 'concurrent subjects'. These include community and rural development, agriculture and stock, town planning, forestry, wild life protection, parks, reserves and land and land development.

A provincial legislature may make a law with respect to a concurrent subject and that law takes effect in so far as it is not inconsistent with an Act of the National Parliament. The latter, however, can legislate on concurrent subjects only if the matter is or to the extent that it is of national interest.<sup>17</sup> Whether an Act relates to a matter of national interest is to be determined by the National Parliament and the issue is non-justiciable.<sup>18</sup>

Part VI division 5 of the Organic Law further empowers the provincial government to make laws with respect to any other matter upon which the National Parliament has not enacted an 'exhaustive law', provided that the law is not inconsistent with an Act of Parliament. If there is any inconsistency between the law and an Act, the law is deemed to have been repealed 'by a provincial law'.<sup>19</sup> Generally, the legislative power of provincial governments in respect of the unoccupied legislative field is limited by section 32 of the Organic Law: a provincial government may not make laws with respect to, inter alia, matters which can only be dealt with by an organic law or emergency legislation. The extent of its law-making powers on judicial matters is prescribed in Part VII of the Organic Law. Part X of the Organic Law deals with fiscal matters. Section 57 provides for various kinds of tax which are exclusively provincial taxes to be imposed by provincial 'laws'. These include land tax.

Finally, provincial legislative powers may also be derived from an Act of the National Parliament. Section 43 of the Organic Law provides for the delegation of powers and functions of the National Government by Act of Parli-

ment. There are some limitations on such delegated legislative power. There is no authority to delegate to provincial legislatures power to make, *inter alia*, (i) an amendment to the National Constitution, or (ii) an Organic Law.

(b) **Provincial Executive Council**

Section 187(2)(b) and (c) of the Constitution provides that there shall be a provincial executive and a head of the provincial government who is called the Premier. Section 17 of the Organic Law makes provision for these offices. The Provincial Executive Council has a similar role to play in the province to that of its national counterpart in the state. The Council would examine policy submissions and bills, execute the decisions of the provincial assembly, and carry out central government functions delegated to the province. In carrying out its functions, the Provincial Executive Council is organised on the portfolio system, like the National Executive Council.

5. **NATIONAL-PROVINCIAL RELATIONS**

(a) **Controls by National Government**

The delegation/devolution of power to provinces is subjected to the principle of the inability of Parliament to bind itself. By section 100 of the Constitution all legislative powers of the people are vested in the National Parliament, which is forbidden from transferring or divesting itself of such power permanently. Parliament may, however, if it chooses, refrain from legislating in an area it considers more appropriate for provincial legislation.

But Parliament has the ultimate authority. Parliament may abolish the provincial system through the repeal or amendment of the relevant provisions in the national Constitution and the Organic Law. Secondly, less extreme provisions provide the national government with a wide range of supervisory and controlling powers. These span the spectrum, from disallowing provincial laws where it is believed that disallowance is in the 'public interest' (s.37), to suspension of a provincial government for, *inter alia*, corruption in its administration, mismanagement of financial affairs, deliberate and persistent frustration of or non-compliance with lawful directions from the national government.

(b) **Consultation**

In contrast to the formal methods of supervision and controls of provincial governments by the national government, the constitutional instruments make provisions for consultation between the two levels of government on many issues: on the Constitution of a province and the original grant of provincial government; before disallowance of a provincial government law; on the assignment of public servants to a province; before the passing of national government laws on concurrent subjects; on any proposed major commercial investment in a province, etc.. These latter two circumstances would be discussed with special reference to land matters.

(i) **Law-making**

The Commission of Inquiry into Land Matters (CILM) recommended that land and land development matters on the concurrent list should be matters of national concern,<sup>20</sup> but that the law-making power of the national government should be exercised only after consultation with provincial governments. The government would appear to have adopted the view that the implementation of the various recommendations of the CILM on ownership, valuation, dispute settlement, registration and policies are matters of national interest to be realised by national legislation. Consultation is generally mandatory where the national government proposes to legislate upon a subject on the concurrent list. Section 31(4) of the Organic Law provides as follows:

Not less than two months before an Act of Parliament is made concerning a subject [on the concurrent legislative list], the Minister responsible for provincial affairs shall give to each provincial government notice by registered post of the proposed Act.

Consultation is usually not 'consent' or 'accord'.<sup>21</sup> Consultation on the National Land Registration enactment did not take place until after the passage of the Bill through Parliament. The Office of the Legislative Council took the view that an Act of Parliament is made on the date of certification by the Speaker and that the two month period is to be reckoned from that date. The purpose of consultation is to ascertain and meet the wishes of the provinces. It is therefore within the spirit of the subsection that consultation should take place at least before the presentation of the Bill to Parliament. Section 255

of the Constitution provides that, in principle, consultation must be meaningful and must allow for a genuine interchange and consideration of views. The technical interpretation adopted by the Legislative Council would not further the cause of provincial government and the smooth functioning of the governments.

(ii) **Major and other investments**

Section 85 of the Organic Law on Provincial Government provides that the national and provincial governments should consult with each other concerning any major investments or proposed investments in or affecting a province. Two areas relevant to this work that have caused problems between the two levels of government have been the exploitation of timber rights and grants of licences to foreign companies to fish in provincial waters.

In *Milne Bay Provincial Government v Minister for Primary Industry and the Independent Government of PNG*,<sup>22</sup> the Provincial Government sought a declaration that certain licences granted by the national government to unknown Taiwanese fishing boats and to the Utama Fishing Co. were invalid, because of failure of the national government to consult the provincial government as is required by section 85 of the Organic Law. The application was rejected on the grounds that disputes between the national and provincial governments are non-justiciable in the courts and are subject to the non-judicial settlement procedures established by the *Provincial Governments (Mediation and Arbitration Procedures) Act, 1981*, and the Organic Law on Provincial Governments. The latter vests in the Premiers' Council power to discuss and find solutions to all matters concerning inter-provincial and inter-governmental problems with a view, in particular, to avoiding legal proceedings between governments. The former, by s.3, defines disputes which are subject to the process of mediation and arbitration as including disputes between two governments which are not eligible for reference to the National Fiscal Commission. It then provides quite peremptorily that 'no court has jurisdiction to hear a dispute to which this Act applies.'

The court was therefore not given an opportunity to define 'major investments', which is not statutorily defined, or to pronounce upon the level of consultation necessary to satisfy the constitutional requirement of 'meaningfulness'. It is problematic whether failure by the national government to consult a provincial government would adversely affect the contractual rights of a third party.

At the level of the Premiers' Council, provincial governments have asked

the national government to delegate powers to provincial governments to issue fishing and timber licences. At the 1983 Conference it was resolved that the proposed new national legislation on both forestry and town planning should involve consultation with the provinces to identify provincial areas of interest which should then be left free for provincial legislation.

An area where consultation with provincial governments has become necessary to the exercise of administrative power is in relation to mining leases. By section 200 of the *Mining Act (Amalgamated) Act, 1977*, the Minister responsible for mines must first consult with the relevant provincial government before granting a prospecting authority or mining lease to land situated in the province. However, at the Premiers' Conference of 1984, a more fundamental effort to deal with the concurrent subjects was made by calling for a full review of all national legislation on concurrent subjects, with a view to the national government amending or repealing legislation not covering matters of 'national interest'.

## 6. DECENTRALISING LAND MATTERS

### (a) Delegation

There are two models of decentralising power in land matters: delegation and devolution. The CILM recommended the former. It accepted as an important element in the administration of the national land legislation the involvement of the people at the 'District' level. It stated specifically that:

The national land law should allow for as much involvement of the people from the Districts as possible, and there should be little need for Districts to refer land administration to Port Moresby. (Para. 11.9)

It envisaged that the provincial governments would appoint Provincial Land and Land Control Boards and establish provincial Land Registry Offices. The recommended functions of these bodies are: the allocation of state lands and the imposition and surveillance of development conditions; the enforcement of national policies on distribution and accumulation of land; and the registration of land titles. The provincial bodies were, however, to be responsible to national bodies: the National Land Board, the National Land Control Board and the National Land Registry Office. A step towards the implementation of this model



of decentralisation was taken with the establishment of Provincial Building Boards<sup>23</sup> to administer national powers under the Building Act, 1971.<sup>24</sup>

The Department of Lands, pursuant to these recommendations, agreed upon a plan to establish Provincial Land Boards, which would be responsible for hearing applications for state lands in their respective provinces. Under this scheme the Boards were also to determine applications to transfer lands in the provinces. The resolution of appeals from the decisions of Provincial Land Boards would be a centralised function of the National Land Board, which will take over the reviewing powers of the Head of State under section 11 of the Land Act. The process of decision-making and conflict resolution would be greatly speeded up under this model.

The Land Board as presently constituted is the instrumentality appointed under the Land Act to hear all applications for state leases. After considering applications, the Land Board recommends to the national Minister for Lands the persons to whom leases should be granted. Although it is a national board, the membership is large enough to enable different members to act at different times, and hearings and determinations may take place in any part of Papua New Guinea. There is a tendency for Land Board meetings to occur in provincial centres under the chairmanship of a Deputy Chairman when leases in a particular province are being considered.

This arrangement allows some concession towards decentralisation. Members of the Board are appointed from various provinces, and the composition of the Board at any given sitting may be made to reflect a predominance of local interest. This model establishes a hierarchical structure but does speed up decision-making, as the practice is for the minutes of these meetings, including recommendations for allocation of land, to go directly through the Chairman to the Minister for his approval. Uniformity and coherence in the implementation of national and provincial policies are ensured.

#### (b) Devolution

The alternative model which is proposed here is to vest in the provincial governments<sup>25</sup> title to, including the power of control of, lands in the provinces. The provincial governments would thereby be given power to legislate with respect to the administration of such lands and to make grants and dispositions thereof. Under this model the national government would retain ownership and control

of state lands required for national governmental purposes or for its instrumentalities, including national corporations, and it should reserve a compulsory power of acquisition for such purposes. All mineral rights should fall within the purview of the national government.

Experience elsewhere with this form of devolution has highlighted shortcomings which are not intractable: (a) a tendency for the regional bodies to enact discriminatory laws on land acquisition and use, detrimental to citizens not of the province; and (b) a multiplicity of land tenure systems. These shortcomings can, however, be overcome by the exercise of the power of disallowance or the enactment of a national code setting out principles of land policies binding on all provinces. As we have seen, a provincial law on a concurrent subject is subject to the test of consistency with an Act of Parliament.

The model reflects the recommendations of the Constitutional Planning Committee, which required provincial governments to be given clear legislative power over a wide range of subjects. But the danger is nevertheless apparent in the call by some provinces for the amendment of the constitutional guarantee on 'freedom of movement' so as to permit them to introduce provincial 'pass laws' to control the movement of those citizens who are not from their province. Such developments could be a hornets' nest, arming provincial governments with powers to repatriate and retaliate against citizens from other provinces. Already, related disputes concerning the eviction of squatters from other provinces are typical of inter-provincial disputes. To permit the sovereignty of provincial governments over their land area could lead to a compounding of this problem.

## 7. FUTURE OF PROVINCIAL GOVERNMENTS

The future of provincial government in Papua New Guinea is sometimes thought to be precarious. Three provincial governments were suspended in 1984 for 'gross financial mismanagement'. In March 1985 there was a call in the National Parliament for the suspension of all governments which the recently published Auditor General's Report indicated were misusing funds.

The Prime Minister responded first in October 1984, and more recently in March 1985, by pledging the holding of a referendum on the provincial government system. In explaining this decision of the national government, he said that the people all over the country were dissatisfied with their provincial govern-

ments and that they should be given an opportunity to decide whether the system should continue (Post Courier, September 27 1984 and March 20 1985). In his statements he listed the causes of dissatisfaction as being 'insufficient number of persons to man the system', 'bad practices and misuse of funds by provincial governments', and 'unawareness by many people that provincial governments existed in their area.' The last point amounts to a serious indictment of the operative system for failing to provide for the meaningful participation of people at the grass roots level in the decision-making process in matters that directly concern them.

Some studies, whilst agreeing with the allegation of mismanagement, questioned the *bona fide* intentions of politicians who show hostility to provincial governments in general. They claim that the root cause of the polemics is the diminishing influence of Members of Parliament over project spending at local level, the loss of their role in provincial matters and loss of status to provincial officials in their home provinces. There is evidence, however, that some governments may have been manipulated in order to provide protection for the economic base of the rural business class. In Fitzpatrick's stricture, they 'incorporate traditional and variant patron-client structures within the state system'.<sup>26</sup>

However, there has been strong provincial opposition (including threatened secession) to the abolition proposals from four of the Islands Region premiers. The lack of a workable mechanism to enable the greater capacity of particular provinces to be recognised by the devolution of greater powers and functions to them has been a cause of some frustration. These provinces have raised fundamental questions about adequate transfer of funds and activities and the national government's failure to adhere to legal requirements in respect to the treatment of provinces. There is a strong view that united public opposition by premiers, combined with the lobbying of Members of Parliament, would arrest the abolition movements, and that the solution lies in a total review of the inter-governmental relationship.

## 8. THE SOURCES OF LAW

Until Independence the legal system could be divided sharply into traditional systems, based on custom, and non-traditional systems introduced by the colonial regimes. The latter was originally the system of German origin in New

Guinea, and that of English and, later, Australian-English origin in Papua. Since 1921 the German system has virtually disappeared, leaving only minor traces in land law, and the Australian-English system has occupied the whole field, with some differences between the two parts of the country until the 1940's but, since then, in an increasingly uniform shape.

The new Constitution assumed a complete rejection of any form of legal authority vested in either the Parliament of the Australian Commonwealth or the United Kingdom. A clean break with any theory of the continued application of English common law was also made. The Laws Repeal Act, 1975, repealed all pre-Independence Laws applicable in Papua New Guinea. Accordingly, the 'basic norm' of the system is, in the truest sense, to be found in the Constitution. Section 9 of the Constitution declares that the laws of Papua New Guinea consist of the Constitution, the Organic Laws, Acts of Parliament, provincial laws, laws made under or adopted by the Constitution and the underlying law.

### (a) Constitution

The Constitution is itself a major source of law. In one sense it is the source of all sources, for it is the instrument that establishes the law-making organs, i.e. the legislature, judiciary and the executive. It vests in these bodies, and defines, their powers. In the Kelsenian analysis, it is the *grundnorm* of the legal system.

In another sense, it is the supreme law of the land. This is expressly provided for in section 11 *ibid.*, which states, 'This Constitution and the Organic Laws are the Supreme Law of Papua New Guinea'. Consequently, any act (whether legislative, executive or judicial) that is inconsistent with them is, to the extent of the inconsistency, invalid and ineffective. The courts' power of judicial review of legislation is an important armoury to ensure the Constitution's supremacy.

Finally, the National Goals and Directive Principles and the Basic Social Obligations of the Constitution, together with the basic rights set out therein, form a part of the underlying law; hence they are the agencies of new laws.

### (b) Acts

Schedule 2 adopted as Acts of Parliament or of equivalent subordinate legislative enactments all pre-Independence Acts and regulations in force in Papua

New Guinea immediately before Independence. That schedule also adopted as laws of Papua New Guinea a short list of Australian and English statutes which are set out in Sch.5. Most of these statute laws are now contained in the Revised Edition of the Laws of Papua New Guinea, brought into force on January 1 1982 and subsequently updated.

There is a commitment to reform the laws in the context of the changing needs of Papua New Guinean society and, to this end, the Law Reform Commission was set up in 1975. This Commission makes proposals for changes in the legal system. It has issued a Working Paper on the Law of Succession.<sup>27</sup> This paper (a major part of which deals with succession to land), proposes the unification of the laws of succession in order to eliminate the existing dual system (the customary system, and the other based on the common law) and preserve the role of custom as a source of law.

The major impetus for land tenure reform has, however, come from the Report of the CILM.<sup>28</sup> The Report made far-reaching proposals for changes in land ownership, administration and policies. The government has adopted a number of the proposals and has given effect to some of the more urgent ones.

#### (c) Laws

The extent of provincial governments' legislation would depend on the process and form of decentralisation adopted. Some proposals have been made above for devolving law-making powers in land matters on provincial assemblies.

#### (d) Precedents

Schedules 2.8 and 2.9 of the Constitution state, in general terms, principles on the authority of judicial precedents and the power of the National and Supreme Courts to overrule their own previous decisions. Lower courts may refer to the National Court, and the latter to the Supreme Court, any question arising from a conflict of precedents.

The decisions of the High Court of Australia and the Judicial Committee of the Privy Council, courts to which appeals lay from Papua New Guinea before Independence, are not binding on the National or Supreme Courts.<sup>29</sup> The Supreme Court is the highest court of the land, hence judicial sovereignty is realised.

#### (e) The Underlying Law

Schedule 2 of the Constitution provides that there shall be an 'underlying law' consisting of two main parts: firstly custom, and secondly, 'the principles and rules of common law and equity in England' as they existed immediately before Independence Day.<sup>30</sup> Custom applies only to the extent that it is consistent with constitutional law or a statute, and not repugnant to 'the general principles of humanity'. Common law similarly applies only in so far as it is consistent with constitutional and statute law and is not 'inappropriate to the circumstances of the country from time to time'. Custom prevails over common law.

Wherever there is no rule of law or where the common law or rules of equity are not applicable or appropriate to the circumstances of the country, the National Judicial System is empowered and required to develop 'as part of the underlying law' rules derived from, inter alia, the National Goals and Directive Principles of the Constitution and the Basic Rights; or rules derived by analogy from existing laws and/or the laws of other similar legal systems.

The courts are required to develop the underlying law in a coherent manner, as appropriate to the circumstances of the country from time to time. The concept of underlying law can therefore be an important source for the development of land tenure rules in accordance with national policies.

The Constitution provides for the National Parliament to (a) further redefine the underlying law, and (b) provide for its development.<sup>31</sup> In a Working Paper of the Law Reform Commission which was published in 1976, the Commission expressed the view that judges and the legal professions were more inclined to adopt pre- and post-Independence legal rules of the common law than develop a legal system based on the customs and perceptions of the people. It therefore attempted the restatement of the underlying law in a way that would require the profession and judges to develop a Papua New Guinean common law 'fashioned out of the various but in many respects similar customs' of the people.<sup>32</sup>

Essentially, the Working Paper argued for customary law and the common law and equity to become sources of the 'underlying law'. Custom should, however, play a more dominant role and therefore courts must first look to custom for solutions to problems. The proposals were subsequently discussed at a Law Reform Commission seminar on the 'Declaration and Development of the Underlying Law and Customary Law'. The seminar took the view that the act of relegating

customary law and the common law and equity to the status of sources of law was to create an unnecessary vacuum in the legal system. Secondly, the Constitution required a definition of the underlying law, not merely its sources. The seminar adopted a proposal to reformulate the underlying law to consist of:

- (a) general principles of customary law; and
- (b) decisions of the courts.

Only where there was no existing principle of the underlying law could the court develop a rule from the common and foreign laws. A foreign law was defined to include the common law and equity of England as well as other foreign legal systems. These proposals were for discussion and have not yet been given legislative force, though a draft bill incorporating the recommendations has been published by the Law Reform Commission.<sup>33</sup>

## NOTES

1. See Organic Law on Provincial Boundaries, 1975.
2. Organic Law on Boundaries of the National Capital District, 1975. The National Capital District is now governed by an Interim Commission.
3. See Final Report of the Constitutional Planning Committee. (1974) Chap. 10; Report on Central-Provincial Government Relations by Tordoff W. and Watts R.L.; Conyers D., *The Provincial Government Debate*. Monograph 2, IASER (1976); Goldring J., 'Bulsit Bilong Bel Isi'. *Melanesian Law Journal* (1977) p.250.
4. See President J.K. Nyerere's statements to the NEC meeting in Iringa, May 1972, entitled 'Decentralisation: The People's role in Planning'.
5. Act 48 of 1974; see also Provincial Government (Electoral Provisions) Act 20 of 1975.
6. Act 50 of 1975.
7. Papua New Guinea National Gazette, 11 of 1975.
8. Constitution Amendment Act No.1, passed in 1976, now Part VA of the Constitution, p.1.
9. Certified on March 7 1977, (Cap.1).
10. Constitution s.138.
11. Constitution s.158 and see *In the Matter of the State v John Womom of Jizi* [1975] P.N.G.L.R. 311.
12. Constitution s.86(2).
13. *The State v Independent Tribunal Exparte Sasakila* [1976] P.N.G.L.R. 491; *The Minister for Lands v Frame* (1981) S.C. 186.
14. Act. No.66 of 1974 (Cap.192); See also s.5 of Land Settlement Schemes (Prevention of Disruption) (Amendment) Act No.52 (1983).
15. Constitution s.187C(2).
16. See s.26 of the Organic Law. However, note S.100(1) and (3) of the Constitution and the argument that the Act will prevail over the Provincial Law since the legislative power of the people is vested in Parliament; Goldring J., *The Constitution of Papua New Guinea*. Sydney: Law Book

- Co. (1978) p.84.
17. S.29(1), *ibid.*.
18. S.29(2), *ibid.*.
19. This phrase avoids the revival of the provincial law on repeal of the Act, cf. *Butler v A.G. (Vic)* (1961) 106, C.L.R. 268.
20. Report of the Commission of Inquiry into Land Matters. Port Moresby, October 1973, para. 11/12.
21. *Paikara v Nau* [1971-1972] P.N.G.L.R. 354; *Gupta v Union of India* (1982) All India Reporter. 149 at 372.
22. [1981] P.N.G.L.R. 63.
23. Building (Provincial Building Boards) Act, No.22 of 1977.
24. Act 71 of 1971; See also the Conservation Areas Act, No.52 of 1978.
25. A provincial government has the authority to acquire, hold and dispose of property: s.12 of the Organic Law.
26. See Weisbrot et al. (ed.s), *Law and Social Change in Papua New Guinea*. Sydney: Butterworths (1982) pp.36-7.
27. Law Reform Commission Working Paper No.12, April 1978.
28. See fn. 20 above; and post, Chapter 12.
29. Sch.2.12 of the Constitution. See on this principle as a general proposition, 'Refusing to follow precedents...'. *Australian Law Journal* Vol.51 (1977) p.288.
30. For statements of the cut-off date being Independence Day see Kearney J in *State v Woile* [1978] P.N.G.L.R. 98 at p.103; but see *Vian Guatal v PNG* [1981] P.N.G.L.R. 230; and see generally, Roebuck, Srivastava D. and Nonggorn J., *The Context of Contract in Papua New Guinea*. Port Moresby: UPNG Press (1984) pp.67-76.
31. Constitution s.20.
32. Declaration and Development of Underlying Law. Law Reform Commission of Papua New Guinea Working Paper No.4 (1976).
33. Contained in Roebuck D., et al., *op. cit.*, p.215.

#### FURTHER READING

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CHAPTER TWO  
FUNDAMENTAL CONCEPTS AND CATEGORIES

1. MEANING OF THE EXPRESSION 'LAND'

(a) Customary Law

The expression 'land' assumes a different meaning depending on whether one is concerned with the unalienated or alienated land tenure system. If the former, traditional law recognises that the physical soil (land) may be owned by a lineage or other group, but growing crops and other improvements thereon may be claimed by individuals or members of communities who might be strangers to the landowning group. These rights in land are often referred to as usufructs, not as land. The basis of this separation of land and attachments thereon is that labour creates rights, therefore he who is responsible for improvements to the soil retains ownership of the attachments. Trees growing naturally on land present different considerations, which raise a presumption that they belong to the community which owns the soil. Land in the traditional sense is not an alienable commodity, but it provides security for the land-owning community and for future members thereof.

Though the distinction between 'land' and 'usufructuary rights' is generally correct for the customary system,<sup>1</sup> there are some statutory modifications for specific purposes. Thus village courts, which are set up to resolve conflicts by applying the relevant customs, are expressly denied jurisdiction over disputes involving the 'ownership of land' under the general law.<sup>2</sup> They do, however, have jurisdiction to hear disputes as to the ownership by custom of land, and rights by custom to its use, and to make interim orders pending the determination of the substantive issue by the Land Court. Land is defined for this purpose to include 'a reef or bank and a house or other structure built on or over water, but does not include things growing on land.'

A house or other structure built on soil and not being over water, and

growing crops are, in customary jurisprudence, not deemed to be land. Disputes thereover are therefore justiciable by village courts under their general jurisdiction. In contrast, a house or other structure built on land, and things growing on land, are within the definition of land for purposes of the jurisdiction of the Land Courts.

The modern day practice of planting cash crops which tie up the land for a number of years, and the practice of building permanent structures on soil, could no doubt lead to the modification of the concept of land in traditional tenure. Traditional law is itself flexible and could change to accommodate the changing circumstances.

The 'Task Force on Customary Land Issues' recommended the formalisation of, and increase in, land transactions in customary-owned land. Under the proposed scheme, the grantees would acquire occupational rights with specified development conditions. As a corollary, the Committee suggests the need to arrive at a formula for compensation payments to the developer of such lands for his improvements thereon.<sup>3</sup> Such payments would be in substitution of his severance rights.

(b) General Law

For purposes of the general law, the common law definition has been adopted.<sup>4</sup> Land is defined to include the soil and everything that is below and above the soil that is annexed<sup>5</sup> in such a manner that it becomes a part of the soil. In *Geita Sebea v The Territory of Papua*<sup>6</sup> it was established that the traditional owners leased unimproved lands to the Crown for a ten year period. The Crown transformed the land into an aerodrome and, together with private persons, erected buildings thereon. Subsequently, it acquired the property by compulsory process and offered to pay the traditional owners compensation based on the value of the land without the improvements. It was held that the land which was compulsorily acquired included all the improvements affixed to it at that date and compensation was payable for these.

It is trite knowledge that upon the annexation of any chattel or other improvements on the soil, such improvements become a part of the land and pass to the owner of the soil. A person who is responsible for the improvements generally has no power to remove them; if he did, he would have committed an act of trespass. Nor has the improver a claim for compensation for the added value.<sup>7</sup>

At common law, gold and silver found in the soil belonged to the Crown by royal prerogative and were not deemed to form *partes soli*.<sup>8</sup> This was the principle which was early established in Papua New Guinea. Gold and silver were the subject of reservations in Crown grants and Crown leases of land, and the State's ownership of them was later given statutory recognition.<sup>9</sup> The state's right to minerals was extended to include all mines and minerals in or upon lands which were stated in the earlier mining legislation in Papua New Guinea to be the property of the state.<sup>10</sup> The Mining (Amalgamated) Act 1977, which amalgamated the relevant laws of the country, restated this basic principle of state ownership of all gold and minerals in this country.

This division of land ownership, i.e. mines and minerals in the state, and the rest of the soil in a defined area in an individual, is an instance of the concept of lateral or horizontal ownership.<sup>11</sup> This is a concept recognised by the common law and, as we have seen, characterises the traditional legal system.

## 2. FIXTURES

### (a) Definition

We have seen that at customary law the person responsible for making improvements on land of another retained ownership thereof, while at common law the applicable principle is *quic-quis plantatur solo, solo cedit*. The *locus classicus* of the common law principle is the English case of *Holland v Hodgson*,<sup>12</sup> where it was stated by Blackburn J. to be that:

articles not otherwise attached to the land than by their weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land... and on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue a chattel...

The tests referred to in that passage are expressed in terms of the 'degree of annexation' and 'purpose of annexation'. Thus, when an article is no further attached to land than by its own weight, it generally retains its character as a chattel. On the other hand, a chattel attached to land or to that which is

attached to land (e.g. a building) in some substantial manner, e.g. by nails or screws, would generally become a fixture. If the purpose of annexation was to enhance the land or its use, even a minimal annexation would suffice. But if the purpose of annexation was to enable the owner of the chattel to better enjoy it (e.g. a painting), attachment would not prevent the object from retaining its character of personal property.

The consequence of an article ceasing to be chattel and becoming a fixture is that, on the determination of the interest of the developer, (whether he is a lessee, licensee or trespasser), all fixtures must be left with the landlord, unless they fall within the category of removable fixtures, a category which is unduly limited at common law. There are indeed other consequences which will follow, consequent upon the classification of such improvements as fixtures.<sup>13</sup>

### (b) Protection of Improver

The recognition of improvements as fixtures and the non-recognition of a corresponding obligation on the landlord to recompense the builder or improver for his improvements to the land may cause injustice to the latter, and could adversely affect land development in cases where the occupier has no secured or long-term interest in land. In some countries, therefore, there have been moves to enfranchise a tenant who has spent years on a landlord's land and has been solely responsible for developing it.<sup>14</sup> No enfranchisement legislation of this kind exists in Papua New Guinea, but some attempts to give recognition to the developer's claim, based on the time and money he has spent on enhancing the value of the land, is apparent.

Even at common law there are some mitigating principles which give rights to the developer for his improvements. These may be adopted in Papua New Guinea. The Land Act provides for compensation for improvements, though no uniform principle has yet been established. Both the common law and Papua New Guinean statutory development contributing to the solution of this problem will now be discussed.

### (i) Tenant's fixtures

A tenant has a right to remove 'tenant's fixtures' at the termination of his lease or within a reasonable time thereafter.<sup>15</sup> The 'right of removability' is, however, limited because the category of 'tenants' fixtures' is itself limited

at common law.

Prima facie all fixtures attached by the tenant are 'landlord's fixtures' and must be left for the landlord. The right of severance is limited to 'trade', 'ornamental' and 'domestic' fixtures. The former are fixtures attached by the tenant for the purpose of his trade or business. The expressions 'ornamental' and 'domestic' fixtures are self-explanatory. They include window blinds, panelling, stoves, etc.

Judges in the West Indies have had to confront the paradoxes which arise from the application of principles of attachment, the social attitudes of the people to the so-called 'chattel houses', and the narrowness of the common law definition of 'tenants' fixtures'. Perhaps the most celebrated West Indian decision which discussed the point at issue is *Mitchell v Cowie*.<sup>16</sup> The facts were that the plaintiff agreed to purchase from the defendant a dwelling house in the course of construction, on land which the latter held as a tenant. The defendant had, however, already executed a mortgage, with the incompleting house as security, in favour of D.C. to secure a loan, and later the same year D.C. paid a further sum to the defendant, who gave a receipt in full payment for the house. The plaintiff moved into possession, and in the ensuing suit, contended that the sale of the chattel house to her was a sale of goods and that the legal interest passed to her. (The chattel house in question was built of hollow clay blocks standing upon concrete pillars covered with galvanised iron sheeting). Both Fraser J. and the Court of Appeal of Trinidad and Tobago (Wooding C.J., McShine and Hyatali J.J.A.) held that the house was a fixture and hence not 'goods' within the Sale of Goods Ordinance. It followed that nothing passed to the plaintiff.

What was interesting in this case was the recognition by the judges that a slavish adherence to English precedents would pose irreconcilable conflicts with West Indian social practices, hence the need for qualifications on the application of the logic of *Holland v Hodgson*. Fraser J. (as he then was) cautioned:

I am convinced that the chattel house is the type of fixture which has attracted a relaxation of the general rule as to the annexation of chattels to the soil. I am also of the opinion that the description of the structure as a chattel house necessarily implies an element of removability and, unless there is clear evidence of a contrary intention, a chattel house which, by reason of its mode of annexation, becomes a fixture must carry as a part of its character

the right of removal by the tenant or his assignee at the end of or during the term.

In the Court of Appeal, Wooding C.J. did little more than summarise the English position which, by enactment, is deemed to be in force in Trinidad and Tobago, and to apply it. He shared the doubt of Bourke J. in the Kenyan case of *Saleh v Eljofri*,<sup>18</sup> when the latter found it:

difficult to appreciate how a house of the nature in question can properly be said to be a chattel... It could only be completely transferred by delivery by reducing it to pieces of wattle wood and dried mud or daub with particles thereof. By such a process the whole character of the thing would be gone and its state hardly more enviable than that of the late lamented Humpty-Dumpty.

The analogy of Humpty-Dumpty and the Caribbean 'chattel house' is somewhat misplaced, for the assistance of 'all the King's horses and all the King's men' is not necessary to put together again a dismantled 'chattel house'. The typical West Indian scenario was presented in *O'Brien Loans Ltd. v Edward Missick*.<sup>19</sup> In this case, the Court of Appeal of the Bahamas had to decide whether a small wooden house bolted to concrete blocks into which cement had been poured to make them solid was a fixture or a chattel. Their Honours held that there was not sufficient annexation for the house to be part of the land and hence it remained a chattel. At the end of his judgment Hogan J. noted:

If this case was to be determined...in the environment of England I think it would be very difficult to resist the appellant's claim. The concept of a chattel house has, however, been a feature of countries in this part of the world and in the Far East to a very much greater extent than in England and I believe it would be wrong to ignore that aspect in determining this appeal. It appears that the house was moved with little difficulty and retained its identity virtually intact on removal. In these circumstances, though not without considerable hesitation and difficulty, I have come to the conclusion that it would be right in the environment of the Bahamas to regard the house as a chattel rather than a fixture.

Other judges in contrast would readily accord to 'chattel houses' the status of fixtures, but apply the common law with such modifications to suit local conditions. Georges J.A. displayed his awareness of the problem which is acutely



West Indian in the following passage:

In many parts of the West Indies persons become the yearly tenants of plots of land on which they build houses. In a sense the purpose for which the house is built is always the proper enjoyment of the plot of land but even though there may be some minimal attachment which will make the house less liable to damage from stormy weather, there is no intention to benefit the landlord by adding value to the land. In a sense the conclusion that the tenant did not intend to benefit the landlord can be said to be subjective but in a sense it can objectively be determined from the nature of the tenancy and the method of construction which aims to make the annexation minimal. It is true that such minimally annexed structures might still be saved from becoming the property of the landlord by holding them to be tenant's fixtures which can be moved at the end of the tenancy.<sup>21</sup>

In a trilogy of cases (*Baptiste v Supersad*,<sup>22</sup> *Dolan v Ramlakan*<sup>23</sup> and *Fields v Modest*),<sup>24</sup> the High Court of Trinidad in the former and the Court of Appeal in the latter two decisions decided that a 'chattel house' is a fixture. The effect of this finding is not hard to see. In the English decisions of *Crossley Bros. Ltd. v Lee*<sup>25</sup> and *Provincial Bill Posting v Low Moor Iron Co.*,<sup>26</sup> it was laid down that only chattels could be seized in distress and not fixtures, the reason being that fixtures formed part of the land which could not be distrained. The West Indian courts have thus displayed some judicial activism in moulding the English rules to keep the roofs over the heads of poor tenants.

(ii) 'Equity'

The protection of the developer's improvements may be achieved by a finding that his actions, coupled with the conduct of the owner, were such as to entitle him to claim a right over the land.<sup>27</sup> The application in Papua New Guinea of the concept of the 'licence coupled with an equity' or 'licence by estoppel', as the right acquired in the above-mentioned circumstances is called, has never been doubted.<sup>28</sup> Until the decision in *PNG Ready-Mixed Concrete Pty Ltd. v Utula Samana and Kiamba*,<sup>29</sup> however, there was no guiding authority on the circumstances in which an 'equity' would be held to exist in Papua New Guinea.

In the earlier case of the Administration of the Territory of PNG v

*Tirupia*,<sup>30</sup> the plaintiff on behalf of the kinship group which he headed claimed, *inter alia*, to have acquired an 'equity' in land registered in the name of the Administration. His claim arose out of the following circumstances:

- (1) long occupation by himself and the group he represented in the action;
- (2) their expenditure of money and other acts in developing the land; and
- (3) knowledge, constructive or actual, by the state, and its tacit approval, of the developments.

The Full Court of the Supreme Court did not question the notion of the 'licence by estoppel', but it held that, in the absence of an allegation of fraud, section 69 of the applicable Lands Registration Act, 1924, of New Guinea, protected the registered owner, i.e. the Administration, by providing it with an 'indefeasible' title to the land.

In the PNG Ready-Mixed Concrete Case, the defendant Kiamba and five hundred and eleven other persons had settled on state land in Lae. Subsequently, the state agreed to lease the land to the plaintiff for a state lease of ninety-nine years. In the action of the purported lessee for possession of the land to which the state was joined as a plaintiff, the court held that the defendants had acquired an 'equity' in the land in the following circumstances:

- (1) their possession and the act of effecting substantial improvements (including seventy buildings as dwelling houses) on the land;
- (2) the improvements were effected with the tacit approval of the state, whose officers remained silent whilst the buildings were going up;
- (3) the occupiers were led to have an 'expectation' that they would be able to continue to reside on the land for some indeterminate time.

Miles J. further held that the 'equity' was binding on the grantee whose lease, not being registered, amounted to an equitable interest in land and was, therefore, subject to an 'equity' of which he, as transferee, had notice (constructive or actual).

In cases where an 'equity' is found in favour of the developer of land, it is for the court to say in what manner it will be satisfied. In some cases

the developer is allowed a life interest, in other cases, compensation for the improvements and, in others still, occupation for a fixed term. In *Inwards v Baker*, the son who built on his father's land at his invitation and encouragement in the expectation of obtaining an indeterminate right of occupation was granted possession for life or as long as he desired. In *PNG Ready-Mixed Concrete Co.*, the judge found that consideration should be taken of the following circumstances which should influence his decision in defining rights arising from the 'equity':

- (1) the defendants were originally trespassers with knowledge that the land belonged to the government;
- (2) they failed to notify their interest to the state, which had advertised both the land for tenders and the meetings of the Land Board, which later allocated the land to the plaintiff.

In view of these considerations, the learned judge made an order for possession in favour of the *PNG Ready-Mixed Concrete Co.*, subject to rights of the occupants to remain on the premises for periods of:

- (a) one year, in the case of two named persons (who were the first occupants of the land) and the members of their households; and
- (b) six months, in the case of all other occupants who were residing on the land on June 30, 1981, the date of commencement of the action.

It is well recognised that the life of the law is not always logic, and the *PNG Ready-Mixed Concrete Co.* case poses at least two outstanding problems. The first is whether an 'equity' is such an interest or right capable of protection under the land registration system - the Full Court in *Tirupia's Case* having held, and Miles J. in the *PNG Ready-Mixed Concrete Co.* case having conceded that an 'equity' has no over-riding effect under s.33 of the Land Registration Act. This statement of the law is reminiscent of the House of Lords' decision in *National Provincial Bank v Ainsworth*.<sup>31</sup> The second is whether an appropriation of unseverable improvements by the registered proprietor or his transferee is a deprivation of property for which compensation is payable by virtue of s.53 of the Constitution.

The Court would seem to have been misdirected on the issue of the constitutional property protection. It rightly held that the protection is not directed

at a decision of a court which adjudicates, declares or determines pre-existing rights. In other words, there is no loss of property rights because a court has held that the claimant has no interest in land. However, the guarantee is directed against the deprivation of 'property', which includes real or personal property i.e. land, money etc.. It will therefore include improvements to land. The court made no order as to permanent improvements effected by the occupiers. On the authority of such decisions as *Brand v Chris Building Co.*<sup>32</sup> and those discussed above, they form part of the land. Is this a deprivation of property for which compensation must be paid? Secondly, can the *PNG Ready-Mixed Concrete Co.* be termed an 'expropriating authority' within the terms of the protection, or is the obligation to pay compensation that of the state as 'expropriating authority'?

In *Tirupia's Case*, the court held that the principle of indefeasibility operated to defeat any 'equity' of the occupiers of land owned by a registered proprietor. The *PNG Ready-Mixed Concrete Co. Case*, however, would seem to have held that the 'equity' binds the equitable purchaser from the registered proprietor. In the cases at common law where an 'equity' was held to bind a third party, whether purchaser or successor in title, and whether he had a legal estate or an equitable interest, it was itself binding on the original owner.<sup>33</sup>

In conclusion, it is recognised that at the best of times the finding of an 'equity' is uncertain. The authorities suggest various criteria. On the one hand, the person who develops land under a mistake of his own legal rights must prove that he expended money or effected other acts on the faith of his mistaken belief. He must establish that the owner, for his part, acquiesced in his acts with knowledge of his own legal right and the occupier's mistaken belief. With that knowledge it becomes inequitable for the latter to maintain silence and then claim to benefit from the occupier's mistake. Where the developer was permitted either expressly or impliedly to enter another's property and develop it, and the owner so behaves as to lead the occupier to form an 'expectation' of some interest in or indeterminate right to the land, knowing or intending that the other will act on that belief, and the occupier so acts, these facts might raise an 'equity' in favour of the developer. Secondly, an 'equity' cannot be the subject of an action for its protection, but it is a defence in an action for possession by the owner, his assignee or successor in title.<sup>34</sup>

## (iii) Compensation for improvements

Some statutory provisions have gone some way to alleviating the hardship caused to the land developer through the application of the common law principle of *quicquid plantatur solo, solo cedit*. Section 48(6) of the Land Act gives the government lessee who surrenders his lease a power of removal of such of his improvements that are severable.<sup>35</sup> This power is very limited, but has some practical utility.

A more satisfactory provision is that of payment of compensation for improvements. A claim for compensation against the state is by statute unnecessarily limited to the state lessee and in very restricted circumstances. It avails only if he applies for a renewal of the lease and the application is rejected in whole or in part.<sup>36</sup> The Land Act expressly states that a lessee who does not apply for a renewal of his lease has no claim for compensation for improvements against the state. He may, however, sever such of the improvements that are severable or arrange with the incoming lessee for payment thereof.<sup>37</sup>

There is no right to compensation for improvements when a lease has been forfeited by the government for breach of conditions.<sup>38</sup> However there is, by virtue of the recently enacted Land Registration Act, a general power in the courts to allow a defendant compensation for his improvements in ejectment actions provided (i) he has a certificate of title for the land; (ii) he has complied with the statutory requirements of serving notice on the landlord of the fact and value of the improvements;<sup>39</sup> and (iii) presumably, there is no inconsistency with the Land Act. The latter condition follows from the fact that the Land Registration Act is subject to the provisions of the Land Act.<sup>40</sup>

In the context of the land policies discussed in Chapter Ten, the lessee ought to be entitled to compensation for his unexhausted improvements to the land in all cases where his lease was determined. In some jurisdictions (for example Tanzania), where the government lease or equivalent interest predominates in the land tenure system and which have comparable land policies, the outgoing lessee is guaranteed compensation to the value of his unexhausted improvements. He is, however, denied a claim for compensation for improvements effected within five years of the termination of his interest by effluxion of time, unless the improvement was carried out with the approval of the state. This limitation on compensation rights is intended to avoid developments carried out with the

sole object of deriving a benefit from an award of compensation or in cases where the state decides to change the usage of the land consequent upon new zoning arrangements.

In Chapter Ten we discuss the constitutional protection of land rights. This includes article 53, 'protection from unjust deprivation of property'. It is arguable that, in so far as the Land Act purports to permit the deprivation of improvements without providing for adequate compensation, these are offending provisions which are unconstitutional. By subsection 4 of section 53 of the Constitution a reference to the taking of possession of property is defined to include a forfeiture or extinction or determination of any right or interest in property. These considerations are strong arguments for the exercise of the court's power to award compensation in ejectment actions. Already in disputes over customary land the land courts are empowered by the Land Disputes Settlement Act (s.40) to award compensation where the occupier loses the right to improvements which he has put on the land.

In practice, the payment of compensation for improvements does not present much difficulty, because the state lessee has the capacity to assign the lease together with the improvements thereon, provided he gets governmental approval for the proposed transaction. This approval is always forthcoming in normal circumstances.<sup>41</sup> On a disposition he gets the market values of his improvements. Difficulties remain when his lease expires, whether by effluxion of time or as a result of forfeiture, though the constitutional argument seems to have been endorsed in the recent amendment to the Land Settlement (Prevention of Disruptions) Act (see Act No.52 of 1983).

## (iv) Limitation and prescription

The acquisition of title by adverse possession for a period of twenty years<sup>42</sup> indirectly gives protection to the developer of land in Papua. The policy of limitation statutes is, however, not to reward the user of land but to grant titles which are openly and consistently asserted.<sup>43</sup> It is therefore a precondition that there should have been no acknowledgement of a superior title during the period of adverse possession. Limitation is largely evidentiary. The courts have held that the concept of limitation has no application in New Guinea in the absence of legislation.<sup>44</sup> The recognition of rights flowing from use of land is further discussed in Chapter Ten.

## (v) Constitutional protection

We have submitted in Chapter One that one aspect of the Independence Constitution is that it is an important source of law. Rights which hitherto did not exist at common law may be asserted sometimes even in derogation of the statute law. By section 41 *ibid.*, any act done under a valid law but which in the particular circumstances is harsh and oppressive or unwarranted or disproportionate to the requirements of the circumstances or particular case may be invalidated by the court. In *Jivetuo v The Independent State of Papua New Guinea et al.*,<sup>45</sup> the plaintiff sought an injunction on his behalf and as representative of a group illegally occupying state land to prevent the state from ejecting them from land they had occupied for a number of years. Bredmeyer J., in making the order, observed as follows:

On the facts before me the plaintiff has been on the land for 12 years and has a house there, and many others of the class he represents have also been there for a long time and live there. It is not easy to get other land in Papua New Guinea and I can take it that many of the plaintiff's class are poor and cannot easily buy a property elsewhere. The notices to quit which were served gave about 14 days to quit. I consider that, although done under a valid law, it is harsh and oppressive to the plaintiff to leave within two weeks and I consider that that contravenes s.41 of the Constitution. I propose to enforce and protect that fundamental right under s.57 of the Constitution. I therefore order that the defendants are not to eject the plaintiffs forcibly from the land until two months has elapsed from the service of each notice. In other words, the notices to quit are extended two months from the date of service of each notice.

## (c) Conclusion

The common law concept of land has much to commend it in the interest of maintaining the development of land. The shortcoming is the absence of a general principle of compensation for improvements, a concept which could well stimulate development. Ideally, a landlord or other landowner who benefits from the improvements on his land effected by his tenant, or other limited holder, should ordinarily<sup>46</sup> be obligated to compensate the outgoing developer for the value of the unexhausted improvements. The application of this statement as a principle in the legal system is dependent on the acceptance of new policies

proposed by the Commission of Inquiry into Land Matters. These are discussed in Chapter Ten.

## 3. UNALIENATED AND ALIENATED LANDS

The principles and rules of land tenure in Papua New Guinea are best discussed in the context of the divisions recognised in the legal system. The main categories are unalienated and alienated lands, as shown in Table 1 below.

TABLE 1

Total Land Area = 47,615,700 hectares	
Unalienated	Alienated
46,310,419 hectares	1,305,281 hectares
97.25%	2.75%

Unalienated land is that which is owned and controlled by the indigenous peoples according to their customs. The expression 'customary land' is normally used in legislation to refer to this category of land. 'Customary land' has been defined to mean land which is owned or possessed by an automatic citizen or community of automatic citizens by virtue of rights of a proprietary or possessory kind which belong to that citizen or community and arise from and are regulated by custom.<sup>47</sup> This category forms just over 97% of the total land area.

Alienated land is largely land alienated from the traditional sector either voluntarily or by compulsory process. It comprises two basic subdivisions: state land and privately-owned freeholds. Although it is only just under 3% of the total land area, it accounts for prime urban and agricultural land in the country. For example, alienated land accounts for over 40% of the arable land in the Gazelle area, which is a very fertile area of Papua New Guinea.

This broad division between unalienated and alienated land carries the implication of the contrast of unwritten and written laws. It also expresses diverse theoretical basic principles of the Papua New Guinea land tenure system, i.e. the radical title to alienated land is in the state,<sup>48</sup> whilst the ultimate ownership of unalienated lands is vested in the traditional groups. Whilst at customary law land is intended to provide a shelter and security for the group owners, at

common law it is a marketable commodity. These different objectives are reflected in the controls and restrictions on dispositions apparent in both law and land policies. These are topics discussed in Chapter Six.

The colonial Administration adopted a long-term policy to convert all unalienated land into alienated land, thus creating a unified land tenure system. The implementation of this policy was opposed by the nationalist government and has presumably been abandoned.<sup>49</sup> On the other hand, the latter has resisted continuous pressures to adopt a policy of retransferring title of all alienated lands, including government lands, to the original owners or their descendants.<sup>50</sup> The arguments in favour of this demand have been mainly historical ones, e.g. the original alienation was involuntary and/or resulted from trickery by officials during the colonial Administration. It was also contended that the original land-owning groups should be able to share in the benefits that flow from the use of their lands and that the share should be a continuing one in the form of rents from the occupiers of land.<sup>51</sup>

Though similar arguments found support in the Report of the Special Select Committee on Lands and Mining for the Solomon Islands,<sup>52</sup> and the indigenous landlord class has long been a feature of the land tenure system in Fiji, they were conclusively rejected by the Commission of Inquiry into Land Matters (CILM) for Papua New Guinea. That Commission recommended the passage of legislation to strengthen the government's title to its land which is needed for public purposes (National Lands) and to give greater power for further acquisitions to meet national needs, e.g. urban development, land settlements, etc.. Apart from the theoretical merits of the arguments, the experience of the limited redistribution programme in Papua New Guinea points to the confusion in and difficulty of determining who were the original owners, in the face of conflicting claims.

#### 4. STATE LAND AND PRIVATE FREEHOLDS

The title to land owned by the government is vested in the state. Such lands are scattered all over Papua New Guinea. Some areas are made available as settlement areas for various agricultural projects and schemes, others for schools, hospitals, roads, etc.. Leases over state lands are granted to ensure that land is used for productive purposes, and some state lands are allocated to town-dwellers for residential, commercial or industrial uses.

The distinction between state land and private freehold is that the private owner controls his land for his own benefit; state land is held on behalf of the people as a whole. Such land may be truly called *giraun bilong girapim' ples* (Pidgin: 'land for development'). Whilst the basic land tenure rules regulating the incidence, control and disposition of private freeholds are the received laws, (viz. the English common law and principles of equity),<sup>53</sup> such matters in relation to state land were consolidated in the Land Act<sup>54</sup> and are therefore locally expressed.

#### 5. STATE LEASES AND FREEHOLDS

Administration leases (New Guinea) and Crown leases (Papua) are now referred to as state leases and are registered in the Register of State Leases. The distinctions between a state leasehold and a private freehold are as follows: the maximum period of the former is ninety-nine years, whilst the life of freehold is indefinite. State leases are subject to development conditions, and an important term of the lease is that if the land is not utilised properly, the government could forfeit the lease and give a new lease to someone who will develop it. The title in private freehold is immune from such conditions. This is a common law protection, and local attempts to make the security of freehold dependent on proper utilisation of land have been unsuccessful.

#### 6. INTERACTIONS WITHIN THE LAND TENURE SYSTEM

The model of the land tenure system discussed so far is an oversimplification. It expresses a plural but static legal system. On the contrary, the law permits the conversion of unalienated land into state land by voluntary processes<sup>55</sup> and compulsory acquisition by the state.<sup>56</sup> Waste and vacant declarations<sup>57</sup> were in the past an important process for such conversion. On the basis of the argument that there was no ownerless land at customary law, and in view of constitutional guarantees of customary law,<sup>58</sup> the validity of future declarations is now doubtful.

However, the contrary view was suggested in *Agevu v Government of PNG*.<sup>59</sup> There it was suggested that upon the annexation of Papua (though not New Guinea)<sup>60</sup> all 'waste and vacant lands' (i.e. lands which were unoccupied, uncultivated and unused) automatically became the property of the Administration.

There was, therefore, no need for an Act or instrument to achieve this result and no conversion process took place. On this reasoning, waste and vacant land is a unique category and a Declaration is merely confirmatory, for the land is already alienated land vested in the state. This decision conflicts with the colonial constitutional principle applicable to ceded and conquered territories, and certainly with authorities discussed later.<sup>61</sup> Although this pronouncement was not doubted on appeal,<sup>62</sup> the Appellate Court held that Fisherman's Island, the land in dispute, could not be assumed to be waste and vacant simply because it was unoccupied, uncultivated and unused. Regard must be given to the exigences, habits and practices of the people. Depending on the seasons and the availability of fish, the lands of fishermen may for months or even years be unoccupied and uncultivated. This reasoning cannot be restricted to fishermen and applies *mutatis mutandis* to agricultural communities who practise shifting cultivation.<sup>63</sup>

State land may be declared as customary land under a section 76 declaration of the Land Act, and thereby effect a reconversion. This process has been at the centre of the implementation of the land redistribution programme of the national government and is an example of the reconversion of alienated land to traditional tenure. On the other hand, about 6,330 hectares of privately-owned freeholds have been acquired out of the traditional sector under the tenure conversion process between 1963 and 1973. Tenure conversions in selected areas are still taking place.

The reconversion of privately-held freeholds to traditional tenure is theoretically possible by purchase either voluntarily or under the plantation redistribution programme. Unlike the African jurisdictions which recognise a doctrine of 'reverter' on an intestacy,<sup>64</sup> in Papua New Guinea the system of land registration has not permitted such a doctrine. The rule is that principles of traditional law only determine the successors to the deceased and the land does not revert to traditional tenure in cases of intestacy.<sup>65</sup>

It is arguable that there can be no conversion of state land to private freeholds as opposed to grants on government leaseholds, for the power to grant government lands absolutely is no longer defined in the land legislation. There is, however, machinery for the conversion of private freeholds to state titles by compulsory acquisition,<sup>66</sup> leasehold conversion<sup>67</sup> and the doctrine of *bona vacantia*.<sup>68</sup>

These forms of tenure are not intended to be permanent features of

the land tenure system of Papua New Guinea. The CILM recommended as a long-term goal the establishment of a uniform system of registered titles. These are 'group titles',<sup>69</sup> 'conditional freeholds' (or perpetual estates)<sup>70</sup> and 'government leaseholds'.<sup>71</sup> Legislation to bring about this rationalisation of land tenure on the lines suggested by the CILM was drafted but would seem to have been shelved.<sup>72</sup>

## NOTES

1. See further Wanji R., *Statements of Customary Rules of Succession in the Wosera and Amele Areas*. Law Reform Commission Occasional Paper No.3 (1975).
2. See s.20 Village Courts Act, No.12, Cap.44.
3. Report (March 1982) p.13, cf. s.40(5)(f) of the Land Dispute Settlement Act, Cap.45.
4. See Interpretation (Interim Provisions) Act, No.91 of 1975, Cap.2. Real Property Act, s.5; Land Registration Act, s.4; and see now the unifying statute, Land Registration Act, No.2 of 1981.
5. For the definition of annexation see *Geita Sebea v The Territory of Papua* (1943) 67 C.L.R. 544.
6. *Ibid.*.
7. Cf. *Francis v Ibitoye* (1936) 13 N.L.R. 11, applying the common law; *Brand v Chris Building Pty Ltd.* (1957) V.L.R. 625.
8. *The Commonwealth v N.S.W.* (1923) 33 C.L.R. 1.
9. See now s.39 of Land Act, 1962 (Cap.185).
10. Mining Act 1937-66 (Papua) s.166; Mining Act 1928-66 (New Guinea) s.191.
11. On this concept at common law see *Toporowski v Rogalski* (1956) 1 D.L.R. 709; Risk D., 'Condominiums and Canada'. (1968) C.B.R. 1.
12. (1872) L.R. 7 C.P. 328.
13. See post, p.104.
14. See, for example, the English Leasehold Reform Act, 1967.
15. *Poole's Case* (1703) 1 Salk 368; *Badalato v Trebilcock* (1923) 5 Ontario Law Report 359.
16. (1962) 5 West Indian Reports 409, affmd. (1964-5) 7 W.I.R. 118. For a more in-depth discussion of Caribbean developments on the topic, see Gibson M., 'Pluralism, Social Engineering and Some Aspects of Law in the Caribbean'. *Bulletin of Eastern Caribbean Affairs* Vol.10, No.3 (1984) at p.70 et seq..
17. 5 W.I.R. 409, pp.414-415.

18. (1950) 24 K.L.R. 17.
19. (1977) 1 B.L.R. 49.
20. *Ibid.*, pp.54-55.
21. *Ibid.*, pp.58-9.
22. (1966-9) Vol.19, pt.1, Trin. & Tobago L.R. 153.
23. (1966-9) Vol.19, pt.2, Trin & Tobago L.R. 311.
24. (1966-9) Vol.19, pt.4, Trin & Tobago L.R. 251.
25. [1908] 1 K.B. 86.
26. [1909] 2 K.B. 344.
27. Cf. *Inwards v Baker* [1965] 1 All E.R., 466; *Ward v Kirkland* [1966] 1 W.L.R. 601; *E.R. Ives Investment Ltd. v High* [1967] 2 Q.B. 379; *Jones v Jones* [1977] 1 W.L.R. 438; *Pascoe v Turner* [1919] 1 W.L.R. 431.
28. *Administration of Papua and New Guinea v Tirupia* [1971-1972] P.N.G.L.R. 229.
29. [1981] P.N.G.L.R. 396.
30. Fn. 28.
31. [1965] A.C. 1175.
32. (1957) V.L.R. 626.
33. *Dillwyn v Llewellyn* (1862) 4 De S.F. & J. 517; *Ramsden v Dyson* (1866) L.R.H.L. 129; *Poole*, 'Equities in the Making' (1968) Conv.96. In any case, it would appear that an unregistered lessee is not entitled to give notice to occupiers of the premises to quit, see *Gawi v PNG Ready-Mixed Concrete Pty* (1984) SC267, *Freeman v Hambrook* (1947) V.L.R. 70 and *Adelstein v Morgan* (1968) 2 N.S.W.R. 170 at p.172.
34. *Meerchin v Lombank* (1963) E.A. 304.
35. See also subsection 5, where there is a similar power on expiry of a lease, and subsection 11 on the rights of the lessee of a Mission or Special Purpose lease.
36. S.48(3) and (5).
37. S.48(7).
38. S.48(8).
39. See s.148 of Land Registration Act, 1981.
40. S.36(3), *ibid.*.
41. See post, pp.93-96.

42. Distress, Replevin and Ejectment Act, 1867, (Vol.3, Laws of Papua) s.6.
43. Ballantine, 'Title by Adverse Possession'. *Harvard Law Review* 32 (1918) p.135.
44. *Administration of Papua and New Guinea v Tirupia* [1971-1972] P.N.G.L.R. 229.
45. (1984) No.485.
46. In Tanzania, there is no obligation on the government to compensate for improvements effected within five years of the expiry of the right of occupancy, unless the government's consent was first obtained to such an improvement.
47. See Interpretation (Interim Provisions) Act, No.91 of 1975 (Cap.2).
48. S.4, Cap.185; see also Lalor P., 'Land Law and Registration'. *Fashion of Law in New Guinea*, p.137.
49. See post, Chap.3.
50. A limited land redistribution programme has, however, been adopted, see post, Chap.7. The Constitution of Vanuatu has effected a re-conversion of all alienated lands to traditional tenure.
51. See Hansard, 26 June 1969, p.1377.
52. Honiara, March, 1976, see Parts 1 and 2.
53. Constitution, Sch.2.2.
54. 1962.
55. SS.13 and 15, Cap. 185.
56. SS.16 and 17, *ibid.*, for example.
57. S.75, *ibid.*.
58. Cf. s.53(5)(e) of the Constitution.
59. [1977] P.N.G.L.R. 98.
60. *Gaya Nomqui v Adm. of Territory of PNG* [1974] P.N.G.L.R. 349. However, see s.4, Land Act.
61. Post, Chap.4.2.
62. *Re Fisherman's Island* [1979] P.N.G.L.R. 202.
63. See *Tolili & Ors. v The Director of Native Affairs* [1965-66] P.N.G.L.R. 12; *Gaya Nomqui v The Adm. of Territory of PNG* [1974] P.N.G.L.R. 349.
64. On this doctrine, see James R.W., *Modern Land Law in Nigeria*, p.65; Kasunmu A.B., *Nigerian Family Law*, p.262.

65. See *In the Estate of Doa Minch* [1973] P.N.G.L.R. 558; Kassam F., *Melanesian Law Journal* (1974) p.5. Cf. s.41 Land Registration Act (New Guinea), and see s.125, Land Registration Act, 1981, Cap.191.
66. See Land Act, ss.16-24; post, pp.72-76.
67. Land (Ownership of Freeholds) Act, No.76 of 1976; post, pp.76-77.
68. S.87, Wills, Probate and Administration Act 1966, Cap.291.
69. See post, Chap.3.3.
70. Post, Chap.3.4.
71. Post, Chap.3.5.
72. Preliminary drafts of a bill were circulated for discussion. The bill comprised 4 Parts: Registration of Customary Land (Draft of January 8, 1980); Recording of Agreements Pertaining to Customary Land (Draft of January 7, 1980); Land Boards (Draft dated January 3, 1980); and Conversion of Freeholds (Draft of January 8, 1980).

#### FURTHER READING

- Griffin J.A., 'Conflict of Inheritance Law and Custom in Niugini'. *Melanesian Law Journal* (1970) p.29.
- Hargreaves A.D., *An Introduction to the Principles of Land Law*. Sweet and Maxwell (1963) 4th edn., Chaps.6, 7 and 8.
- Megarry R., *A Manual of the Law of Real Property*. Stevens and Sons (1975) 5th edn., Chaps.1 and 2.
- Megarry R. and Wade, *The Law of Real Property*. 4th edn. pp.711 et seq.
- Wanji R., *Statements of Customary Rules of Succession in the Wosera and Amela Areas*. Law Reform Commission Occasional Paper No.3 (1975).
- Zorn J., 'Fighting Over Land'. *Melanesian Law Journal* (1976) p.7.



CHAPTER THREE  
'UNALIENATED' LAND POLICIES\*

I. 'STATUS QUO' POLICY

(a) Introduction

What we refer to here as the 'status quo' policy is that which implied respect for existing land ownership and tenurial systems. The British Government, in declaring a Protectorate over British New Guinea, had expressed the desire to protect the indigenous communities, land rights and traditional 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.<sup>1</sup> Consequently, whereas at the time of the settlement of the Australian colonies all lands were deemed ownerless and hence the property of the Crown, in contrast 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, and this system was to be protected.<sup>2</sup>

The earliest property legislation followed this policy by prohibiting any disposition 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, nor was 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 need for government to hold a pool of land for public and governmental purposes.

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The policy was strenuously pursued until the sixties as a consequence of which less than three per cent of the total land area was alienated. Of the alienated lands, less than one per cent 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.

(b) Recording Ownership

The policy of preserving traditional land tenure was, however the subject of close scrutiny by the colonial Administration of the fifties. It was generally felt that customary land tenure did not promote rapid economic progress and could not accommodate changes which were taking place and which were caused from planting permanent crops on the land. In particular it was felt that traditional land tenure was incompatible with a cash economy. It was thought that the solution was one of securing individuals' rights in land and establishing land boundaries. A commencement in creating a formal system of recognised ownership was taken 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 register.<sup>3</sup> The ultimate aim was the creation of a kind of Domesday Book of records of titles to land. 'Ownerless lands' could then be declared to be Administration land.<sup>4</sup>

There were various obstacles to the implementation of this objective. It was viewed with grave suspicion by traditional owners, who did not co-operate, for 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 sixties, 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 this system of registration.

The programme was pursued for ten years with little practical result. Four hundred and seventy-two applications for adjudication of land rights were recorded, but only 176 were completed. A few plots were surveyed but none were actually registered. The compilation of family genealogies in the process of adjudging the applications has provided those landowners with a written state-

ment of their history. This is probably the only achievement of the programme.

Notwithstanding the failure in 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 subsequently entrusted with the task of implementing the transformation process, that local 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 its 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 and implemented by the Native Land Registration (Repeal) Ordinance of 1962 (Act No.12 of 1963).

## 2. TRANSFORMATION POLICY

### (a) 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 in developing countries. The objective in Papua New Guinea was to introduce and extend commercial agriculture to and among Papua New Guineans.<sup>5</sup> The 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*:<sup>6</sup>

- (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 and administered by the Department of Lands of the Central Government, and providing for secured individual registered titles after the pattern of the Australian system.

- (2) 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.
- (3) Upon either acquisition or conversion of title, compensation should 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 was 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,<sup>7</sup> which replaced the Native Land Commission by 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) Act, 1963.<sup>8</sup> Registration under the Real Property Act<sup>9</sup> in Papua, the Lands Registration Act<sup>10</sup> in New Guinea, and now the unified and consolidated Land Registration Act<sup>11</sup> 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, although another 340 applications for adjudication were pending.<sup>12</sup> 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<sup>13</sup> 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<sup>14</sup> 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 undertaken by committees drawn from the local people who had intimate knowledge of land rights in the area; that the emphasis should be on systematic, not sporadic adjudication; that conversion should follow automatically on registration without the need for a separate application; representatives of groups as trustees in cases where there was opposition to individualisation should be incorporated and, finally, that a uniform, simple register of titles and a system of control of land transactions by local land controlling bodies should replace the fragmented and highly centralised systems respectively.

New legislation incorporating the recommendations made by Simpson was prepared to replace the existing ones. 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.<sup>15</sup> 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.

#### (b) 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 fee simple. It was envisaged that the plots thus registered would be enclosed. The machinery was introduced in Kenya in the fifties. Pilot schemes were introduced in Uganda in the early sixties<sup>16</sup> and similar legislation was enacted in Nigeria.<sup>17</sup> The 1964 Land Commission Report of Zambia recommended the introduction of similar

machinery in that country.

'Tenure conversion' legislation was enacted in Papua New Guinea in the early sixties,<sup>18</sup> which was the era of the conversion mania. The adjudication and registration processes were introduced as pilot projects mainly in the Northern Province and in the Highlands.<sup>19</sup> The new system was intended to be buttressed by the reception of English property legislation governing the quality of interests in land and their dispositions. 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 will 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 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.<sup>20</sup>

Fingleton's study of the New Warisola scheme of systematic tenure conversion and registration in the Northern Province of Papua New Guinea attests to similar patterns. Doa Minch's Case<sup>21</sup> is a reminder of the tenacity of custom. Fingleton has highlighted a new danger which is similar to that which characterised the United Nations' sponsored Village Settlement programme, implemented in Tanzania in the 1960's, 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 block-holders to being virtually labourers on their lands. This was accompanied by their feeling of alienation.

#### (c) Joint Tenancy and Tenancy in Common<sup>22</sup>

The scheme allowed between two and six persons, 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 resem-

blance 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.<sup>23</sup> 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.

#### (d) Trust Institution

There has been an increasing volume of literature explaining the lineage system in terms of the Anglo-American trust.<sup>24</sup> The Communal Land Rights (Vesting in Trustees) Law of Western Nigeria (1959)<sup>25</sup> is the first and 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,<sup>26</sup> this model has gained popularity as a method of tackling the problem of registering lineage and pastoral tribes' rights to their lands and as being superior to the joint tenancy. Both the Kenya Land (Group Representatives) Act, 1968,<sup>27</sup> and Simpson's inspired Bills for Papua New Guinea,<sup>28</sup> 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 land of the mangafaoa (family group or clan) is vested in a leviki mangafao (or head) in trust for the group.<sup>29</sup>

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

history 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.<sup>30</sup>

The Nigerian experience of the trusteeship model is not reassuring. In the first few years of introducing 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 the entertainment of friends.<sup>31</sup>

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 the 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 unfamiliar with its 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 longstanding disappointments and conflicts. The paradoxes are much too sharp to be legislated away.

### 3. THE IMPROVEMENT APPROACH

#### (a) 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 Guinea forms of social, political and economic organisation.<sup>32</sup> 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 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 owning 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 the 'Maori land group corporations' of New Zealand<sup>33</sup> and the 'agricultural communities' of Ethiopia.<sup>34</sup> We will first consider the theoretical basis of this model before examining the legislation enacted to effect it in Papua New Guinea.

#### (b) 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, Monsieur Delafosse, made a passing reference to the system of family holding as being one of corporate ownership.<sup>35</sup> 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.<sup>36</sup> 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<sup>37</sup> on Yoruba land tenure, made a crucial observation when he took 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 (descendants) 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.<sup>38</sup> Some of these researchers, however, incorrectly ascribed the concept of corporate personality in traditional law to borrowings from the

'unique development of English law'.<sup>39</sup> They 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'.<sup>40</sup>

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 is 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, 1977, is based 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:

- (1) the accuseds, if found guilty, would be convicted for offences not defined by 'written law', contrary to s.37(2) of the Constitution, and
- (2) the procedures provided for in the Act, being essentially inquisitorial, do not afford the accused persons the 'due process' protection of the Constitution.<sup>41</sup>

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 on 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.

(c) **Corporate Personality: Model for Land Reform**

Although the corporate personality theory has been elaborated in the literature with references to traditional African societies and only quite lately to societies in the Pacific region,<sup>42</sup> 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 sixties in order to provide a machinery for group recognition as corporate entities. The Range Development and Management Act<sup>43</sup> implemented the 'Fallon Report' to allow the incorporation of pastoral groups as ranching associations in Tanzania.

The Ethiopian Civil Code (Articles 1489-1500)<sup>44</sup> 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 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 is provided, thereby avoiding the difficulties surrounding any purported dispositions of land by traditional groups as was experienced in West Africa. It is long established that 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.<sup>45</sup>

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.

(d) **Land Group Corporations**

For an appreciation of the concept of the land group corporation in Papua New Guinea one would need to go to the Report of the Commission of Inquiry into Land Matters, 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 supplementary 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 incorporation of recognised land groups,<sup>46</sup> business groups<sup>47</sup> and companies with Division 4 or privileged status.<sup>48</sup> It is with the land groups that we are mainly concerned.

The Land Groups Incorporation Act, 1974, provides for the recognition of traditional groups and their statutory incorporation. Incorporation is by registering the constitution of the group<sup>49</sup> with the Registrar, who is then required to issue a certificate of recognition<sup>50</sup> 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,<sup>51</sup> i.e. powers to sue and be sued, to be registered as an owner of land, to 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 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.<sup>52</sup>

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. a tax holiday and exemption 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.

#### 4. REGISTRATION OF GROUP TITLES

##### (a) Introduction

Whilst the Land Groups Incorporation Act provides for the recognition of the corporate nature of customary groups, the CfLM proposed legislation to provide for the registration of group titles. It argued that such titles are based on typical Papua New Guinean forms of organisation so far as land rights are concerned.<sup>53</sup> 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 of the 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 can raise loans on and give occupational rights to land on the basis of legal arrangements which define 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 exists.

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 will complement the improvement model of land reform, thereby preserving group rights. In the absence of legislation to define and provide for the registration of group titles, the impact of the improvement model cannot be assessed. Failure of successive governments to implement these recommendations has been the decisive blemish in the legislative programme for land law reform.<sup>54</sup>

##### (b) Derivative Interests

The creation of group title would allow recognition and protection of a number of derivative rights known to customary law.<sup>55</sup> 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 right-holder 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.<sup>56</sup> In contrast, 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 characterises 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, hunting rights, or rights of way.

##### (c) Perpetual Estates

The CfLM 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 or group. It is conditional on the proper utilisation of the land and there are restrictions on alienation through restrictions on the titles. Such an estate would be held from the state, which will hold the reversionary interest thereover. It was felt by the Policy and Planning Committee in the Department of Lands that the expression 'freehold' has foreign and colonial connotations and therefore the better expression for the proposed estate is 'perpetual estate'. The perpetual estate is intended to be the exception not the norm and its recognition should not be used as an opportunity to carve up group land into individually owned land.

##### (d) Group Titles and Land Policies

The CfLM 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 need land most and are prepared to use it'. The implementation of these principles can best be achieved by the imposition of limitations on the title of the right-holders 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 the constitutional provisions. Land rights derived therefrom are restricted and conditional upon the utilisation of the land. The CfLM 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.<sup>57</sup>

## 5. Conclusion

Land policy in a country is conditioned by the social and economic goals operating at any given time. In seeking to stimulate agricultural production a number of non-economic factors are usually identified by planners as inhibiting (or contributing to) the pace of development in this sector. Prominent among these non-economic factors is land tenure. Land policy, however, cannot be divorced from the ideology of the dominant class. The classification of policies into distinct and separate categories reflects distinct ideological bases at different historical periods.

Though a government may be committed to 'agricultural development', in the absence of clear ideological commitments much is left to chance or evolution in land tenure matters. In this context a recent study on Papua New Guinea land tenure<sup>58</sup> has warned that economic factors which are seemingly inevitable will operate to make the status quo policy dysfunctional and ultimately lead to its collapse. Among the factors identified are the increased value of land and increased population mobility, which would compel land dealings. The study isolated the inhibiting factors of the status quo policy as being 'formidable transaction costs', 'chronic delays' and 'uncertainties' in the effectuation of land dealings. The study recommended a shift from the status quo or protectionist policy as a precondition to facilitating direct land dealings between traditional owners and interested parties, and the change of focus from land tenure to institutional arrangements.

## NOTES

1. See Oram N.D., 'Land and Race in Port Moresby'. *Journal of the P.N.G. Society* 4(1) (1970), pp.5, 7-13.
2. See *Safe Lavao v. The Independent State of PNG* [1978] P.N.G.L.R. 15; *Milirpum v. Nabalco Ltd.* (1971) F.L.R. 141; *Calder v. A.G. British Columbia* (1971) 13 D.L.R. (3d) 80.
3. Native Land Registration Act, 1952, s.23.
4. S.37 *ibid.*.
5. For a comprehensive account of the arguments for the transformation process as an instrument of socio-economic change see Fingleton J., 'Customary Land Registration as an Instrument of Socio-Economic Change' (mimeograph July 1981), paper presented at the 1981 Waigani Seminar. See also Gershenberg I., 'Customary Land Tenure as a Constraint on Agricultural Development: A Revaluation'. In Haynes C.E.P., *Land Law and Land Policy in Papua New Guinea: Text, Cases and Materials*. Port Moresby: UPNG (1983).
6. Hasluck P., 'Ministerial Statement on Land Tenure in Papua New Guinea'. *Hansard* 7th April 1960, Vol.26., p.1019.
7. 5/1962, as amended.
8. 15/1964, as amended.
9. 1913, as amended.
10. 1924, as amended.
11. Act No.2 of 1981; Cap.191.
12. Jim Fingleton (*op.cit.*) has reported that 737 titles were issued by October, 1978.
13. Such titles may be registered under the Lands Registration (Communally Owned Land) Ord., 1962 (No.10 of 1963), see s.9.
14. *Report on Land Problems in Papua New Guinea*. (1969). See also Rowton Simpson S., 'Land Problems in Papua New Guinea'. In *Land Tenure and Economic Development - New Guinea Research Bulletin No.40*. Canberra: ANU Press (1971).
15. For the subsequent history of the Bills, see Ward A.D., 'Agrarian Revolu-



- tion'. *New Guinea Quarterly* Vol.6 (1972) p.32.
16. The implementation of the pilot scheme in Kigezi, Uganda, is discussed by Obol-Ochola J., 'Customary Land Law and Economic Development in Uganda'. Unpublished LL.M. dissertation, Univ. of Dar es Salaam (1971).
  17. Registered Land Act (No.4/1965 of Laws of Federation); see Willoughby P., 'Land Registration in Nigeria'. *Nigerian Law Journal* 260 (1965).
  18. See the Land Tenure (Conversion) Act, No.15 of 1964.
  19. See the 'Simpson report'; Hide R., *The Land Titles Commission in Chimbu*, *New Guinea Research Bulletin* No.50; see also Jim Fingleton *op.cit.*, pp.21 et seq..
  20. See 'Land Reform in Papua New Guinea, Report on a Visit to Kenya' (Mimeograph 1970), known as 'the Grove report'; and *New Guinea Research Bulletin* No.40; Ward A., 'Agrarian Revolution', *New Guinea Quarterly* Vol.6 (1972) p.25; *Post Courier* June 7 1971.
  21. [1973] P.N.G.L.R. 558.
  22. See further, Megarry and Wade, *The Law of Real Property* (4th ed.) Chap.7.
  23. See ss.24, 25 and 27, Land (Tenure Conversion) Act.
  24. 1965 I.C.L.Q. 1144; Bentsi-Enchill K., *Ghana Land Law*. Sweet & Maxwell (1964), pp.236-7.
  25. Cap.287 (Western Nigeria).
  26. Report of the Mission on Land Consolidation and Registration in Kenya.
  27. Cap. 287, Laws of Kenya.
  28. Ss.142-144, Registered Land Bill.
  29. Report on Land Tenure in Niue. Wellington: Government Printer 1968. Crocombe R., 'The Niue Alternative'. In Sack P. (ed.) *Problem of Choice: Land in Papua New Guinea's Future*. Canberra: ANU Press (1974). Crocombe R. (ed.), *Land Tenure in the Pacific*. Oxford: University Press. (1971).
  30. 'The Niue Alternative', *ibid.*, p.82.
  31. James R.W., *Modern Land Law of Nigeria*, Chap.3.
  32. Goal No.5 of the National Goals and Directive Principles.
  33. Norman Smith, *Maori Land Corporation*. Wellington: A.H. & A.W. Reed (1962).
  34. Mandefro B., 'Agricultural Communities and the Civil Code - A Commentary'. *Journal of Ethiopian Law* Vol.6, No.1, p.145.
  35. *Les Civilisations Negro-Africaines*. Paris (1952).
  36. Elias T.O., *The Nature of African Customary Law*. Manchester: University

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37. Lloyd P.C. 'Some Notes on the Yoruba Rules of Succession and on Family Property', *Journal of African Law* (1959) p.105; and 'The Yoruba Lineage', *Africa*, 25 (1955) 135-51.
  38. See for example, James R.W., *Modern Land Law of Nigeria*, (1973); Mandefro B., 'Agricultural Communities and the Civil Code A Commentary'. *Journal of Ethiopian Law* Vol.VI No.1 p.145; Woodman G., 'The Family as a Corporation in Ghanaian and Nigerian Law', (mimeograph 1974; a seminar paper presented in the Law and Modernisation programme, Yale Univ.); Lloyd P.C., 'Agnatic and Cognatic Descent Among the Yoruba', *Man* (1986) p.484.
  39. Glynn Cockran, 'Use of the Concept of the Corporation - A Choice between Colloquialism or Distortion'. *American Anthropologist* 73 (1971) pp.1144-1145; Gluckman M. (ed.) *op. cit.* p.39, et seq..
  40. *Ideas and Procedures in African Customary Law*, p.39.
  41. SCR No.1 of 1981, [1981] P.N.G.L.R. 151.
  42. See Norman Smith, *Maori Land Corporation*. Wellington: A.H. and A.W. Reed (1962).
  43. Act 51/1964, Tanzania.
  44. See Mandefro B., *op. cit.*.
  45. In West Africa the norm is that 'buying family land is buying a land dispute'. See the monograph James R.W. and Kasunmu A., *Alienation of Family Property in Southern Nigeria*. University of Ibadan Press (1966).
  46. Land Groups Incorporation Act, No.64 of 1974, Cap.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.
  47. Business Group Incorporation Act, No.59 of 1974, Cap.144.
  48. Companies (Amendment) Act 1974. See Companies Act, Cap.146, ss.368-372.
  49. See Cap.147, s.8 on the contents of the Constitution.
  50. S.5, *ibid.*.
  51. S.11.
  52. Part 4.
  53. Para 3.22.
  54. See post, Chap.12-2(c).
  55. *Ibid.*, paras 3.39-3.47.

56. Para 3.40.
57. *Ibid.*, 3.45, see post, Chap.10, on Land Policies.
58. Trebilcock and Knetsh, 'Land Policy and Economic Development in Papua New Guinea'. *Melanesian Law Journal* (1981).

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## CHAPTER FOUR STATE LAND

### 1. INTRODUCTION: DEFINITIONS

The basic property statutes in Papua New Guinea assume a distinction between the expressions 'land the property of the state' (national title), 'government land' and 'state land'. It is therefore necessary at the outset to define these concepts before discussing the sources of state lands, which are the main concern of this chapter.

#### (a) National Title

Section 4 of the Land Act provides that 'all land other than customary land is the property of the state'. It is submitted that this section has accomplished no more than a restatement of the basis of the common law principle of tenure and estate, i.e. the radical title in alienated land is in the state. Thus the concept of freehold signifies not ownership of land but of an estate in land. It might be argued that the principle was always a part of the common law of Papua by virtue of (a) the Royal Prerogative and/or (b) the reception provisions applicable to Papua. By contrast, in New Guinea, where German Law and therefore the concept of allodial ownership applied, no such principle existed. The Land Act made it very clear that on the substitution of English real property law for German law in New Guinea the title to alienated lands in New Guinea became vested in the state as it did in Papua.

The principle is largely theoretical. Its most important significance (on a death intestate without heirs, land escheats to the state as ultimate owner) was in our view wrongly rejected in *Re Robert Johns' Case*<sup>1</sup> in favour of the application of English statute law. However, by section 87 of the Wills, Probate and Administration Act (Cap. 291) land in such circumstances passes to the state as *bona vacantia* 'in lieu' of the right of 'escheat'.

## (b) State Lands

The Land Act does not expressly mention a category of 'state land'. Dominion in state lands in Papua New Guinea is vested in the state and is controlled by the national government for the benefit of the nation. It comprises all government land within the meaning of that expression in the Land Act and the Land Settlement Schemes (Prevention of Disruption) Act 1976. Customary land leased by the government from the customary owners is also included in this category. In this case, ownership is of the leasehold interest.

The expression 'government land' is given a slightly restricted meaning in the Land Act. The definition section provides that:

'Government land' means land other than:

- (a) customary land that is not leased by the customary owners to the state; or
- (b) land held by a person other than the state for an estate greater than an estate for a term of years; or
- (c) land that is the subject of a state lease or a lease from the state under any other Act; or
- (d) land reserved from lease or further lease under this Act;<sup>2</sup>

The Land Act sets out the government's power to acquire, inter alia, alienated and unalienated lands; to dispose of undisposed state land (i.e. government land) on leases and other grants; and it defines the incidents of such dispositions. Upon such a disposition, the state retains a reversionary interest in the land. The reversion in such land might therefore be correctly included in the category of state land. The Land Settlement Schemes (Prevention of Disruption) Act,<sup>3</sup> which aims at preventing disruptive conduct detrimental to the progress of land settlement on state land, sets out the more comprehensive definition. The National Lands Registration Act provides for the registration of state land as 'National Lands'. For purposes of rates and taxes, state land in urban areas which is the subject of a lease from the state is rateable, whilst other state lands not yet leased are not, but a tax is imposed on buildings thereon.<sup>4</sup>

## 2. SOURCES OF STATE OWNERSHIP

## (a) Pre-Annexation Purchases

The Land Act of 1962 rightly assumed doubts on the validity of the pre-annexation Crown purchases and it was the intention of the legislature to validate retroactively such purchases. Section 23 referred to the capacity of the customary owners to transfer lands and provided that, in relation to customary lands, 'a native' (hereinafter referred to as an 'automatic citizen') is deemed always to have been empowered to lease, sell, transfer or convey land to the government. This statement, however, does not answer the equally perplexing and fundamental question of the applicable law under which automatic citizens disposed of land to foreigners, including officers of the British Crown, for trade goods and other considerations. There have been some authoritative but no final statements on this subject. A number of decisions have upheld these early purchases on behalf of both the Crown and expatriates. It must be remembered that legislation to facilitate such transactions was not passed until 1888.<sup>5</sup>

Though the courts have never questioned the validity of such Crown purchases, a number of inconsistent judicial pronouncements are on record concerning their legal basis. These will be examined under the following headings: English or customary law, Act of State, and finally, 'proprietary' versus 'political' sovereignty.

## (i) English or customary law applicable?

In the *Administrative v Guba (Newtown case)*,<sup>6</sup> where the administration claimed to have purchased a large area of land from the traditional owners in 1886, Frost J. as he then was, expressly raised the question of the legal system under which the transaction took place. Relying on Robert Wray's *Commonwealth and Colonial Law*,<sup>7</sup> he thought that the answer turned on the status of the Territory at the time of the purchase and the social organisation of the people. He concluded that as British New Guinea at the date of the purchase in question was a Protectorate and populated by 'uncivilised tribes' having no system of law, the only solution was 'that English law was applicable to a purchase by the Crown as in the case of an uninhabited Colony acquired by cession or settlement'. Yet he was not prepared to apply the strict standards for land dealings required by English Law. These were contained in the U.K.'s Statute of Frauds and the Real Property Act 1845, which required the agreement to be evidenced in writing

and the transfer to be by deed.<sup>8</sup> The learned judge thought that neither of these statutes could be considered applicable because of the illiteracy of the population. Interestingly, in arriving at this conclusion he preferred to follow *Sinclair v Mulligan*<sup>9</sup> (a Canadian case) on this point rather than *Okoleji v Okupe*<sup>10</sup> of Nigeria, where the Statute of Frauds was held applicable to protect illiterate people. Yet in terms of colonial policy, Nigeria rather than Canada was more relevant.

The judgment of the Australian High Court<sup>11</sup> is even more unsatisfactory on this point. It was suggested that the application of English law could be implied from the proclamation of the Protectorate. Yet when Erskine proclaimed the Protectorate he enunciated assurances that the people's lands would be secured to them.<sup>12</sup> The High Court thought that these assurances 'clearly related to acquisition by persons other than the Crown. The reasons for this limitation are, however, not clear from the judgment.

It is arguable that the applicable law was the customary rule prevailing in the area at that time of the purchase i.e. the *lex situs*. There was evidence of land sales taking place in the country at the relevant periods.

The need to enact the Crown Grants Ordinance<sup>13</sup> immediately on annexation is a recognition of the dubious nature of land purchases in the pre-annexation period. This Ordinance provided for the issue of Crown Grants to any person who had acquired from the traditional owners rights in land prior to 1888.<sup>14</sup> It was directed at confirming title and would seem to extend to the Crown. With reference to Crown purchases, however, section 20 of the Crown Lands Ordinance<sup>15</sup> required an instrument in writing under the hand of the Administrator as evidence of the Crown's acquisition of the land from the native owners. The High Court questioned the capacity of the local administration to bind the British Crown as to its title to land which it had already acquired. It would therefore limit that Ordinance to facilitating a record of title rather than the confirmation of the Crown's title and, presumably, as regulating future land purchases.

#### (ii) Act of State

The validity of the Crown's title to pre-annexation purchases may be explained by reference to the concept of an Act of State. The application of this theory in this context is that the courts would not enquire into the conduct of representatives of the Crown, nor into the legality of anything done pursuant to annexation by its officials on its behalf. Lord Denning in *Oyekan v Adele*<sup>16</sup>

gave expression to the theory in ascertaining the contents of general rights that passed to the Crown on an annexation.

#### (iii) Proprietary versus political sovereignty

Finally, it is instructive to look at this topic of pre-annexation Crown land purchases comparatively, an approach attempted but not adequately accomplished in *Newtown Case*. The High Court of Australia alluded to the Australian case of *Milirrpum v Nabalco Pty Ltd.*<sup>17</sup> and the Canadian case of *Calder v A.G. British Columbia*<sup>18</sup> in determining the Crown's claim to title to land in its territories. These cases established what the court referred to as the 'traditional view' i.e. sovereignty of the British Crown vested in the Crown effective title to all lands subject, however, to usufructuary or other rights of the 'natives'. On this assumption the total land area was at the disposal of the Colonial government and the subject people were licensees of their lands. These licences were revocable at will and payment is either for improvements thereon, if any, or on an *ex gratia* basis. Hookey has pointed out that this was generally the approach in jurisdictions in Canada, Australia and United States.<sup>19</sup> This has been the interpretation of the Judicial Committee of the Privy Council in cases arising from Southern Africa.<sup>20</sup> These courts held that the Crown acquired 'proprietary sovereignty' or dominium, and the indigenous people's rights in land were interpreted as licences. This conclusion was as a result of the interpretation of the Treaties of Cession or the act of conquest.

It is ironical that in reality the Courts have, without a clear realisation, substituted for the traditional principles of communalism, the worst elements of feudalism of the western system. This is based on a hierarchical structure of lord and man, the King having the supreme rights to all land and the subject an estate derived from a grant from the feudal overlord. Until such grants, the subject is a licensee on the land. This feudal principle has been under attack in England from as early as 1290 with the passage of the statute *Quia Emptores*, and it has been the subject of criticisms by text book writers.

It is generally thought that the better view is that expressed in the Nigerian case of *Amodu Tijani v Secretary for Southern Nigeria*,<sup>21</sup> that annexation or cession gave the Crown 'political sovereignty', not 'proprietary ownership' in land; and that legislation was necessary to permit the acquisition by the Crown of land occupied by the indigenous inhabitants.<sup>22</sup> As was stated in the opinion of the Privy Council, 'a mere change of sovereignty is not to be presumed as meant

to disturb rights of private owners.'

These two differing approaches are explicable in terms of British Constitutional principles applicable to settled and ceded territories and the objective of colonisation and the question of paramountcy: settlers or the indigenous inhabitants; European settlement or European direction. Colonial policy in Papua New Guinea fell within the latter, i.e. development by the indigenous population,<sup>23</sup> therefore traditional land rights received recognition. On this assumption legislation was necessary to provide a machinery for land alienation, without which non-natives could not acquire unimpeachable titles by purchase. Hence the need for retroactive validating legislation.

#### (b) Post-Annexation Purchases

By the Land Regulation Ordinance the Administrator was empowered to purchase or lease customary owned lands from the traditional owners.<sup>24</sup> This power has featured in each successive Land Act. Section 23 of the current Land Act expressly provides for transfers to the government by representatives of the traditional group. The introduction of the concept of 'special agricultural and business leases' (section 15A of the Land Act)<sup>25</sup> is to enable traditional owners or members of the land owning group to have documentary evidence of title which may be used as security for a loan or other credit. The Minister of Lands could lease the land from the owners and hold title to it for such a period as is considered sufficient for the purposes of the business. The sublease from the Minister to the customary owner would provide acceptable documentary evidence of an interest capable of being dealt with under the general law of mortgages.

There is a strict requirement that before the government buys or takes a lease of traditionally-owned land, an enquiry is necessary to ascertain that the land is in excess of the needs, and is not likely to be required for the future use of the owners or their families.<sup>26</sup> Section 77 of the Land Act entrusts a general protective role of the people's rights in the First Assistant Secretary, Department of Provincial Affairs.

##### (i) Inquiry and satisfaction

Section 15(2) of the Land Act states that the Minister for Lands shall not purchase or lease customary land under the Land Act unless he is satisfied,

after reasonable inquiry, that the land is not required or likely to be required by the owners or by persons on whom the land will or may devolve by custom.

Section 15(3) further provides that where the Minister is satisfied, after reasonable enquiry, that customary land is not required nor will be likely to be required for a certain period by the owners (or by persons on whom the land will or may devolve by custom), but is of opinion that the land may be required after that period, he may lease the land from the customary owners for the whole or part of that period.

There have been at least two cases where the effect of these provisions has been considered by the courts. Both of these cases concerned purchases of customary land from the customary owners. In *Rahonamo v Enai*<sup>27</sup> the Supreme Court had to consider whether customary owners could impugn a purchase of customary land by the Administration on the ground of 'the state of satisfaction in the mind of the Administrator'. Section 5 of the Land Regulation Ordinance 1888-1889, under which the purchase was effected, made it unlawful for the Administrator to purchase customary land 'until by sufficient enquiry he had become satisfied that such land, or the use or usufruct thereof, is not required nor likely to be required by the native owners'. There was nothing before the court to show expressly that the Administrator had made any enquiry, or for that matter was satisfied that the land, or the use or usufruct thereof was not required nor likely to be required by the native owners. On the other hand, there were no facts or circumstances to indicate that the process was not duly completed. The court therefore held that in all the circumstances a presumption arose that the appropriate enquiry had been made by the Administrator, as a result of which he became satisfied that the land was not required nor likely to be required by the native owners.

Clarkson J. conceded that there may well be cases where the factual situation does not justify the presumption that the prerequisites were duly completed. In such cases the burden of showing the due performance of the prerequisites to the lawfulness of the purchase would be on the Administration. However, once the Administrator had carried out the appropriate enquiry, it was irrelevant whether he had satisfied himself rightly or wrongly that the land was not required nor likely to be required by the native owners. But the right or wrong satisfaction must be based on a sufficient enquiry. To come to a wrong state of satisfaction based on an insufficient enquiry would mean that the transaction was unlawful. The decision of Clarkson, J. was affirmed by the Full Court

of the Supreme Court.

The other case where the court has considered the effect of a provision similar to section 15(3) of the Land Act is *Safe Lavao v. The Independent State of Papua New Guinea*.<sup>28</sup> Again, this case concerned the purchase and not leasing of customary land. In 1963 the Administration purported to acquire a large portion of land in Kerema known as the Kerema Town and Airstrip Land. In relation to the acquisition, an instrument of transfer was registered. In 1967 the appellant and others claimed to be the owners of certain of the lands included in the purported acquisition of 1963. They claimed that they, as owners of the land, had never sold the land to the Administration. Pritchard J. stated:

It is my view, when a law in Papua New Guinea affects traditional or customary rights, especially in relation to land, which historically is of so much more significance to the people of Papua New Guinea than in many other countries, that law will be strictly construed where it purports to deprive the people of their rights to assert ownership, or interest of any sort, in the land.

The land in respect of which the State claimed ownership had never been sold by *Safe Lavao* or the other appellants. They had manifested an unwillingness to sell. Pritchard J. held that this apparent unwillingness to sell placed the appellants clearly within the situation envisaged in the second portion of section 5 of the Land Act, 1911-1940, which provided that it shall not be lawful for the Lieutenant-Governor to purchase or lease land from native owners until by sufficient enquiry he had become satisfied that the land was not required or likely to be required by the owners.

After holding that the second part of section 5 of the Land Act, 1911-1940, of Papua was a 'mandatory' and not a 'directory' provision in the light of the wording, legislative history and 'protective' background of the legislation, and after referring to part of the judgment of Clarkson J. in *Re Hitau*, his Honour went on to hold that the instrument of transfer 'contains no suggestion that anyone had, even bothered to ask if the vendors had considered whether they would possibly have a need for their land in the future. The question appears to have been ignored. Failure to comply with the statute invalidates the instrument of transfer.'

(ii) **Documentary requirements**

As early as 1890<sup>29</sup> it was required that a Crown purchase should be

evidenced by a Deed of Attestation. This requirement was extended retroactively to Crown purchases made before the passage of legislation.<sup>30</sup> In the *Newtown Case*, the High Court held that in so far as pre-annexation purchases were concerned, the need for an instrument of attestation was to provide for the recording of land transactions.

Section 15(4) of the Land Act requires that all leases and government purchases should be authenticated by such instruments and in such manner as are prescribed. These are mandatory requirements, the omission of which would be detrimental to the acquisition of an unimpeachable title.<sup>31</sup> The prescribed instruments of authentication are required to set out, *inter alia*, (a) a description and plan of the land; (b) the names of the vendors or lessors; (c) a description of the improvements thereon; and (d) a statement of the purchase price.<sup>32</sup> The earlier Land Regulations required the Instrument to be sealed with the seal of the Territory and recorded.<sup>33</sup> Recording gave the document conclusiveness as to the facts set out therein and of the Crown's title, i.e. no contrary evidence is effective to displace the document if on the face it satisfied the statutory requirements. There are no requirements for sealing under the 1962 Land Act which consolidated the laws of Papua and New Guinea and no element of indefeasibility, except in rare cases where the government's title is registered.<sup>34</sup> In this case a certificate of title of the state's title is unimpeachable.

The change in the nature of documentary requirements upon the consolidation of law and practice relating to government purchases has brought about a change in terminology from DA to NLD (Native Land Dealing). In practice a Native Land Dealing is accompanied by a number of documents: a deed of sale and transfer and a certificate of alienability necessary to certify (i) that the land is not likely to be required by the vendors; (ii) that the owners are willing to sell and the sale will not be detrimental to their interests; (iii) the boundaries; and (iv) that the interpreter truly interpreted the contents of the document to the vendors.

(iii) **Resolving conflicting claims to customary land**

It is not an unusual occurrence for various traditional groups to claim ownership of the same piece of land. It is therefore in the interests of government before entering into transactions to buy disputed lands or an interest therein to get an authoritative statement on the ownership. In some cases this might

delay the transaction; in others, where possible, all claimants might be made parties to the agreement of transfer and, in a separate document, agree that the consideration shall be paid into a trust fund pending the final settlement of the dispute.

Under section 9 of the Land Act of 1911, provisions existed for the appointment of a Land Board or Boards to determine cases of disputed ownership in which a Papuan was a claimant.<sup>35</sup> An appeal could be made from the Land Board to the Supreme Court. The High Court of Australia held that the decision of a Land Board was a judicial decision capable of sustaining a plea of estoppel against those who were parties to the hearing or were aware of and made no claims in the proceedings.<sup>36</sup>

Exclusive jurisdiction to hear and determine all claims to ownership of land subject to native custom was subsequently vested in the Land Titles Commission.<sup>37</sup> Section 74 of the Land Act expressly provides for the Minister of Lands to refer to the Land Titles Commission for its determination any question of ownership of land or an interest therein. The National Court is vested with appellate jurisdiction on a number of grounds specified in section 38 of the Land Titles Commission Act, e.g. the decision was wrong in law. Although in 1975 the jurisdiction to determine claims to customary land was divested from the Land Titles Commission and vested in Local Land Courts,<sup>38</sup> if and when established in the appropriate Province, section 74 applications may still be made by the Minister to the Land Titles Commission.<sup>39</sup>

#### (iv) Criticisms of procedure

On the whole, the government faces substantial delays in acquiring lands from the customary owners because of title uncertainty and/or disputed ownership, and the necessity of securing the consent of every member of the land owning group to any transaction. These difficulties may lead to the continued non-utilisation of large areas of potentially productive unalienated lands and consequently some development decisions that do not lead to as great an increase in productivity commensurate with the effort expended. This fact was illustrated by Knetsch and Trebilcock<sup>40</sup> with reference to the Ramu Sugar Development project in Morobe Province. This scheme, which required an extensive land area, had to be located on lands already in use for a successful cattle operation. The determining land factor was not the location of the land used or the quality of the improvements thereon, but the ease of acquiring already alienated lands over other unused but

unalienated lands in the Province.

The solution of this problem is, of course, the exercise of the powers of compulsory acquisition, a solution which politically is not always feasible. In the context of the history of land disputes arising out of land alienation,<sup>41</sup> it is doubtful whether the acquisition process should be speeded up. At present, groups are prepared to make land available to government on a leasehold basis and they are very conscious of the need to safeguard the environment where major projects are planned.

#### (c) Waste And Vacant Declarations

The Crown Lands Ordinance of 1890<sup>42</sup> and subsequent land legislation<sup>43</sup> enabled the Crown to acquire land which 'was not used or required or reasonably likely to be required by Papuans.' This land was commonly called 'waste and vacant' and its acquisition was by an Order in Council published in the Gazette to that effect.<sup>44</sup>

The enactments established a procedure for protests to be made against such declarations by claimants of interests in or ownership to such lands. The procedure for challenges was ineffective, as challenges were directed to and decided by the Administrator in Council. Under the Land Act 1962, expropriation is by a gazetted notice declaring that the land is not customary land. This was usually referred to as a 'section 83 Declaration.' The section in the revised legislation is now section 75. The land in question is then deemed conclusively not to be customary land.<sup>45</sup> It is suggested that upon such a declaration government acquired effective control and ownership by virtue of section 4 of the Land Act.

A different view of the effect of a 'section 83 Declaration' was taken by O'Meally A.J. in *Agevu v The Government of Papua New Guinea*. He purported to express a general principle that firstly, the statutory provisions referred to were merely regulatory and did not create or extinguish any authority or right of the Crown to such lands because, secondly, from the date of the proclamation to annex British New Guinea, the ownership of all waste and vacant land effectively vested in the Crown as 'Crown Land'. We have already commented on the propriety of this view in Chapter Two above.

The Land Act established an effective procedure for challenges to such

declarations to be made either by the people claiming to be entitled to land declared as ownerless or by the First Assistant Secretary (Provincial Affairs) on their behalf.<sup>47</sup> Such challenges are referable to the Land Titles Commission, or the Land Court if one is established in the area, for their determination.<sup>48</sup> In such cases the land 'shall not be deemed not to be customary land' until the claims have been resolved.<sup>49</sup>

Much existing government land has been acquired through waste and vacant declarations and they have been a source of contention. The CILM regarded the power as being too wide and charged that it was abused in the colonial era. The validity of a section 75 declaration is now doubtful by virtue of section 53(5)(e) of the Constitution, which permits legislation to provide for the acquisition of ownerless or abandoned property, 'other than customary land'. However, on the view taken by O'Meally A.J. in the case referred to above, such land in Papua New Guinea is not customary land but state land and therefore does not fall within the Constitutional protection.

(d) Eminent Domain

(i) Introduction

The right of a government to appropriate land for public use is an inherent, unquestionable right of government to govern. It is a necessary aspect of sovereignty. The Land Ordinances 1906<sup>50</sup> and 1911<sup>51</sup> (of Papua) made provisions for the government to acquire land (unalienated or alienated) compulsorily from any landowner. Acquisition under this process was (a) for a public purpose as defined in the legislation, and (b) in consideration of compensation payable for land so acquired. These are basic principles of the exercise of the powers of compulsory acquisition and were continued in force in subsequent land acquisition legislation,<sup>52</sup> culminating in the Land Acquisition Act of 1952. This latter legislation applied to both Papua and New Guinea. The principles stated above are guaranteed in the Constitution for the benefit of citizens and form the basis of the current law which is set out in the Land Act, 1962.

Section 53 of the Constitution grants protection to property rights of automatic citizens of Papua New Guinea. However, exceptions are made where the government (1) exercises emergency powers; or (2) acts under an enactment that provides for the acquisition for a public purpose that is so declared and defined in legislation; or (3) acts under legislation which provides for acquisition

for a reason that is 'reasonably justifiable'<sup>53</sup> in a democratic society that has a proper regard for the rights and dignity of mankind. The necessity for taking possession or the acquisition must be such as to afford reasonable justification for the causing of any resultant hardship to any person affected; and finally, 'just compensation' must be made on 'just terms' to the person or persons deprived of the land. Purposes which will satisfy one or more of the criteria in (2) and (3) above are those connected with the defence of the country, health services and the schooling of children. In contrast, non-citizens do not enjoy a special constitutional protection,<sup>54</sup> nor did non-automatic citizens for five years from Independence Day,<sup>55</sup> and, provided that an Act of Parliament defined the powers of eminent domain, compulsory acquisition is then possible on terms stated in such an enactment.

(ii) Public purposes (extension of)

A comprehensive definition of a public purpose is set out in the Land Act.<sup>56</sup> Both the Land Acquisition Act, 1974<sup>57</sup> and the National Land Registration Act, 1977,<sup>58</sup> extended the definition to include, inter alia, resettlement of residents of urban areas, education, social welfare or community purposes and urban development or land settlement. The Mining Act (Amalgamated) Act permits the acquisition of land or possession thereof for purposes connected with mining.<sup>59</sup> And the Land Settlement Schemes (Prevention of Disruption) (Amendment) Act (No. 52 of 1983) extended compulsory acquisition of state leases as a possible penalty for disruptive conduct on the leased land by the leaseholder.

In pursuance of the government's plantation re-distribution programme,<sup>60</sup> 'public purposes' was given a very wide meaning by the Land Acquisition (Development Purposes) Act<sup>61</sup> in its application to non-citizens. Section 7 enables the acquisition of land for the purpose of making land available to automatic citizens for subsistence farming and for their economic development.

The powers of acquisition under this Act have been criticised as a violation of the principle that the power of eminent domain should be directed to community benefits, not to individuals. Under those of the terms of the Act, it is possible for land to be acquired to be given to an individual for his own personal benefit. It is further argued that since the Act does not apply to customary land, most of the land in Papua New Guinea is excluded from its ambit, thus putting a tremendous strain on the owners of alienated land. Its scope would alarm the new investor as well as inhibit any further development by existing (foreign)



landowners.

(iii) Notice to treat

The procedures for compulsorily acquiring lands are fairly uniform. For example, the Land Act and Land Acquisition (Development Purposes) enactments both assume a process of formal negotiations to purchase the land in the first instance, and only when agreement cannot be reached (more often on the purchase price) is there the need for a compulsory order to be made. The owner must therefore be notified of government's intention to purchase the land and a 'notice to treat'<sup>62</sup> must be served on him, requiring particulars of the amount for which he would be willing to sell the property. If negotiations break down, a compulsory purchase order then becomes necessary.

This notice which invites negotiations can be dispensed with only where the Minister certified that there were 'special reasons' for dispensation of the notice. Those reasons must be specified in his certification. The fact that the land is required urgently and that preliminary negotiations were fruitless are not 'special reasons' justifying dispensing with the notice to treat,<sup>63</sup> for the scheme of compulsory acquisition implies an urgency for the land, and unsuccessful preliminary negotiations are common occurrences.

(iv) Compensation

The concept is compulsory acquisition and not confiscation. One would therefore expect compensation to be paid to the owner on the exercise of the power of eminent domain over his property.<sup>64</sup> The Constitution expressly guarantees citizens (excluding non-automatic citizens for a period of five years after Independence) 'just compensation on just terms'.<sup>65</sup> It was silent on the measure of compensation payable to the non-automatic citizens for the period between 1975 and 1980, and continues to be silent on the measure of compensation to non-citizens. However, by section 68(4) *ibid.* the former (non-automatic citizens) during the excluded period, shall not have fewer rights than those accorded to the latter.

The Constitution does not set out the meaning of compensation nor the principles on which compensation is assessed. Legislation existing at the date of adoption of the Constitution provided those principles. In particular, section 88 of the Land Act and Part III Division 2 of the Lands Acquisition (Development

Purposes) Act so provided.

In interpreting section 88 of the Land Act the courts are usually guided by the interpretation of provisions of statutes *in pari materia*. The well-settled rules are: (i) the owner should receive the equivalent worth in money for the land he gave up; and (ii) the valuation is at the time of compulsory acquisition.<sup>66</sup> In short, in assessing compensation one should be guided by the amount that the land might be expected to realise if it were sold in the open market by a willing seller.<sup>67</sup> This measure of compensation, it was held, would satisfy the Constitutional enjoyment of compensation on 'just terms' payable to citizens.

Difficulties arose on whether the measure of compensation provided in the Land Acquisition (Development Purposes) Act was the same as that provided for by the Land Act. The former was passed specifically to facilitate the plantation redistribution scheme. It does not define compensation nor the measurement thereof. The formula to arrive at the quantum of compensation is somewhat different from that set out in the Land Act and consists of, in the case of developed lands used for purposes other than the return of an income, the product of the value of improvements by a prescribed factor. In the case of lands developed for the purpose of returning an income, it consists of the product of the average annual income for a specified number of years and multiplied by a prescribed factor fixed by the Governor-General.<sup>68</sup>

Mr. Justice Kapi, in *The Minister for Lands v William Frame*,<sup>69</sup> in determining the principles of compensation under the latter Act, was prepared to approach his interpretation on the basis of the history of the legislation and the intent of the redistribution scheme - the mischief rule of interpretation. He held, therefore, that the application of this rule led to the conclusion that where the expropriated owner was a non-citizen or non-automatic citizen (within the five-year period) the legislature must have intended to depart from the recognised principles as established in the Land Act and similar legislation. A strict application of the formula set out in the relevant legislation excluded any notion of 'just', 'fair' or 'adequate' compensation. Therefore a figure arrived at by using the formula cannot be revised upwards in order to accord with the concept of market value.

However, the majority opinion in that case was to the effect that both the Land Act and the Land Acquisition (Development Purposes) Act provided for the payment of 'compensation' on the exercise of compulsory powers of

acquisition. In interpreting statutes, words must be given their ordinary meaning - the literal rule of construction. The ordinary meaning of 'compensation' connoted 'adequacy', i.e. the money value into which the owner's property might have been converted.

The Judges further held that, although a non-citizen and non-automatic citizen (for five years) had no Constitutional safeguard to 'just' or 'adequate' compensation, the legislature was left untrammelled in the means whereby it might provide for the rights of such persons on the compulsory acquisition of their property. There was no qualification in the Land Acquisition (Development Purposes) Act on the use of the expression 'compensation' in its application to non-citizens and non-automatic citizens, hence the money value of their lands is the same as that of a citizen.

They found that, under section 21 of the Act, it was the Minister for Lands who was responsible for determining the compensation that should be paid, and a dissatisfied owner was given a right of appeal from the Minister's determination on one or more of the following grounds, viz.: the use of an incorrect average annual net profit or incorrect prescribed factor in assessing the compensation. In correcting the amount of compensation there was no requirement on the Appellate Court to use the prescribed factor or any factor at all. This was particularly so when the factor was not one calculated to lead to a right result.

The majority view was that the factor of four prescribed by the Governor-General to be used in assessing compensation for the land in question was incorrect. It was incorrect because it led to a quantum that was too low and did not represent 'compensation' in its ordinary and well-established signification. In retrospect, although the Commission of Inquiry into Land Matters (CILM) had intended a different mode of assessing compensation and a departure from the notion of 'market value' for one which would lead to a less inflated amount, it did not draw a distinction based on the nationality of the owner. The legislature, having preserved the status quo to citizens by guaranteeing 'just' compensation, must be deemed to intend the protection for others when the operative legislation does not distinguish between citizens and others.

#### (e) Conversion of Freeholds to Government Leasehold

A number of developing countries, including the Solomon Islands, passed legislation to convert freehold titles into government leases. The CILM recom-

mended similar legislation in Papua New Guinea in order to give the government effective control over lands held in freehold. This process amounts to the expropriation of the freehold reversion on the government leases, thus increasing the total area of state land. Safeguards in the Constitution would prevent this course of action on freeholds owned by citizens.<sup>70</sup> As we have stated, non-citizens are not accorded this property protection.<sup>71</sup>

The Land (Ownership of Freeholds) Act created a machinery for the voluntary surrender of freehold and the substitution of a government lease for ninety-nine years in its place.<sup>72</sup> Upon the grant of a 'substituted lease', the absolute ownership in the land vests in the state and the 'substituted lease' assumes the form of a government lease.<sup>73</sup>

The Constitution prohibits non-citizens from acquiring freehold estates in land.<sup>74</sup> Therefore an owner of freehold who wishes to transfer his interest to a non-citizen, either by an inter vivos act or a testamentary disposition, would need to first convert his freehold title into a 'substituted leasehold', if he is a non-citizen. If he is a citizen, he may grant the non-citizen a leasehold interest. In the former case the reversion becomes state land, in the latter it remains privately owned freehold.

### 3. ESTABLISHING THE STATE'S TITLE TO DISPUTED LANDS

We have seen that government's claims to land are derived from various sources. In many cases where the government claimed to have purchased lands there were no sale documents. Numerous communities and leaders have questioned many of the 'waste and vacant' declarations as being made over their traditional hunting and grazing grounds.<sup>75</sup> There are instances of more dubious acts, such as land confiscations by the erstwhile colonial Administration. The descendants of the traditional vendors have raised questions of unfairness in the way various colonial administrators acquired customary land. Allegations ranged from the inadequacy of the considerations granted, such as trade goods, to mistakes as to the nature of the transactions. It is rather doubtful whether most of the early land purchases can be regarded as being bargains between equals.

Although the Crown Lands Ordinance had provided for the recording of the Crown's title to lands in a Register of Crown Titles, recordation did not accord the government the advantages of indefeasible title enjoyed by grantees

of Crown leases and private freeholds. Nevertheless, under the Land Ordinances, 1899 and 1911, a recorded instrument was deemed conclusive evidence of the facts stated therein and of the titles of the Crown. These provisions could not accord absolute security and gave none, where there were no instruments evidencing the acquisition, or where the instrument had not strictly complied with the requirements of the Land Act.<sup>76</sup>

The law and practice differed in New Guinea. Land of the former German Administration was registered in the land register. Registration in the Ground Book did not give an indefeasible title. Upon the introduction of the Torrens System by the Lands Registration Act 1924, and the registration of some of the government's titles under that system, the government acquired secured titles to some lands. The Act provided for an index of unregistered state lands. These did not enjoy the advantages of indefeasibility and, during the Japanese occupation of Rabaul, the registers of government titles were destroyed.

In the face of the insecurity of estates, the Australian Administration made a number of efforts to establish and clarify titles to state lands. It took the view that clarity of its own titles was essential to the security of those who held grants of state lands, and for the maintenance of a pool of such land for grants in the interest of the economic development of the country. Since Independence, the government has accepted the necessity for the state to own some land. But the criterion used to determine the amount of land the state should own is now one of 'necessity' viewed in the context of public purpose, and not one of 'desirability'. The national government has been sensitive to the general claims of the traditional owners of unfairness about land acquisitions and their desire to repudiate some of the original transactions.

The guiding principle adopted is, therefore, that it is in the interest of the nation to make clear the title of such state lands needed for public purposes, but disputed state lands which were not needed for such purposes and were unused should be returned. These differing policies have led to different approaches to the problem. The total experience is discussed under the following headings:-

- (a) Title Restoration;
- (b) Presumption of State Ownership; and
- (c) Registration as 'National Lands'.

#### (a) Title Restoration

Because of the destruction of the land registers in German New Guinea it was necessary to enact legislation to restore titles of the registered owners, including those of the government. Provisional machinery under the National Security (External Territories) Regulations and the Lost Register Ordinance was followed by the Land Titles Restoration Act of 1951. The aim of the exercise was to replace the lost registers by new ones. Though the latter act provided for the adjudication of adverse claims in such lands, the courts took the view that there was no intention to open up enquiries into the correctness of the pre-war registrations.<sup>77</sup> Therefore, any evidence that the original owners were not paid for the land, or that the wrong people were paid, was irrelevant to the issues raised in the Act, i.e. was the government the registered owner of the land before the destruction of the registers?

#### (b) Presumption of State Ownership

The Evidence (Land Titles) Act of 1969 was enacted to remove doubts on those titles which were not registered under the Torrens enactments. It raised a presumption of state ownership in actions against the government<sup>78</sup> provided certain prescribed acts<sup>79</sup> were established, e.g. a government purchase, compulsory acquisition, twelve years' continuous occupation by government or anyone on its behalf, or the land was the subject of a government lease or other grants.

The presumption, though not generally conclusive as to government's ownership, was strong evidence thereof. The existence of a purchase document which complied with the requirements of the Land Act, however, raised a conclusive presumption of state land.<sup>80</sup> The Evidence (Land Titles) Act was repealed by the National Land Registration Act, 1977.<sup>81</sup>

#### (c) Registration as 'National Lands'

So far the techniques we have discussed to establish the state's title to land are piecemeal, and the application of the presumption was dependent on the existence of a disputed claim to the land. A more comprehensive approach was taken by the post-Independence government. This was on the recommendation of the CILM that government's title to lands required for public purposes should be clarified, the lands renamed 'National Lands' and registered in a National Lands Register.<sup>82</sup> National Lands would also include land already owned by

government and so declared and registered, whether leased to private companies or individuals, and all converted freeholds and future purchases. In the long term, National Lands would comprise all registered state land. The significance of these proposals of the CILM is that security is intended only for titles to state land required for a public purpose, and the government would openly confirm its title to such lands, thereby avoiding the necessity of a presumption of ownership based on suppositions of facts (e.g. because the government has occupied or had control of land for twelve years, it is the owner).

The National Land Registration Act implemented the proposals of the CILM. The Minister for Lands is empowered to give notice of an intention to declare any disputed or other state owned land that is required for a public purpose as 'National Land'.<sup>83</sup> After proper advertisement of his intention and consideration of representations by adverse claimants, he may withdraw from the claim or go on to declare the land as 'National Land'.<sup>84</sup> Upon such a declaration the land vests in the state as National Lands.<sup>85</sup> The Registrar-General is required to register such lands in the Register of National Lands.<sup>86</sup> Registration gives the government an indefeasible title,<sup>87</sup> subject of course to estates and interest properly created by government. This power to declare state land 'National Land' includes a power over land which the government claims to have acquired before Independence Day and subsequently.<sup>88</sup> It does not, however, extend to customary land which has been so declared expressly or implicitly in a prior court action.<sup>89</sup>

Any unresolved adverse claims in National Lands are converted into a right to claim settlement payment against the government before the National Land Commission.<sup>90</sup> Such a claim is only allowable if (1) made within a prescribed time, and (2) the claimant can establish that he or his representative has made a claim to the land before Independence in accordance with the existing law, and received no payment for the land.<sup>91</sup> Any insignificant payment will be disregarded. The Commission, however, has power to allow a claim even if no previous claim has been made, when it is satisfied that in the circumstances the claimant had no reasonable opportunity to make the claim before.<sup>92</sup> Such claims have been allowed where it was established that the proceeds of clan land were improperly distributed by the clan's agent, or it was discovered that the clan's land was disposed of without the knowledge of sections of the clan who became aware of the disposition subsequently.

A successful claimant is entitled to compensation from the state. This

compensation is called a 'settlement payment' and is calculated in accordance with a scale set out in schedule 2 of the enactment.<sup>93</sup> An increase of compensation by an amount not exceeding fifty percent of the settlement payment calculated in accordance with the prescribed formula may be made by the Minister on the recommendation of the National Lands Commission in certain circumstances.<sup>94</sup>

#### 4. REDISTRIBUTION OF UNUTILISED STATE LANDS

The implementation of the proposals of the CILM for government to redistribute 'state lands' not required for public purposes is intended to complement the policy on National Lands. This subject is discussed in Chapter Seven. However, it should be noted that the government has always had power to reserve state land for various purposes, including declaring such land as native reserves<sup>95</sup> and placing the land in the control of trustees. Where a community has granted land to government for the purposes of such declaration, government is bound to carry out the terms of the agreement.<sup>96</sup>

## NOTES

1. [1971] P.N.G.L.R. 110; see also *Melanesian Law Journal* Vo.1, No.2 (1971) p.81.
2. Cf. Mining Act (Amalgamated) Act, 1977.
3. Act 77 of 1976. 'Government Land' means (a) Government land as defined in the Land Act, 1962, or (b) land the subject of a state lease.
4. See Local Government (Rates and Taxes) Act, No.11 of 1971, s.57.
5. Land Regulation Ordinance. For an indication of the extent of pre-annexation land purchases in Papua, see Oram N., 'Land and Race in Port Moresby'. *J. of P.N.G. Society* (1970) p.9. Also Oram N., *Colonial Town to Melanesian City*. Chap.2.
6. In the Full Court of the Supreme Court, July 31 May, 1971; (app. [1973] 47 A.L.J.R. 621).
7. 1968 edition.
8. These requirements are now contained in the Statutes of Frauds and of Limitation Act, 58 of 1951, Cap. 330.
9. (1886) 3 Man. L.R. 481.
10. (1939) 15 N.L.R. 28.
11. [1973] P.N.G.L.R. 603; (1973) 47 A.L.J.R. 621; see also *Agevu v Govt. of P.N.G.* [1977] P.N.G.L.R. 99.
12. See Oram N., (1970) op.cit..
13. 1889.
14. S.2.
15. 1890.
16. (1957) W.L.R. 880.
17. (1971) F.L.R. 141; see also *Williams v A.G. of N.S.W.* (1913) 16 C.L.R. 404.
18. (1970) 13 D.L.R. (3d) 80.
19. 'The Contribution of the Supreme Court to the Recognition of Customary

- Rights in Land'. Seventh Waigani Seminar, on Law & Development.
20. *Re Southern Rhodesia* (1919) A.C. 211, 233. *Gathorno v Murito* (1921) EAPLR 102; James R.W., 'The Role of the Courts in Attempts to Recover Alienated Land'. *Melanesian Law Journal* (1974) p.270.
  21. (1921) 3 N.L.R. 21; (1921) 2 A.C. 399.
  22. Elias T.O., *Nigerian Land Law*. Chapter 2. Park A., 'The Cession of Territory and Private Land Rights'. *N.L.J.* 38 (1964) p.43. Nwabueze B., *Nigerian Land Law*. (1972) pp.199 et seq. Meek C.K., *Land Law & Custom in the Colonies*. (1949) pp.12 and 178.
  23. See Oram N., (1970) op.cit. p.9: 'New Guinea must be governed for the natives by the natives', 'native customs must be recognised, native rights must be respected'. Cf. the 'Erskine pledge', post, p.114.
  24. See s.4 Land Regulation Ordinance, 1889; cf. ss.14-16 Land Act, 1962.
  25. Introduced by the Land (Amendment) Act, No.23 of 1984. See further 'Draft Report of Task Force on Customary Issues'. (Aug. 1982) pp.10-11. Huime D., 'Credit, Land Registration and Development: Implications of the Lease - Leaseback System'. *M.L.J.* 11 (1983) p.91.
  26. S.15(2) Cap. 185, first contained in s.5 Land Ord., 1888.
  27. [1971-72] P.N.G.L.R. 58.
  28. [1978] P.N.G.L.R. 15.
  29. S.18 Crown Lands Ord..
  30. S.20, *ibid.*.
  31. In *Re Morobe Goldfields* [1973] P.N.G.L.R. 71. The Registrar of Titles would refuse to register a title unless there is sufficient documentary evidence of the sale in the prescribed form, or as far as possible thereto, cf. section 41 Lands Registration Act 1924 (N.G.). For an extreme case, see *Safe Lavao v The Independent State of Papua New Guinea* [1978] P.N.G. L.R. 15.
  32. See Land Regulations 1963, No.31/1963, reg. 2 Cap 185. The requirement in subsequent regulations varied, cf. Sch. 1 to Land Ord., 1922-58 (N.G.).
  33. Sch. 2 Land Ord., 1911-58, Regs. 5-7, Sch.1 to Land Ord. 1922-54, Reg. 5 (N.G.).
  34. Normally, where government purchases already registered land. However, see the National Land Registration Act, 1977, under which an increasing number of government titles are being registered.
  35. It was suggested in the Newtown Case that section 9 of the Land Act was ancillary to section 8, and the Land Board had no jurisdiction independently of a waste and vacant declaration (see Supreme Court judgment). In the opinion of the High Court it was, however, held that the Land Board had an independent jurisdiction to determine any conflicting claims to ownership, provided a Papuan claimant was a party to the dispute.

36. Newtown Case; Cf. *Nana Ofari Atta v Bonsra* (1958) A.C. 95.
37. See s.15 Land Titles Commission Act, 1962, No.5/1963.
38. S.66, Land Dispute Settlement Act (No.25 of 1975) Cap.45. On the structure of customary land dispute settlement see Eaton P., 'Customary Land Dispute Settlement: Should Lawyers be kept out?' *Melanesian Law Journal* (1983) p.47.
39. S.66, Cap.45. see *Olei v Provincial Land Court at Port Moresby & Ors.* (1984) N.461 (M).
40. Knetsch and Trebliicock, Land Policy and Economic Development in Papua New Guinea. Institute of National Affairs Discussion Paper No.6 (1981) p.26.
41. For the documentation of polemics arising from land alienations see references in fn.75, below.
42. S.23.
43. S.11 Land Ord., 1906; S.8 Land Ord., 1911.
44. On the Court's jurisdiction to go behind the declaration in order to ascertain whether the power was properly exercisable, see *Tolain v the Administration* [1965-6] P.N.G.L.R. 232; *The Administration of PNG v Guba* (1973) A.L.J.R. 621; *First Secretary, Department of Admin. v The Admin. of Papua New Guinea* (1974) F.C. 55.
45. S.75(3), Cap. 185.
46. [1977] P.N.G.L.R. 99. The West African doctrine was that there was no land without an owner under traditional law. For a discussion of the authorities, see Woodman G., 'The Allodial Title to Land'. (1969) U.G.L.J. 79; see also (1974) 11 U.G.L.R. 123; see also fn.22, supra.
47. Ss.77 and 78, Cap. 185.
48. S.75(4).
49. S.75(5).
50. S.31.
51. Ss.58 and 59.
52. The Land Acquisition Acts, 1914 and 1952. The application of the former Ordinance was expressly excluded from lands occupied by or the property of natives, whilst the latter was applicable to such lands if required for a purpose connected with the defence or public safety of the country.
53. For the definition of this expression see s.39 of the Constitution.
54. S.53(7). See post, Chap.8.4.
55. S.68(4).
56. S.1, Cap.185.

57. Act 64/1974 as amended by Act 43/1976, retitled Land Acquisition (Development Purposes) Act, Cap. 192.
58. S.3 of Act 49 of 1977.
59. S.20.
60. See post, Chap.7.
61. Cf. s.1, Cap. 192.
62. S.16, Cap. 185; s.8, Cap. 192.
63. *Gumach Plantations Ltd. v Kavali and the Independent State of PNG W.S.* 830 of 1980; Judg. 1/9/80.
64. See s.19 Cap. 185; s.12, Cap. 192.
65. S.53(2).
66. See s.88(1)(a) Cap. 185; *Geita Sebea v The Territory of Papua*, (1943) 67 C.L.R. 544.
67. *Minister of Lands v William Frame* [1980] P.N.G.L.R. 433, *Re Ratavul Land*, (1939) No.206 (Compensation Court); *Corrie v McDermott* [1914] A.C. 1056; *Spencer v Comm. of Australia* (1907) 5 C.L.R. 418.
68. Ss.18 and 19, Cap. 192.
69. [1980] P.N.G.L.R. 433.
70. See further post, Ch.8.3(6).
71. S.53(7) and s.54(c) of the Constitution.
72. Act No.76/1976, ss.17, 23, (Cap.359).
73. S.24, *ibid.*.
74. S.56.
75. See Sister M. Antonius. 'The Tolai Land Case'. *Catalyst* Vol.3. No.3 (1973) p.38. Sack P., 'Early Land Acquisition in New Guinea - the Native Version'. *Jour. of PNG Society* Vol.3, No.2 (1969) p.7. Ian Willis, 'Lae's Land Grabbers'. *New Guinea* 6(4) (1972) p.4.
76. *Safe Lavao v The Independent State of Papua New Guinea* [1973] P.N.G.L.R. 15; *Re Morobe Goldfields* [1973] P.N.G.L.R. 71.
77. *The Custodian of Expropriated Property v Tedep* (1964) 113 C.L.R. 318.
78. S.9, Evidence (Land Titles) Act, No.59/1969, cap.182.
79. S.5, *ibid.* for definition of prescribed acts.
80. S.10, *ibid.*.
81. S.55, Act No.49 of 1977.

82. See Preamble *ibid.*.
83. Ss.6 & 10, *ibid.*.
84. Ss.9 & 12.
85. S.13.
86. S.15.
87. S.19.
88. S.10.
89. S.4.
90. S.39.
91. S.40.
92. S.40(3).
93. S.45.
94. S.45(3).
95. See, for example, ss.68-69 of Land Ord. 1922 (as amended); *Gaya Nomgui v The Administration* [1974] P.N.G.L.R. 349; s.25 of Cap.185.
96. Cf. s.15(1) of Cap.185.

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## CHAPTER FIVE STATE LEASES

### 1. NATURE AND CLASSIFICATION

Leases from the government of state lands were, at various times, under earlier legislation, termed Crown, Administration and government leases. A government lease was defined as 'a lease from the government granted or continued in force under the Land Act'.<sup>1</sup> Such leases are now termed state leases,<sup>2</sup> defined as 'leases from the state granted under or continued in force by the Land Act'.

No statute has defined a lease. It is implied in the Land Act that a lease is a grant of land for a specific period not exceeding ninety-nine years. Though the reservation of a rent is a requirement of a private lease and generally an essential incident of the state lease, no rent is payable upon the grant of a mission lease,<sup>3</sup> i.e. state land granted for one or more of the following purposes: a church, a dwelling house for members of or persons employed by or working in connection with a mission, a school or hospital, a building for any charitable, educational or religious purpose, or land for gardens or pastures or other purposes connected with the conduct of a Christian mission. A special purpose lease may be granted rent free, or in consideration of such royalties or other substance or thing to be recovered from or taken off the land the subject of the lease.<sup>4</sup> A special purpose lease is appropriate where the Minister thinks that the grant of an ordinary lease is inappropriate. The only purpose for which a special purpose lease cannot be granted is for private residence within a township. Purposes for which special purpose leases have been granted include sites for hydro-electric power stations and other large government schemes.

A state lease, like any lease, is an estate or interest in land which is assignable by transfer or capable of being sub-let. But the government's consent is required to such an action. At common law, if a tenant seeks the landlord's consent to a proposed disposition and it is unreasonably withheld, he may forth-

with assign or sub-let the premises.<sup>5</sup> The better course is, however, to seek a declaration of the court of his right to effect the transaction.<sup>6</sup> These rules ought to govern the exercise of the Minister's discretion when he acts in the capacity of landlord.<sup>7</sup>

A lease is distinguishable from a licence, which is permission to enter upon government land for a specified purpose or a purpose approved by the Minister.<sup>8</sup> For example, a licence may be granted to an applicant for a lease of government land pending the consideration of his application in order to, for example, enable him to carry out feasibility studies of projected developments. A licence of state land, like a lease, is for a stated period, though it must not exceed one year. It may be granted on specified conditions, including the payment of a fee. Unlike a lease, however, it conveys no estate or interest in land, and is therefore not assignable, disposable or chargeable in any form whatsoever.

There are important practical distinctions between a lease of state land and a lease of state land on which government-owned buildings stand. The latter is not subject to the provisions of the Land Act, except section 113 (relating to remedies for unlawful occupation). Such leases do not appear to be registrable under the registration enactments, and according to section 62(5) *ibid*, the laws which govern such leases are solely those which 'apply to and in relation to a lease of land held for an estate in fee simple'.<sup>9</sup> Thus leases of government-owned buildings may be granted on a periodical basis, e.g. weekly, fortnightly, monthly or quarterly.

A state lease may be granted for one or more of the following purposes: agricultural or pastoral development, business, residential, or any other purpose specified in the lease. This latter type of lease is called a special purpose lease. Whilst the rent on all other types of lease is assessed on the basis of five per cent of the unimproved value of land<sup>10</sup> (except a mission lease for which no rent is payable), the rent charged on a special purpose lease is such as the Minister deems proper and specifies in the grant.<sup>11</sup> No compensation for improvement is payable to the outgoing lessee of a special purpose or mission lease in circumstances under which compensation is payable to a government lessee of an agricultural, pastoral, residential or business lease.<sup>12</sup> He is, however, allowed a right of severance of his improvements.

A town sub-division lease is defined in section 66 of the Land Act as a lease in a township of state land which is suitable for laying out in lots and

for developing in accordance with a building scheme. Such a lease is only granted if the applicant has presented an acceptable programme, which should include proposals for the sub-division of the land in lots and the development of roads and drainage in the area. Such a lease is for an initial period of up to five years, with an entitlement to a further maximum period of ninety-nine years, if the building scheme has been complied with within the initial or extended period.

The classification of state leases is based on the purpose for which the land is granted and therefore the use to which it may be put. Land granted for one purpose can only be used for that or ancillary purposes,<sup>13</sup> unless a variation is permitted by the Minister.<sup>14</sup> The differing categories of leases imply different modes of annexing, and types of, development conditions. The development conditions in agricultural and pastoral leases are expressed in terms of minimum development of a percentage of the land within fixed periods. Those annexed to business and residential leases require a minimum expenditure of money on improvements on the land within a specified period of time. A town sub-division lease imposes developments as a condition precedent to the grant of a secured title.

## 2. GRANTS AND REGISTRATION

State lands available for leasing should be and are from time to time advertised in the National Gazette. There are exceptions to this obligation. By section 31(1) of the Land Act, there is no duty to advertise land available for leasing as residence or business leases if the land is situated within a town, or as mission leases or special purpose leases. For other types of leases (agricultural and pastoral leases, residence or business leases of land situated outside townships, leases of land on which there are government-owned buildings and town sub-division leases), there is a duty to advertise in the National Gazette. The Act nevertheless allows agricultural, pastoral etc. leases to be granted over land that has not been the subject of advertisement in the National Gazette 'where for any special reason the Minister thinks fit'.

Advertisement is an important safeguard against nepotism and corruption and should not be dispensed with lightly. The advertisement in the National Gazette must contain the following information: (a) the type of lease available to be granted; (b) the purpose of the lease; (c) the terms of the lease; (d) the



description of the land the subject of the lease; (e) the amount of rent (if any) payable for the first period of the lease; (f) in the case of a special purposes lease, the royalties (if any) payable on a substance or thing from or taken off the land which is the subject of the lease; (g) the reservations, covenants, conditions and provisions of the lease; and (h) such other information as the Secretary for the Lands Department thinks fit or the Minister for Lands directs to be included.

It should be noted that the statement in the National Gazette is similar to newspaper advertisements. It constitutes an invitation to treat and is not an offer or acceptance which binds the state. The Land Act specifically states that a statement contained in an advertisement in the National Gazette does not in any way bind the state in the granting of a lease over land the subject of the advertisement or constitute an offer to lease land (see section 30(3) *ibid.*).

In some cases, officers of the Lands Department actually do more than is required by the Land Act. Besides advertisements being placed in the National Gazette, some advertisements are placed on town notice boards, at provincial government offices, patrol posts, post offices, and at council chambers. Announcements are also made over the local radio stations. In the case of agricultural leases, advertisement is more widespread, with the Department of Primary Industry assuming some of the responsibilities for bringing the matter to the notice of potential applicants. In other cases, occupants on the land or nearby are verbally informed. However, it should be noted that the only duty is to advertise in the National Gazette, and once that has been done, any lease allocated thereafter is validly effected. Land situated in a township may by section 64 of the Land Act be advertised as available for tenders at a set price, based on the assessment of the unimproved value of the land.

Applications are considered by the Land Board, which makes recommendations to the Minister for Lands on the person to whom an offer should be made. Each applicant is then notified of the result of his application and an unsuccessful applicant is given twenty-eight days, after the notice is forwarded to him, to appeal to the Head of State. The latter acts on the advice of the National Executive Council in determining the appeal, and his decision is final.

The name of the successful applicant is gazetted and he is then served

with a notice under section 35, *ibid* setting out a summary of moneys payable and other terms and conditions of the lease. He must then notify his acceptance to the Lands Department and pay all amounts specified in the notice within twenty-eight days after the publication of his success in the Gazette. The notice of acceptance concludes the lease agreement and the lessee acquires an equitable interest in the property. A formal lease document is then executed. A state lease is a registerable interest in land, and this is so even if the government's title to the land in question is itself not registered. Registration gives the lessee all the protection, including that of 'indefeasibility', of a registered proprietor.<sup>15</sup>

### 3. INCIDENTS AND CONDITIONS

It follows from the definition of a state lease herein offered that the two important incidents are the obligations to develop the land and to pay rent. A state lease is also usually subject to various other covenants and conditions. Breach of an obligation, covenant or condition would give the government a right to forfeit the lease. It is necessary to examine in some detail the statutory incidents and conditions which attach to such leases and the power of forfeiture.

There may be other terms and conditions set out in the document evidencing the transaction. Certain powers of, and covenants against the lessee are implied in registered leases by virtue of the Land Registration Act, 1981.<sup>16</sup> Part 4 of the Act applies to all registered leases. If there is a conflict between the provisions of that legislation and the Land Act, then the latter would prevail.<sup>17</sup>

#### (a) Development Conditions

The mode of annexing development conditions on an agricultural lease is to require as a term of the lease that the tenant puts under cultivation with specified or unspecified crops a proportion of the land. The proportion increases progressively with the length of occupation. For example - one-fifth in the first period of five years; two-fifths in the first period of ten years; three-fifths, in the first period of fifteen years, and four-fifths, in the first period of twenty years. This stipulated minimum improvement must be maintained for the remainder of the lease. The conditions in a pastoral lease are related to the stocking capacity of the land. A lease for business or residential purposes requires that the lessee expends in improvements a stated minimum expenditure within a stipulated period.

Under the early land Acts, the development conditions for agricultural and pastoral leases were prescribed in the Act. This technique did not give the necessary flexibility required to tailor conditions to the quality of the land and national needs in individual cases. The policy of the 1962 Land Act is to vest the power to determine the conditions of development in the Department of Lands. These conditions are therefore express terms of the grant and are no longer statutory.

(b) Rent

It has been mentioned that an important incident of a state lease is an obligation on the tenant to pay rent. The rent is assessed at five percent of the unimproved value of the land,<sup>18</sup> but the Minister may impose a lesser rent where in any particular case he thinks it proper so to do after considering a report of the Land Board. The unimproved value of land is reassessable every ten years of the lease, and the rent is subject to variation on the reassessment of the value of the land.<sup>19</sup> However, the Minister may 'for some special reason' fix an earlier date from which the period of ten years shall be calculated. A reassessment takes effect as from the 1st January next following the giving by the Secretary for Lands to the lessee of notice of the re-assessment.

Section 41(5) of the Land Act empowers the Minister for Lands 'for any special reason he thinks fit' to remit or postpone in whole or in part, for such period and on such terms as he thinks proper, payment of rent on a state lease. This must be done on the application of the lessee and after considering a report of the Land Board on the matter. The government publishes each year a list of defaulting tenants and the amount of rent which remains due and unpaid. This list of overdue rent<sup>20</sup> is receivable in any court of law as prima facie evidence of the amount of rent outstanding and that payment was lawfully demanded.

(c) Payments for Improvements on the Land

Where land the subject of a government lease has improvements thereon, the lessee may be required to make payment in respect of the improvements.<sup>21</sup> This payment is related to the value of the improvements. The amount due is fixed by the Minister, after considering a report of the Land Board. The Minister may permit it to be paid by annual instalments, and the obligation to complete such a payment is generally not extinguished by the termination of the lease.<sup>22</sup>

So long as an amount payable in respect of improvements on land leased remains unpaid, the lessee is under an obligation to insure the improvements and to maintain them in good order and condition, and if the improvements suffer loss or damage, to immediately make good the loss or damage to the satisfaction of the Secretary for Lands.

(d) Insurance

Where a payment for improvements already existing on the land is outstanding, the lessee is invariably required to insure the improvements and keep them insured with an insurer approved by the government for the full insurable value of the improvements.<sup>24</sup> The insurance is against loss or damage by fire or any other risk against which he might have been required to cover. Any payment made under the insurance should first be applied to rebuild or reinstate the improvements lost or damaged, or towards paying the unpaid cost of the improvements as directed by the government.

(e) Not to Deal with Land without Landlord's Approval

It is a usual covenant in a government lease that the lessee will not assign, sub-let or part with possession of the land without the consent of the Minister. More comprehensive terms of similar import are implied by virtue of section 69 of the Land Act, which precludes any dealing with alienated lands without the Minister's approval.

(i) Definition of dealing

A dealing includes a transfer, mortgage, sub-lease or the grant of any right or interest in land. It includes also the creation of an encumbrance as well as a privilege in land. As such it would extend to a licence to use land. The definition is wide enough to include an agreement for any dealing which is capable of passing an equitable interest in land,<sup>25</sup> e.g. lease, mortgage or transfer. It has been held that a vesting order vesting a deceased tenant in common's share of property in his personal representative creates no new interest and does not require the approval of the Minister.<sup>26</sup>

(ii) Unapproved dealings

The Land Act in its original form provided that any dealing without

approval, was 'void and of no effect'.<sup>27</sup> As a consequence, money paid under a void agreement or transfer was generally recoverable.<sup>28</sup> By section 5 of the subsequent Land Act, 1965, 'a dealing which was required to have been made or done with...prior approval shall be deemed to be and to always have been validly and effectively made or done and of full force and effect if that approval or consent was obtained or given after the making or doing of that dealing.' The effect of this latter provision is to render any dealing ineffectual until approved,<sup>29</sup> though not void.

If an agreement for any dealing is (a) expressed to be subject to the approval of the Minister, or (b) provides that, until that approval is given, the contract or agreement has no force or effect, it remains valid.<sup>30</sup> Some authorities suggest that, though valid, it is unenforceable or inoperative until approval is given. On this reasoning no action for specific performance of an agreement, or partition or sale of co-owned land, or damages or payment arising out of a disposition is possible until approval of the transaction or agreement has been obtained.<sup>31</sup> Other authorities rejected this inchoate theory and held that the agreement is enforceable, and that partition or sale by a court may be ordered, provided approval has not been refused.<sup>32</sup> In this case, a court order will not preclude the need for the Minister's approval.<sup>33</sup>

An apparent inconsistency arising from the consent requirement and the court's power to order the disposition of property in an application for specific performance, partition or sale etc. and the resolution of the apparent conflict is suggested in the following passage from the ruling in the Tanzania case of *Harichand v Dhillon*.<sup>34</sup> There, an application was made for the sale of joint property, and the defendant objected to any 'order' being made on the grounds that the Commissioner's consent was not obtained as was required by statute. The Court held as follows:

Unless the defendant can put forward reasons why a sale should not take place, presumably the application would be granted. At the same time, no such disposition can be made without prior consent of the Commissioner for Lands. Here is another example where the courts must indulge in a dignified tussle with the Commissioner. The question is, who is to have priority? It is suggested that the Plaintiff ought to have sought the Commissioner's consent before he brought these proceedings. It could be that the Commissioner might reply that he would not entertain a hypothetical proposition and that

unless the courts were willing to grant sale rather than partition, he would not consider whether he should give his consent. Again, it could be said that there would be no good reason for the Court to grant sale if it was urged that the Commissioner was adamantly against the sale of the property. That would be a reasonable ground on which the court would refuse the application. There is unfortunately no procedure by which this conflict of interest is to be resolved. It is of interest to note that on the sale of land under executive proceedings (see 0.21.r.90 of the Civil Procedure Code) it is provided that:

Where no application is made under rule 87, rule 88 or rule 89, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute; provided that where it is provided by any Law that a disposition of property in the execution of a decree or order shall not have the effect or be operative without the approval or consent of some person or authority other than the court, the court shall not confirm such disposition under this rule unless such approval or consent has first been granted.

That rule appears to indicate that the court should not act by confirming the sale in those circumstances without the prior consent of the Commissioner. It might well be argued that the situation with regard to the sale of common property should follow a similar pattern. However, in a matter of this nature, the proposal could be put to the Commissioner, on the grounds that a sale would be ordered, unless for special reasons the court thought otherwise after hearing the defendant's case. The Commissioner should be invited to indicate his stand on the basis that the sale would be ordered in all probability. If there is no objection in principle to the sale of the common property, the court could then go on to determine the position between the parties, after which, of course, formal consent to the disposition will be necessary. As far as this case is concerned, as the Plaintiff pointed out, the position vis-à-vis the Commissioner will be a matter of evidence at the trial. If he fails to satisfy the court upon the point, he conceded that his case might be defeated. The Commissioner's consent which cannot, in any event, be a final consent until the case is heard, should not be a prerequisite to the bringing of the case.

By subsection 4 of section 69 of the Land Act, the Minister's approval must be sought by the transferee, mortgagor, or encumbrancer, as the case may be, within twenty-eight days of the execution of the document to which the requirement relates. Any agreement for a transaction, however, which is expressed in terms of subsection 3 *ibid.*, (e.g. subject to approval of the Minister) is enforceable *inter partes*, i.e. money payment arising therefrom is recoverable and the court can order specific performance thereof.<sup>35</sup>

Although section 28 of the Land Registration Act would appear to protect an agreement for a lease against third parties if the contractee takes possession of the premises, such an interpretation would create a conflict with the consent requirements of the Land Act, and in cases of conflict the latter will prevail.<sup>36</sup> There is authority for the proposition that an agreement, even if not expressed in terms of the requirements of subsection 3 of section 69 of the Land Act, may be enforceable. For if the agreement is silent on the subject of the Minister's consent, 'it will be implied that if consent of the Minister is refused, the contract would go off, but that this does not prevent a decree for specific performance being made.'<sup>37</sup>

### (iii) Oral agreements

If an agreement for the sale of land or for a lease is not evidenced by writing as is required by the Statute of Frauds and of Limitations Act,<sup>38</sup> the first question is whether there is an act of part performance to take the case outside of the Statute of Frauds and of Limitations. In the celebrated case of *Walsh v Lonsdale*,<sup>39</sup> it was held that the letting of the contractee into possession of the premises is such an act. In *Alice Bowring v New Guinea Goldfields Ltd.*,<sup>40</sup> on the other hand, the court held that payments of money as rent in pursuance of an oral agreement to transfer a lease is not such an act of part performance as to make the agreement enforceable. 'A mere money payment between vendor and purchaser or lessor and lessee', said Bignold J., 'is an equivocal act'.

If there is a sufficient act of part performance of the oral agreement, the next question is to the validity of the transaction. A transaction or agreement must be in written form if it is to be approved by the Minister. Subsection 4 of section 69 of the Land Act stipulates that, where approval is required, (a) the instrument must be presented to the Department of Lands for endorsement of the certificate in the prescribed form to the effect that approval was given, and (b) a duplicate or certified copy of the instrument is to be filed in the Department.

There is authority for the view that there would be implied in any such transaction or agreement a term that, if Ministerial consent is refused, the transaction shall be called off. And either party may sue for an order of specific performance of the oral agreement/transaction, including an order to compel the contractor to do all acts and execute all such documents as are reasonable and proper to enable the contractee to apply for approval.<sup>41</sup>

A lease for three years or less, where the lessee takes possession and the rent reserved amounts to at least two-thirds of the full improved value of the demised property, may be oral. Such a lessee of registered land is protected by the Land Registration Act.<sup>42</sup> Technically a lessee of a short-term lease is, in the absence of an agreement to that effect, not entitled to the execution of a written document.<sup>43</sup> Unless there is such a document, the Minister's approval cannot be obtained. It is arguable that an oral lease is subject to an implied term of an entitlement to a sufficient document to seek the Minister's approval. An application can, therefore, be made to the court for the lessor to perform all acts and execute all documents as may be reasonable and proper to enable the lessee to seek approval. Both the National and Supreme Courts can make such orders as are necessary to do justice in the circumstances of a particular case.<sup>44</sup>

The alternative argument is that, by implication, section 69 requirements have the effect of abolishing oral leases,<sup>45</sup> and the purported lessee's obligation is to pay for the use and enjoyment of the land. It is doubtful, however, whether the courts will countenance the abolition of oral leases by mere implication.

### (f) Implied Powers

By virtue of sections 36 and 50 of the 1981 Land Registration Act, the following powers are implied in favour of the state in a state lease:

- (i) A right of entry to view the state of repair of the premises and where necessary to serve a written notice of any defects on the lessee requiring him, within a reasonable time, to repair the property.
- (ii) A right of re-entry and repossession of the property when the rent or part thereof is in arrears for a period of six calendar months, or default is made in fulfilling any other covenant whether expressed or implied, and it has so continued for six calendar months. These powers supplement the special powers granted by the Land Act to inspect land held from the government in order to ascertain whether the conditions to which the lease is subject have been or are being observed.<sup>46</sup>

(g) **Implied Covenants**

By virtue of sections 36 and 51 of the Land Registration Act, the following covenants are implied on the part of the lessee of a state lease: (a) that he will pay the rent at the times specified in the lease and pay all rates and taxes payable in respect of the property during the continuance of the lease; (b) that he will keep and yield up the property in a good and tenantable state.

4. **FORFEITURE**

(a) **Exercise of Power**

Forfeiture of a state lease is the premature determination of that lease for breach of a covenant or condition. The power of forfeiture is defined in section 46 of the Land Act and its exercise is dependent on the service of a statutory notice on the tenant. An act of forfeiture may be reviewed by the court.<sup>47</sup> It is argued herein that the jurisdiction to review an order of forfeiture enables the court to make an order for relief against forfeiture. It is in this context that forfeiture is distinguishable from revocation. Revocation is the premature determination of a lease for non-payment of the survey fee.<sup>48</sup> It is not dependent on the service of a statutory notice and the tenant has no right to seek a review or relief against forfeiture.<sup>49</sup>

We have already seen that a power of re-entry and repossession is implied

in every registered lease. This power is exercisable for non-payment of rent which is at least six months in arrears, or breach of any other covenant, which breach has continued for six calendar months; or if the granting of a lease was obtained wholly or partly as a result of statements that were, to the knowledge of the lessee, false or misleading (s.46(1) Land Act). Where this power is exercised, a court order is unnecessary.<sup>50</sup>

(b) **Statutory Notice**

Before forfeiting a government lease for breach of condition or covenant the Minister must first serve a notice upon the lessee specifying the breach and calling upon him to show cause, within a specified period, why the lease should not be forfeited on the ground specified in the notice.<sup>51</sup> This requirement is consistent with the constitutional mandate upon the application of the rules of natural justice, in particular the right to be heard where one's property rights can be seriously affected by a decision. The notice may also require the breach to be remedied within a specified period.

A copy of this notice must be served upon all persons with an interest, right or claim in the land, e.g. a sub-lessee, mortgagee, etc. The lessee is entitled to be allowed reasonable time to comply with the notice and in default of compliance or on his failure to show cause, acceptable to the Minister, why the lease should not be forfeited, the Minister may go on to forfeit the lease. If the breach is one of non-payment of rent, no forfeiture arises unless the rent is due and unpaid for six months. Forfeiture is by the publication of a notice to that effect in the government gazette.<sup>52</sup>

(c) **Reviewing Act of Forfeiture**

The National Court has jurisdiction to review an act of forfeiture.<sup>53</sup> Section 112 of the Land Act provides that an interested person may appeal to the National Court within twenty-eight days after the forfeiture, or within such further time as the Court for any 'special reason' allows.

It should be noted that the application is not limited to the lessee but extends to any 'interested person'. Such a person is not defined, and the cases have so far not considered this matter. However, it is submitted that an interested person would at the least include an assignee of the lessee as well as a sub-lessee. It may be that the court may go further and hold that members of the

family of lessees, assignees or sub-lessees or their successors come within the term, as they have some interest in seeing that the lease is not forfeited. Despite the fact that the Land Act affords specific protection to mortgagees of land which has been compulsorily acquired (see section 98, *ibid.*), it is arguable that a mortgagee is a person who is very interested in the effect of a forfeiture by the state.<sup>54</sup>

Section 39 of the Land Registration Act, 1981, provides that where a notification appears in the National Gazette that a state lease has been forfeited, the Registrar of Titles shall make an entry to that effect in the Register of State Leases. This requirement to register a forfeiture raises the question of the effective time when forfeiture takes place. Does this occur on notification in the National Gazette or when the Registrar notes the forfeiture on the Register of State Leases, or on re-entry?

It is important to determine the time of forfeiture, if for no other reason than to determine the time limit for appeals to the National Court against forfeiture. As we have seen, this should be done within twenty-eight days from forfeiture unless the National Court is prepared, because of 'special reasons', to extend the period for appeal. If forfeiture were effective only on registration, then the twenty-eight day period would begin to run from that date and not from the date of notification in the Gazette.

The courts have so far assumed that the effective date of forfeiture is the date of notification in the Gazette. It would appear that this is the correct interpretation. Section 39 of the Land Registration Act can be contrasted with s.38 which specifically deals with the extinguishment of the title of a surrendered lease, the effective date being that of registration. Under this provision a duty is cast upon the parties to register the surrender. In contrast, it is the Registrar himself who is given the 'duty' to register a forfeiture and not the parties to the transaction.

The National Court has a discretionary power to extend the time within which an appeal must be lodged. In *Placer Holdings v The Independent State of PNG*,<sup>55</sup> the issue raised was whether an application for further time must itself be lodged within twenty-eight days after forfeiture. Greville-Smith J. stated that the court has jurisdiction after the twenty-eight days have elapsed to enlarge the time for appeal.<sup>56</sup> He then referred to the discretionary nature of the power and continued:

Whether the court will in the exercise of its discretion do so in a particular case will no doubt depend on all the circumstances. It may be that where the proposed appeal is against forfeiture of a lease the court will evolve a rule of practice comparable to or more stringent than that laid down by the court in *Ex parte Lovering*,<sup>57</sup> especially if rights have arisen in third parties, such as on a release.

All three judges (Kearney D.C.J., Greville-Smith and Bredmeyer J.J.) referred to the situation where the land had been re-leased after the purported forfeiture and the effect of a late appeal on the title of the subsequent government lessee. All were of the opinion that this was more properly seen as a matter which went to the exercise of a judicial discretion. Bredmeyer J. stated that if after the forfeiture the land was leased to a new lessee, that would be a compelling reason for a judge, in his discretion, to refuse to allow an application for extension out of time. Their Honours, however, came short of holding that in no case where the land had been re-leased would an application be allowed. Circumstances can be envisaged where a court may be persuaded to exercise its discretion in favour of the original lessee.

The Supreme Court held that application for extension of time can be made before or after the twenty-eight day period. It remitted the case to the National Court to determine afresh the application for extension of time, as an exercise of discretion. When the matter for an extension of time in which to appeal against forfeiture came up for hearing before the National Court,<sup>58</sup> Kapi D.C.J. declined to define the meaning of 'special reason' in section 112(3) of the Land Act stating 'what is or may not be a "special reason" on the particular facts of a case should be left to the discretion of the court in the particular case'. He did, however, set out the principles to be applied in such an application:<sup>59</sup>

- (1) leave will not be granted as a matter of course;
- (2) there must be special reason, or substantial reason, or satisfactory reason, or cogent and convincing reasons or exceptional circumstances shown for the delay;
- (3) there must be some merit in the grounds of appeal; and
- (4) the onus of satisfying the Court that principles (2) and (3) exist is on the applicant.

An example of a 'special reason' allowing for the favourable exercise of the discre-

tion is delay caused by prejudicial representations made by the Department of Lands.

*Dent v Thomas Kavali and Alan Bryan*<sup>60</sup> raised an interesting question whether the jurisdiction of the National Court, created by the Constitution, to grant declaratory orders without a specified time limit thereon could be invoked regardless of the expiry of the time set out in the Land Act. Bredmeyer J. held that by virtue of s.155(4) of the Constitution, the National Court had a constitutional power to grant a declaratory order (and under the earlier part of s.155(4) a certiorari order) regardless of the time limits on appeal imposed by s.112(2) of the Land Act. The plaintiff was not therefore debarred by s.112(1) of the Land Act from seeking a declaratory order. Whether or not he succeeded in getting a declaration lay in the discretion of the court.

Kapi D.C.J. dealt with this argument in *Placer Holdings Pty Ltd. and the Land Act*<sup>61</sup> and found otherwise. He held as follows:

This provision [s.155(4) of the Constitution] has been fully considered in *Avia Aihii v The State* [1981] P.N.G.L.R. 81, and S.C.R. No.2 of 1981; *Re s.19(1)(f) of the Criminal Code* [1982] P.N.G.L.R. 150. These cases have established that power given under this provision is remedial in nature and cannot be used to create primary rights. There must be an existing right. This power can be used to protect or enforce existing rights. In principle, I consider that the right to apply for an extension of time in which to appeal under s.112(2) of the Land Act could equally be enforced under the second leg of s.155(4) of the Constitution. However, I do not consider that the provision takes the matter any further than the Land Act. Under s.155(4) of the Constitution, the court may make orders which 'are necessary to do justice in the circumstances of a particular case'. What is justice in the circumstances means justice according to law. The court cannot apply its own notion of justice. The law to be applied on an extension of time in the context of this case is in s.112(2) of the Land Act. That is to say, the exercise of the court's discretion can only be exercised in favour of extension of time for a special reason.

(d) Relief Against Forfeiture

The general jurisdiction of the court to grant relief against forfeiture

is defined in the Distress Replevin and Ejectment Act.<sup>62</sup> Sections 118 and 119 of that Act limit relief to cases of forfeiture for non-payment of rent and breach of the covenant to insure premises against loss or damage by fire. This Act applied in Papua only. There was no comparable statute in New Guinea. It is arguable that it does not bind the state and therefore has no application to government leases because of the rule of construction that the state is not bound by a statute unless by express mention or necessary implication.<sup>63</sup>

However, at common law, if a lease was forfeited for non-payment of rent, the lessee could apply to the court for relief against forfeiture and the court had jurisdiction to make an order negating forfeiture. Relief was granted on terms, for example, that the tenant should pay the arrears of rent and the expenses incurred by the landlord, and in circumstances where it was just and equitable to grant relief. These rules ought to be applied by courts in Papua New Guinea by virtue of the reception provisions in the Constitution<sup>64</sup> which provide that the principles and rules that formed immediately before Independence Day the principles and rules of the common law and equity in England are adopted as part of the underlying law. There are authorities elsewhere to the effect that they apply to state leases.<sup>65</sup>

It is further submitted that the jurisdiction of the National Court to grant relief is extended by statute and is not limited to the common law jurisdiction i.e. forfeiture for non-payment of rent. Section 112 of the Land Act vests in the National Court a power to review an act of forfeiture; section 155(4) of the Constitution empowers the court to make any orders as are necessary to do justice in the circumstances of the particular case. The court has held that the express reference in the section 'to circumstances of a particular case' leaves no room for a restrictive construction of the constitutional provisions.<sup>66</sup> If an order is made in favour of the lessee, he is put in the same position as if no forfeiture has occurred.

## 5. GENERAL REMEDIES

Breach of conditions or covenants in unregistered state leases does not operate to effect a forfeiture automatically, but there is an implied power of re-entry in a registered lease. It is for the government to elect whether to prosecute the forfeiture remedy or impose a fine on the lessee instead of for-

feiture.<sup>67</sup> Alternatively, the government can bring an action for damages for breach of covenant and, if the breach is by non-payment of rent, distress proceedings might be taken.<sup>68</sup>

If the government with knowledge of the breach agreed, for example, to renew the tenant's lease upon its determination, or did any other act which is unequivocal of an intention to treat the lease as continuing, it would be held to have waived its right of forfeiture, though it may proceed with one or more of the other remedies. The acceptance of rent alone is stated not to operate as a waiver of a right of forfeiture of a lease<sup>69</sup> or the right to impose a fine in lieu of forfeiture.<sup>70</sup> A waiver of a breach does not operate to waive future breaches or breaches of a continuing nature.<sup>71</sup> For example, if the tenant is in breach of the covenant to keep the premises insured against loss by fire, or to repair, each day the property is uninsured or is in disrepair gives rise to a new cause of action.

## 6. LESSEE'S RIGHTS ON TERMINATION OF LEASE

### (a) Compensation for Improvements

Generally, when a state lease comes to an end by effluxion of time, surrender, forfeiture or compulsory acquisition, the lessee may acquire rights of compensation for improvements he effected on the land.<sup>72</sup> The same holds where a state lease is appropriated because of disruptive conduct by the leaseholder (s.4 of the Land Settlement Schemes (Prevention of Disruption) (Amendment) Act 1983). The process of compulsory acquisition including compensation rights, has been the subject of discussion in Chapter Four above. The state lessee's claim to compensation in other circumstances was discussed in Chapter Two (2.2(b) (iii)) above.

### (b) Severance

We have seen that at common law all permanent improvements to land by a tenant are *prima facie* landlord fixtures and follow the ownership of the land. Such improvements are explained as being merged in the freehold.<sup>73</sup> However a lessee is allowed to remove improvements in the nature of tenant's fixtures at the time of the termination of his lease. Where, pursuant to the terms of a lease, a lessee acquired his interest with improvements and had not paid their

value to the Crown, these improvements belonged to the Crown, and the lessee was precluded from claiming a right thereto.

The Land Act permits a state lessee to remove his improvements on land in the following circumstances:

- (i) where the improvements are severable;
- (ii) he has not received compensation for them; and
- (iii) severance is effected on or before the expiration of the lease whether it be by surrender, forfeiture or effluxion of time.

On exercising this right of severance the lessee should avoid, as far as is possible, damage to the reversion.



## NOTES

1. S.6 Land Act, 1962.
2. Cf. definition of State Lease, S.1 Land Act, Cap. 185.
3. S.61 *ibid.*.
4. S.63 *ibid.*.
5. *Treloar v. Bigge* (1874) L.R. 9 Ex. 151.
6. *Young v. Ashley Gdns.* (1903) 2 Ch. 112; *Stanley v. Ward* (1913) 29 T.L.R. 714.
7. *Post*, p.93.
8. S.67, Cap. 185, e.g. a licence to remove gravel from the land, or to enter land pending the execution of a formal lease, to graze stock.
9. S.62(5), *ibid.*.
10. S.41, *ibid.*.
11. S.63.
12. S.48(11).
13. S.39(3)(d).
14. S.40.
15. *Mudge v. Sec. for Lands & Ors.* (1983) (unreported National Court Judgment).
16. See ss.36(1), 50 and 51 of Land Registration Act, No.2 of 1981.
17. S.36(2) *ibid.*.
18. S.41(1), Cap. 185.
19. S.41(3) & (4) *ibid.*.
20. S.41(7) and (8) *ibid.*.
21. S.42.
22. Cf. *Hill v Booth* (1930) 1 K.B. 381.

23. S.48(4).
24. S.43.
25. But see *Pitt v. Hogg* 171 E.R. 1144; *M'Kay v. M'Nally* L.R. (1879) Vol. iv p.438; *Cairns v. Burgess* (1905) 2 C.L.R. 298; however see s.69(3) Land Act, where there is an assumption that an agreement is subject to the consent requirement.
26. In the Application of *Heather Hutchinson* (1984) N.457, the Court finding support from *Re Strath Blain Estates Ltd.* (1948) All E.R. 162.
27. S.75(2).
28. Cf. *Kiriri Cotton Ltd. v. Dewani* [1960] E.A. 188; [1906] A.C. 192; *Singh v. Kalubya* (1963) 3 All E.R. 499; *Cases on Contract*, McGarvie, Panam and Hocker, 2nd ed. pp.564 et seq..
29. Cf. S.69(2) of cap. 185.
30. S.69(3) *ibid.*.
31. *Roach v. Bickle* 20 C.L.R. 663. See Or.14, rules 33-6 National Court Rules, 1983, for Court's power to order sale or partition of land. The courts in Papua New Guinea have had no difficulty acting under this Order. The purchase document would need approval to ensure its validity.
32. *Daba Hisiuna v. Turner* [1974] P.N.G.L.R. 364; *Bütts v. Dyer* 87 C.L.R. 267.
33. *McCosker v. Kuster* [1967-68] P.N.G.L.R. 182; *Harichand v. Dhillon* (1969) H.C.D. 165.
34. *Ibid.*.
35. Cf. *Souza Figueiredo and Co. Ltd. v. Moorings Hotel Co. Ltd.* (1960) E.A. 926; *Meralli v. Parker* (1956) K.L.R. 26.
36. Cf. Land Registration Act, S.36(2).
37. See *Egan v. Ross* 49 N.S.W.R. 382, *Daba Hisiuna v. Turner* (n.32); *Rainbow Holdings v. Central Province Industries* [1983] P.N.G.L.R. 34.
38. SS.4 & 5 of cap. 330.
39. (1882) 21 Ch.D. 9.
40. In the Supreme Court at Wau, (1932) N.4.
41. *Daba Hisiuna v. Turner* [1974] P.N.G.L.R. 13; *Dagan v. Ley* (1946) 71 C.L.R. 142; but see the Nigerian case of *British and French Bank v. Akande* (1961) 1 All N.L.R. 820.
42. See s.33(1)(f).
43. See s.3 of Cap 330; s.49 Land Registration Act.
44. S.155(4) Constitution.

45. The Nigerian Courts have held that such a lease is void for lack of approval, *Elkali v. Fawaz* (1940) 6 W.A.C.A. 213.
46. S.79, Cap. 185.
47. S.112(1).
48. S.117(4).
49. Cf. *Nathu v. Land Officer* (1960) E.A. 941.
50. Implications of s.60, Land Registration Act.
51. S.46(2).
52. S.46(1).
53. In the Matter of S.121 of the Land Act [1977] P.N.G.L.R. 1.
54. Fisher and Lighwood, *Law of Mortgages*, (8th edn.) p.24.
55. [1982] P.N.G.L.R. 16.
56. Per Contra, In the Matter of S.121 of the Land Act [1977] P.N.G.L.R. 1.
57. (1874) L.R. 9 Ch. App. 586.
58. [1982] P.N.G.L.R. 326.
59. P.328. *ibid.*
60. [1981] P.N.G.L.R. 488.
61. [1982] P.N.G.L.R. 326 at 329.
62. 1867 (of Queensland).
63. *Nathu v Land Officer* (1960) E.A. 941; *R. v. Dale* (1906) V.L.R. 662.
64. Ch.2.2.
65. *R. v. Dale* (1906) V.L.R. 622; *Kirkham v. The Queen* 8 V.L.R. 1, where the common law rules of relief were held to bind the crown. See *Bashir v Comm. for Lands* (1959) E.A. 1018 (P.C.) for principles of relief.
66. *Maugga Logging Co. v South Pacific Oil Palm* [1977] P.N.G.L.R. 80.
67. S.47. However, see post, p.163.
68. See s.32 Distress, Replevin and Ejection Act of 1867 (applicable in Papua); there is a common law right of distress in New Guinea.
69. S.46(5).
70. S.47(4).
71. Cf. s.127 Distress Replevin and Ejectment Act of 1867 (Papua); Cf.

- Segal Securities v Thoseby* (1963) 1 Q.B. 887; *Variety Timber v Musa* (1971) E.A. 389.
72. But see ante, p.3.
73. *Minister of Lands v Kitto* (1912) 29 W.N. (N.S.W.) 42.

CHAPTER SIX  
FREEHOLDS

1. INTRODUCTION

(a) Historical Introduction

The expression 'freehold interest in land' is used in contradistinction to leasehold. The former is land held for an indefinite period, the latter gives the tenant a fixed term, e.g. ninety-nine years, three thousand years. Freehold is further characterised by the absence of incidents attached to the grant. In other words, the owner, unlike the lessee, pays no rent for occupation of the land and is not subjected at common law to the control of a landlord on the way in which he uses or disposes of his land. In fact, he is free to use or abuse it. The tenant on the other hand, and in particular the government lessee, is subject to controls by his landlord in the use and disposition of the land.

At common law there are basically four types of estate which satisfy the characteristics of the freehold estate: fee simple, fee tail, life estate and the estate *pur autre vie*. Nevertheless, for the purposes of s.56 of the Constitution, which limits the acquisition of freehold ownership in land after 1975 to citizens, the expression 'freehold' is given a restricted meaning.<sup>1</sup>

(i) Fee simple

The fee simple, which is the largest freehold estate, is not unlike absolute ownership. Some traditional owners of customary-held lands purported to dispose of parcels of their land to foreign traders, missionaries and other expatriates 'absolutely'. Most of these pre-annexation transactions were subsequently recognised by the Administration, and fee simple titles given to these foreigners in substitution for whatever interest they acquired from the informal purchases. Thus the fee simple estate was first officially recognised under the Crown Grants Act (1889). That Act did two things, viz.: it vested in the Crown power (i) to

confirm the early land purchases of the expatriates by giving them Crown grants in fee simple and (ii) to dispose of Crown lands by way of fee simple estates. The details of the grants are discussed in section two below.<sup>2</sup>

The history of the fee simple estate in German New Guinea is somewhat different. There, the law which applied to alienated land was German land law as distinct from English land law. The policy of the German Administration in New Guinea was to grant unlimited interests in land to settlers, traders and other foreigners. These grants were similar to the fees simple in Papua, and post-1920 legislation has called these land interests 'freeholds'. Strictly they were allodial grants of land. With the amalgamation of the administrations of Papua and New Guinea, the Australian Administration then abolished most German laws, including those applying to alienated land. The German laws were replaced by Anglo-Australian derived law, basically modelled on laws applied to or enacted in Papua. The Courts have held that whilst the legislature did not expressly state that German private titles were fees simple, it dealt with lands so held as if they were. Therefore, it was judicially asserted that, upon registration of German titles under the newly enacted Land Registration Ordinance, the interests dealt with were translated by registration into estates in fees simple.<sup>3</sup>

The Land Ordinance, 1922, of New Guinea was based on the Land Act, 1911, of Papua. However, whereas the Papuan Land Act, 1911, expressly stated that no new fees simple could be created in Papua, s.13(1) of the Land Act, 1922, (N.G.) expressly permitted fees simple to be created. That section said:

The Governor-General may...grant, convey or otherwise dispose of estates in fee simple of Administration lands...

(ii) Fee tail

The fee tail estate is also known as an 'estate tail' or 'entailed interest'. 'Fee tail' basically means a 'cut-down fee'. This estate contrasts with the fee simple: whereas a fee simple could be inherited by a wide section of beneficiaries and, in particular, on a testamentary disposition could be left to a complete stranger, succession to a fee tail was limited to lineal descendants of the donee, i.e. sons and daughters and grandsons and granddaughters, etc. Collaterals (e.g. uncles, cousins, nephews, etc.) could not inherit the land, even if the children of the donee-family died out or were never born.

Another feature of the fee tail was that it could not be sold, given away or otherwise alienated, except for the lifetime of the 'owner' of the fee tail. For example, if the son was entitled to the fee tail, he was entitled for his life. When he died, his son or daughter became entitled to the land (fee tail) for his or her life. There could be different types of estates tail, e.g. tails male, tails female or special tail, where the class of persons who could inherit the land was even more restrictively defined. Words of limitation were as necessary for the creation of the fee tail as for the creation of a fee simple.

By fictions the English courts allowed tenants in tail to bar the entail, i.e. to convert the fee tail into a fee simple. The intention of the grantors was therefore defeated. The barring was done by fictitious actions called 'fines and recoveries'. It is not known how many estates of fee tail (if any at all) were created in Papua New Guinea. If there were any, most probably they were done by will. In any event the legislature 'barred the entail' in 1962 by virtue of a statute. From January 1 1963, all then existing fees tail were abolished and converted into fees simple. Section 38(2) of the Law Reform (Miscellaneous Provisions) Act, 1962, provided for this. Section 38(1) provided that where a person would become entitled to an estate tail (i.e. a fee tail) it should be deemed to be an estate in fee simple (legal or equitable, as the case may be) in favour of that person. Section 38(1) therefore provided that no new fees tail could be created after 1962.

### (iii) Life estates

The life estate is an estate for the life of the grantee ('to A for life'), and the estate pur autre vie is for the life of a third party and not the life of the grantee ('to A for the life of B'). In the first limitation, the estate comes to an end when A dies. In the second, it comes to an end when B dies. The life estate is not a fee, i.e. an estate of inheritance.

### (b) Words of Limitation

It is important at the outset to understand the difference between 'words of purchase' and 'words of limitation'. Words of purchase tell one who got the estate or interest in the land; words of limitation define what estate or interest the 'purchaser' took. To illustrate the point, take a grant of land which contained

the following words: 'to A and his heirs'; the words 'to A' are words of purchase - they tell you that A gets an estate; 'and his heirs' are words of limitation - they tell you that A gets a particular type of estate called a fee simple estate.

### (i) Fee tail

Appropriate words (of limitation) were required in order to create the fee tail estate. It was important to make a distinction between inter vivos transfers and wills of land. In the former case, the actual words used by the grantor were of paramount importance. In the case of wills, the intention was more important than form. In inter vivos alienations the word 'heirs' was essential, followed by words of procreation, e.g. 'of his body', 'begotten by him'. A grant 'to A and the heirs of his body' was an effective grant of a fee tail to A. An inter vivos grant 'to A and the issue of his body' did not create a fee tail. It only created a life estate in A. However, if the words 'to A and the issue of his body' occurred in a will, then the law looked at the intention of the testator and a fee tail was created. The Conveyancing Act, 1881, U.K. provided that the limitation 'in fee tail' was, in the alternative, sufficient.

### (ii) Fee simple

We observed above that the fee tail estate was abolished by the Law Reform (Miscellaneous) Provisions Act of 1962.<sup>4</sup> All fees tail in existence at that date were automatically converted into 'fees simple', and any grant 'in tail' made subsequently is deemed to create a 'fee simple' estate in favour of the grantee. This indirect method of creating the fee simple estate may be referred to as 'creation by the operation of laws'.

To create a fee simple inter vivos or by a testamentary disposition, i.e. by an act of the grantor, requires the use of appropriate 'words of limitation', e.g. 'in fee simple', or (named grantee) 'and his heirs', or (named grantee) 'in fee tail'. In a will a devise without words of limitation, e.g. 'to A', would be construed as passing the fee simple or any other interest the grantor may have in the property.<sup>5</sup> In *Rahonamo v Enai*,<sup>6</sup> Clarkson J. held that, in a Crown grant, words which indicate an intention to grant the absolute interest in the land (e.g. 'to A, his administrators and assigns absolutely') will suffice. These rules of

construction could be applied by analogy to all inter vivos grants. Hence the presumption would be that the testator or grantor intended to pass a fee simple, unless a contrary intention is expressed or implied in the document.

(iii) Life estate

To convey a life estate the grant must be made for the life of the grantee or to the grantee for the life of some other person. This latter limitation would create a special kind of life estate named, in the legislation as an estate *pur autre vie*.<sup>7</sup> It lasts for the life of the third party and not that of the grantee.

We shall now turn to the problems concerning the existence of freehold estates in Papua New Guinea, looking first at the pre-annexation dispositions and their validation and then at the post-annexation dispositions.

2. PRE-ANNEXATION LAND PURCHASES

It is submitted that all pre-annexation dispositions of the absolute interest in customary land to non-natives were void for want of the capacity of the traditional owners to transfer land to strangers not of their community. As such, the Crown Grants made under the Crown Grants Ordinance, which purported to confirm private purchases made by non-natives before September 1888, could only be said to have, at best, validated void ones. This proposition is supported by an examination of (a) the Erskine pledge; (b) the Administrator's 'discretionary power' to make Crown grants in fee simple; and (c) the prohibition upon transfers of customary lands to non-natives, a feature of traditional law subsequently enacted into statutory form.

(a) The Erskine Pledge

Commodore Erskine, at the time of his proclamation in relation to Papua in 1884, held that the intention of Her Majesty's government with reference to land policy was:

to prevent the occupation of portions of that

country by persons whose proceeding unsanctioned by lawful authority might tend to injustice, strife and bloodshed, and who, under the pretence of legitimate trade and intercourse, might endanger the liberties, and possess themselves of the lands, of such native inhabitants.

He, therefore, committed that 'no settlement or acquisition of land is on any account permitted' from natives. Subsequent Commissioners paid lip service to this pledge but they then purported to purchase land on behalf of the Crown. These Crown purchases, we have seen, were held valid by the High Court of Australia in the *Newtown Case*.<sup>8</sup> However, their Honours in that case did not pronounce on the validity of private purchases, but conceded that the Erskine pledge 'clearly related to acquisitions by persons other than the Crown'.

(b) Discretionary Nature of Crown Grants

The main characteristic of the Administrator's power to make Crown Grants was its discretionary nature. Under the Crown Lands Ordinance of 1890 a comprehensive scheme was enacted to provide for the issue of Crown Grants. Under Part I of the Ordinance applications for such Grants in relation to land alleged to have been purchased from the native owners, both prior to the proclamation of the Protectorate and during the Protectorate, were to be considered by the Administrator in Council, who was given power to resolve the matter in various ways.

A confirming grant was not a matter of right. It might have been refused; or it could have been granted on condition that further payments were made towards the purchase price to the original vendors or other owners or that the purchaser took other land in exchange for or in substitution of the land claimed.<sup>9</sup> It is clear that the informal purchaser could not compel a Crown Grant at all, and in fact some of the applications were refused.

(c) Legal Prohibitions

By the Land Regulation Ordinance<sup>10</sup> dispositions of land by natives to non-natives were prohibited. This prohibition has been a feature of all subsequent land legislation and is now contained in s.73 of the 1962 Land Act (Cap. 185), although in the latter enactment the prohibition is in respect of customary land only. Any agreement in violation of the prohibition is void and of no effect.

The prohibition has been recognised as giving effect to 'the Erskine pledge'.<sup>11</sup> It did not introduce a new concept, for traditional law did not countenance absolute transfers. Such transfers that were possible could only operate to give non-natives personal not proprietary rights in the land. In *Cook v Sprigg*<sup>12</sup> the Privy Council, in interpreting a pre-annexation concession given by a chief to a non-native, held that without a confirmatory act of the state, the concession, being contrary to native law, could give no legally enforceable rights, in as much as the native vendor might at any time have repudiated it.<sup>13</sup>

### 3. VALIDATING PRE-ANNEXATION LAND DEALINGS

#### (a) Crown Grants

It was mentioned that s.2 of the Crown Grants Ordinance gave an absolute discretion to the Administrator in Council to issue Crown Grants confirming pre-annexation land purchases when the purchaser was in peaceful possession at the date of application. A Crown Grant could be made subject to such reservations and conditions as were deemed desirable<sup>14</sup> and was only issuable if inquiries established that the original sale was understood by the native vendors and the transaction was not unreasonable, having regard to the area of land granted and the purchase price paid or other considerations.<sup>15</sup> Pre-1884 purchases were subject to special scrutinies.<sup>16</sup> Land purchases made from officers of the Crown were likewise capable of being the subject of Crown Grants.<sup>17</sup>

#### (b) Registration

It has been argued that 'indefeasibility', a key principle of the Torrens system of land registration, has affected the validity of early land purchases in Papua New Guinea.<sup>18</sup> On this reasoning, registration of title would have a validating effect on purchases not otherwise confirmed by Crown Grants. Registration of title was first introduced in British New Guinea by the Real Property Ordinance of 1889. That Ordinance adopted the Queensland Acts of similar title which provided for registration of the fee simple. In *Breskvar v Wall*,<sup>19</sup> the Australian High Court, interpreting sections of a registration enactment of similar import to the Real Property Act, concluded that the conclusiveness of a Certificate of Title is definitive of the title of the registered owner.

But all the cases upholding the 'indefeasible principle' to defeat the claims

of the original owners arose out of the peculiar circumstances of the Titles Restoration Ordinance of New Guinea.<sup>20</sup> It is submitted that, in Papua, a disposition which was not confirmed by a Crown Grant and not effected by a document in the prescribed form could not be registered, and one effected by document, even if registered, which has a doubtful validity for registration should not be able to cure a defective title.<sup>21</sup> However, a subsequent registered transfer to a purchaser for valuable consideration without knowledge of the defect would have a curative effect.<sup>22</sup>

### 4. DISPOSITIONS OF FREEHOLD

#### (a) Native to Non-Native (Prohibition)

The early land legislation permitted 'natives' to dispose of lands to the Administration or to another native. Dispositions to non-natives were prohibited. In 1962, the prohibition on dispositions to non-natives was restricted to the transfer of customary lands.<sup>23</sup> This prohibition was in order to protect the indigenous people's rights to their land. The only exception which allows direct dealings in or to unalienated lands between automatic citizens and non-automatic citizens or non-citizens is that of timber purchase agreements by virtue of the Forestry (Private Dealings) Act, 1971.<sup>24</sup>

The expression 'native' has had varied definitions and differed from statute to statute. For land purposes, a native is an 'automatic citizen'<sup>25</sup> of Papua New Guinea.<sup>26</sup> The expression is, however, wide enough to include a traditional kinship or descent group, or a native land group or community.<sup>27</sup> A recognised group incorporated under the Land Groups Incorporation Act is a native<sup>28</sup> and can take a disposition of native land, though not a group incorporated under the Business Groups Incorporation Act.<sup>29</sup> Presumably a company is not a native even if all shareholders are citizens.

#### (b) Native to Non-Native (Permissible Dealings)

Although technically an automatic citizen (native) is able to dispose of freeholds to a non-automatic citizen or to a non-citizen,<sup>30</sup> it must be remembered that, since Independence, a non-citizen can no longer acquire freeholds,<sup>31</sup> but only leaseholds. Secondly, restrictions on sale are usually a feature of title derived from the tenure conversion process. Section 26 of the Land (Tenure

Conversion) Act, 1963,<sup>32</sup> expressly provided for the registration of restrictions on the freehold title, viz: that the owner may transfer or lease his land only to the government or another native (the definition of which includes a business group)<sup>33</sup> but not to a non-native. Where an automatic citizen therefore, wishes to dispose of traditionally-held land or his converted freehold to a non-automatic citizen or to a non-citizen, the transaction would need to be done via a government purchase. Direct leases to non-natives are, however, permitted upon the removal of the restrictions under the order of the Land Titles Commissioner,<sup>34</sup> the Minister or the Governor-General.<sup>35</sup>

Subject to what is stated in the preceding paragraphs, if an automatic citizen desires to transfer alienated land or an interest therein, whether by sale, lease, mortgage or gift, to a non-citizen, the disposition would require governmental approval. This restriction is of general application and is intended to serve the purpose of implementing governmental policies discussed later.<sup>36</sup>

#### (c) By Non-Citizens

There are no prohibitions on a non-automatic citizen holding or disposing of freehold estates. Section 56 of the Constitution, by implication, proscribes any further acquisitions of freehold lands by non-citizens only.<sup>37</sup> Though freeholds held by non-citizens are not automatically converted into leaseholds in accordance with policy,<sup>38</sup> any disposition of such an estate to another non-citizen would be ineffective to pass the freehold title but will pass a 'frustrated right' instead, i.e. a right entitling the transferee to a 'substituted lease' for ninety-nine years. A non-citizen who owns freehold may also acquire a 'substituted lease' in place of his freehold with a view to disposing of it to another non-citizen.<sup>39</sup>

#### 5. STATE GRANTS OF FREEHOLD

The Crown Grants Ordinance (1889)<sup>40</sup> empowered the early colonial Administration to make grants of Crown lands in fee simple. This power was extended by the Crown Lands Ordinance, 1898,<sup>41</sup> but was subsequently repealed by the Land Ordinance, 1911. Section 10 of the latter enactment provided that no fee simple or other estate in freehold could be granted of any Crown lands. This Act applied in Papua only.

In New Guinea, the policy of the German Administration was to grant

the absolute interest in land to settlers at a nominal price. Following the defeat of the Germans in the First World War, all enemy properties were, by legislation, vested in the Public Trustee and subsequently in the Custodian of Expropriated Property.<sup>42</sup> Enemy missions' properties were vested in the Administrator<sup>43</sup> and subsequently in the Board of Trustees. These properties were sold to citizens of the Allied and associated countries and the proceeds placed in the War Liquidation Fund.

Under the Land Ordinance, 1922, of New Guinea, the Australian Administration continued the German policy of making freehold grants of Administration lands. Such grants, together with transfers of expropriated German properties, were brought under the new registration system introduced by the Lands Registration Ordinance<sup>44</sup> and were registered as freeholds.

Freehold grants of Administration land were legally possible in New Guinea until 1962. The Land Act of that year unified the law of Papua and New Guinea on the control and disposition of government lands. There is no expressed provision for grants in freehold except in the peculiar case of regranteeing lands compulsorily acquired.<sup>45</sup> It is therefore arguable that, quite apart from policy which was against freehold grants, there was no power in the government to make such grants of land after 1911 in Papua, and 1962 in New Guinea. A contrary argument is that the state has an inherent power to make grants of freeholds of state lands. In the context of the history of land policy the latter contention is weak.

#### 6. TENURE CONVERSION

We have discussed in Chapter Three the policy of converting traditionally-owned lands into freeholds. The converted fee simple has all the features of the common law fee simple, although it enjoys a greater protection (e.g. from execution process) and is subject to a greater number of restrictions<sup>46</sup> on disposition than freeholds not created by way of tenure conversion. A brief outline will now be given of the process of conversion and the special status of these estates.

The conversion procedure is by way of the twin principles of adjudication<sup>47</sup> of land rights by the Land Titles Commission and the demarcation<sup>48</sup> of the boundaries. The land legislation provides for both systematic<sup>49</sup> and sporadic<sup>50</sup> adjudication. The adjudication process determines the question of who is entitled to

what interest under customary law; the demarcation committee demarcates the boundaries of and the extent of the individual's landed interest.<sup>51</sup> The final process is by way of an application by the customary interest-holder to convert his rights into a fee simple estate.<sup>52</sup> All persons with rights and interests in the land must agree to the conversion order and, unless they are made joint owners, or have their rights or interests protected on the Register as 'encumbrances, they must be adequately compensated for loss or reduction of their rights. After the conversion order is made, the land is registered in the Torrens Register and all future dealings with the land are required to be registered.

Except for succession purposes customary law ceases to govern the land, and all customary interests, except those registered as encumbrances, are abolished. In other words, registration accords the security of a Torrens title. The Registrar is directed by legislation to enter restrictions on the title unless the Land Titles Commission otherwise directed. These give the registered proprietor immunity against loss of the land on his bankruptcy or insolvency. Although he is free to dispose of his land or otherwise deal with it under the general law, he is only able to sell or lease it to the government or an automatic citizen. A transfer by way of mortgage or charge does not entitle the mortgagee or chargee to remain in possession for longer than three years or to destroy the mortgagor's right to redeem his property.<sup>53</sup> These privileges accorded to the registered proprietor were based on the continuing assumption that individualisation of land tenure is not in the best interests of Papua New Guineans. Simpson<sup>54</sup> stated that experience elsewhere has proved that there is no surer way of depriving a peasant of his land than to give him a good title which is readily transferable for money. There is therefore need for safe-guards against his own indiscretion.

#### 7. ABOLITION OF FREEHOLDS OF NON-CITIZENS

Policy in Papua New Guinea has come to favour the government lease over the freehold. It has been mentioned that the entailed interest was abolished in 1962, and no fee simple grants of state land could be made in Papua New Guinea after 1962. The aspect of the freehold estate which has been most unacceptable to those concerned with land development is the inability of the state to control the development of such land held privately, though planning legislation could control the type or pattern of land use.<sup>55</sup> The inability of the state to control the development of freeholds was reflected in the fact that in New Guinea,

out of 700,000 acres of freehold grants of land in 1914, only 84,941 acres were actually under cultivation.

The state of the undeveloped and underutilised freeholds throughout the country prompted the passage of the Land (Underdeveloped Freeholds) Act, 1969,<sup>56</sup> which attempted to attach development conditions on those freeholds over which a development notice was issued. A development notice required the owner to prepare a scheme for the development of the land within a specified period. Until compliance, the land owner could not dispose of his land<sup>57</sup> and persistent failure would give the government a power to acquire the land, the subject of the scheme, under its compulsory powers. This technique of imposing land use conditions on freehold proved to be ineffective. The requirement of notices and appeals against development schemes added to the complexity and unenforceability of the provisions.

Attention came to be directed at the undeveloped freeholds in the period after self-government because many communities repossessed themselves of such lands. The government was therefore faced with a law and order problem arising directly from non-utilisation of freeholds. The freehold estate has also been the subject of critical comments in other developed and developing countries. The solution posed has been one of converting all freeholds into government leases. Conversion was achieved in the Solomon Islands,<sup>58</sup> Tanzania and Zambia by legislation,<sup>59</sup> and is proposed for the Australian jurisdictions.<sup>60</sup> The CILM recommended that all freeholds be converted into government leases of sixty years (citizens) and forty years (non-citizens),<sup>61</sup> and that development conditions be imposed on the lessees.

The recommendation for the conversion of the interests of non-citizens has been agreed upon in principle and the Constitution has taken the first step by preventing non-citizens from acquiring new freeholds.<sup>62</sup> Freeholds belonging to automatic citizens are, however, given Constitutional protection,<sup>63</sup> and this protection was extended to non-automatic citizens on September 17 1980.<sup>64</sup> This protection represents a serious departure from the recommendations of the CILM and therefore a deviation from the proposed basic principles of national land policies.

The Land (Ownership of Freeholds) Act<sup>65</sup> defines the forms of ownership that are regarded as freeholds for purposes of the Constitution<sup>66</sup> and provides for their voluntary conversion into leases of ninety-nine years. There is no pro-



vision for compensation to be paid to the lessee for loss of the freehold reversion, which vests in the state absolutely.<sup>67</sup> The CILM argued that a conversion of freehold to government leasehold is no real deprivation of property. This assumption is questionable in law but, as non-citizens have no constitutional property protection, a conversion legislation with no provision for compensation is still valid and enforceable.

Details of the process of compulsory conversion, e.g. the length of the substituted government lease and methods of imposing development conditions, are still to be agreed upon. Legislation providing for compulsory conversion, when passed, will complete the demise of freehold estates held by non-citizens in Papua New Guinea. On the conversion of the fee simple, the estate for life would no doubt be downgraded into a sub-lease of the substituted government lease. However, ten years have elapsed since Independence and no compulsory conversion legislation has yet been enacted.

#### 8. PERPETUAL ESTATES FOR CITIZENS

In contrast with non-citizens, citizens, including citizen corporations, are by the Constitution allowed to acquire freehold interest in land.<sup>68</sup> This right is regarded as a special right of citizens. The CILM recommended the conversion of unalienated land in limited circumstances into registered conditional freehold interests in the name of small families or individuals.<sup>69</sup> It also proposed that existing freehold titles held by Papua New Guineans may in turn be converted into conditional freeholds,<sup>70</sup> as an alternative to the government leasehold.

The concept of conditional freehold is not new in Papua New Guinea. Under the Crown Lands Ordinance<sup>71</sup> a freehold could have been granted subject to development conditions. A conditional grant took the form of a provisional grant in the first instance. Upon the fulfilment of the development conditions by the grantee, the provisional grant was surrendered in substitution for the grant of an absolute interest.<sup>72</sup>

The freehold interest proposed by the CILM is, however, subject to conditions subsequent not precedent. It entails the grant of a restricted title (i.e. a title subject to development conditions) with controls on disposition, e.g. that the land-holder could transfer his land to a citizen only if he can prove that he still holds sufficient land for his family's use, present and future.<sup>73</sup> Most

freeholds held by citizens under the tenure conversion process are held on a restricted title. The restrictions are for the protection of the land owner<sup>74</sup> and not for the protection of a national interest. Their conversion to conditional fees simple, unlike a conversion to government leases, might cause no violation of the Constitutional protection against deprivation of property.<sup>75</sup>

However, the CILM proposed that if land were to remain substantially unused for ten years, an application could be made to the Local Land Court to have it declared 'National Land' and leased to people who needed it. Such a process would amount to a deprivation of property and would need to conform to the Constitution, which permits forfeiture only if it is an incident of the original grant.<sup>76</sup> It has already been pointed out that the expression 'perpetual estate' was thought to be a more suitable term than 'conditional freehold', to express this interest.<sup>77</sup>

## NOTES

1. See post, p.149.
2. See p.116.
3. The *Adm. v Tirupia* [1971-72] P.N.G.L.R. 229 at pp.224-5; *Re Custodian of Expropriated Property v Tedep* (1964) 113 C.L.R. 318 at p.328.
4. No.58/1962, s.38; see now Land (Estates Tail) Act, Cap.187, ss.1 & 2.
5. Wills, Probate & Administration Act, 68/1967, s.37, hereinafter referred to as Cap.291 (s.30).
6. (1971) No.612 [1971-2] P.N.G.L.R. 58.
7. Cap.291, s.11(2)(a).
8. Ante, p.63.
9. See s.14, Crown Lands Ord. 1890.
10. 1888, ss.1-3; Land Ord. 1911-24, s.3.
11. As well as being revenue producing, see Oram N., 'Land & Race in Port Moresby'. J. of P.N.G. Society (1970) p.9.
12. [1899] A.C. 572.
13. Cf. Lalor P., ('Land Law and Registration', in *Fashion of Law in New Guinea*, p.139) who submitted that private purchases before the passage of validating legislation were invalidated by the proclamation.
14. Ss.4 and 5.
15. S.4, Crown Lands Ord..
16. S.5, *ibid.*.
17. S.6, *ibid.*.
18. 'Indefeasibility and Justice'. In Sack P.G. (ed.), *Problem of Choice*. Chap.17.
19. (1971) A.L.J. 68 at p.70.
20. *Custodian of Expropriated Property v Tedep* (1964-65) 113 C.L.R. 318;

- Adm. v Tirupia* [1971-72] P.N.G.L.R. 229.
21. See *Gibbs v Messer* [1891] A.C. 248; *Sajabi v Anneliwalla Warnala* (1956) 23 E.A.C.A. 71; see, in general, Taylor 'Scotching Frazer v Walker'. (1970) 44 A.L.J. 248.
  22. See s.87, Real Property Act; Cf. *Adm. v Tirupia* (*supra*).
  23. Ss.15 and 73 Land Act, hereinafter referred to as Cap. 185.
  24. Ss.4 & 5, Cap. 217.
  25. See Constitution s.65 for the definition of this term.
  26. Interpretation Act, 1975, Cap.2, s.98(1). Cf. *Rebeka Ambi v Mary Rabi*, (1980) N279.
  27. See the definition section of Cap. 185.
  28. See s.11(2) Land Groups Incorporation Act, 1974, Cap. 147.
  29. Cap. 144, s.17(2), cf. s.18(2)(c).
  30. Subject of course to consent under the general policy provision, see s.69, Cap.185.
  31. See post, p.149 for the statutory definition of freehold.
  32. Act 15/1964.
  33. S.17(2) Cap.144.
  34. S.26(d) Land (Tenure Conversion) Act.
  35. S.25A *ibid.*.
  36. Post, p.167.
  37. See post, p.148.
  38. Post, p.150.
  39. Ante, p.77.
  40. 1889, s.1.
  41. S.30.
  42. Expropriation Ord. 1920-34.
  43. German Missions Ord. 1926.
  44. 1924.
  45. S.19(3) and (4), Cap. 185.
  46. See post, p.120.

47. See Part III Div. 2 of Land Titles Commission Act, No.5 of 1963.
48. Ss.20 and 21, *ibid.*.
49. S.17, *ibid.*.
50. See s.7 Land (Tenure Conversion) Act.
51. S.21, Land Titles Commission Act.
52. SS.8 & 9, Land (Tenure Conversion) Act.
53. S.26, *ibid.*.
54. Para. 23, Simpson's Report on Land Problems in Papua New Guinea.
55. Town Planning Act, Cap. 204.
56. Act No.13/1970, Cap. 193.
57. S.13 *ibid.*.
58. The Land and Titles (Amendment) Act, 1977, provides for the conversion of freeholds of non-Solomon Islanders to leases of seventy-five years.
59. In Tanzania, where the common law principles are applicable, the conversion legislation made no provision for compensation for the expropriation of the reversion. The former freeholders, however, acquired government leases for ninety-nine years at a nominal rent. See James R.W., Land Tenure and Policy in Tanzania, East African Literature Bureau, Ch.6. The Land (Conversion of Titles) Act, 1975, of Zambia, vests all freehold rights in land in the President. The owners acquired statutory leases for one hundred years. See Commonwealth Law Bulletin Vol.2 (1976) p.23.
60. See Else-Mitchell, 'Unto John Doe his Heirs and Assigns Forever - A Study of Property Rights and Compensation' Australian Planning Inst. Journal 5 (1967); Sackville and Neave, Property Law Cases and Materials, p.1159.
61. Paras. 4.18 to 4.27.
62. S.56(1)(b) of the Constitution.
63. Cf. s.53, and see *post*, Chap. 9.
64. Effect of s.53(4) and s.68(4).
65. Act No.76/1976, s.3 (Cap. 359).
66. S.56(2)(b); *post*, p.149.
67. S.2424(2)(a) of Act 76/1976.
68. Citizen corporations are defined in section 15 of the Land (Ownership of Freeholds) Act; see *post*, Chap.8.
69. Para. 3.48.
70. Rec. 23.

71. 1889, s.34.
72. S.38, *ibid.*.
73. Para. 3.49.
74. See *post*, p.166.
75. This argument is supported by the Constitutional requirement for Parliament to define forms of ownership that are to be regarded as freeholds, s.56(1)(b).
76. S.53(5)(c); see Chap.9.
77. *Ante*, p.55.

#### FURTHER READING

- Eccleston M.J., 'Freehold Land in Papua New Guinea - An Alien Concept'. In *Surveying - Future Trends & Techniques*. Papers at 9th Survey Congress, (1974).
- Else-Mitchell, 'Unto John Doe His Heirs and Assigns Forever - A Study of Property Rights and Compensation'. *Australian Planning Inst. Journal* 5 (1967) pp.6-12.

CHAPTER SEVEN  
LAND REDISTRIBUTION

I. INTRODUCTION

There has been a tendency in the literature to reduce the government's policy on 'land redistribution' to what one author has termed 'the controversial Plantation Redistribution Scheme'.<sup>1</sup> As a consequence, the proposals of the Commission of Inquiry into Land Matters (CILM) on the redistribution of alienated lands<sup>2</sup> tended to be misrepresented and taken out of context. Some of the literature suggests that plantations taken over by automatic citizens under the scheme have declined drastically. Plantation redistribution therefore is seen as an end in itself rather than an aspect of land redistribution.

Examples of plantations regarded as being unsuccessful following their take-over are well known; Kareeba Plantation in New Britain, whose valuation at the date of take over (1975) was based on an annual production of 17 tons; production went down to 5.5 tons by 1979. Varzin Plantation also presented an equally depressing economic picture. On the other hand, those who defended the programme have drawn attention to the success of some plantations which were redistributed, particularly in the Highlands, and the condition of some of the unsuccessful ones at the time of take-over: in many cases the trees were old and disease-ridden and the land was overgrown with weeds and in need of clearance and replanting. They have pointed to the overvaluation of some copra and cocoa plantations, where enough allowance was not made in the valuation for the deterioration and age of the trees.<sup>3</sup>

Although the plantation issue raises wider and interesting questions of decolonisation, economics and management, it is necessary to redirect attention to the thesis that the plantation redistribution programme is an aspect of the broader issue of land redistribution, which was the subject matter before the CILM. The evidence presented to the CILM was that land alienation posed severe social and political problems for the country, which was soon to be independent. There

were deep-seated resentments in those places where large tracts of land were alienated to expatriate individuals or companies, or expropriated by the colonial Administration. Some of the grievances expressed concerned the way in which alienation and appropriation took place: purchases in consideration of trade goods, or from the wrong person; waste and vacant declaration of areas reserved by the tribes for hunting or cultivation for present and/or future generations.

In addition to these complaints, grave problems arose from land shortage, especially because of population increase, in areas where plantations were established. This has been the experience particularly in the Gazelle Peninsula, the Duke of York Islands and Eruk Island of the New Ireland coast. The extent of the law and order problems generated from land alienation in some areas, e.g. New Ireland, was apparent from the number of instances of breaches of the peace by dispossessed owners, some of whom forcibly re-entered alienated lands in furtherance of varying forms of what they regarded as self-help. This had already happened on Eruk Island, for example, where the people had started to harvest coconuts from alienated plantation lands.<sup>4</sup>

In short, the CILM had to find solutions to pressing problems which were not unique to Papua New Guinea but characterised the colonial history of land tenure and administration. Similar problems arose in the Solomon Islands and other colonial territories in East and Central Africa, for example. The mood prevailing in the pre-Independence period was another constant factor in the search for permanent solutions. Settlers, for various reasons (e.g. fear for their personal and proprietary security, inability to accept an indigenous government, uncertainty of their future privileged status in an atmosphere of rising nationalism), disregarded rules of good estate management and scaled down their operations. Indigenous groups, with Independence in sight, acquired confidence in their ability to dictate favourable solutions. Experiences elsewhere indicated that solutions would be dictated by the intensity of the pressure from the people and the ideology of the decision-makers.

The CILM was presented with various models of post-Independence land reform programmes devised to cope with similar problems. The Kenya Million Acre Scheme was one of them. The programme was part of the Independence package under which a substantial fund was provided in loans and grants by the government, the outgoing colonial power and other outside bodies to purchase plantations from expatriates for resale to indigenous individuals. Here the intention was to ensure the alienated status of the land and the productivity of the farms.

Rigid criteria had to be met by the indigenous farmer in order to qualify for a grant. The dissatisfaction with this model was that the land reform programme had no impact upon land pressure problems and no benefits to the landless, who continued to pose a threat to the social and political stability of the new nation.

In Tanzania, where the extent of land alienation was less and the political party which formed the government was firmly in control, land reform was not an immediate priority. Grievances of dispossessed groups were solved in an ad hoc manner by the application of a machinery to inquire into their claims and decree solutions either by way of repossession or compensation payments. The major land reform programmes in general and plantation redistribution in particular were motivated by ideology: ujamaa and nationalisation of privately owned plantations. In the latter programme, foreign-owned plantations were taken over and vested in parastatal bodies, e.g. the Sisal Corporation, the Coffee Industry Corporation and the Tea Corporation. Recently, there has been a policy to re-vest them in co-operatives in order to achieve the social and political benefits which may accrue from this sector of the economy.

Neither solution was acceptable to the CILM: the Kenyan programme because it was dictated by principles of capitalism, the Tanzanian by principles of socialism. The CILM categorically rejected solutions in terms of extreme ideologies for solving Papua New Guinea's land problems. Rather, it set out to be guided by:

- (1) good sense: the large areas of alienated land held by government and unutilised should be redistributed; and
- (2) pragmatism: 'where freeholds and leaseholds have been granted and the land developed but the traditional right-holders are acutely short of land, government should recover the land and return it to them and pay compensation to the present title-holder'.

In sum, it was intended that 'plantations' brought under the redistribution programme should be given to the original owners of the land and, where feasible, to the labourers. The grantees should own the land primarily through indigenous forms of social, political and economic organisations, called group corporations.<sup>5</sup> These corporations should be characterised not by the separation of ownership from labour and economic criteria of profits but by co-operative principles.

As one writer has pointed out, the thrust of the recommendations was

the fulfilment of the 'Eight Aims', which at the time summarised the government's development policy, e.g. a greater participation by Papua New Guineans in the economy, and an equal distribution of economic benefits.<sup>6</sup> It is therefore a misconception to categorise land brought into this sector as plantations and to use as the only criteria of success the principle of profitability. This misconception is apparent in the Report of the Committee of Review into the Plantation Redistribution Scheme,<sup>7</sup> which perceived the issue as being one of national involvement in the plantation industry. It recommended inter alia a new policy of plantation redistribution embracing the following principles:

- (a) viable plantations with willing vendors should be taken over by Papua New Guinean groups formed into companies;
- (b) run-down plantations should be acquired by government and leased to a management company for a ten year period for development, then put up for competitive tender purchasable by any Papua New Guinean group company; and
- (c) the encouragement of Papua New Guinean involvement through equity participation in well-maintained, foreign-owned plantations.

The overall policy suggested by this committee on plantation redistribution was that compulsion should cease in the acquisition of foreign-owned plantations and the principle of voluntariness substituted therefor. Government assistance to groups wishing to buy established plantations should be dependent upon them satisfying certain criteria, e.g. they must have at their disposal financial, management and technical resources.

It has already been argued that these recommendations proceeded on the basis of a misconception of the land redistribution scheme in general and the plantation redistribution programme in particular. One must agree with the conclusions of Fingleton that the purpose of the programme was to restructure the plantation sector and the recommendations of the Committee of Review are the means of 'turning back the clock'.<sup>8</sup> If the policy has become one of national involvement in 'plantations', there are other viable alternatives to those suggested by the Review Committee, e.g. vesting the ownership of plantations in provincial agencies or national corporations. This course of action finds support from the Directive Principle that the 'citizens and government bodies [should] have control of the bulk of economic enterprise and production' in Papua New Guinea.

## 2. ALIENATED LANDS: LEGISLATIVE FRAMEWORK

Legislation to implement the recommendation of the CILM on redistribution was enacted as a matter of urgency in 1974. The Land Acquisition (Development Purposes) Act<sup>9</sup> gave the government power to acquire land by negotiations or compulsory process from overseas persons for non-overseas persons in order to make the land available to the latter for subsistence farming, resettlement, economic development or other social welfare or community development purposes, in circumstances where other suitable land is either unavailable or insufficient.<sup>10</sup> Though the Act did not expressly exclude from the ambit of its operation alienated lands owned by automatic citizens,<sup>11</sup> it was not the intention of the legislature to compulsorily acquire such lands under this Act. The courts, however, interpreted the relevant sections in this statute literally in applying the compensation provisions.<sup>12</sup> Consequently, as we have seen, it was held that, on the basis that the Lands Acquisition (Development Purposes) Act may be applied to land owned by automatic citizens as well as that of other estate-owners, the protection of the former in the Constitution to 'just compensation on just terms' extended to the latter. In the words of Justice Pratt:

With certain defined exceptions, the Act applies to all land in the country and it applies to all persons in the country (other than those persons, of course, who are owners of exempted land).<sup>13</sup>

The consequence has been that compensation for plantations has been on the basis of the 'market value' of land, and the statutory formula was relegated to being one of the many sets of criteria used to establish that phenomenon.

The Land Redistribution Act (1974) provided the machinery for identifying those persons and groups in whom the acquired lands should be vested. The procedure is discussed in section 13 below. The Land Groups Incorporation Act<sup>14</sup> sets out the machinery to accord recognition to the corporate character of the customary groups in order to enable them to acquire, manage and deal with the land as 'group ventures'. In fact very few groups which benefitted from the redistribution scheme have been incorporated. The Registrar's reluctance to incorporate land groups would appear to be derived from the multi-purposeness of the institution. The institution of land group corporation combined a concept of group title, within the CILM's proposals on the registration of unalienated land, and that of corporateness for purposes of redistribution under the Plantation Redistribution Scheme. The limitations arising from the former, which make

the group corporation unsuitable as an economic entity, are:

- (1) the limited powers accorded to land groups by s.13 of the Land Groups Incorporation Act, which envisaged an incorporated group mainly as a land holding and land administration unit, and not a commercial enterprise; and
- (2) the wide privileges and immunities enjoyed upon incorporation.

In the recognition of the limited role of land groups as economic entities, the registrar has a power to refuse registration of a group if he is satisfied that some other form of incorporation, e.g. business group, is more suitable. The reluctance of the bureaucracy to register local groups in one legal form or the other, hence their non-incorporation, has:

- (1) adversely affected their capacity to acquire a legal registrable title to the land; and
- (2) seriously affected their ability to raise finance to support their activities.

The laws of Papua New Guinea allow for the incorporation of various types of institutions, e.g. companies, business groups, land group corporations, and co-operatives. The Review Committee favoured the company forms. Though this is the most suitable institutional form for owning and managing plantations,<sup>15</sup> the latter two are superior for group ventures of the type envisaged by the CILM. A more informed approach to the issue of group incorporation needs to be adopted to ensure the success of the programme.

The final legislation passed to facilitate orderly land redistribution was the Land Trespass Act.<sup>16</sup> This Act supplemented existing legislation<sup>17</sup> by introducing criminal sanctions for unlawful entry on land earmarked for redistribution. The intention was to prevent groups from anticipating or attempting to foreclose decisions on whom the disputed land should be granted to, by occupying it without permission.

## 3. REDISTRIBUTION OF UNUTILISED STATE LAND

The policy on returning unutilised state lands to the original owners and/or their descendants in areas of land pressure, and to other land-short automatic

citizens has been implemented in a sporadic and piecemeal fashion. Since 1973, about 150,000 hectares of unused government land was converted into customary tenure by gazetted declarations made under s.76 of the Land Act. We have seen that a more positive commitment to this policy was stated as an integral part of the government's policy on National Lands.<sup>18</sup>

Commenting on the legislative proposals for the National Lands Registration Act, the National Executive Council directed that:

- (i) a full investigation be conducted throughout government departments to determine what areas of government land were being used for public purposes or were needed in the foreseeable future for such purposes (to be registered as National Lands); and
- (ii) government adopt and implement a general policy of returning unused and disputed state lands, not so required, to dispossessed groups.

A complete compilation of National Lands and their registration therefore is a necessary complement of the Land Redistribution Scheme. It was envisaged that, in many cases, the benefactors of this new policy would be the former traditional owners, but not necessarily, as in cases where the original owners already had ample land. The second of the National Goals in the Constitution required that those people who experienced emotional and material disadvantages as a result of the loss of their customary land should be given an opportunity to gain a fair share of the social and economic development arising from the alienation of their lands. It was thought that they ought, therefore, to have a claim to such lands.

However, it is doubtful how far this ideal is practicable when the group has had no historical connection with the land and the original owners are hostile to such an arrangement. In this case, the Constitutional precept would be best achieved by government declaring such land as National Land required for resettlement of land-short Papua New Guinea, and reserving such land for their use.<sup>19</sup> Alternatively, a compromise solution may be sought under the Land Redistribution Act by the government recognising the ownership of the traditional owners and providing for subsidiary rights in the land to be given to the land-short people.

It is now necessary to examine the special machinery existing for the distribution of such lands:

#### (a) Section 76 Declaration

Section 76 of the Land Act provides for the Minister of Lands, by a gazetted notice, to declare any undisposed 'state land' to be customary land. Thereupon that land is deemed for all purposes to be converted into unalienated land. Though the Minister may at the same time declare the owner or owners of the land, such a course is not normally adopted. In the absence of such a declaration, the land vests in the descendants of the original owners under the relevant customary tenure.

Presumably, any disputes over the ownership would be determined by the Land Courts under their general jurisdiction over customary land, for this land is deemed always to have been customary land.<sup>20</sup> A more specific procedure to identify the traditional owners can, however, be invoked under the Land Redistribution Act. That Act applies *inter alia* to any land declared as customary land under s.76 of the Land Act.<sup>21</sup>

#### (b) Land Redistribution Act

Although this enactment was passed to implement the plantation redistribution programme and the eventual localisation of expatriate-owned plantation, it was extended to state lands not otherwise disposed of. The innovation in the Act was the special machinery established to identify the persons to whom such lands were to be granted. This machinery could therefore be invoked in cases where the government intends to vest the land by a section 76 declaration or otherwise.

In order to bring land within the Act, it is first necessary for the Minister of Lands, by a notice in the gazette, to declare an intention to distribute the land under the enactment. He then consults the persons in occupation or persons who claim an interest in the land, the local government, the village court for the area in which the land is situated and any other body or groups whom he thinks it necessary to consult. Consultation is intended to ensure that the body responsible for proposing a scheme for redistribution is acceptable to both the government and the people concerned.<sup>22</sup> It is the primary function of the Distribution Authority to ensure a permanent effective agreement about the manner of redistribution of the land.<sup>23</sup> To this end, the authority may conduct proceedings and enquiries in the manner and with the powers of a village court.<sup>24</sup>

In arriving at an agreement or in determining a scheme for redistribution, the Authority should consider any guidelines or directives made by the Minister on the manner or conditions for redistribution. For example, he might require that the arrangements make provision for a group which was living on the land but with no claim based on original ownership. In the event that it is unable to mediate an agreement, the Authority will convene a meeting, hear representation from the people concerned, and arbitrate a decision on the distribution.<sup>25</sup> The agreement or other scheme decided on should be publicised and reported to the Minister, who might approve it, disallow it for good cause or refer it back to the Authority with directions for further reconsideration.<sup>26</sup> Upon the acceptance of an agreement or scheme it is for the Minister to vest the land in accordance therewith. This might be under a section 76 declaration. The Act envisages other forms of title in which case the group might be directed to register as a land group corporation.

There is no doubt that an interest capable of being created under the Land Act (e.g. a licence or government lease) may be vested in the corporation. Such an interest is, however, inconsistent with the stated objective of returning unused land not required for public purposes to the original owner. The implication of this policy would seem to be that the government should divest itself of the ownership of the land.

It is arguable that the government has no power to make fee simple grants of land,<sup>27</sup> but s.16 of the Land Redistribution Act provides that, upon publication of the vesting order in the Government Gazette, that order takes effect to vest rights and impose liabilities in accordance with its tenor. In the absence of legislation to create group titles as recommended by the CILM, that section, read with section 2(2), may permit the creation of an interest not otherwise allowed in the legal system, e.g. a fee simple or absolute title.

## NOTES

1. See Walter M., *Initial Report on the IASER Conference: What do we do about plantations?* IASER Discussion Paper No.34 (1980).
2. *Report of Commission of Inquiry into Land Matters.* (1973) Cap.4.
3. See Eaton P., *The Plantation Redistribution Scheme in PNG*, pp.9 and 10 (mimeographed). Paper presented to 1981 Waigani Seminar (now published as F.A.O. Publication). Cf. Knetsch and Trebilcock, *Land Policy and Economic Development in Papua New Guinea*. Institute of National Affairs, Discussion Paper No.6 (1981) at p.104. Fingleton J., 'Plantation Redistribution Among the Tolai...'. *Melanesian Law Journal* (1983) p.99.
4. See, for example, *Sebulon Wat v. Kari* [1975] P.N.G.L.R. 326; and *Sebulon Wat v. Kari* (No.2) [1975] P.N.G.L.R. 339. On 19 Aug. 1972, the East New Britain District Commissioner was murdered, while leading a police party to remove a large group of Tolais occupying Kabaira plantation under a claim of right. In 1974 field staff listed sixty properties as illegally occupied, and another forty were threatened with occupation. See Fingleton, 'Land Policy in Papua New Guinea'. In Weisbrot D. et al (ed.s), *Law and Social Change in Papua New Guinea.* (1982) pp.110 et seq..
5. See ante, pp.54-7.
6. Eaton P., 'Melanesian Land Reform: The Plantation Acquisition Scheme'. *Melanesian Law Journal* (1980) at p.135.
7. August - September, 1979.
8. IASER Discussion Paper No.34 at pp.6 and 7. Fingleton further captures the mood of the 'popular outcry' which conditioned the land redistribution proposals, in Weisbrot D. et al (ed.s), cit. Chap.5, pp.110.
9. Cap. 192.
10. See s.1, Cap. 192.
11. See s.3 *ibid.*.
12. See majority view in *Minister for Lands v. Frame*, discussed ante, p.75.
13. *Ibid.*, p.54. One such category of exempted land is customary land, another is land so 'prescribed', see s.3 of Cap.192.
14. No.64 of 1974, Cap.147, see also ante, p.53.



15. The practical distinctions between the western company forms and the indigenous group corporations relate to the decision-making process, management and methods of financing. For details see Knetsch and Trebilcock, *op.cit.* pp.33-34.
16. Act 53/1974, Cap.271.
17. Statutes which provided some form of penalty for unlawful occupation of land are the Land Act, s.113 Cap. 185; Public Order Act (76/70), S.33 (claim of right is a defence), and the Criminal Code, s.70.
18. *Ante*, p.81.
19. Under Part V. Cap. 185.
20. S.76(2) *ibid.*.
21. Land Redistribution Act (No.15 of 1975) Cap. 190, s.5.
22. S.9(5) *ibid.*.
23. S.12.
24. S.10.
25. S.13.
26. Ss.14 and 15.
27. See *ante*, p.119.

#### FURTHER READING

- Eaton P., 'Melanesian Land Reform: The Plantation Acquisition Scheme'. *M.L.J.* (1980) p.134.
- Eaton P., 'The Plantation Redistribution Scheme in Papua New Guinea'. In *Land Reform, Land Settlement and Co-operatives*. F.A.O. Publication (1983) pp.52-62.
- Fingleton J., 'Plantation Redistribution Among the Tolai - A Qualified Success in Land Tenure Reform'. *M.L.J.* (Special Land Tenure Issue) (1983).
- Walter M. (ed.), *What do we do about plantations?* IASER Monograph No.15 (1981).
- Weisbrot D. et al., *Law and Social Change in Papua New Guinea*. Sydney: Butterworths. (1982) Chap.5.

#### REPORT

- Report by the Committee of Review Into the Plantation Redistribution Scheme. Port Moresby (1979).

## CHAPTER EIGHT THE CONSTITUTION AND LAND RIGHTS

### 1. INTRODUCTION

The Independence Constitutions of former British colonial countries very rarely set out principles concerning land rights. This omission was in spite of numerous unsolved land problems at the time of the handing over of power to nationals of those countries. The only provisions dealing with land rights in those Constitutions were contained in the chapter setting out the protection of the individual's fundamental rights and freedoms. These operated, *inter alia*, as legal restraints on the sovereignty of the national parliament to expropriate property (including land rights). Where expropriation was permitted in limited circumstances,<sup>1</sup> there was usually a prohibition against the exercise of the power of the state to tax the compensation, which was invariably a prerequisite of compulsory acquisition, and to restrain its remittance 'to any country of the owner's choice'.<sup>2</sup> There was invariably a constitutionally guaranteed right to the property owner to have access to the courts to challenge the propriety of any acquisition order and the amount of compensation, and to enforce its prompt payment. Such provisions were obviously intended for the benefit of immigrant groups living in the country, and absentee owners.

The constitutional history of these countries indicates that such restrictions rarely survived once the nation became confident in its ability to exercise free choice in defining its economic and social systems and, consequently, of controlling its natural resources for the benefit of its people. At that stage, the property protection was either taken out entirely or more often modified, *inter alia*, to remove its inhibiting effect on the proper control of land use, and to establish the sovereignty of the nation in financial policy. These amendments are usually hailed by the western press as proof of imminent dictatorship by the local leaders and of the insecurity of the young nation.

The experience of both Papua New Guinea and the Solomon Islands, where

planning committees were set up to propose home-grown constitutions embodying the concerns of the people, provided a contrast. Property issues, particularly land, influenced many important constitutional proposals, in particular those on citizenship. The Independence Constitution of Papua New Guinea contains statements of fundamental rights of the individual and sets out the property protection as a special right of citizens, although non-automatic citizens were denied this protection for five years from Independence.<sup>3</sup> In contrast, non-citizens have no constitutional property protection<sup>4</sup> and are further prohibited from acquiring freehold interests in land.<sup>5</sup> These constitutional provisions are a direct consequence of the statement of the national goal embodied in the constitution as 'national sovereignty and self reliance'.<sup>6</sup>

The Constitution sets out many more statements of principles of direct significance to the property lawyer: the conservation of natural resources and the environment; development primarily through Papua New Guinean forms of social, political and economic organisation,<sup>8</sup> etc. Papua New Guinea, in the tradition of some of the more progressive developing countries, has looked to the Constitution to set a standard in controlling its natural resources to satisfy fundamental needs of the masses, as opposed to those of the indigenous elites. These considerations have inevitably led to the promulgation of a Leadership Code<sup>9</sup> in the Constitution and the establishment of the Ombudsman Commission.<sup>10</sup>

This chapter places in context some crucial proposals of the Papua New Guinea Constitutional Planning Committee (CPC) and provisions of the Constitution of Papua New Guinea which either directly deal with land rights or are a result of compromises on land issues. Comparisons will be made with the recommendations contained in the Report of the Solomon Islands' Constitutional Committee (SICC) and provisions in some orthodox Constitutions.

## 2. THE COLONIAL ERA

Colonial history is notorious for the non-existence of fundamental rights' provisions binding the colonial power and it is common knowledge that the colonial Administration did not always respect the land rights of the indigenous people. On occasions, however, statements were made of the intention of the colonial rulers to protect the indigenous population in their land rights. These were empty promises! When Papua was declared a Protectorate, there were assurances by Commodore Erskine to Papuans that: 'Evil disposed men will not be able to occupy

your country, to seize your lands or to take you away from your homes. Your lands will be secured to you'.<sup>11</sup> In 1912, shortly after the transfer of Papua by Britain to Australia, Sir Hubert Murray, as Governor of Papua, purported to restate the guarantees of Erskine as a Bill of Rights, and further assured the people that the guarantees were a fundamental part of the Papuan Constitution which would not be altered by legislation.

Similarly, in those Mandated Territories administered by the Allies, there was invariably an obligation on the administering country to respect the land rights of the native inhabitants. This obligation was found necessary as an antidote to the Germans' confiscatory practice. For example, in Tanganyika, the Trusteeship Agreement provided as follows:

In framing laws relating to the holding or transfer of land and natural resources the administering authority should take into consideration native laws and customs, and should respect the rights and safeguard the interests, both present and future, of the native population.

Similar obligations were placed on the Australian Administration in regard to New Guinea.<sup>12</sup> However, in spite of these unambiguous statements of protection of indigenous land rights, numerous instances are documented of occupied lands being declared waste and vacant or ownerless, and expropriated without the payment of compensation and of land rights being confiscated in punishment of individuals and groups, without compensation being paid to the dispossessed.<sup>13</sup>

The Meru land case<sup>14</sup> is one of the best known in Africa and illustrates the perversity of colonial policy on land rights. Conflicts arose and were consequent on the shift in colonial policy in Tanganyika from that of sporadic European settlement to that of 'homogeneous settlement'. This necessitated the removal of the whole tribe to allow for European settlement on their land. Their refusal resulted in their forcible and arbitrary dispossession and the burning of their huts. These incidents were the subject of strong protests to the United Nations, but to very little avail. Both the CILM<sup>15</sup> and the special Select Committee on Lands and Mining of the Solomon Islands<sup>16</sup> (SCLM) documented numerous instances of confiscation and other types of forcible alienation from indigenous landowners without compensation in their respective countries. These studies lead one to the conclusion that there was no restriction on the theory of 'eminent domain' in a colonial context and that the indigenous inhabitants had no legally

enforceable safe-guards, national or international, to receive 'prompt', 'fair' or any compensation.

So far references have been made to countries not designated by colonial policies as 'settlers' countries'. In those which were suitable for 'white' settlement, colonial policy was less subtle and more ruthless. Oginga Odinga in *Not Yet Uhuru* expressed the axiom that 'white settlement, white government and land alienation went hand in hand'.<sup>17</sup> He was expressing what is now trite knowledge with reference to the former settlers' colonies: Australia, America and Canada. This observation was justifiably made in the context of colonial land policy in Kenya and those other African countries to which the 'dual policy' theory was applied. Wholesale confiscation was justified by the theory that the legal title or fee to the total land area was automatically vested in the colonisers and that the land rights of the indigenous people were encumbrances (licences) on that title. By asserting title, the foreign administration could parcel out the land to white settlers once the licences were revoked. The ubiquity of this theory is apparent when, notwithstanding the enactment of constitutional or other safeguards of property rights, as in America and Australia, for example, the aborigines still derive little protection.<sup>18</sup>

In all of these jurisdictions the only titles which were protected were the common law estates and interests. Protection was initially by virtue of the reception of the common law and subsequently buttressed by the concept of indefeasibility granted by the registration system. These were, however, interests largely of the European population. The only Europeans who received shabby treatment similar to that meted out to the indigenous people were the alien enemies in time of war. Article 297 of the Treaty of Versailles provided that the Allied and Associated Powers had the right to retain and liquidate all property rights and interests of German nationals or companies in the colonies. The expropriation ordinances of both Tanganyika and New Guinea omitted any provision for compensation. In New Guinea, a total of two hundred and sixty-eight plantations, estimated in 1926 to be worth four million pounds, were expropriated.<sup>19</sup> An alien enemy whose land was expropriated had a claim for compensation against his national government; indigenous subject people could turn to no one for redress.

### 3. ENFORCEABLE BILLS OF RIGHTS

#### (a) Introduction

Legally enforceable guarantees of property rights are a feature of the Constitutions of a great number of newly independent countries. Professor Gower<sup>20</sup> stated a truism when he observed that the elaborate Bills of Rights contained in these Constitutions are but a *donatio mortis causa* put together by the colonial power in the expectation of the demise of colonial rule.<sup>21</sup> It is an interesting fact that, starting with the Nigerian Constitution of 1959, a list of the individual's fundamental rights is very often incorporated into the Constitution of dependencies upon their advancement to the stage of responsible parliamentary government. It has been the feature of the constitutional history of Papua New Guinea as well. This development in British constitutional practice has provoked many cynical comments on the motives of colonial governments in imposing limitations on legislative and executive powers of nationals in a manner which the colonial rulers never would have tolerated for themselves.<sup>22</sup>

A study of the constitutional history of these countries points to the complexity of motives. In Nigeria, the enactment of legally enforceable fundamental rights in 1959 was a result of local circumstances: fear by indigenous minority groups who lived in a region and felt that the regional government, relying on the support of a majority ethnic group, might become tyrannical to the smaller groups.<sup>23</sup> In Papua New Guinea, where local circumstances were also a determining factor, the Human Rights Act, 1971,<sup>24</sup> arose out of conflicts with and suspicion of the Administration by the individual. This enactment is traceable to the *Ballaards* case,<sup>25</sup> which led to the establishment of a Select Committee of the House to investigate the conduct of the Administration towards Mrs. Andre Ballaard. It was established that she suffered an injustice by the non-renewal of her restaurant licence by the Health Department. Non-renewal was in realisation of the fact that, by running a restaurant on the premises, she violated the restrictive covenants in her government lease. It was established that her initial violation of the covenant was a result of the encouragement she had from the Administration to open up the restaurant. Mrs. Ballaard's grievances were taken up in the House by the late Rev. Percy Chatterton, Member of the House of Assembly. In championing this isolated cause, he raised the wider question of justice for the individual vis-a-vis the Administration, and proposed the establishment of an Ombudsman as a long-term solution to assist the individual. Finding no support for this suggestion, he proposed instead a Human

Rights Bill as a means of establishing beyond doubt the individual's rights and freedoms. The argument for the Bill was further strengthened by the enactment of the controversial Public Order Act in 1970. When introducing the Bill, Mr. Chatterton argued that if such a bill were enacted prior to Independence, the people would become so alert to their rights that it would be difficult for future 'power-hungry political leaders' to take them away.

The introduction of a fundamental rights chapter in the Solomon Islands' Constitution in 1974<sup>26</sup> sprang partly from British colonial practice, partly from the felt need to restrain the power of the national leadership and partly as a means to assuage foreign vested interests in the process towards Independence.

As the motives for the introduction of constitutional guarantee differed, so did the substantive contents of the property guarantees in the Independence Constitutions, the determining factor being the extent of European settlement and/or investment in the country in question. Where these considerations were not in issue, there was a simple property guarantee that no property can be compulsorily taken by the state, except on payment of 'adequate' compensation.<sup>27</sup> Where there were European vested interests, however, extreme guarantees in terms of limitations on the circumstances in which acquisition is permitted, and prohibition against the taxation and repatriation of the compensation were also made.<sup>28</sup> These provisions were invariably entrenched in the most stringent manner possible, making any amendments dependent on a referendum, and therefore perilous.

For example, in Zambia, consequent upon the Mulungushi Declaration, which incorporated a goal of national sovereignty and control of Zambian resources, the land reform programme was planned to give the state control of its natural resources. In order to implement this goal by reserving a power to expropriate unutilised and vacant lands owned by absentee owners and convert freeholds to leaseholds, more realistic property provisions were needed to replace the more absolute provisions incorporated in the Independence Constitution. But a referendum became necessary in accordance with the entrenchment clause. The process was not only expensive, but the occasion presented the opportunity to revive old party political bitterness and for the opposition party to misrepresent and misinterpret the motives of the government to the people.<sup>29</sup> Nevertheless, in the midst of the confusion resulting from the riots which ensued, the government won the referendum, and the protection in the Constitution was amended to remove protection in cases of abandoned, unoccupied and unutilised lands, and

to give Zambia more general control over its land resources.<sup>30</sup>

#### (b) Protection of Rights of Citizens

Reference has been made to the ineffectiveness of the Erskine guarantees. The experience bears out Bentham's famous comments on the French 'Declaration of the Rights of Man', that they are simple nonsense, historical nonsense, nonsense upon stilts. The Human Rights Act, which in contrast contained enforceable rights, was, within the span of its short history, effective in safeguarding some basic rights and freedoms,<sup>31</sup> but was never tested in the context of the property protections it contained.

The CPC and SICC devoted much time to considerations of the need for enforceable human rights provisions and, in particular, property protection, in the Independence Constitutions of their respective countries. Both committees expressed the view that constitutional safeguards of fundamental rights in an independent state were regarded by the people as of high priority. Ever present in their minds was the authoritarian nature of the colonial rule and the insecurity of their land rights through waste and vacant declarations. They concluded, therefore, that the Constitution should give protection against the repetition of those abuses.

The committees took cognisance of the arguments of the CILM that unqualified property safeguards would have an inhibiting effect on development programmes, and that some powers of compulsory acquisition were inevitable. In the limited cases in which they were prepared to permit compulsory acquisition, they recommended that the owner's rights in land would be a claim to just compensation from the expropriating authority. But the SICC went on to propose for Solomon Islands the exclusion of 'customary lands' from the powers of compulsory acquisition where the sole purpose was to facilitate town and country planning. In this case, acquisition could take place only through negotiations. So incensed was the SICC with the past practices, particularly of confiscation through 'waste and vacant' declarations, that it felt it was necessary to express in strong terms that, as a general rule, negotiations with the land owners should be a prerequisite to land acquisition and the Constitution should guarantee the dissatisfied land owner legal advice and representation at the public's expense to challenge any expropriation.<sup>32</sup>

The Independence Constitution of Papua New Guinea gives citizens protect-

ion to their property rights. Section 53, cited above, provides that:

Possession may not be compulsorily taken of any property, and no interest or right over property may be compulsorily acquired except in certain defined circumstances.

In those circumstances 'just compensation' must be paid to the owner on 'just terms'. The circumstances which will permit the compulsory acquisition of property are defined in terms of the 'national interest'. These include the promotion of the welfare of the nation and the resolution of long-standing land disputes between the state and local groups.

(c) **Protection of National Interest**

(i) **Acquisition for public purposes**

We have stressed that the protection contained in the Constitution of Papua New Guinea is a special right of citizens. This right, however, must in cases yield to the 'national interest' in the acquisition of land for public purposes.<sup>33</sup> The basic principles of compulsory acquisition are that property may only be compulsorily acquired if it is required for:-

- (a) a public purpose which is declared by an Organic Law or Act of Parliament; or
- (b) a reason that is reasonably justifiable in a democratic society that has a proper regard for the rights and dignity of mankind that is so declared and described in an Organic law or Act of Parliament; and
- (c) the necessity for the taking of possession or acquisition for the attainment of that purpose or for that reason is such as to afford reasonable justification for the causing of any resultant hardship to any person affected.

In the event of such acquisition 'just' compensation must be paid on 'just' terms.<sup>34</sup>

The right to protection of one's property is a qualified right. Any act which impinges adversely on such rights must satisfy the substantive requirements

in s.38(1) of the Constitution and the formal requirements of s.38(2). The Constitution restricts acquisition to circumstances necessary to give effect to one or more of a number of specified matters of overall national importance, e.g. defence, the protection of children and persons under disability, the development of underprivileged or less advanced groups or areas, or public safety, order, welfare or health.

Legislation which provides for the acquisition of property rights must also satisfy a test of being 'reasonably justifiable in a democratic society' having a proper regard for the rights and dignity of mankind. For the purpose of determining whether a proposed act is reasonably justifiable in a democratic society a court may have recourse to, inter alia, the provisions of the Constitution, the United Nations Charter, the laws and practices and judicial decisions of the National Court or those of any other country and to any other material the court considers relevant.<sup>35</sup>

Further, deprivation of property can only be effected by a law passed in accordance with the requirements of s.38(2) of the Constitution, i.e. the law must:

- (a) be expressed to be a law that is made for the purpose of restricting or regulating guaranteed rights.
- (b) specify the right that is being regulated or restricted; and
- (c) be made and certified by the Speaker in his certificate under s.100 to have been made by an absolute majority.

(ii) **Resolving disputed claims to state land**

In order to recognise the title of government to land in circumstances where there is a genuine dispute whether the land was acquired validly from the customary owners, the Constitution provides for the passage of legislation to confirm the government's title to disputed lands which are required for public purposes. Such legislation cannot be declared invalid on the basis of deprivation of property if the land is required for a public purpose.<sup>36</sup> The National Land Registration Act was enacted to give recognition of the state's title to such disputed lands. This legislation was discussed in Chapter Four.<sup>37</sup>

#### 4. LAND RIGHTS OF NON-CITIZENS

Both the Commission of Inquiry Into Land Matters and the Constitutional Planning Committee recommended that non-citizens should be protected in their land rights by ordinary legislation but that they should enjoy no constitutional protection. This was in order to ensure a sufficient flexibility to deal with the acquisition of property by foreigners according to the particular circumstances facing the country at any given time. This is in accord with standard British practice and these recommendations were implemented in Papua New Guinea.<sup>38</sup> Foreign enterprises registered with the National Investment Development Authority (NIDA) have further guarantees in the NIDA Act,<sup>39</sup> including the right to remit overseas all compensation payable upon nationalisation or expropriation of property rights. Because these protections are not superimposed in the Constitution, however, they are subject to changes from time to time in accordance with changing circumstances, including the exchange control policy of the country.

We have seen that there is authority for the view that, failing clear statutory limitations on the property rights of non-citizens, they enjoy rights equal to those of automatic citizens for compensation payments, notwithstanding the absence of constitutional safeguards.<sup>40</sup> The Aliens (Property) Act (Cap.14) reiterates the other rights of non-citizens to hold, enjoy and dispose of property in every respect as a citizen, subject, however, to the disabilities discussed below.

##### (a) No Constitutional Safeguards

The arguments of the CPC and the SICC to restrict the constitutional property were based on sympathy with the basic recommendations of the Lands Committees of the respective countries on the need for the re-acquisition and redistribution to indigenous persons of some expatriate-owned lands, especially those not fully utilised; and the conversion of freeholds and perpetual estates of non-citizens into government leases.<sup>41</sup>

##### (b) Disabilities

Section 56 of the Constitution states that 'only citizens may acquire freehold land.' The implications of this statement are that a non-citizen may retain any freehold land he had acquired before Independence Day, unless it was otherwise converted by statute, but he has no capacity to acquire new freeholds after that date. The Constitution does not define a freehold interest in land but leaves

it to an Act of Parliament viz. the Land (Ownership of Freeholds) Act, 1976,<sup>42</sup> to stipulate the forms of ownership that are to be regarded as freehold.

At common law, a freehold interest is one of 'an indefinite duration' and includes a life estate and all forms of fee simple estates, e.g. absolute, conditional and determinable. The statutory definition accords with the common law definition. It is stated that the following interests are to be regarded as freehold for purposes of section 56(1) of the Constitution:

absolute ownership, fee simple and equivalent forms of ownership being ownership of interests greater than terms of years, whether legal or equitable but not including any form of customary ownership or interest in land.

However, the legislation sets out a number of exceptions and circumstances where indefinite interests are not regarded as freehold for purposes of the Constitution.<sup>44</sup> These include the life interest, any estate acquired by a surviving joint tenant or by personal representatives of a deceased in the process of administering an estate.

These exemptions raise serious problems of the constitutionality of the Land (Ownership of Freeholds) Act on these matters. The most glaring inconsistency with the Constitution is s.14, which purports to validate a post-Independence Day transfer in pursuance of a pre-Independence Day agreement. It is arguable that the effect of s.56 of the Constitution is to frustrate any such pre-Independence Day agreement and the purported transfer is invalid. Equally perplexing problems arise from the technique of the above-mentioned enactment, which defines freehold for the purposes of the Constitution and then goes on in subsequent sections to list exceptions which are essentially freeholds and derogate from the definition.

#### 5. CONSTITUTIONAL ORTHODOXY

It is apparent that the legislature has rejected the recommendations of the CILM, which proposed that all freeholds should be converted into government leaseholds in order to give the state effective control over land. Although the Constitution gives a necessary guarantee of property rights to citizens, it creates obstacles to the implementation of the recommendations on National Land policies.

(These policies are discussed in Chapter Nine.) Similarly, whilst the recommendation of the Commission was that the converted leasehold should not exceed sixty years, a 'substituted lease' granted under the Land (Ownership of Freeholds) Act is one for ninety-nine years.<sup>45</sup> The longer term was justified on the grounds that it gives security of tenure comparable to a freehold and, as such, would encourage major foreign investments. It was also thought that a substituted term of ninety-nine years would be no real deprivation of property and would be unlikely to be regarded as such, whilst one for a shorter period might justify allegations of expropriation without compensation.<sup>46</sup> In the Solomon Islands, the substituted lease is one of seventy-five years duration, whilst in Tanzania it is one for ninety-nine years. On conversion, the rent attached to the lease is nominal and forms essentially a means of acknowledgement of the state's title to the land.

## NOTES

1. 'In the interest of defence, public safety, public order, public morality, public health, town and country planning or land settlement; or in order to secure the development or utilisation of land, or other property for a purpose beneficial to the community'. See the *Zambian Independence Constitution*.
2. *Independence Constitution of Zambia*, s.18(2); *Independence Constitution of Kenya*, s.75. See further, on the Kenya provision, Ghai Y.P. and McAuslan J.P.W.B., *Public Law and Political Change in Kenya*. Oxford: University Press (1970) p.421. The authors claim that property rights are the most comprehensively protected of all the rights in the Kenyan Constitution.
3. *The Constitution of the Independent State of Papua New Guinea* s.68(4).
4. *Ibid.* s.53(7).
5. *Ibid.*, s.56.
6. *Ibid.*, Goal No.3 of the 'National Goals and Directive Principles'.
7. *Ibid.*, Goal No.4.
8. *Ibid.*, Goal No.5.
9. *Ibid.*, Part III, Division 2.
10. *Ibid.*, Part VIII, Division 2.
11. Referred to in *Adm. v Guba* (1973) 47 A.L.J.R. p.621; Jinks B., Biskup P. and Nelson H. (ed.s), *Readings in New Guinea History*. Angus & Robertson (1973) p.38.
12. See Article 8 of the *Trusteeship Agreement for the Mandated Territory of New Guinea*.
13. See *Report of the Commission of Inquiry Into Land Matters*. Port Moresby (1973) Chap.4. Sack P., 'Early Land Acquisitions in New Guinea: The Native Version'. Third Waigani Seminar, mimeograph (1969). Willis I., 'Lae's Land Grabbers'. *New Guinea* Vol.6 (1972) p.4.
14. Seaton E. and Japhet K., *The Meru Land Case*. Nairobi: East Africa Publishing House (1967). Nelson A., *The Freeman of Meru*. Nairobi: Oxford University Press (1967); Purritt P., 'The Meru Land Case'. In *Tanzania Notes and Records* No.69 (1968) p.53.

15. Report of the CILM, Chap. 4.
16. Report of the Select Committee on Lands and Mining. Office of the Legislative Assembly, Honiara, 1967.
17. Heinemann (1967) p.22.
18. See *Tee-Hit-Ton Indians v US* (1955) 348 US 272; *Milirrpum v Nabalco Pty* (1971) 17 F.L.R. 141. In the Canadian case of *Calder v AG.* (1971), 13 D.L.R. (3d) 80, the Court of Appeal, relying on American cases, held: whatever may be the situation in this regard in relation to natives in some other part of what was once the British Empire, in my opinion whatever rights the Indians in British Columbia possessed which have not been specifically recognised...may be extinguished by the Crown without the consent of the Indians, just as it is the case in the United States.
19. Spicer J.A., 'The Expropriation and Sale of German Plantations in the Mandated Territory'. In Eggleston F.W. (ed.), *Australian Mandate for New Guinea: Record of Round Table Discussion.* MacMillan (1928).
20. Gower L.C.B., *Independent Africa: The Challenge to the Legal Profession.* Oxford: University Press (1967) p.24. See also Campbell E., 'Papua New Guinea Government - Consideration of a Bill of Rights'. *Melanesian Law Journal* (1971) p.44.
21. By the end of 1962 Sierra Leone, Jamaica, Trinidad and Tobago, Uganda, Kenya, Malta, Guyana, and Aden had Bills of Rights.
22. Martin R., *Personal Freedom and the Law in Tanzania*, p.38; see also pp.5-11 and pp.38-43. McAuslan J.P., 'Prolegomena on to the Rule of Law in East Africa'. In East Africa Institute of Social Research Conference Proceedings. Kampala (1964).
23. De Smith S., *The New Commonwealth and its Constitutions*, p.177; Odumosu O., *The Nigerian Constitution: History and Development*, pp.240-3.
24. No.4 of 1972.
25. See Report from the Select Committee on the Conduct of the Administration Towards Andre Margaret Ballaard, 1967.
26. Solomon Islands, 1262 of 1974, Chapter I.
27. For example, see the Independence Constitutions of Nigeria and Guyana (1966).
28. See the *Zambian Independence Constitution* s.18 and the *Kenyan Independence Constitution* s.75.
29. See *Africa Confidential* No.11 (1969).
30. See *Referendum Act*, No.39 of 1967 and *Constitution (Amendment) No.5 Act*, No.33 of 1969.
31. See *R. v Mitchell Ijahujo* [1973] P.N.G.L.R., p.461; P.N.G. Law, Case No.61.

32. SICC, Report, Chap.11; and Recommendation 31 of Chap. 18.
33. For definition see ante, p.31.
34. S.53(1) and (2) Constitution.
35. S.39.
36. S.54 *ibid.*.
37. See also p.34 et seq..
38. See PNG Constitution s.53(7).
39. No.77 of 1974 (Cap.120), Cf. *Aliens (Property) Act*, Cap.144.
40. Ante, p.32.
41. CILM, Report, Chap.4, SCLM Report, Chap.3. *Supra*, Chap.6.7. and Chap.7.
42. Act 76 of 1976.
43. S.3.
44. Part 2 Div. 2.
45. Ante, p.54.
46. Larmour, P., 'Land Succession and Independence in Melanesia'. Mimeo-graphed (19/1/81) p.22.



CHAPTER NINE  
LAND RIGHTS AND CITIZENSHIP

I. THE CITIZENSHIP ISSUE

In the previous chapter we saw that the Constituent Assembly took a decision to restrict constitutional safeguards of property rights to citizens and to limit the capacity to acquire freehold interests in land in a similar manner. It was, therefore, inevitable that the criteria for citizenship would be unduly influenced by the subject of land rights. This has been the experience in both Papua New Guinea and the Solomon Islands. The Constitutional Planning Committee (CPC) was concerned to prevent the perpetuation of the status quo in land matters, i.e. the protection of land rights of non-indigenous persons by grants of indefeasible titles and their capacity to make further acquisitions. Yet at the same time the Committee wanted to safeguard the principle of equality between citizens.

The Committee saw the solution in terms of narrow citizenship proposals. It argued that liberal citizenship laws would lead to a distinction being made in the Constitution between different classes of citizens (indigenous and non-indigenous), for this distinction would be vital if the land rights of the indigenous inhabitants of Papua New Guinea were to be truly protected and the status quo were to be altered. The Committee readily quoted Fiji as a precedent for this contention. It pointed out that liberal citizenship criteria and only one category of citizens would be tantamount to the institutionalisation of the exploitation of the indigenous citizens by immigrants who were the beneficiaries of the colonial period and who would seek citizenship to protect those privileges in post-Independence Papua New Guinea.

The CPC, therefore, preferred to recommend that only persons indigenous to Papua New Guinea, i.e. those who were born in the country, of four indigenous grandparents, should automatically become citizens on Independence Day. Persons who did not qualify for automatic citizenship may be granted citizenship by natura-

lisation upon proof of long residence after Independence Day. The period suggested as a qualification for naturalisation was eight years' residence after Independence Day.

These recommendations were, however, unacceptable to the Somare Government, which introduced into the debate the category of 'provisional' citizenship based on eight years' residence in Papua New Guinea at Independence Day, provided that the applicant made an application for citizenship within two months of Independence, and that he satisfied certain tests of commitment to Papua New Guinea. The government also successfully proposed that any person born in Papua New Guinea of two grandparents who had been born in the country or specified adjacent areas, regardless of race, should automatically become a citizen.

The Chief Minister, however, conceded that (a) a 'provisional' citizen would not enjoy all the property rights and privileges of a full citizen, and (b) this discrimination could be justified by the need to redress the economic and social imbalances caused by the colonial system. This imbalance was a fact recognised and frowned upon by the government.<sup>1</sup> But this proposal struck at the principle of equality which was fundamental to the thinking of the CPC. The proposal for a category of 'provisional' citizenship was subsequently dropped.

The compromise on non-automatic citizenship which was agreed upon was as follows: a person with eight years' residence in the country should be able to apply at any time for and may be granted citizenship by naturalisation if he satisfied a number of cultural and other tests, but that some property protections should be restricted to automatic citizens for five years from Independence Day.<sup>2</sup> And, finally, Acts of Parliament may confer benefits or privileges on automatic citizens alone within the first ten years of Independence Day, without their being struck down as unconstitutional for derogating from the fundamental rights provision of the Constitution which guaranteed 'equality of citizens'.<sup>3</sup> It was hoped that, within the five year period, the plantation redistribution programme would have been completed and, during the longer period, other reformative proposals would be implemented so that the colonially-inherited imbalances would be less apparent in the country by the year 1985.

Like the CPC, the most emotional issue the Solomon Islands Constitutional Committee (SICC) had to grapple with was that of property rights of non-automatic citizens. The dilemma arose out of its proposal that those persons with 'be-

longer status', i.e. eight years' residence, and foreign spouses of automatic citizens should qualify for citizenship by registration,<sup>4</sup> and that constitutional guarantees of property rights be extended to all citizens.<sup>5</sup> After lengthy debates on the concept of equality of citizenship the Committee decided in favour of safeguards for all citizens, provided that the land legislation was amended to provide that only automatic citizens should be allowed in future to acquire freeholds or perpetual estates in land and that future assignments or grants of such estates would be capable of being made only to automatic citizens or to government. The SICC further endorsed the retention of protective or 'benign' legislation enacted to prohibit the alienation of traditionally-owned lands to non-indigenous Solomon Islanders.

## 2. CATEGORIES OF CITIZENS

### (a) Automatic Citizens

The Papua New Guinea Constitution provides for two categories of automatic citizenship: (i) s.65, 'automatic citizen on Independence Day', and (ii) s.66, 'automatic citizen by descent'. The first category comprises (a) persons born in Papua New Guinea before Independence Day who had two grandparents who were born in the country or an 'adjacent area', and (b) persons born outside the country before Independence Day but who also had two grandparents born in the country. In this latter case, however, automatic citizenship is acquired upon registration in a prescribed manner and upon the renunciation of any other citizenship the person might have had.

In the spirit of what has been termed 'pan-Melanesian sentiments'<sup>6</sup> and in recognition of a considerable movement and intercourse between the peoples of the territory which formed the state of Papua New Guinea and her adjacent areas, the Constitution provides that a person born in Papua New Guinea with two grandparents born in the Solomon Islands, Irian Jaya or the Torres Straits is qualified for Papua New Guinean citizenship. However, in furtherance of the policy of non-recognition of dual citizenship, except in limited cases, s.65(4) excluded from this category persons who were naturalised or registered Australian citizens or who acquired citizenship of any other foreign countries. Such a person may, however, within a prescribed time, renounce his foreign citizenship and

thus acquire the status of an automatic citizen.

Finally, any person born in Papua New Guinea on or after Independence Day of a parent who is a citizen of the country is an automatic citizen by descent. When a child of a citizen was born outside of the country on or after Independence Day and his birth was registered, he also acquired automatic citizenship by descent.

### (b) Non-Automatic Citizens

These are naturalised citizens. Section 67 of the Constitution sets out the requirements for a non-citizen to acquire Papua New Guinean citizenship by naturalisation. The applicant must satisfy the test of (a) continuous residence for at least eight years, and (b) acceptability, i.e. he is, inter alia, a person of good character who intends permanent residence in the country, has a genuine interest in the customs and culture of the people and is not solely motivated by ulterior motives, e.g. his economic interests. The Minister responsible for citizenship matters could grant or refuse his application. In making a decision on such an application he acts on his 'deliberate judgment', after taking into consideration the advice tendered to him by the Citizenship Advisory Committee, which is required to interview the applicant.

## 3. EQUALITY OF CITIZENS

The Constitution guarantees to all residents of Papua New Guinea a number of fundamental rights. Some of these rights are, however, declared to be exclusive to citizens and their enjoyment is not guaranteed to non-citizens. These special rights of citizens include the right to 'vote and stand for Public Offices',<sup>9</sup> 'freedom of information',<sup>10</sup> 'freedom of movement',<sup>11</sup> the right 'to acquire freehold interests in land',<sup>12</sup> protection against 'unjust deprivation of property'<sup>13</sup> and a right to 'equality'.<sup>14</sup>

The principle of equality of citizens stipulates that all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, etc. The Constitution, however envisaged and permitted some qualifications and exceptions to this principle.

## (a) Qualifications

The passage of legislation which provides for the special benefit, welfare or protection of disadvantaged groups in the society, e.g. females, children, the underprivileged and residents of less advanced areas, is not regarded as unconstitutional. This qualification of the equality statement no doubt sanctions positive attempts to achieve the basic principle of 'equality'.

Section 68(5) of the Constitution specifically allows for an Act of Parliament passed within ten years of independence to confer benefits, rights or privileges on automatic citizens provided (i) there is no derogation from those basic rights guaranteed in the Constitution, with the exception of 'equality of citizens', and (ii) they are for the purpose of giving an advantage or assistance to automatic citizens. Thus, within the period of ten years, it was possible, for example, for fiscal policies in relation to land and investments to be directed for the benefit of automatic citizens only. This has taken the form of generous tax concessions and exemptions to them through their membership of citizen corporations, defined as:

- (a) a business group registered under the Business Groups Incorporation Act, 1974; and
- (b) an incorporated land group recognized under the Land Groups Act, 1974; and
- (c) a corporation incorporated under the Companies Act, provided that:
  - (i) no present or future legal or equitable right to or interest in any share in the corporation is beneficially owned by any person other than
    - (A) a citizen (other than a naturalized citizen); or
    - (B) a corporation to which this section applies; or
    - (C) a provincial government (including a provincial government body); or
    - (D) a local government body, or an equivalent body, by whatever name known, established by or under a provincial law as defined in Section Sch.1.2 of the Constitution; or
    - (E) the state or a statutory authority or statutory instrumentality of the state; and
  - (ii) the affairs of the corporation are being conducted in the best interests of the shareholders of the corporation;

## (b) Exceptions

## (i) To adjust colonial imbalances

The Constitutional framework gave recognition to the historical imbalance based on race and therefore supported, in the short run, the adjustment of these imbalances. We have already seen that, for five years from Independence Day, non-automatic citizens suffered in theory some disabilities in comparison with automatic citizens, e.g. they did not enjoy the constitutional protection against unjust deprivation of property. However, the Land Acquisition Act, passed to effect the land redistribution programme, did not expressly discriminate against non-automatic citizens and the latter were held by the courts to enjoy rights and protection comparable to automatic citizens.<sup>15</sup> Secondly, the Plantation Redistribution Scheme had limited application, consequently only a small fraction of plantations owned by non-automatic citizens were compulsorily acquired for redistribution within the available five years.

The position would now appear to be that no legislation is permissible which, in its application, would (i) deprive a non-automatic citizen of his property protection including that of 'just compensation on just terms' on the compulsory acquisition of his land, or (ii) accord different treatment to automatic and non-automatic categories in or to their existing land rights.

## (ii) Saving clause

Subsection (3) of s.55 of the Constitution purported to save some existing laws which were discriminatory in their application. It provides that the principle of equality does not affect the operation of pre-existing laws. Nevertheless, the validity of the Native Regulations, which imposed criminal sanctions on automatic citizens for 'adultery' and none on non-automatic citizens has been questioned by judges. Narokobi A.J.<sup>16</sup> thought that notwithstanding the 'saving clause', those provisions infringed the Constitutional guarantee of 'equality of all citizens.' He expressed doubts on their enforceability having regard to 'the scheme of the new constitutional universe created by the Constitution itself'.

This viewpoint finds support from the concept of constitutional supremacy, and has been cogently argued by Dr Francis Alexis, with reference to the Independence Constitutions of the Commonwealth Caribbean countries.<sup>17</sup> Though this argument may be extended to laws which are termed 'benign',<sup>18</sup> e.g. those statu-

tory provisions which are directed against automatic citizens transferring land to non-automatic citizens,<sup>19</sup> such laws were expressly permitted to exist as exceptions to the principle of 'equality' for ten years after Independence Day.<sup>20</sup> By subsection 3 of s.68 of the Constitution, a benefit, right or privilege conferred upon 'natives' or 'local persons' by any pre-Independence law shall continue to be enjoyed only by automatic citizens for (a) a period of ten years after Independence Day, or (b) until an Act of Parliament takes away that benefit, right or privilege. By implication, where such laws continue, they will become unconstitutional and void on the tenth anniversary of Independence Day. This argument can only be applicable to statutory provisions<sup>21</sup> and not customs, for the existence of 'personal laws' cannot be stated to be inconsistent with the equality concept in the Constitution. 'Personal laws' cover a wide field such as adoption, marriage, divorce, burial and devolution of property on death.

#### 4. CITIZEN CORPORATIONS

The Constitution does not define those bodies corporate which are deemed 'citizens' for the purpose of being able to acquire freeholds. It provides for an Act of Parliament to enact such a definition.<sup>22</sup> The Land (Ownership of Freeholds) Act lists the following corporations as citizens for this purpose:<sup>23</sup>

the state, provincial governments and parastatal bodies; local government councils and Authorities; land group and business group corporations; and any other corporation declared by an Act of Parliament to be a corporation for purposes of section 56(1)(b) of the Constitution.

A notable exception from the list is the company whose membership is restricted to local persons. These are therefore subject to the disability of non-citizens discussed above. Though the justification might be the perpetuity argument, there is no rational basis for inconsistency in the legal system. The alternatives are for such companies to be recognised as citizens or to implement the recommendations of the CILM in toto and prohibit all corporations other than state instrumentalities from acquiring freeholds. The law relating to citizen corporations for purposes of tax concessions<sup>24</sup> and dealings with or in customary lands has been discussed above.<sup>25</sup>

#### NOTES

1. Post Courier, October 14, 1974, p.3.
2. S.68(4) of the Constitution. Ante, p.31.
3. See s.68(5) and (6) *ibid.*.
4. SICC, Report, Chap.18, para. 48.
5. *Ibid.*, Chap.11, para. 50.
6. Larmour P., Land Succession and Independence in Melanesia. Mimeographed (19/1/81).
7. For example, a person under the age of nineteen, see s.64.
8. S.75, *ibid.*.
9. S.50.
10. S.51.
11. S.52.
12. Ante, p.122.
13. Ante, p.146.
14. S.55.
15. Ante, p.132.
16. See *Sipo v Mukara Meli* (1980) No.240 and *Rebeka Ambi v. Mary Rabi*, (1980) No.279.
17. When is 'an Existing Law' Saved? Public Law (1976) p.256.
18. On this expression see Goldring J., *The Constitution of Papua New Guinea*. Sydney: Law Book Co. Ltd. (1978) p.226.
19. Ante, p.117.
20. Though the common law protected and sanctioned discriminatory or racial restrictive covenants (see *Commissioner for Local Govt. v. Kaderbhai* 12 K.L.R. 12) they were held as violating the 14th Amendment (Equal Protection of the Law) of the American Constitution: *Shelley v. Kraemer*,

(1974) 334 US 1; *Bucharan v. Warley* (1917) 245 US 60; see generally Garner, 'Racial Restrictive Covenants in England and the US'. (1972) 35 *Melanesian Law Review* 478.

21. For these see Chap.6.4.
22. s.56(2)(c).
23. s.15.
24. *Ante*, p.117.
25. P.244.

#### FURTHER READING

Fingleton J.S., 'Land Policy in Papua New Guinea'. Weisbrot D. et al., (ed.s) *Law and Social Change in Papua New Guinea*. Sydney: Butterworths (1982) Chap.5.

Goldring J., *The Constitution of Papua New Guinea*. Sydney: Law Book Co. Ltd., (1978) Chap.13.

*Constitutional Planning Committee, Final Report*. Port Moresby (1974) Chap.4.

## CHAPTER TEN THE CONSTITUTION AND LAND POLICIES

### 1. DEVELOPMENTS IN LAND POLICY

The land policies of post-Independence governments were derived from the recommendations of the CILM. These recommendations were rooted in the basic tenets of the Eight Point Plan, formulated in 1972 by the Somare government. In many respects these aims were lost sight of in the process of governing, but in the area of land tenure and ownership they were given new life in the CILM Report. The CILM formulated its policies with the assumption that land is the basis of economic and social relations for most Papua New Guineans and not simply a marketable commodity as the colonial government advocated. Land tenure and policy should therefore reflect principles which will help to determine the kind of society which would develop in Papua New Guinea. The CILM therefore recommended three basic national principles to be adopted in terms of the 'improvement programme':

- (a) land security should be conditional on land use;
- (b) the state should retain control over private dispositions of land speculation and accumulation;
- (c) the law should favour those who needed land most and were prepared to use it. Indefeasible title should therefore give way to the superior claim based on use and need.

The Constitution did not expressly legislate long-term land policies but safeguarded some of the major principles outlined above. Without these safeguards their implementation would create conflicts with the fundamental rights provisions contained therein. For example, s.53 *ibid.* accommodated as exceptions to the property protection (i) a right of forfeiture of land if forfeiture is an incident of a grant, and (ii) reasonable provisions in the form of limitations or prescription. But basically it was left to the legislature and executive to provide the machinery for implementing land policies.

The National Goals and Directive Principles in the Preamble to the Constitution articulated certain goals in general terms, from which policies are derived. They emphasise the sharing of economic improvement among all people of Papua New Guinea, the wise use and conservation of the land and other natural resources, and development through Papua New Guinean social and economic forms. The interpretation of these goals has led to the preference for group rather than individual ownership and for decentralised mediation and arbitration of land disputes settlement rather than adjudication. However, statements of national goals and directive principles in the preamble of a Constitution suffer from the limitation that they are essentially programmatic and therefore non-justiciable. It is for the legislature and executive to give life to such statements. They are so broad that they are capable of many diverse interpretations in the context of their implementation.

We can now turn to an examination of the legal system in so far as it facilitates the implementation of these principles, consider proposals for their realisation and the extent to which the Constitution facilitates or inhibits their implementation.

#### (a) Land Security and Use

The principle of security of tenure being conditional on land use has been of the utmost importance in the formulation of the state lease. The lessee is only allowed to continue in possession of the land if he complies with the development conditions stipulated therein. Default would enable the government to forfeit the lease.<sup>2</sup> In terms of machinery, the twin devices for implementing this maxim are the 'annexation of development conditions' and the 'reservation of a power of forfeiture for good cause' in the grant.

This principle has never been a feature of the freehold system, which permits the tenant to commit an act of waste, i.e. wanton destruction, and recognises that he has an unrestricted power to use or not to use his land. We have seen that attempts to structure the development of such land are likely to fail because of the complexity of the machinery.<sup>3</sup> The principle of indefeasibility of the registered title gives greater protection to the owner of land. Maximum security, it is argued, is a necessary aspect of property.

S.R. Simpson in his Report argued against changes in the land laws to reflect the principle of land use as a necessary incident of land tenure. He

expressed doubts on the technique of compulsion arising out of either contract terms or regulations. He thought that far more important factors stimulating land use were practical extension services and the economic circumstances which made development worthwhile.<sup>4</sup> His arguments reinforced those of the East African Royal Commission, which reinvoked Arthur Young's famous comments made over a hundred and fifty years ago that private freehold ownership could 'turn sand into gold'.<sup>5</sup> On these views the leasehold system, with its restrictions and controls, may reduce the efforts which individuals may be willing to make on the development of their lands. Anything which could reduce the efforts of the proprietors is detrimental to development.

Knetsch and Trebilcock<sup>6</sup> gave further weight to the argument. They rejected any policy to convert non-automatic citizens' freeholds on the grounds that it is likely to create in the minds of the owners further uncertainties about government policies and the return on investments in the plantation sector. Secondly, they argued that such reforms would entail the allocation of substantial scarce bureaucratic inputs to value properties, fix rents, and determine and monitor performance of improvements and compliance with use conditions. They could find no benefits of the leasehold to offset the disadvantages they enumerated. Why the authors singled out non-automatic citizens as qualifying for protection in spite of the safeguards given to them in the constitution is uncertain.

However, to the CILM, the overwhelming consideration was that land is a national asset which should be used properly so as to avoid squatter problems such as have invariably been experienced when land was left unutilised, and that the policy should ensure the rational and best usage of land. These are national interests to be realised by state surveillance and its ultimate control. The CILM thus expressed opposition to the freehold estates in principle, for it excluded the public interest and public control of land. They noted that many of the owners of freeholds in Papua New Guinea neglected to use the land. They recommended that freeholds of automatic citizens should be converted into group titles, conditional interests or government leases of sixty years,<sup>7</sup> and development conditions be annexed to the converted estates. Freeholds of non-citizens and naturalised citizens were recommended for conversion into government leases for forty years with similar development conditions.<sup>8</sup> In all cases of a converted lease the government would retain a power to forfeit the lessee's interest for non-utilisation of the land. No compensation should be paid to owners of existing freehold titles for the change in title, and the law should protect the government from such compensation claims.

It has been argued that freehold property of automatic citizens is safeguarded by the Constitution. The compulsory acquisition of these in any form would be a deprivation of property and, though permitted, would attract the Constitutional protections. Naturalised citizens now enjoy the benefit of Constitutional property protection. Non-citizens do not, thus the conversion of their freeholds is feasible if the recommendations of the CILM are to be partially implemented and if the state is to assert some control over the use of such lands.

It is submitted that the extension of this principle to customary land could again only be partially guaranteed in the context of the recommendations of the CILM for the conversion of customary titles into group titles and conditional freeholds.<sup>9</sup> The reservation of a right of forfeiture consequent upon the non-utilisation of land could be an incident of grant of the conditional freehold and can thus be exercised under the Constitution.<sup>10</sup> The proposed group title is intended, however, to be an original title and consequently free from threats of premature determination.

#### (b) Controlling Dispositions

##### (i) Paternalism

An attribute of a common law estate in land is an unrestricted power to dispose of it. In contrast, in Papua New Guinea although an automatic citizen is free to dispose of unalienated lands to another automatic citizen, and to a non-automatic citizen from September 1982, he cannot dispose of it to non-citizens. The prohibition was extended to his freehold interest acquired under tenure conversion. The exceptions being (i) grants of timber rights in forest lands which are permissible with the approval of the government, (ii) a sale of timber to a non-citizen who has obtained a Native Timber Authority under s.2 of the Forestry (Amalgamated) Regulations, 1973; and (iii) converted freeholds freed of restrictions. Restrictions on transfers between indigenous and non-indigenous people have been a colonially-inspired attempt to protect the indigenous people from the 'wiles and trickery' of the Europeans and other foreign nationals.

Simpson, in recommending a programme for the individualisation of land, saw the need to withhold or at least severely restrict the individual power of disposition. He justified the paradox of registrable individual title and restriction on disposition by the need to protect the unsophisticated land proprietor against

those who are more astute or are in a stronger bargaining position economically.<sup>12</sup> He therefore recommended the establishment of District Land Control Boards, whose approval would be essential to any disposition of land in their appropriate districts. These boards were intended to exercise a quasi-parental jurisdiction until such time as the peasants learned to take care of themselves. The thinking in the post-Independence period is, however, that this paternalistic philosophy of control should give way to the more far-reaching test of 'national interest'.

##### (ii) National interest

The control provisions in the Land Act<sup>13</sup> which apply to alienated lands are a device to protect a national interest in land. This national interest is that the resources of the nation should not be used for speculative or exploitative purposes but for the collective benefit of all. The CILM was concerned that colonial exploitation should not be replaced by exploitation of one class of citizens by another.

Legislation to control dispositions of alienated lands was first introduced in New Guinea in 1922 with the intention of limiting the extent of land a person could accumulate. By the Transfer of Land Control Ordinance the government's approval was necessary for the transfer of land. No consent was ordinarily given when the effect of the transaction was that the transferee would acquire a quantity of land above a stipulated maximum. The restriction was preventive not curative and there was no means of enforcing its violation. The 1962 Land Act retained the consent requirement. It is provided in s.69 that:

- (1) Notwithstanding anything in any law, but subject to this section, a person shall not, without the approval of the Minister,
  - (a) transfer land; or
  - (b) give a mortgage or encumbrance of or over land; or
  - (c) grant a lease, easement, right, power or privilege of, over, in or in connection with land.
- (2) Until the approval referred to in subsection (1) has been given a transfer, mortgage, encumbrance, lease, easement, right, power or privilege in or in connection with land is of no effect.

Concerning the exercise of the power, it is expressly stated therein that

the permission to transfer a state lease ought not to be granted where the vendor had not complied with the development conditions in his lease and was therefore speculating in land;<sup>14</sup> or where there is any outstanding rent due to the government. Contravention of the statutory requirement of approval invalidated the disposition.

The CILM recommended the extension of the national interest to include that of the re-acquisition of alienated lands by citizens from persons overseas. Consequently, it was stated as a matter of general policy that no transfer of rural lands would be approved unless made to citizens or unless satisfactory provisions were made for citizens to participate in the ownership and exploitation of the land.

The exception that may justify a transfer to a non-citizen would be where major investments are proposed for the introduction of new crops or new technology.<sup>15</sup> However, following the criticisms of the Plantation Redistribution Scheme the Chan government announced plans for non-citizens' involvement in the plantation sector. The new measure allowed for the renewal of leases and extensions, and transfers to non-citizens, each case being judged on its merits. The government would, in considering applications for transfers to non-citizens, be guided by the availability of land in the area to ensure that there is no shortage for citizens, and the ability of the foreign applicant to redevelop the land and involve and encourage local participation.<sup>16</sup>

The CILM was concerned that no citizen should be allowed to acquire more than his fair share of the natural resources. This share was defined as agricultural and house sites. It therefore recommended that control should be effected by imposing strict limitations on the number of pieces and the size of land which a person could hold or lease. Contravention of the statutory requirement of approval would invalidate the disposition. The CILM proposed that, in the latter case, enforcement should be by forfeiting the title to the land in excess of the permissible holding.

The difficulties associated with a statutory arbitrary limit to the quantity of land which any person or group of persons may hold is apparent from considerations of variations in the quality of land. It ought to be sufficient to strengthen the existing consent provisions by requiring a person who contracts to acquire an interest in land to disclose on his application for approval, *inter alia*, the particulars of any other land in his possession. If applications were to be effect-

ively scrutinised and the records were to be kept at the Provincial Land Registry and consulted whenever necessary, it would be possible to prevent individuals acquiring excessive holdings of land. In terms of long-term reforms of unalienated lands, the CILM recommended conversion of traditional title to conditional freeholds,<sup>17</sup> instead of absolute freehold. The characteristic of the conditional freehold is that it is transferable only within the family. Implicit in this recommendation, the main controls on alienation are in the restrictiveness of the title, a feature of customary land tenure.

### (iii) Decentralising control

It was argued that benign laws which aim at protecting property rights of natives are in essence discriminatory against non-automatic citizens and as such infringe the constitutional precept of 'equality of citizens'. The application of these laws against this group of citizens therefore became invalid in September 1985,<sup>18</sup> and once there is a willing seller and buyer a proposed transaction cannot be prevented.

Prohibitions against 'direct dealings' with non-citizens have been criticised as being counter-productive.<sup>19</sup> For even where there is a willing vendor and purchaser, transfers only become possible via the state - a slow and expensive process. Similar inconveniences accrue upon any proposed transfers for short terms or as security. It has even been posited that bureaucratic delays have been the cause of a rapid growth of informal 'direct dealings', in violation of policy.

The existing administrative and procedural machinery to obtain approval to land transactions generally has been a source of a great deal of complaint. The almost absolute powers given to the Minister permits abuses. Authorities suggest that where an administrative discretion is given to the Minister he need not give reasons for his decisions<sup>20</sup> and there is no right of appeal therefrom. However, if the Minister chooses to give reasons, the court may review the decision if the stated reasons are manifestly absurd,<sup>21</sup> or indeed are unconstitutional. It is also arguable that the Minister, in the exercise of his discretion to approve the disposition of state leases, is exercising powers of a landlord or trustee and is therefore bound by the common law rule of 'reasonableness'.<sup>22</sup> This would appear to be an aspect of the general principle that 'a discretion must be exercised reasonably', and there is no such concept of an 'unfettered discretion'.<sup>23</sup> The courts will no doubt find guidance from the authorities in other common law jurisdictions. In *Associated Provincial Picture House Ltd.*



v. *Wednesbury Corporation*,<sup>23</sup> Lord Greene M.R. expressed the basic principles governing the exercise of a discretion as follows:

- (i) The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.
- (ii) It is true that the discretion must be exercised reasonably - however, ... 'unreasonable' is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must properly direct himself in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey the rules, he may truly be said to be acting 'unreasonably'.

With reference to delays, there is a Nigerian authority to the effect that the order of *mandamus* is available only to compel the performance of a statutory duty. It will not lie to compel the exercise of a discretionary power conferred by statute, and therefore the Court cannot compel the Minister to approve a transaction.<sup>24</sup> *Quaere*, however, whether *mandamus* will not lie to compel the Minister to decide one way or the other where there is undue delay on his part.

The solution proposed by Knetsch and Trebilcock to complaints of delays in getting decisions on applications for leases or approval for transfer is to eliminate the restrictions in favour of unrestricted direct dealings. But to adopt this solution might be to sacrifice the national interest. It is submitted that the interest could, however, be ensured and the decision-making process speeded up if the powers were to be vested in the Provincial Land Boards. This suggestion is a realisation of the Directive Principle in the Constitution for 'substantial decentralisation' of forms of government activities.

### (c) Land to the User

The CILM expressed as a basic principle of land tenure that the law should favour those who need land and will use it. It stated as a limitation on the principle of indefeasibility of a registered title the acquisition of land by use. The Commission, however, did not discuss the machinery to realise this objective

beyond suggesting that, if land remained substantially unused for ten years, an application should be made to the Land Court to grant a lease of the land to a person who needed it.

The state has always had the power to forfeit a government lease for breach of development conditions and grant the land to a person prepared to use it. Beyond this there is no machinery to divest title of the owner and vest it in the user of land. 'Limitation', we have observed, has no application in New Guinea, though the concept is applied in Papua.<sup>25</sup> However, in its operation limitation is negative, i.e. it is not intended to protect the user or person who occupies land, but to penalise the owner who is out of possession. It bars the owner who is out of possession. It bars the owner from seeking the aid of the court in recovering his land and at the same time destroys his title but does not operate to vest the interest in the user.<sup>26</sup> It is based on long occupation by an adverse possessor for twenty years and not on the user of land.

The Simpson Report had recommended the introduction of the principle of prescription to land.<sup>27</sup> This is a process whereby possession and use of land continuously for a prescribed period would operate to vest title in the adverse possessor. Prescription operates positively and confers title on the person in occupation. It is the *de jure* recognition of a *de facto* position.

Legislation could very well go further and give the Minister for Lands the power to divest title of the owner and vest it in the developer of land. The Rural Farmlands (Grant and Regrant) and the Urban Leaseholds (Grant and Regrant) Acts enable the Minister of Lands in Tanzania to implement this principle.<sup>28</sup> In Papua New Guinea the Constitutional provisions might well be an obstacle to the implementation of such a radical land policy except in relation to the non-citizen, particularly the absentee owner.

## 2. CONSTITUTIONAL INHIBITIONS

In terms of the recommendations of the CILM, the main method of enforcing land policies is to reserve in the state effective controls backed by a power of revocation for breach. This technique is a feature of the government lease and the proposed constitutional fee. The Constitution, however, purported to set out the limits on compulsory acquisition of land, which is defined to include acquisition 'by forfeiture or by extinction of rights otherwise than by way of

reasonable provisions for limitation, prescription or adverse possession'.<sup>29</sup> It is true that property protection is a qualified right and therefore subject to general qualifications in the national interest. Again, these qualifications are exhaustively stated and do not appear to embrace legislation with an object of securing land development or utilisation.<sup>30</sup>

In conclusion, the Constitution is unduly inhibitive. It would have to be amended in order to express, as a general qualification on qualified rights, a public interest in securing the development and utilisation of land for a purpose beneficial to the community. Without such an amendment the enforcement of these policies is severely restricted and becomes unduly complicated.

### 3. TAX FORMULAE

An alternative scheme which has been suggested is the introduction of a tax system as a means of ensuring that idle land is used for development. There are a variety of formulae, but two types have been proposed, and these deserve consideration:

- (a) The introduction of a tax on all agricultural land with remittance, if the land is productively used.
- (b) The imposition of a tax on unused clan lands.

The latter model was seriously considered by the East New Britain and Eastern Highlands Provincial Governments.<sup>31</sup> But any tax formula as an indirect method of ensuring land use tends to be a cumbersome method. It would entail the setting up of an elaborate machinery under which a new tax liability would be imposed and assessed. There would be need for the making of returns and their scrutiny with, ultimately, the remission of the tax under the first formula in the majority of cases. The identification of the owners of every parcel of land, developed or undeveloped, is a pre-condition of the tax system.

In cases of non-payment, proceedings would have to be taken in court for the recovery of outstanding taxes, with the complications of court process. The tax system is a very roundabout, elaborate and expensive method of achieving the objectives of the CILM. The CILM preferred the more direct method suggested in the preceding paragraphs. The essential difference between the two techniques is that the one entails forfeiture, with provision for the payment of compen-

sation to the landowner. The other entails compulsory sale of the land by the court and the payment of the purchase price to the landowner after deduction of tax. The intention of the CILM was not to obtain revenue by taxation but to ensure that the land is occupied by someone who will use it productively.

## NOTES

1. S.25(1) Constitution.
2. See ante, Chap.5.4.
3. Ante, Chap.6.
4. Para. 54.
5. 'The magic of property: turn sand into gold - give a man the secure title of a bleak rock and he will turn it into a garden. Give him a nine-year lease of a garden and he will convert it into a desert'.
6. Land Policy and Economic Development in Papua New Guinea p.110.
7. Para. 4.20; ante, pp.121-122.
8. Para. 4.27; ante, pp.122-123.
9. See ante, p.55.
10. S.53(5)(c) of the Constitution.
11. Cf. S.73 of Cap. 185.
12. Land Law and Registration, p.238.
13. S.69 of Cap. 185.
14. S.70, *ibid.*, cf. s.13, Land (Underdeveloped Freeholds) Act 13 of 1970 Cap. 193.
15. Statement of Mr. Kavali, Minister for Lands, to the House of Assembly, 1974.
16. See 'Major Conflict Looms over Plantations'. The Times, 25 September - 1st Oct., 1981.
17. Para. 3.49.
18. Ante, p.158.
19. Land Policy and Economic Development in PNG by Knetsch and Trebilcock, particularly at pp.24, 65. Draft Report of the Task Force on Customary Land Issues (Aug. 1982) pp.5-6, 9 et seq..
20. *Liversedge v. Anderson* (1942) A.C. 206; *R. v. Gaming Board, ex parte*

*Benaim* (1970) 2 Q.B. 417; the Court in *Sausau v. The Police Commissioner* held that failure of a quasi-judicial body to give reasons for its decision will not invalidate the decision. The Supreme Court was, however, prepared to formulate a rule that reasons should be given if expressly requested; (1981) S.C. 206.

21. *Gumach Plantations Ltd. v. Thomas Kavali and the Independent State of PNG*, WS 830 of 1980. See also *Assoc. Provincial Picture Hse. Ltd. v. Wednesbury Corp.* (1948) K.B. 223; *Padfield and Ors. v. The Minister For Agric. etc.* (1968) A.C. 997. In the *Assoc. Picture Hse Case*, at page 228 and 230, Lord Greene M.R. stated, the case being one where abuse of a discretion power was alleged, that:

when a discretion of this kind is granted, the law recognises certain principles upon which the discretion must be exercised, but within the four corners of these principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law... That the decision of the... authority can be upset if it is proved to be unreasonable really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether.

In *Padfield's Case*, Lord Reid, at p.1030 of the report, sees the order of mandamus as running to the Minister under the Act in question, where the Minister, by reason of having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and object of the Act.

22. Ante p.93.
23. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1947) 2 All E.R. 680.
24. *The Queen v. The Minister for Lands Ex Parte The Bank of the North Ltd.* (1963) N.N.L.R. 58.
25. Ante pp.32.
26. See generally, Wade H.W.R., *Constitutional Fundamentals*. (1980) pp.43-6. Simpson, *Land Law and Registration*, 8.12. Ballantine, 'Title by Adverse Possession'. (1918) 32 *Harvard Law Review* 135.
27. At p.45.
28. James R.W., *Land Tenure and Policy in Tanzania*, Chap.9.
29. See S.52(4) and (5) of the Constitution.
30. S.38(2), *supra*, pp.164-166.
31. See *Post Courier*, Friday June 23, 1978.

## FURTHER READING

James R.W., *Land Tenure and Policy in Tanzania*. (1971).

James R.W., *Nigerian Land Use Act: Policy and Principles*. Univ. of Ife Press (1985).

CHAPTER ELEVEN  
LAND TENURE AND DEVELOPMENT

## 1. INTRODUCTION

A legal system is at the same time a reflection of and an instrument for realising the goals (economic, social and political) set by a people, or rather, by their leaders. This proposition is particularly true of the land tenure system, which is the focal point of development in an agricultural economy.

Development planners and economists have in the pre- and post-Independence periods focussed on the agricultural sector in Third World countries as the primary hope for development. Since this sector has received extensive treatment in the literature, it would suffice to summarise its probable contributions to the overall economic development strategy.

- (1) Agriculture may serve as a supplier of food and raw materials. (In the developed nations, industrialisation began with the processing of such agricultural products as grain, e.g. into whisky, and of cotton, e.g. into cloth).
- (2) Agriculture may serve as a source of foreign exchange earnings. (Foreign exchange will, to a large extent, determine how fast Third World countries will develop economically; in particular, foreign exchange is required for the importation of necessary tools and machinery for industrial development).
- (3) Agriculture may serve as a market for industrial products. (If farmers enjoy rising incomes based on increased productivity, the market for non-agricultural products will be enlarged. This is of special importance, given the limited markets that currently exist for domestically produced manufactured goods, which in turn operate to make such production uneconomic).

- (4) Agriculture may serve as a basis for many industries such as agricultural implements, machinery for farming, fertiliser and pesticides.
- (5) Agriculture may serve as a major supplier of capital for industry. (Even small increases in savings in the rural sector, where the overwhelming majority of the population reside and are occupied, will contribute significantly towards reducing national dependence on external sources for development financing).

The role of land tenure in effecting agricultural development has also been extensively dealt with. Suffice it to say that, although it is generally recognised that 'land tenure' cannot build roads or grow food and by itself can work no economic miracles, it can, however, create the framework within which the economic and social energies of a people may be fruitfully mobilised. In particular, it is the key to realising policies on the commodity or the security aspects of land, credit and (investment), individualism or collectivism, etc.

The literature on traditional land tenure systems in the Pacific and Africa concludes with the proposition that the pre-colonial systems must be changed if the agricultural sector is to play its rightful role in economic development. It is generally asserted that customary land tenure impedes agricultural progress, hence the need for reforms. Land tenure changes, like all legal changes, must, however, be conditioned by the political economy of the particular country.

Speaking generally on the relationship between law and development, and a theory of legal 'transplant' in developing countries, Robert Seidman remarked that the agenda of history limits the 'value sets' which might be adopted by these countries in their development strategy to three broad categories, viz. the 'subsistence model', in which rights and duties are largely dependent on status; the 'capitalist model', in which the legal system permits the norms of economic activities to be defined by the parties themselves under the rules of contract law; and the 'socialist model', which derives its norms from the physical planning of specific economic activities. Seidman recognised that his list of models was not complete but suggested that other socio-economic and their corresponding legal options (e.g. feudalism) were not realistic alternatives for developing countries. 'History', he therefore concluded, 'limits the choice of jural themes... to a catalogue of three entries: Status, Contract and Plan.'<sup>2</sup>

One might extrapolate two further propositions from Seidman's analysis:

each socio-economic option has its correlative form of land tenure structure; and secondly, a tenurial system constructed in the context of and for one model will not adequately function in another. These propositions, if they are correct, set serious limitations on the theory of legal transplant. It is argued herein that they are borne out by a number of important studies made of the land tenure systems of some developing countries. The possibility of an eclectic developmental model utilising an eclectic land tenure structure as is adopted in Papua New Guinea poses interesting speculations.

## 2. CAPITALISM AND TRADITIONAL TENURE

The land tenure system of a subsistence economy is characterised by its communal nature and the exclusion of individual ownership of land. Land rights of an individual flow from his group membership and are based on need and use. Though original titles were acquired by settlement or conquest, acquisition by purchase was unknown. Land utilisation is based on extensive rather than intensive farming, and on labour intensive techniques. The corresponding techniques of land use (e.g. shifting cultivation and bush fallow) reflected the level of technology attained in the society. Dispute settlement mechanisms within groups were characterised by 'settlement' rather than 'adjudication' objectives. The 'security' notion of land in the traditional system excluded any 'commodity' concept of land.

Paliwala, et al., in their analysis of the 'Economic Development and the Changing Legal System of Papua New Guinea',<sup>3</sup> observed that, during the colonial period, the western powers imposed on their colonies with subsistence economies a 'western diffusionist' model of development. The norms of free enterprise and the operation of the market and the money economy were important aspects of the structure.

From all accounts, and in particular that of the East African Royal Commission (EARC),<sup>4</sup> a subsistence tenurial system is an anathema to the free enterprise economy. In particular, the concept of communal ownership, the prohibition on dispositions of land and the absence of clear individual titles prevented (i) a free market in land, thus preventing agricultural land from passing to the most efficient farmers; and (ii) the use of land as security to raise finance for development. The EARC argued that without a 'transformation' to individual ownership, the traditional system will either remain backward or become dysfunc-

ional and act as a brake on modernisation.

In deference to these arguments, the Administration in the post-War periods in Papua New Guinea adopted radical changes in policy relating to indigenous economic development and the role of customary land. The protectionist or status quo policy of the early period gave way to that of preparing Papua New Guineans for 'full participation in the wealth and government of their country'. This was by the adoption of, *inter alia*, new forms of production which included the individualisation of land holding. Western concepts of private land ownership and land usage were identified as being the best for all peoples and all lands, alienated as well as unalienated.

We have indicated that the model has always had its problems. First, there was local resistance arising from suspicion of the motives of the colonial administrators. Secondly, a successful transformation programme would involve heavy expenditure to achieve systematic conversion and registration. No colonial administration was prepared to finance the implementation of a total programme. Thirdly, even with massive financial commitment, Kenya's post-Independence experience has high-lighted (i) the 'social' costs arising from the inevitable consequence of landlessness; and (ii) the tensions between the new system and traditional concepts, particularly of inheritance.

The cost of a transformation programme in social terms was predicated in the **Swynnerton plan**, which was adopted in Kenya:

Holdings of an economic size [should be created] by consolidation...or by enclosure of communal lands; the able African must not be debarred from acquiring units in excess of any minimum laid down for the area...That he will be 'sold out' if he defaults must be accepted by any farmer in applying for loans... Able, energetic or rich Africans will be able to acquire more land, and bad or poor farmers less, creating a landed and a landless class. This is a normal step in the evolution of a country.

Without a complementary industrial 'take off' to provide employment opportunities for the landless, they become the focal point of national instability.

A number of important studies have conclusively proved the point that the traditional system is flexible, and that even without the adoption of an official

transformation policy, new economic pressures influence changes in the direction of capitalism by the infusion of new values, technology and skills, and the emergence of cash cropping which gives an economic value to land. Permanent land rights soon develop and the traditional system gradually and imperceptibly becomes disrupted. C.M. White<sup>6</sup> attested to the effect of cash cropping, which contributed to the individualisation of land tenure in all the provinces he studied in Northern Rhodesia (Zambia). There is compelling evidence of this evolving pattern of land tenure for similar causes in some of the studies on West Africa. Asante's 'Interest in Land in the Customary Law of Ghana - a New Appraisal'<sup>7</sup> is the most exhaustive.

In Papua New Guinea, Ward described a rapid growth of informal and often non-customary dealings in unalienated lands. These included the clan land usage agreement which permitted an individual member of a clan to have exclusive use of a piece of land for agricultural production for the market; and 'contrived disputes' which are designed to produce binding declarations of individual titles to land.<sup>8</sup> David Hulme in the Special Land Tenure issue of the *Melanesian Law Journal* (1983), documents the evolution of what he termed 'an ingenious administrative legal mechanism', the 'lease-leaseback system'.<sup>9</sup> These adaptations are all intended to bring traditionally-owned lands into the western economy.

The 'unofficial' changes took place in a haphazard, disorderly and costly manner. In some cases they were accompanied by conflicts within and between traditional land-owning groups, causing wastage of money and time on law suits rather than expenditure on development. This has been particularly the case in West Africa, where illicit trading by individual members of their group land became prevalent. This state of affairs was summed up in the admonition that buying '[family] land was buying a law suit'.<sup>10</sup> In Papua New Guinea attention has been drawn to the 'lack of equal opportunity' created by some of the changes, with the consequent danger of socio-economic stratification. Hulme warned that the 'lease-leaseback' practice tended to benefit prominent individuals: politicians and or successful businessmen in selective areas.<sup>11</sup> Equally significant are the inter-tribal tensions and bickering which are manifested in increased levels of tribal fighting caused from unclear land boundaries and the redefinition of land rights for cash cropping purposes.<sup>12</sup> At the micro level, the picture is, as we have illustrated, one of tension between traditional concepts and practices and the dictates of developing rural capitalism. At the macro level, the relationship between the traditional and capitalist sectors is one of 'chronic underdevelopment' of the former.

Mafeji,<sup>13</sup> using the tools of the economist in constructing a model of the colonial economy has reminded us that the theory of the 'dual economy', restated in recent years by Ann Seidman<sup>14</sup> as being the development of an export enclave isolated from the hinterland, is a fallacy, at best, a myth. He demonstrated that capitalism had, during the colonial period, impinged on important facets of the subsistence economy to the detriment of the latter. Fitzpatrick attested to this element of 'inter-relationship' between the pre-existing traditional and the new capitalist modes of production: the former provided not only land and labour for the latter but, most importantly, a form of social security for the maintenance of the latter's labour force.<sup>15</sup>

The structure depicted an economically dominant sector and a weak and subservient periphery. The complex of rules which regulated the relationship between the two was designed to secure and perpetuate the dominance and prosperity of the former and the inferiority and underdevelopment of the latter. The internal arrangement of a colony mirrored inevitably its external relationships with the colonial power. The related theory of neocolonialism graphically constructed by Fitzpatrick<sup>16</sup> would explain the official developments in land tenure as a deliberate colonial policy to create in the colony a 'big peasantry' in anticipation of Independence.

This proposition was earlier put forward by Sorrenson in order to explain the colonial administrators' interest in a transformation process in Kenya.<sup>17</sup> He asserted, on the basis of considerable documentary evidence, that there was a deliberate policy of creating a stable and conservative landed gentry that would provide a bulwark against radical policies in the post-Independence period. This class would also provide the structure for neocolonialism. However, what has become apparent with time is that the subsistence economy and, in particular, the land tenure system has little chance of surviving intact and co-existing with the dominant capitalist economy, and that structural changes become necessary.

The nineteenth century thrust of land reforms in western countries was, in Maine's famous aphorism, from 'status to contract'. This has been the gist of the recommendations in seemingly incompatible reports on reforming land tenure in developing countries in general and Papua New Guinea in particular. Nevertheless, the important variable of the recommendations has been the purported 'instrumentalities' of ownership, control and use. The CILM has moved the emphasis away from the individual of the western model and placed it on the 'progressive adaptation of traditional institutions'. The vehicles are new, but

the aim has not changed, i.e. to realise the mobilisation of land resources. However, legal history has taught that the form can substantially shape the substance.

### 3. TRADITIONAL TENURE AND SOCIALISM

The biggest obstacles to the implementation of a socialist ideology in countries where there is a traditional land tenure system have been the phenomena of group ownership and personal attachments to land. Traditional land laws are partly concerned with defining and maintaining the rights of group members to and in their land. These include succession rights. They are partly concerned with working out the relationship of the landowning group and outsiders. 'Strangers' are not readily accepted into a group and, in the absence of acceptance, can acquire land rights only through agreements and transactions which operate largely to their disadvantage.

The psychological characteristics alluded to above are best explained by reference to the much quoted passage of Burton-Bradley in his essay 'The Psychological Dimension':<sup>18</sup>

In the course of my work in Papua New Guinea I have become aware that the indigenous person has a psychological attachment to his land transcending the purely economic and legal arrangements of the superimposed alien culture, however liberal the latter might be. I find that he may go along with the formal arrangements in order to please, but in his thinking and at a deeper level his basic attitude to what is his land remains substantially unchanged throughout life, independent of any transactions and exchanges which have taken place. His land is the place where he was born, where he was subjected to primary enculturation, where he has lived the most important aspects of his life, where the values of his cultural-linguistic group have been reinforced, where, in most instances, he may die. As he grows up he learns that it is the place where his ancestors preceded him, and to which they may return, thus giving the attachment a magico-religious sanction. It is the place where his children and his children's children will follow. At the psychological level it is clearly an extension of the concept of self.

Except for isolated cases the traditional groups are not 'production units' but landowning and social entities. In the colonial era the group became at best

a marketing unit in which seeds of exploitation were planted. The Tanzania experience was that where the groups are settled in scattered hamlets, efforts to achieve social progress and to upgrade their amenities by bringing them to villages become well-nigh impossible. In 'Implementing the Arusha Declaration; the Role of the Legal System'<sup>19</sup> it was argued that the influence of the common law, which is largely protective of individual land rights, has been a major obstacle to the development of Ujamaa villages in Tanzania, a country where ninety-seven per cent of the land was in the subsistence sector. The plethora of land claims based on customs and protected by common law principles had a disruptive effect on the realisation of the Ujamaa village programme.

So, whilst African socialism eloquently advocated the fusion of the best elements of traditional society and socialist economy, it would appear from the Tanzanian experience that in the area of land tenure, claims to land rights based on traditional tenure must ultimately give way to effective state ownership, and new succession rules become inevitable if headway is to be made in the direction of a socialist reconstruction.

Theoretically, however, nationalisation is a logical development. Traditionally, land was vested in that social-political unit (e.g. the clan or tribe) which best served the interest of its members. In the modern society it is the state that has assumed many of the responsibilities of those entities and it is only logical that the ultimate ownership of land should be transferred to the state. This, it has been argued,<sup>20</sup> is the best way of ensuring the fair distribution of land, instead of certain individuals or groups acquiring more land than they need, while others have none.

#### 4. GROWTH AND REDISTRIBUTION MODEL AND AN ECLECTIC LAND TENURE SYSTEM

In the context of the premises stated at the beginning of the chapter it is finally necessary to offer some speculations on the inherent dangers of an eclectic land tenure system which is developing in Papua New Guinea in response to an equally eclectic developmental economic model. For a discussion of the model of development in Papua New Guinea one must turn to the analysis of Paliwala et al. in their 'Economic Development and the Changing Legal System in Papua New Guinea'. There they depicted the development strategy as being one of 'redistribution and growth'. This model combines free enterprise capitalism

with state controls in major areas of policy. In political terms, the state's function is not limited to the threefold functions of the classical school, but embraces positive obligations to exert controls in the national interest and to alleviate inequalities. In economic terms the direction is that of an export-oriented or cash crop economy, based partly on peasant agriculture and partly on investment by large foreign firms, which formulate their investment and trade policies primarily in terms of their profits and their own interests as determined by the state of the world market.

The 'national goals' of the Constitution set out the major social objectives of a welfare state: integral human development, equality and participation. The realisation of these objectives further justifies state interference in the affairs of the nation.

In formulating its proposals for land reform, the CILM was very much aware of government's commitments to these goals in the 'Eight Point Plan'. It therefore adopted as a major premise of its recommendations that 'land policy must be concerned with increasing production but even more concerned with the kind of society Papua New Guinea should become.' More specifically, the CILM was concerned in its proposals on land policy and administration to provide institutional checks for the avoidance of very unequal distribution of land rights and therefore the development of private landlordism, the division of 'haves and have nots' and, at the same time, to satisfy the needs of those who wanted land most and were prepared to use it well.<sup>21</sup> These are concerns one has come to associate with a socialist model. The CILM was, however, bound by the implications of the Eight Point Plan that:

Land policy should be an evolution from a customary base, not a sweeping agrarian revolution. Collective and individualist extremes should be avoided.

According to the fifth goal of the Constitution, development should be achieved primarily through the use of Papua New Guinean forms of organisation. This has led to the adoption of the 'improvement model', utilising the land group corporation as the basic unit of land ownership, and the registration of group title, thereby vesting complete control of group land in the groups.

The result is that what is proposed is a home-grown system adopting traditional forms of group corporation and dispute settlement and socialist methods



of state controls to promote proper land use, the satisfaction of needs for, and the avoidance of trafficking in, land; but encompassing and strengthening the evolving pattern of individuals' rights to use land. In essence, the individual was confirmed as the productive unit and not the group.

The contradictions arise out of constitutional orthodoxy of the kind one finds in the liberal democratic state and political biases against state ownership and the collectivity as a production unit. Orthodox property protection, we have seen, has led to the negation of state control of land owned by citizens of Papua New Guinea. In particular, the Constitution has safeguarded all the attributes of common law freehold ownership: (i) a citizen, including a citizen corporation, which owns land in freehold or for an equivalent interest is entitled to keep the land out of use or commit acts of waste, and (ii) a citizen, including a citizen corporation, with an unlimited quantity of land, is entitled to deny the use of land to those with no land or to permit the use of its land on its own terms. The founding fathers did not acknowledge the need to recognise as a national interest the control of land resources in order to realise the stated national goals.

We have referred to the decision of the National Executive Council, in the context of the national land legislation, that all alienated lands except those required for public purposes should be given back to the original owners or their descendants. The consequence of this policy would be to place the ownerless, including migrants in towns, at the mercy of the traditional group owners, who are becoming rapacious and demanding. They are now aware of land as a potential source of power and means of exploitation and are prepared to use it. Regrettably, the implementation of this policy would have adverse effects on any self-help programme adopted by government, which would need to look to the traditional owners for grants of land either on a partnership<sup>22</sup> or on a leasehold basis.

There is already evidence that mere group title would not necessarily ensure the desired land development. There is mounting criticism of the land redistribution programme in terms of the performance of the traditional owners who have been the beneficiaries of developed plantations but have failed to discharge their obligations of proper land utilisation. This omission has led to the serious deterioration of the plantations.<sup>23</sup>

Finally, there is the inherent danger that, notwithstanding the adoption

of policies geared to egalitarianism, the economic superstructure would be a major influence on developments in land tenure. The group corporations could well take on the shape and role of the modern company, exploiting those within and without for the benefit of the few who assert the leadership role in their affairs. In short, a weakness in the land reform programme has been the failure to provide for the group corporation as the 'production unit', an omission no doubt influenced by the rejection of 'collective extremes' by the Committee.

## NOTES

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16. See particularly, Fitzpatrick, *Law and State in Papua New Guinea*, Chap.5.
17. *Land Reform in Kikuyu Country*, Chaps. 13 and 14.
18. In Sack P. (ed.), (1974) *op.cit.*, p.34.
19. James R.W., *East African Review* (1973) p.179.
20. Sione Latukefu, 'Tradition and Modernisation in Pacific Islands'. *Public Prospective* Vol.5(2) (1976) p.22.
21. See *supra*, Chap.10.
22. A recommendation made by the Morgan Committee, see *Report of Committee of Review on Housing*, 31st January 1978, Port Moresby; see also *Self-Help Housing Settlements for Urban Areas*. Ministry of Interior (1973).
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CHAPTER TWELVE  
CONCLUSION: LAND TENURE REFORMS

1. INTRODUCTION

The CILM was established by the Papua New Guinean Government on February 16 1973, and invested with the responsibility of finding answers to a multiple set of problems. All had land tenure and policy implications. They were wide ranging, from policy and administration to dispute settlement and registration. Some were particularly urgent, e.g. those concerning plantations, especially in the Gazelle Peninsula, where the Mataungan squatting movement was at its height; and those which raised issues of land demarcation, particularly in the Highlands, where there was increasing violence, much of which had to do with unclear land boundaries. There were pressing issues of compensation payments for land alienated for inappropriate considerations, or through waste and vacant declarations. Many of these were the subject of expensive and protracted litigation in the courts and were the root of many squatting problems in the country. 'Alienated land' problems, therefore, were so urgent that they were the subject of an Interim Report, which the CILM submitted to government in June, 1973. The more long-term and far-reaching issues had implications of a social, economic and political nature and they ranged from those of the nature of land rights and future land policies to institutional forms and controls.

The Commission, whose membership consisted of ten Papua New Guineans, took only eight months to table its Final Report in the House of Assembly. The Report attested to the fact that it had received 258 written submissions and conducted 141 public hearings in 135 centres in all the districts of Papua New Guinea. The Report itself is an impressive document of over two hundred pages, with 132 recommendations on all aspects of land policy and tenure. These included responses to the issues alluded to above and recommendations on on-going researches into land policy and administration and the training of the land administration staff.

The Commission drew attention to the magnitude and seriousness of its task in the following passage:

The Report... is equivalent to the work of one man for eight years. Every District has been visited and indeed every Sub-District but three. Thousands of miles have been travelled; millions of words have been heard and read. Each chapter has been drafted and discussed at least three times before the final draft has been approved. Where appropriate, the draft chapters have been shown to people experienced in the subject of the chapter and their comments have been taken into account. None of the opinions or recommendations presented is presented lightly. (Para.2.1.)

It expressed the hope that its recommendations will solve many of the problems referred to it:

We have worked our recommendations out in enough detail, with due appreciation of the realities of the situation in which they would operate, to demonstrate that they are workable. We have also looked at land policy as a whole, and tried to make the recommendations of the various sections consistent with one another. We believe we are offering for consideration the basis of a new national land policy. We trust that Cabinet and the House of Assembly will give it early consideration, as we believe the country is in urgent need of a clear land policy. (Para.2.4.)

More than a decade has elapsed since the publication of the Commission's Report, and one decade since Independence. It is therefore apposite in an introductory work on land tenure to conclude with an assessment of the impact of the Report on the process of land reform and to venture some remarks about the future. The latter is particularly important for two main reasons: (i) the apparent impasse in the implementation of the Commission's recommendations; (ii) the changes which have been effected, though largely incremental or piecemeal, can themselves effect structural changes of the kind the CILM set out to avoid, if not reject.

2. TEN YEARS: A BRIEF ASSESSMENT

(a) Preparing for Land Policy Reforms

The Commission was aware that the thrust of its recommendations would challenge the established system of land administration. Also, that the priorities it asserted would threaten the privileges of the dominant commercial entities and the ambitions of the aspirant or emerging class of local entrepreneurs. In short, it was concerned that suitable legislative proposals should be placed before the National Assembly to effect those recommendations which gained Cabinet approval, and that the subsequent implementation of the legislation would not be aborted.

It stressed the need for proper training for the men and women who were to administer and man the new systems and, in particular, training for the staff in the land registry offices, the proposed Land Boards and those involved in the settlement of land disputes. It therefore sought to have established (i) a 'Policy, Planning and Research' unit in the Lands Department, charged with the task of working out detailed plans for implementing its recommendations at all stages, and to monitor their operations; and (ii) appropriate programmes in land management pitched at appropriate levels, at the tertiary institutions in Papua New Guinea.

Even before the Commission had reported, the Minister for Lands was able to advise in Parliament that the Cabinet had approved a new Policy, Planning and Research Committee in the Lands Department. That unit came to assume responsibilities for preparing policy and legislation submissions to effect the recommendations contained in the Report, to discuss and propose amendments, to draft legislation in order to ensure compliance with the spirit of the Report, and to work out administrative procedures for implementing the resultant legislation.

The unit had only marginal success. In a Report on the 'Organisation of Administration of the Department of Lands and Survey', which is still unpublished and restricted, the following warning was made as early as February 1975, and has, regrettably, remained unheeded:

I have to report with regret (but I hope with understanding) that the Policy, Planning and Research Committee set up by the Cabinet in the Department, and on the operation of which the Commission of Inquiry into Land Matters placed such store (11.32), is not working successfully as a Committee, although individual members are doing very good ad hoc work (including drafting

speeches for the Minister - time-consuming but not a particularly creative function).

The Committee had to overcome the initial problem of acceptance in the Lands Department, as it was viewed with grave suspicion by the established order. Its personnel, drawn largely from outside the Department, were subject to rapid changes. It did not have a free hand in determining its programmes. Priorities for land reform were set by the Minister and reflected political urgencies rather than those of the Commission. The preoccupation of politicians and the legislative institutions with the Independence Constitution and subsequent Organic Laws partly explains the loss of momentum in considering new land legislation.

Jim Fingleton, who was a member of that unit in the initial period has documented some of the other major constraints and we need only quote from his essay on 'Land Policy in Papua New Guinea':<sup>1</sup>

The manpower available to promote the land policy reform programme consisted of Posa Kilori (until late 1975), myself, and our staff of three in the Policy and Research Branch. We also had assistance from Alan Ward, who made fairly regular visits [from Australia] as an honorary consultant, Nick O'Neill, then Secretary of the newly formed Law Reform Commission, and Rudi James and Abdul Paliwala from the Law Faculty of the University of Papua New Guinea, but all these outsiders were available only when their normal duties allowed. The bulk of the work in preparing submissions to the National Executive Council (NEC), and following the lengthy processes through NEC's consideration of submissions, instructions to the Legislative Counsel during the drafting of bills, presentation of bills and their debate in Parliament, and final implementation of new legislation had to be carried out by the Policy and Research Branch, and its limited resources imposed a critical constraint on policy reform. In addition, under a cabinet system of government, the participation and co-operation of all affected ministries are essential to the gaining and survival of any policy reform, and in the case of land administration, this spread the net of involvement very wide.

In the area of training for land administrators there has been more success. The recommendation of the CILM was for short in-service courses (which were established at the Administrative College) and longer-term courses within a modular framework. Following a submission from the Policy, Planning and Research Branch,

the University of Papua New Guinea, in 1976, established the Diploma in Land Administration course in its Law Faculty. This programme was formulated as the theoretical module in the training model recommended by the Commission.

(b) **Short Term Changes**

Those legislative changes which sought to implement some of the Commission's recommendations were discussed in previous chapters. They comprise:

- (i) the Land Redistribution Act, 1974 and the Land Acquisition (Development Purposes) Act of the same year, to implement the proposals on redistribution of alienated lands (*supra*, Chap.7);
- (ii) the Land Groups Incorporation Act, 1974, which provided for the corporate nature of traditional groups for purposes of holding titles in group land (*supra*, Chap.3.3);
- (iii) the Land Disputes Settlement Act, 1975, passed to implement the proposals on the methods of resolving disputes involving land rights among Papua New Guineans;
- (iv) the Land (Ownership of Freeholds) Act, 1976, enacted to effect limitations on an alien's power to acquire freehold interests, and to convert freehold to leasehold estates (Chap.8.4);
- (v) the National Land Registration Act of 1977, and amendments to the Lands Acquisition Act, which were directed at clarifying government's title to state lands, resolving compensation and other claims thereto and confirming government's power to hold a pool of land (National Land) in order to realise its obligation to, in the words of the Commission, 'hold land for the benefit of the people of Papua New Guinea as a whole' (*supra*, Chap.4.3(c)).

One might characterise these reformative measures as 'urgent'. All but the third and fourth enactments were exclusively concerned with alienated lands. But even the dispute settlement machinery was part of the solution of the wider, 'law and order' problems which prevailed, particularly in the Highlands. Group incorporation was a non-starter, for the incorporation of recognised groups became meaningless without legislation to provide for registrable group titles. But here

again, the Land Groups Incorporation Act was intended to provide the institutional form for returning the plantations to indigenous Papua New Guineans.

To the cynic, the reform would appear to be selective in legislative efforts and invidious in implementation. The government's overconcern with National Lands has been for the clarification of its own title to land with the objective of making adequate land available for large scale ventures. These were embarked upon by government in collaboration with foreign multi-nationals, or sponsored because of their capacity to attract international aid.

It is also apparent that the legislature substituted for the recommendation on freehold conversion its own narrow perspective on capacity to hold freehold land. So whilst, for example, the CILM recommended the conversion of all freeholds to leaseholds of specified periods, the Constitution guaranteed the property rights of citizens, though it established the incapacity of an alien to acquire freeholds. The conversion legislation, rather than being social legislation as was intended, took on the form of implementing the constitutional directive on capacity to hold freeholds, and even in this limited role excluded from its ambit, by various 'exception clauses', estates which are obviously freeholds and come within its own definition (*supra*, Chap.8.4 & 8.5).

The CILM argued that the conversion of customary tenure to individual titles should not be a goal of the reform programme. It went on to recommend that the emphasis should be on the concretisation of group titles, with the individuals having 'occupancy' or other 'subsidiary' rights therein. Only in exceptional cases, because of developments in tenurial practice in the area in question, should a conditional freehold be recognised. Government has not only omitted to provide for group titles but has continued to make available and encourage the use of the machinery to effect the conversion of group lands into individual freeholds. We have seen that such titles enjoy all the attributes of 'ownership', including constitutional protection (*supra*, Chap.8.3).

(c) **Structural Changes**

In so far as a distinction is drawn between aliens and citizens for purposes of land holding, this may be regarded as a structural change. The incapacity of aliens to hold freehold lands is a feature of the legal system of many Third World countries as far afield as Nigeria in Africa, and Trinidad and Tobago in the West Indies. To the CILM structural changes, however, were those with

implications for the economic and social order of Papua New Guinea. It was in this respect that the Commission urged that land policy should be looked at 'as a whole', and it sought to make its recommendations consistent in order to form 'the basis of a new national land policy'.

However, we have seen that only a few of the recommendations contained in the Report have been realised, and implementation has been selective and piecemeal. It is also significant to note that the House of Assembly has only taken note of the Report, but has never adopted it. Consequently, implementation has achieved results either not envisaged by the Commission (e.g. the confirmation of non-automatic citizens' freehold land rights) or totally opposed to the spirit of the recommendations (e.g. a more effective individualisation and/or a 'commodity' notion of land).

The ambiguity of successive governments' attitudes to the Report has led to, and in a sense encouraged, the continuation of the polemics about tenurial reforms, which could well lead to major revisions of its important recommendations of a structural kind. In this context we may refer to the programme of land redistribution in general and plantation redistribution in particular, which foundered partly because of the deliberate misinterpretation of the recommended aims of the programme and partly from lack of finance; the latter not being unrelated to the former! Other areas of concern are (i) the 'commodity' concept of land, a notion rejected by the Commission but supported by vested interests; and (ii) land registration.

The English reforms of the nineteenth and twentieth centuries were aimed at assimilating the law of real property to that of personal property and thereby enhancing the 'commodity' notion of land. These objectives were achieved largely by devising a machinery to facilitate 'unrestricted dealings' over settled lands. In general the scheme of law reform was firstly to vest in the 'tenant for life' powers of dealing with settled lands, free from a third party's interests. This innovation was said to 'strike off the fetters against alienation which, in the process of time, had become attached to land'.<sup>2</sup> Secondly, the creation of a system of titles' registration which conferred indefeasible titles on the registered proprietors and simplified the process of land dealings, registration being structured to ensure that land becomes the object of 'brisk commercial dealings'.

In contrast, the CILM favoured the traditional 'security' notion of land, i.e. that the value of land does not lie solely in its quality as a marketable

commodity, but in its security to the present and future generations of owners. This idea is expressed by a Nigerian Chief as follows:

I conceive that land belongs to a vast family of which many are dead, few are living and countless numbers are still unborn.

The Commission was totally opposed to the notion of land being a freely negotiable commodity; it therefore recommended the proscription of 'direct dealings', except in very limited cases. This policy was expressed by the principle it offered that 'most land transfers should be through Government but some direct dealings in small lots be allowed'.<sup>4</sup> The restrictions were further justified on grounds of avoiding social divisions i.e. the landed and landless, in the society. The CILM alluded to 'the pressures' or 'popular demands' that were apparent for direct dealings between citizens and non-citizens and drew government's attention to this 'most serious subject', for its immediate consideration (para.3.42). Its recommendation was that those statutory provisions which prohibited customary landowners from selling or leasing land to third parties, other than to the state, should be of general application.

Restrictions on 'direct dealings' have been the subject of scathing criticisms by Knetsch and Trebilcock in their Report on Land Policy and Economic Development in Papua New Guinea. They urged the adoption of a policy of 'direct dealings' and are supported by the recently published Report of the Task Force on Customary Land Issues (1983). The main plank of the argument, which is the confirmation of capitalist relations within the Papua New Guinean society, is startlingly set out in the latter Report:

With the development of capitalist relations in the rural economy, there has been a rapid increase in formal and often non-customary dealings in land. In our view it is imperative for government to formalise some forms of direct dealing in land, i.e. to formalise the process that is already occurring. (Pp.25-26).

The Committee then went on to claim that the formalisation of direct dealings in land was a stated election policy of the ruling party.

The pressure for direct dealings and other capitalist arrangements in land

has no doubt been instrumental in supporting renewed interests in tenure conversion which operates to take the land outside of the prohibition in the Land Act (s.15) and into the realm of direct dealings (subject to controls) as defined by s.26 of the Land (Tenure Conversion) Act.

Developments in case law have gone to enhance the 'commodity' notion of land. In this respect reference must be made to the judgment of Pratt J. in *Re Sannga*<sup>5</sup> (affirmed by the Supreme Court),<sup>6</sup> that an automatic citizen has an unrestricted power of testamentary disposition of all of his property, except customary lands. Disposable property would no doubt include his converted freeholds.<sup>7</sup> 'If,' says Mr. Justice Pratt, 'in full exercise of his intellect and desire, a citizen wishes to make a will and thereby over-ride the provisions of his customary law, then I can see no reason why he might not do so, and the statute itself affords him the capacity even if his customary law forbids it'.

Prentice D.C.J., (as he then was), justified freedom of testamentary disposition on the basis of the need to equalise access to the legal process:

The desire to make proper testamentary disposition of his property comes within the legitimate needs and aspirations of a citizen. Equalization of access to the legal processes and services necessary to achieve these needs and aspirations, including (I conceive) the drafting and making of effective wills of which probate can be granted by the Court is a declared aim.

A consideration of the law of 'disinheriting heirs' is beyond the scope of this work. Suffice it to note the recommendation on this subject made by the Law Reform Commission in its working paper on the Law of Succession.<sup>9</sup> That Commission recommended the introduction of a concept of 'dependents' rights'<sup>10</sup> in the laws of Papua New Guinea so as to ensure the application of some traditional norms in the distribution process.

The history of land registration in Papua New Guinea has been discussed in Chapter Three. Indeed, the most controversial subject of law reform has been that of titles' registration. As is so well known, the establishment of the CILM was a result of the reaction of indigenous politicians to the package of four Bills introduced to implement Simpson's recommendations on land registration in Papua New Guinea. Although there is general agreement that some form of 'title' registration' of 'unalienated' lands is a desirable objective, consensus ends

there and conflicts pervade the important issues of substance and procedures. The disagreements are firstly, on the objective of registration (economic or social?); secondly, on the nature of registrable titles (group or individual?); thirdly, on the degree of application of the system (sporadic or systematic?); fourthly, its relation to substantive law (whether custom or statute law would apply to registered land); and fifthly, its relation to the existing registration system (a unified or a dual system?).

The CILM addressed all of these issues from its political and social standpoint. However, attempts to draft appropriate legislation have been thwarted by personality and ideological differences between those concerned with the preparation of Cabinet submissions and instructions and those whose responsibilities were to advise and draft new legislation. There is also an apparent lack of political will to complete the task, a difficulty compounded by the absence of administrative competence in the Lands Department, and an inability to co-ordinate this major project.

In a study of this kind, one cannot do more than state the conflicts in outline:

- (1) The recommendation of the CILM, which was for the 'immediate' enactment of legislation for the registration of customary lands, was justified mainly on social grounds, i.e. as a mechanism to prevent disputes arising from uncertain and overlapping boundaries within and between traditional groups. The Task Force, on the other hand, emphasised the economic considerations. The salient arguments of the latter were:
  - (a) registration is a necessary step to 'direct dealings', therefore a prerequisite to the realisation of the 'commodity notion' of land;
  - (b) registration ensures 'security of interest' which is a pre-condition of productive activities on the land; and
  - (c) finally, it is an important development in order to promote joint ventures with non-customary third parties.<sup>11</sup>
- (2) It is apparent that, due to manpower and financial constraints, one's perspective on the objectives of a registration system would be a major influence in resolving the issue of its application.

The CILM opted for 'systematic' adjudication and registration in selected areas, but did not rule out sporadic registration in exceptional cases for economic reasons. In contrast, the Task Force, which emphasised the duty to provide landowners with means of access to capital for development and opportunities for joint ventures, opted for sporadic registration:

Sporadic adjudication allows the greatest degree of selectivity, in that title is adjudicated precisely when and where it is required, e.g. to select only those landholders capable<sup>12</sup> of benefitting from institutional credit.

In arriving at this decision the Task Force was prepared to overlook the long-term disadvantages of 'sporadic' adjudication and registration. These are repetitiveness; lack of publicity (which presents a much greater opportunity for fraud and corruption, or merely oversight), and the tendency towards social stratification arising from the process of selectivity.

Sporadic legislation has at times been branded as being 'vicious in principle', for it means that each holding is given isolated consideration when it happens to come up for registration, instead of the conflicting claims of neighbours all being thrashed out at the same time under a systematic registration scheme.

- (3) Remarkably, there is agreement on and support for the incorporation of traditional groups and the registration of group titles. It is also generally agreed that the group should be able to make grants of occupancy rights and leases to individuals or sub-groups wishing to use the land. But whilst the CILM regards the individual base title as the exception, other submissions emphasised a necessity for full negotiable individual titles as the basis of development.
- (4) An essential component of Simpson's recommendations was the substitution of a new code of law, based on the common law, for 'uncertain customs'. The unified registration enactment should therefore establish a complete code of property law which provides

firstly, the machinery for registration and secondly, the operative or substantive rules governing security, proof of title, and the creation and transfer of interests therein. On the other hand, the Task Force would seem to envisage, if not a dual registration enactment, at least a separate customary register regulated by rules contained in a new Part (to be enacted) of the Land Registration Act, 1981. The 'commodity notion' of property adopted by this Committee would suggest the adoption of a unified property code incorporating appropriate common law principles to effect mortgages, leases and transfers of land.

The CILM, being suspicious of the consequences of the flexibility of custom, set out in its Report a body of detailed rules defining the landholders' powers, and the basic terms and conditions which should govern land transactions.

One might venture to put forward the following principles for a programme of land reform:

- Adjudication should be systematic but allow for sporadic registration where there is a clear demand and a real need for customary interests to be confirmed at that level.
- Emphasis should be on group title, with provisions, where custom allows, for the perpetual (but conditional) estate of the individual.
- Usage and occupational rights of individual members of a group should be recognised and registered where there is a clear demand and a real need for it.
- Leases and mortgages to strangers should be permissible and registrable.
- Subsidiary rights recognised by custom should be protected.
- A new integrated code of property law should complement the registration system.

In relation to the administration of land it is generally recognised that the existing structure is far too heavily centralised. With the extension of the



registration system, the decentralisation of administrative processes would become even more necessary. The inhibitions on the application of land policy which were discussed in Chapter Ten require reconsideration and the recommendations which were made for the enactment of a national prescription/limitation enactment (*supra*, Chap. 10.1(c)) should be effected.

Finally, the principle of 'supremacy' of the Constitution, which is discussed in Chapter One, would seem to pose a problem in the application of penal provisions contained in the Land Act. This is because of s.159(3) of the Constitution. As an illustration we may refer to s.47 of the Land Act, which empowers the Minister to impose a fine instead of forfeiture for breach of covenant in a state lease. The Constitution is clear that Parliament cannot vest penal powers in any person or body outside of the National Judicial System.

## NOTES

1. At p.121 in Weisbrot D. et al. (ed.s), *Law and Social Change in Papua New Guinea*. Sydney: Butterworths (1982).
2. *Cardigan v Curzon-Howe* (1885) 30 Ch.D 531 at 537, per Chitty J.
3. Colonial Office Legal Library: Folio 13080, dated April 1917, and cited by Elias T.O., *Nigerian Land Law and Custom*. Routledge and Kegan Paul Ltd., 3rd edn., p.182.
4. *Op.cit.*, para.2-13.
5. N. 379/1982.
6. [1983] P.N.G.L.R. 142.
7. See Report of the CILM, para.7.4.
8. *Public Curator of Papua New Guinea v Public Trustee of New Zealand* [1976] P.N.G.L.R. 427 at p.431.
9. Working Paper No.12 of 1978; See also Report of the CILM, para.7.22.
10. This concept can take various forms: a stipulation that testamentary capacity is subject to the restriction that it must be exercised in favour of persons who would be entitled to claims in the land if the testator had died intestate; or a recognition of free disposition with a power in the courts to vary the testator's directions on the application and in favour of near relatives; or a guarantee to dependent relatives of a right of residence. These alternatives, which are constructed from the Reports of the CILM and Law Reform Commission, are discussed by Haynes C.E.P., 'Succession to Land in Papua New Guinea: Choice of Law'. *Melanesian Law Journal* (1981) p.98 et seq..
11. Pp.7 et seq..
12. P.10, adopting passages from West, 'Registration of Titles: Some Practical Issues in Policy Making'. Mimeo, Dept. of Land Economy, Univ. of Cambridge (1975).

## FURTHER READING

Ward A., 'The Commission of Inquiry into Land Matters, 1973: Choices,

Constraints, and Assumptions'. *Melanesian Law Journal* (1983).

Fingleton J., 'Land Policy in Papua New Guinea'. In Weisbrot D. et al. (1982)  
*op.cit.*.

Fitzpatrick P., 'The Political Economy of Law in the Post Colonial Period',  
*ibid.*, Chap.3.

Report of the Commission of Inquiry into Land Matters (1973). Chap.s 3, 4 and  
11.

Report of the Task Force on Customary Land Issues (1983).