

Berkeley Law

From the Selected Works of Robert Cooter

August, 1989

Issues in customary Land Law

Robert D. Cooter



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**INSTITUTE OF NATIONAL AFFAIRS
DISCUSSION PAPER NO. 39**

ISSUES IN CUSTOMARY LAND LAW

**Robert D. Cooter
Professor of Law
University of California at Berkeley**

August 1989

**Institute of National Affairs
P. O. Box 1530
Port Moresby, Papua New Guinea
Telephone: 21 1044/45**

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FOREWORD

This publication is in two parts, the first part comprising five essays and a series of recommendations on land registration and the second part a number of case studies in land court hearings.

In the first of his essays Professor Cooter asks: "Who Owns the Land in Papua New Guinea?" and notes a divergence in thinking between strengthening land clans to become the business vehicle and greater individualisation of land ownership. This choice, he says, should be left to the evolution of custom, not made by central policy decision. The author then, in his second essay, tells how to make customary law into the common law. Strengthening customary law in this way he believes will promote economic development, redistribute wealth and prevent crime. The urban squatter is the subject of the middle essay which cautions against seeing this issue (adverse possession in formal legal terms) as mere lawlessness, pointing to its historical role in Papua New Guinea in redistributing land according to need which has given this country an enviable record of equality. In his final two essays, Professor Cooter looks at government's role. He argues the case against government monopoly in customary land deals and proposes three steps for limiting government's intermediation. Finally he considers the matter of government's liability for errors in customary land registration suggesting specific legislation limiting liability to proven harm caused by negligence or crimes committed by government officials.

The second part takes up the theme of the second essay - the evolution of customary law into common law. It comprises analyses by Professor Cooter of sixteen cases from local land courts.

INA thanks Professor Cooter for his contribution to the understanding of a very complex, important and topical facet of Papua New Guinea's development. We hope that his initiative in codifying customary land law is carried on. We acknowledge gratefully the financial assistance provided by the Asia Foundation in bringing Professor Cooter to Papua New Guinea and in producing this publication. Finally we thank Michael Trebilcock for kindling in his colleague an interest in coming to Papua New Guinea.

John Millett
4 August 1989

PREFACE

I am a professor of law at the University of California, and a Ph.D. in economics, who spent approximately two months beginning in May of 1988 travelling in Papua New Guinea. The purpose of my trip was to investigate customary land ownership with an eye to economic development.

I spent most of my time meeting with land officials, especially magistrates in the land courts. One month was spent in East Sepik Province observing the implementation of the province's Customary Land Registration Act, two weeks were spent in the highlands, a week was spent visiting Madang, Lae, and Rabaul, and a week was spent in Port Moresby. The openness of officials and their eagerness to share experiences is a great strength of government in Papua New Guinea. I have responded to candor with candor. The five essays that follow convey my analysis of customary land law and its implications for public policy. Papua New Guineans know that an outsider like me is prone to partial vision, so I trust that they will retain what seems valuable in my views and discard the rest.

Papua New Guineans are among the oldest agricultural peoples on earth. Unlike other peoples of comparable antiquity, they have not degraded the environment or created permanent classes of noble and serf, or landlord and tenant. There is in Papua New Guinea freedom and considerable prosperity. I hope that my admiration shows in these essays.

My trip was sponsored by the Institute of National Affairs in Port Moresby and financed by the Asia Foundation. I was received with warmth and hospitality throughout Papua New Guinea. I cannot acknowledge all the people who helped me as I made my way about the country, but I would at least like to thank the people listed on the following page.

Robert D. Cooter

TABLE OF CONTENTS

	Page
Foreword	(i)
Preface	(ii)
Acknowledgements	(iii)
Table of Contents	(iv)
 SECTION A: ESSAYS	
Recommendations on Land Registration	1
Appendix: Resources Needed for Land Registration	7
 Who Owns the Land in Papua New Guinea?	10
 How to Make Customary Law into the Common Law in Papua New Guinea	18
 Making Squatters into Tenants and Owners	32
 The Case Against Government Monopoly in Customary Land Deals	43
 Government Liability for Errors in Customary Land Registration	51
 SECTION B: CASE STUDIES	
Case of Danga Mondo and Korugi Goi	58
Case of Relvi Utul and Allan Marat	59
Case of Nerijs Balanguan and Michael Varting	61
Case of Genaboru-Kibiso and Paul Lora Boiyango	63
Case of Mundua Imbo and Dambayagl Endemongo	67
Case of Hogeteru et al	70
Case of Mundua Imbo and Dambayagl Endemongo	78
Case of Enos Malakit and Jonah Tourai v Peter Tobung	80
Case of Notofana and Kofika Clans	81
Case of Mundua Imbo and Dambayagl Endemongo concerning the Land Gagl	83
Case of Tobuka and Anglimka, Customary Groups	86
Case of Liviko-Karafa and Namori-Sibite	90
Case of Ipao of Okiyufa and Apele of Masilakaiyufa	92
Case of Kefamo and Nagamiufa	94
Case of Ningalimbi No. 2 and Ilahita No. 3 Clans, versus Mamlimbi Clan	96
Case of Relvi IaUtul and Allan Marat, v. Asael ToMimi	100
 List of INA Publications	104
List of INA Contributors	108
List of INA Councillors	109

SECTION A

ESSAYS

RECOMMENDATIONS ON LAND REGISTRATION

Resource constraint upon registering customary land

I begin with some observations on the scope of the land registration problem relative to available resources. No one knows how many customary groups own land in Papua New Guinea. Indeed, no one knows how many customary groups there are in Papua New Guinea, because the census, in a glaring omission, does not record essential facts about clan membership. The scope of the registration problem cannot be known with certainty, but it is possible to make some guesses.

East Sepik Province has begun to register land systematically in the name of clans. My observations in the field near Angoram suggest that the most optimistic estimate of the rate of registration using available resources would be four clans per week. At that pace the registration of all clan lands in the province would take at least 20 years. I do not think that diverting further resources to quicken the pace of registration would be desirable. It seems unlikely that other provinces will be able to proceed on average more quickly than East Sepik, which is committed to registering clan boundaries. So it seems that Papua New Guinea cannot expect its customary land to be registered in less than 20 years, and the actual lapse of time will probably be much longer. (An appendix at the end of these recommendations explains the basis of my estimate in greater detail.)

Since the registration of customary land will take years, resources must be allocated carefully, keeping its purposes in mind. The primary purpose of registration is to preclude future disputes by creating a record of current agreements. Agreement over boundaries becomes more difficult when population pressure and cash cropping make land more scarce, and when elders die without recording genealogies, origin stories, and landmarks. The prospect of future difficulties lends urgency to the land registration process. Land registration should move quickly to record current agreements and postpone until the future attempts to resolve disputes. Resources should be allocated where registration can proceed the fastest and obstacles are fewest.

Where current disputes are pervasive and deep, there is no scope for systematic registration. Disputes tend to be more tractable in coastal regions and the islands than in the Highlands. In any region, however, there is likely to be agreement over some boundaries and disagreement over others. Registration must record agreements about boundaries between customary groups, whether they are families, subclans, clans, villages, or tribes. For example, in some villages the clans cannot agree upon their boundaries, but adjacent villages may be able to agree upon the boundary between them.

Self-registration

The problem of insufficient resources for land registration might be countered by streamlining the registration processes. The key to streamlining is enabling owners to do much of the work of registration themselves. As business opportunities expand, and as education diffuses, more customary groups will recognize the advantage of authoritative recorded boundaries. The land mobilization officers should invent ways for these groups to register land with minimal assistance.

A good start would be to draft standard forms which land owners can use to register customary title. Self-registration of customary groups will permit sporadic registration by clans who are too impatient to wait for the arrival of teams doing systematic registration. Short of self-registration, the land mobilization officers should use methods that draw upon voluntary labor of the clans, which is already occurring in East Sepik Province.¹

Systematic versus sporadic registration

Sporadic self-registration should occur to the extent that customary groups are able to proceed with minimal assistance. There are, however, economies of scale in the registration process that can only be captured by systematic registration. To illustrate, the registration process involves a lot of learning by officials. The knowledge that is gained can be used most efficiently by concentrating knowledgeable officials in a particular region and working systematically.

Systematic registration, however, presupposes dedication and enthusiasm on the part of the officials who carry it out. Systematic land registration in Papua New Guinea has shown fits of enthusiasm without sustained effort.² Although the registration of customary land in the name of clans is currently enjoying a spate of popularity among politicians and administrators, this enthusiasm will subside when the registration effort comes up against its inherent obstacles. Officials in different parts of the country have their own priorities. The systematic registration of lands is most likely to succeed in areas where local officials are committed to it. Fresh national legislation for systematic registration is not the most important means of increasing the certainty of customary ownership. If central authorities issue orders to reluctant local officials to systematically register land, nothing of value will be accomplished. Just as the people in the villages must have enthusiasm for registration before local officials can launch a successful program, so local authorities must have enthusiasm before central authorities can orchestrate land registration.

The effort and attention to detail demanded by registration exceeds the capacities of the central government administration. The Lands Department will fail if it tries to issue orders for officials to proceed with registration. Instead, the impetus must come from provincial officials who are intrinsically interested in, and dedicated to, systematic registration. Even though great human benefits will flow from successful registration, I remain skeptical concerning the number of local officials who have, or might acquire, the ability and commitment to carry it out.

Multiplicity of customary groups

There is confusion over what can be accomplished by registering customary land. Customary groups include the family, the subclan or lineage group, the village, the large clan, and the tribe. Each of these groups has powers under customary law that are recognized in the village courts and the land courts. A full registration of boundaries would encompass all of these groups and provide a map of their jurisdiction.

The situation can be understood by analogy to Australia. Australian families own plots of land that are located in the town of Cairns, which is located in Queensland, which is part of Australia. Each level -- family, Cairns, Queensland, Australia -- has recorded land boundaries. Similarly, the full registration of customary land in Papua New Guinea

would record boundaries for families, subclans, clans, villages, and tribes. I asked elders in East Sepik whether it would be easier and more desirable to register the boundaries of families, clans, or villages. Different answers were given in different places, although everyone agreed that all boundaries should be registered eventually. My view is that land registration officials should respect the judgment of elders when assigning priority to registering boundaries of customary groups. To illustrate, attempts to register boundaries between some clans in the highlands would provoke warfare, according to officials there, yet many boundaries between tribes have already been recorded by a faculty member at the University of Papua New Guinea.³

Respecting custom or concentrating ownership?

Some people think that registration of customary land should do more than record boundaries. Customary groups form a kin network whose members are interdependent. Rights and powers over land are distributed throughout this network. To illustrate, in some East Sepik villages, families subsistence garden on their own plots, the clan's permission is needed for a family to plant permanent crops, and the tribe defends everyone's land. Since ownership rights are dispersed in a kin network, the agreement of several people may be needed in order to make an investment decision. Thus the transaction costs of development decisions are high.

Concentrating all ownership rights in the hands of a particular group might reduce transactions costs, especially where choices involve decisions about economic development that customary law never contemplated. The logical conclusion is that concentration of ownership rights is necessary to economic development. The people who hold this view hope to concentrate ownership rights at the same time that land is registered. To illustrate, some people suppose that registering clan boundaries will give clans absolute, unitary title over the land. Others prefer to give absolute, unitary title to individuals by converting customary land to freehold at the time it is registered.

There is nothing in the East Sepik legislation that links registration with the concentration of ownership rights. The registration of customary boundaries under this legislation has little or no effect upon the legal powers of the groups whose boundaries are recorded. Their property rights are allocated according to customary law, as determined in the land courts. The registration of boundaries merely determines the jurisdiction of customary groups for purposes of applying customary law.

My own view is that a decision by government authorities to concentrate ownership rights through the registration process would retard economic development, not enhance it. Customary law represents an incentive structure for cooperation by kin in the production and distribution of goods. Kin ties, as supported by customary law, are the basis for long run business relationships for many Papua New Guineans. Compulsory concentration of ownership would disrupt this incentive system, erode long run business relationships, and possibly paralyze traditional methods of production and distribution.

Customary law must be allowed to evolve and modernize itself through the common law process as it operates in the land courts. This will happen naturally with the passage of time as people respond to business opportunities. There is already a legal framework that customary groups can use to form incorporated business groups with an explicit governing structure. Officials can assist customary groups in responding to

these opportunities, but officials should not force the pace of change. There is no "quick fix" by which central decision makers can bypass the evolutionary process.

I generally oppose conversion of customary land to freehold title because doing so destroys the incentive structure for cooperation and coordination among traditional groups. There are, however, some exceptions to this general policy. Custom is law designed for people bound together by kinship and freehold is law designed for people who have a commercial purpose but no enduring relationship. In towns and cities, the expansion of the market and the breakdown of kin groups has created demand for marketable land, which is pent up by the slow pace of land conversion. Customary land, consequently, jumps in value when converted. I think that customary groups who experience dissolution and want to distribute lands to members in freehold should be allowed to do so. This is an aspect of my general view that customary law is living law, which changes and develops according to the wishes of the people who are subject to it.

Preserving written records

In my travels I examined land records in various regions of the country and I found them to be uneven. It seems that many officials just cannot be bothered to record and file information properly. Registration has little value if the records are lost or illegible. Techniques for recording title must be devised with these human failings foremost in mind. Perhaps a central file should be established containing a card describing the boundaries of each registered clan. Boundaries could be traced upon a master map as the file grows.

Much hope is held out by East Sepik officials for establishing a computer system to record such information. Most computer systems have a software package with a name like "Filebox" or "Filecard" that provides an electronic method for recording and sorting file cards. Thus the file cards could be recorded on paper records first and subsequently entered into a computer when the technology becomes available. The great advantage of a computer for recording titles is the ease with which new data can be entered and multiple copies made of the updated files.

Common law process in the land courts

When I first flew over Papua New Guinea, I saw vast areas of land that were sparsely inhabited. I later learned that almost all of the land is divided by the local people into plots each of which bears its own name. Many disputes in local land court concern the precise boundaries of these named plots. The resolution of these disputes defines boundaries and creates a written record of them. The local land courts are, in effect, engaged in sporadic registration of land at the initiation of private disputants. Earlier I stated that the purpose of registration is to record current agreements in order to preclude future disputes. Resolving current disputes, which obstruct the registration process, should be carried out by the land courts, not by administrative officials. Adjudication is the business of courts, not administrators.

The land courts, however, accomplish more than recording boundaries and resolving disputes. In addition, they give an explicit, authoritative statement of customary law. Politicians and intellectuals often say that the law should express the Melanesian way of life, but it is a mistake to think that the underlying law can be declared by

Parliament, or anyone else. The problem is not to declare what people know, but to discover what is implicit in what they do. Melanesian legal principles are to be discovered while deciding cases in customary law, which must be done by courts, not Parliament. The most important goal of the land courts and the village courts is to develop customary law into the indigenous common law of Papua New Guinea.

The land courts do not need fresh legislation or additional powers to accomplish this creative task, which should inspire magistrates, but they need small improvements in administration and modest increases in resources. I have several concrete suggestions.

First, the magistrates are not being taught common law methods as applied to land. Their training for deciding cases in customary land law does not go beyond reading the Land Disputes Settlement Act. In addition to the legislation, they need to read, discuss, and analyze cases in which the courts find the general principles that underlie customary practices.

Second, the land magistrates need to circulate and discuss their written opinions. The common law process is carried out by an intellectual community consisting of court officials, lawyers, and scholars. Such a community requires dialogue and interchange over actual court decisions.

Third, there is scope for rationalizing the system of mediation. Mediators are employed by the Department of Provincial Affairs. In practice the kiaps appoint mediators on an ad hoc basis from a permanent list. Mediators are, however, paid by the Justice Department. This split between departments creates administrative difficulties. It would be better for the appointment and funding of mediators to come from the same agency.

Fourth, land court officials need better protection from threats of disgruntled disputants. Mediators in the highlands who hear disputes at their site should have access to government cars when tensions are high. Magistrates should work closely with police in order to be confident of their backing.

The final three recommendations, which are larger in scope, would require departure from practices established under the Land Disputes Settlement Act or, possibly, its revision. Fifth, the mediators would be more successful if their decisions had more authority. Under present rules, magistrates must provide fresh trials of cases in which mediation fails. I think local land courts should be given the option of treating the recommendations of mediators as decisions by a lower court. If this proposal were adopted, magistrates could choose to hear a case from the beginning, accept basic facts as true that were discovered by the mediators, or refuse to reopen the case and simply enforce the mediator's decision.

Sixth, lawyers should be permitted to represent parties in the land court when both sides agree. In cases where the stakes are small, the parties will not want lawyers, so they will not agree to having them. In cases where the stakes are large, however, the parties may want lawyers. If both parties agree, there is no reason for the court to frustrate their wishes. Lawyers contribute to the common law process by policing the consistency of legal officials. It is a mistake to exclude lawyers just because the applicable law is custom. Everyone would benefit if custom were integrated into legal education and lawyers became more knowledgeable about it.

Seventh, the court system must be unified in the long run. The separation of village courts, land courts, and other courts only makes sense when customary law has not been worked into the fabric of formal law. When the principles underlying custom are articulated and become indigenous common law, there will be no need to distinguish courts that decide cases in custom from other courts. Some years must pass, however, before the court system could evolve to the point where this proposal is practical.

No government monopoly on land transactions

Direct dealings in customary land are forbidden under current law. Instead, government must perform the role of an intermediary. The owner must lease the land to the government, who leases it back to the tenant. This ban on direct dealings is retained in East Sepik's Customary Land Registration Act, which establishes a government committee responsible for vetting deals in customary law.⁴

Lease lease-back may make sense for some kinds of transactions, such as when the leasee of converted land is an international corporation who lacks experience in Papua New Guinea and wants the security of a government title. More generally, however, as a routine device for controlling transactions in customary land, it is clumsy and time consuming. I found in my travels that the ban on direct dealing is widely violated. All over Papua New Guinea customary owners are leasing land without going through the government. These leases would be more useful if their enforceability were not in doubt.

The impulse behind the ban on direct dealings is paternalistic. The fear is that unsophisticated owners will be cheated. My own view is that the form of paternalistic protection and the method of administering it are both misplaced. The present form of protection is inappropriate because limitations on customary land transaction should come from customary law itself, not from Parliament. Sales and leases of customary land should be enforceable in the land court to the extent that they conform to customary law, neither more nor less. Customary law is living law which will respond to business opportunities in ways that are best for customary groups. Parliament should not try to constrain or anticipate these responses.

The best method of protecting customary groups from exploitation is through the land courts, not government committees. There are vast sums of money to be made through land deals. The politicians who control government committees are well aware of this fact. A government committee with the power to obstruct or allow land deals is an ideal target for corruption. The independent judiciary, in contrast, stands a better chance of remaining untainted. The magistrates in the land courts should interpret custom to protect customary groups from outside exploitation. Protection should flow from the general principle that a contractual obligation arises from an agreement whose terms are understood and appreciated by both sides.

Customary land contracts often fail to make provision for important future contingencies. To illustrate, the value of the land may increase, or the people leasing the land may invite their relatives to join them. Customary agreements tend to break down when such contingencies arise. To facilitate direct dealing, land officials should create standard form leases that invite the parties to specify how they will handle such contingencies. The parties should be directed by the official form to contemplate in advance the contingencies that cause disputes.

These forms could provide a means for direct dealing without any change in existing law. The officials responsible for lease lease-back, or for vetting land deals, should issue preliminary approval of all transactions that use standard forms. Instead of having civil servants scrutinize every deal, detailed scrutiny should be restricted to cases involving disagreement. When disputes arise, the government committee should refer the case to the land courts, possibly after conducting an inquiry and making a recommendation to mediators.

Conclusion: adjudication not legislation

My specific recommendations follow from a vision or philosophy that was strengthened by my experience in Papua New Guinea. I believe that people in the villages will respond to economic opportunity but their response is difficult for central authorities to predict and impossible to plan. There have been too many legislative daydreams among politicians and administrators who delude themselves into thinking that they can direct the efforts of the nation by their commands.⁵ Many of the laws, directives, rules, and regulations concerning lands are, fortunately, ignored at the local level. Central authorities should aim for the modest goals of removing obstacles to economic opportunity, rather than trying to dictate the pace and direction of development.

The main obstacles to development are uncertainty over property rights, costly transportation that prevents villagers from marketing their products, and lack of technical education. Property law in Papua New Guinea, as in England, is primarily common law. The work of clarifying and modernizing property rights is to be performed in the land courts. Legislation and central administration plays a secondary role. Uncertainty over property rights can only be removed through the evolution of customary law and the registration of customary boundaries.

The great choice facing Papua New Guinea concerns whether the future society will be built upon the dissolution or evolution of customary groups. This choice has little to do with ideological debates in other countries between socialists and capitalists. Customary law provides an incentive structure for cooperation and coordination among kin. If customary law is destroyed, traditional means of production and distribution will collapse. If customary law evolves, customary groups will decide for themselves whether to adapt or dissolve.

Appendix: Resources Needed for Land Registration

"In a country lacking a written history comprising 700 separate tribes speaking 700 separate languages, espousing many different customary laws, recognizing land ownership as largely a function of the vicissitudes of tribal war, mostly defining ownership rights by reference to membership in often very large and ill-defined lineage groups, and recognizing a multiplicity of different ownership and occupation interests in land, the problems and costs of developing, implementing and maintaining a documentary title system are nothing short of immense." --Task Force on Customary Land Issues: Report: Presented to Minister for Lands, March 1983, p.11.

The task is "nothing short of immense", but how large is that? I have done some back-of-the-envelope estimates. There are approximately 1,000 villages in East Sepik Province and there are approximately four clans per village.⁶ Thus there are roughly 4,000 customary land owners in East Sepik Province. Suppose each clan's land is located all together in one parcel shaped like a triangle. In that case there will be approximately 6,000 boundaries.⁷ If each clan owns more than one parcel, or if the parcels have more sides than a triangle, there will be more boundaries. Thus if each clan owns just one parcel with six sides there will be approximately 12,000 boundaries.⁸ In fact the typical clan in East Sepik owns several scattered parcels of land irregular in shape, so the number of boundaries among customary groups that need to be registered probably exceeds 12,000.

The first systematic registration of land under East Sepik's Customary Land Registration Act began in the summer of 1988 near Angoram. It has not proceeded far enough at the time of writing this article to know how quickly land can be registered, but some speculation is useful. The Wewak-Angoram land development project's pre-feasibility study indicated a population in the target area of 3,215. Of this total, 1,825 were smallholders who were resettled at Gavien by the government on land it purchased for that purpose and leased to them for 99 years. That leaves 1,390 people outside the Gavien scheme whose land is in customary ownership and requires registration. The total land area is 90,000 hectares, so the population density is low. There are 19 villages in the district containing 70 clans (on average 3.7 clans per village, 19 people per clan) and 450 "farm families" (6.5 farm families per clan). Clan land averages 500-1,400 hectares, usually in several plots.⁹ One of the development corporations in the project, Kakra Development Corporation included 35 clans from villages comprising 2,000 shareholders.

Working in the field in July when I visited them were approximately five registration officers and three chain men, supported by two drivers with vehicles. The immediate aim is to register the land owned by the 15 clans that make up Kasiman Village. Two weeks of uninterrupted work had proceeded and an estimated four weeks remained. Thus about 2.5 clans are being registered per week.

This registration effort is probably not representative because, instead of merely walking the boundaries, the mobilization officers must hack their way through the bush to cut boundary paths for surveyors to follow. Indeed, one of the most hopeful aspects of the process is the eagerness of the clans to supply the labor needed to cut boundaries through the bush.¹⁰ This area is not typical in another respect: No boundary disputes have arisen as yet. It would be rash to generalize from this limited experience, but suppose, just to show the magnitude of the task, we make the optimistic assumption that the mobilization officials can work quickly enough to register boundaries for four clans per week. At that speed they will register about 200 clans per year, and all 4000 clans in the province will be registered in 20 years.

Some additional information on the resource commitment necessary to register boundaries comes from the Porgera Special Mining Lease. The lease covers 2,700 hectares¹¹ of land claimed by seven major clans, most of which contain several subclans. The clans and subclans appointed 23 bargaining agents for purposes of the lease. Boundaries had to be established for 39 parcels of land. A staff of 15 people spent eight months establishing these boundaries.¹²

Footnotes

1. I spent 9th of July, 1988, with ten men from Kasiman Village who hacked a boundary path using bush knives and axes. This level of voluntary effort by clansmen is the best evidence that registration is worthwhile.
2. The Task Force on Customary Land Issues reached this conclusion in its review of land registration efforts:

"Previous efforts to register interests in customary land -- the Native Land Registration Act of 1952 and the Land Titles Commission Act of 1962 -- adopted essentially a systematic approach to developing a registration system. Both attempts almost completely failed, with scarcely a single block of customary land being registered in either case." -- Report (presented to Minister for Lands, 1983), page 11.
3. John Burton, Gazetteer of Local Group Structures and Territories: North Wahgi Census Division (1987).
4. The legislation also allows for the formation of Incorporated Land Groups and decisions by their governing committees, according to Tony Power, need no government approval.
5. "One of the reasons for failure of previous schemes was that they were too ambitious and complicated in both intentions and design. The task force firmly believes that success can only be achieved by an experimental, incremental approach." --Task Force on Customary Land Issues: Report: Presented to Minister for Lands, March 1983, p. 5.
6. This rough estimate was suggested to me by land officers in East Sepik. The accuracy of the estimate can be tested against data from Angoram described in the next paragraph. There were 3.68 clans per village in the Angoram study area, which is close to the suggested figure of four clans per village. There were, however, 19 people per clan on average in the study area and there were an estimated 260,176 people in East Sepik Province in 1987. Dividing the total population of East Sepik by 19 yields an estimate of 13,700 clans, which is far more than the estimate of 4,000 clans. Either four clans per village is too low an estimate, or else the clans in the Angoram study area are abnormally small. The latter seems more likely in view of resettlements. In any case, the estimate of 4,000 clans must be treated as very rough.
7. As a space is marked off into equilateral triangles of the same size, three new boundaries tend to be added for every additional pair of triangles. To be more precise, as the number of triangles tends towards infinity, the ratio of boundaries to triangles tends to 3:2.

8. The hexagon is the regular polygon with the most sides that packs compactly. As a space is marked off into regular hexagons of the same size, each additional hexagon adds three additional boundaries. Thus the ratio of boundaries to hexagons tends towards 3/1.
 9. Wewak-Angoram Land Development Project: Pre-Feasibility Study (1986).
 10. I spent 9th of July, 1988, with ten men from Kasiman Village who hacked a boundary path using bush knives and axes under the direction of a clan elder and the lands mobilization officer (Paul Gaumier). This level of voluntary effort by clansmen is the best evidence that registration is worthwhile.
 11. Approximately 6,750 acres.
 12. See Land Investigation Report, Porgera Joint Venture, Special Mining Lease (Lands Instruction No. 19/103). The study was directed and written by Dave Moorhouse and Kurubu Ipara, both of whom discussed it with me.
-

WHO OWNS THE LAND IN PAPUA NEW GUINEA?

For two months I asked this question in villages and towns, among educated people in jobs and traditional people living off the land, on the coast, the highlands, and the islands of Papua New Guinea. Everyone recognizes that almost all the land -- 97 per cent according to official statistics -- is in customary ownership. But who are the customary owners? Coastal villagers and university professors often say that the land belongs to clans. Highland villagers and businessmen often say that it belongs to families or individuals.

Although the general question, "Who owns the land?", provokes disagreement, there is much agreement about concrete details of ownership. Everyone agrees that among most customary groups in Papua New Guinea, the clan as a whole defends its land, inheritance follows rules that can be distinguished broadly into patrilineal or matrilineal, land can be given as compensation by one group to another, one group can invite another to live on its land, and a family's claim to a piece of land is strengthened by spilling blood on it, burying dead in it, planting permanent crops or building a permanent house on it.

How can people agree about details of ownership and disagree about who owns the land? The paradox arises because people have different rights in mind when they answer the question, "Who owns the land?" Those people who think about the responsibility to defend the land say it belongs to the clan. So do those coastal people who think about individuals asking the clan's permission to put in a garden. But those people who think about a parcel of land that a particular family has used for a long time -- planted a garden, built a house, put in permanent crops, buried the dead -- will say the land belongs to the family.

Neither answer is wrong. The difficulty lies, not in the answers, but in the question. Full ownership of land consists in possessing a bundle of rights, such as the right to occupy, use, develop, bequeath, inherit, sell, give, defend, and exclude others. If all these rights belong to one person, the question, "Who owns the land?", has a right answer. In some circumstances, however, no one possesses some of these rights. To illustrate, customary law may specify inheritance, in which case no one has the right to choose an heir. Or customary law may forbid anyone to sell some parcels of land ("inalienable"). Or customary law may allow the sale of land among families within the clan, but never contemplate sale to outsiders. If important ownership rights are not the prerogative of anyone, then no one fully owns the land.

In other circumstances, the rights of full ownership are dispersed among different people or groups. To illustrate, customary law among some coastal and island peoples gives a family the right to plant subsistence crops on a piece of land, but the clan may have to give its permission for planting permanent crops.¹ Or a family may have the right to plant cash crops on a parcel of land, but the family may have to ask others for permission to bury its dead there. Or the clan may own common land on which any member may hunt or gather firewood, but permission must be obtained from the clan to plant crops there. If ownership rights are dispersed among different people, or if no one possesses some of these rights, the question, "Who owns the land?", has no right answer. Asking the question in this context involves the same kind of mistake as asking, "Which player is the rugby team?"

Why do people ask a question with no right answer? Perhaps they ask because the question almost always has a right answer in Australia or the United States. In these countries, most land is owned in "freehold". An owner in freehold has such broad rights that ownership is sometimes described as "absolute".² Furthermore, these rights cannot be parcelled out and permanently dispersed to others, even by the owner's agreement, so freehold ownership is sometimes described as "unitary".³ The question, "Who owns the land?", is often taken to mean, "Who is the absolute, unitary owner?"

This is certainly the wrong question to ask about customary land in Papua New Guinea. Customary ownership is not absolute because no one possesses some of the rights granted over land in freehold. As noted, customary owners are not typically free to designate an heir, and their rights to sell land are typically circumscribed by clan rules. Customary ownership is not unitary because the bundle of rights granted over land in freehold are dispersed among different people, at least in some groups.

Market and relational property

Settled agriculture has persisted in most of Papua New Guinea for many generations. During this time, the land has been divided into parcels and the rights over these parcels are usually clear where traditional activities are concerned, such as subsistence farming and building bush houses. For some groups of people, there is a right answer to the question, "Who has traditional property rights over the land?"⁴ But even this question has no right answer for some groups. Richard Scaglione supervised 24 of his students at the University of Papua New Guinea who each wrote a case study on customary law in his or her home district during the long vacation. Most students tried to describe the pattern of land ownership. By my count, 14 explicitly stated that land belongs to clan or lineage groups rather than individuals, three asserted that individual ownership was customary, and seven were uncertain or ambiguous in their reports.

Uncertainty persists about the best term for describing customary ownership. Scaglion describes customary ownership as "communal".⁵ This term avoids the suggestion that village people in Papua New Guinea own land the way farmers in Australia do. Unfortunately, the term "communal" suggests a degree of cooperation and common use that is uncharacteristic of most traditional groups. Indeed, attempts by outside authorities to foster cooperative enterprises based upon traditional social organization have sometimes collapsed in bitterness.⁶

Another suggestion is to distinguish customary title into two types: "group titles" and "individual titles".⁷ There is, again, a danger that these terms suggest unitary absolute ownership by a group on one hand and an individual on the other.

I want to suggest alternative terms that follow from the most salient difference between customary and freehold ownership. These two types of ownership regulate different kinds of relationships. Freehold primarily regulates relations between people without strong commitments to each other, such as strangers. Strangers owe some obligations to each other according to most moral codes, but these duties are limited in scope and they impinge minimally upon commercial transactions.⁸ People whose only relationship to each other is commercial have a thin moral connection because their obligations to each other are minimal.

In Australia and the United States, most land transactions are between people whose only relationship to each other is commercial. Buyers and sellers, tenants and landlords, often have no dealings with each other outside the commercial setting, so there is no basis for prior obligations. The absence of obligations is a type of freedom. To illustrate, if a stranger offers to buy land that I own in freehold, I am free to sell or not to sell, and my choice is not constrained by obligations that I owe to him. I can follow my own best advantage, which is what he expects me to do. In Papua New Guinea, in contrast, many transactions involving customary land are between relatives. A kin network binds people together in a web of mutual obligations that constrain a person's freedom to pursue his own best advantage. To illustrate, if my nephew asks to buy land over which I have customary ownership, I must consider questions that would not arise with a stranger. How badly does he need the land? What obligations do I owe his father, who is my brother? Will he give me aid and assistance in the future? Will my children be able to live amiably along side his children?

The concept of absolute, unitary ownership, which is at the core of freehold, can thus be described as property law for stranger relations, whereas customary land law of Papua New Guinea can be described as property law for kin relations.

Although kinship is unimportant to economic life in Australia or America, it has a feature in common with some important business relationships. Some business relationships last a long time; examples are the relationships between financiers and their debtors, or between a corporation and its union. Feelings of interdependency and mutual obligation arise in long run business relations, just as in kin relations.

Long run relations are such an important aspect of modern business life that economists have recently extended their theories to provide a better understanding of them.⁹ Economists conceptualize the problem as explaining how self-interested people can

cooperate together. These theories typically show that institutions have incentive structures in which cooperation benefits everyone and noncooperation behavior like cheating or shirking benefits no one in the long run, not even the person who does it. These incentive structures thus provide a framework in which self-interested people can yet cooperate with each other.

To illustrate, Ford Motor Company purchases parts for its cars from independent suppliers. In many cases Ford owns the machinery used by the independent suppliers and leases it to them. Since Ford supplies specialized machines and the independents supply skilled labor, each is bound to the other by ties of mutual dependence. These ties create an incentive structure that enhances coordination and cooperation.¹⁰

Long run business relations must be understood through concepts of property that are different from absolute, unitary ownership. To illustrate, a modern corporation typically produces goods and services in a building that contains machinery. Although everything ultimately belongs to the company, employees have flexible, complicated rights to use machinery and space in the building. Thus an employee might say, "This is my office" or "This xerox machine belongs to everyone on the floor." Customary land law in Papua New Guinea is more like the rules determining use-rights among employees over machines and office space within a corporation, than like the rules regulating transactions between a corporation and outsiders.

Customary law can be understood as an incentive structure that enhances coordination and cooperation among kin, rather like the rules regulating the use of property by employees inside a corporation. Freehold ownership, in contrast, can be understood as enabling strangers to transfer property rights in one-shot transactions. Custom is a law of long-term relationships, and freehold is a law of market exchange. Instead of contrasting individual and communal ownership, or individual and group ownership, I contrast market property and relational property.

Development and the form of land ownership

Changing circumstances have created novel activities that customary law did not formerly contemplate, such as sale to outsiders, building permanent structures, and offering title as security on a loan. One possible response is to scrap customary law as quickly as possible and replace it with freehold or something similar. Some experts advocate policies along these lines, as indicated by this quote.

Customary land tenure is unsuitable for the economic development of Papua New Guinea...We therefore propose that the long term objective of the State must be to register all customary land presently held under customary tenure so that individual or group titles can be issued. This we believe will reduce the frequency of land disputes, will provide surety of title, feeling of permanency, and enable easier conveyancing of land without fear. It will enable owners to mortgage their properties in order to develop their land...¹¹

The Land Tenure Conversion Act provides a mechanism for converting land from customary ownership to freehold. The Land Titles Commission after receiving an application for conversion, follows a lengthy procedure designed to protect the interests of affected parties.¹² After the legal process is completed for converting land, the

freehold owner can sell the land to a citizen of Papua New Guinea or lease it to a non-citizen. There is a steady pressure towards conversion, as indicated by the following data.¹³

Table 1
Land tenure conversion activity

Year	Application received	L.T.C.A. Sec.7 Appl. ¹⁴	L.T.C. Sec.15 Appl. ¹⁵	No. of hearings
1975	96	37	59	49
1976	139	7	132	114
1977	19	5	14	15
1978	46	28	18	26
1979	29	21	8	19
1980	27	22	5	23
1981	33	27	6	21
1982	39	36	3	29
1983	45	43	2	36
1984	113	105	8	95
1985	133	128	5	21
1986	154	139	15	87
1987	166	160	6	-

An application usually refers to a discrete parcel of land. In terms of hectares converted, there are no current statistics, but in 1979 Commissioner N. F. Oliver, in reply to a request of the Secretary of the Department of Lands Survey and Environment, determined that 9,250 hectares of land through all of the country had been subject to tenure conversion.¹⁶

The market value of land jumps abruptly upon conversion, so the owners enjoy immediate profit by converting land. This fact explains the persistent pressure for conversions. The jump in price suggests that demand for clear title over land is pent up. Around the towns and cities of Papua New Guinea, a market in alienated land has developed in which strangers transact with each other. It will be difficult to contain this market within the framework of customary law. There is a need for conversion of more urban land.

The wholesale replacement of customary ownership with freehold ownership, however, could have disastrous effects. Customary law provides an incentive structure through which people can cooperate with their relatives in the production and distribution of goods. Land law is an important part of that incentive structure. If customary law is destroyed and replaced by something similar to freehold, the traditional incentive structure will break down and traditional forms of production and redistribution will be paralyzed.

There are many strengths in the traditional system of production and distribution. Papua New Guinea was one of the first regions in the world where agriculture was practised. In other agricultural regions of comparable antiquity, such as Egypt, Mesopotamia, and parts of India, the ecology has been ruined and a class system was created that sharply distinguished landlords from tenants, nobles from serfs, or masters from slaves. In Papua New Guinea the ecology was not threatened and there were no permanent classes of people separated by wide differences in wealth, at least until recently. Many highly developed countries like the United States, that rely upon government to provide for the poor, are plagued by beggars and homeless people. In Papua New Guinea, however, customary groups provide an efficient system for redistributing wealth and relieving destitution. Wholesale displacement of customary law would disrupt the systems of cooperation and coordination that have produced these desirable results for many centuries.

Conclusion

Customary land law creates an incentive structure for cooperation and coordination among kin in the production and distribution of goods. The incentive structure includes a network of mutual obligations, which restricts everyone's freedom. In such a network there can be no unitary, absolute ownership. The analogue to kin groups in the modern economy are long run business relationships. The law relevant to property in these relationships is not freehold, which is best suited to one-shot transactions between people with no enduring ties.

Economic development has created opportunities and risks that customary law did not contemplate. One response is to register parcels of land and choose someone as the absolute, unitary owner of them. This policy would destroy the incentive structure that sustains cooperation and production by kin. The conversion of land to freehold should be limited to urban areas where there is pent up demand on the part of numerous people without strong kin ties. Customary law will, in time, evolve new concepts of ownership in response to new opportunities to increase production and raise the standard of life. Some experts think this process will inevitably lead towards greater individualism, while others believe that strengthened clans will become the locus of business decisions.¹⁷ The choice between these two alternatives should be made through the evolution of customary ownership, not by a central policy decision. Customary groups can work out for themselves the best response to new opportunities and risks.

Footnotes

1. This fact was reported to me in discussions in villages in East Sepik Province.
2. This term is misleading when comparing the power of private owners to the modern state. The modern state puts many restrictions upon what private owners can do with their land. Their ownership rights are not absolute relative to the state. The term is accurate enough, however, for comparing ownership in Australia and Papua New Guinea.
3. Owners can temporarily limit their rights by giving liens on the property to non-owners, but the duration of liens is limited by law ("rule against perpetuities").

Thus all ownership rights dispersed to others automatically revert to the owner **after** the passage of time. This limitation is usually explained as a device to "keep the title unclouded" so as not to interfere with a market in land. Furthermore, the entity who possesses ownership rights in freehold may be an individual, a family, several unrelated individuals, a partnership, or a corporation.

4. In what is perhaps the best study on legal anthropology, Leopold Pospisil tried to identify the rules of customary law among the Kapauku. His rule 42 states: "Land is always owned by a single individual..." See Kapauku Papuans and Their Law (New Haven, 1958), page 180.
5. "In general, land is communally owned. In such cases there is rarely total alienation of land; usufruct rights may be granted in virtual perpetuity as long as users hold to the original terms of agreement". -- Richard Scaglione, ed. Customary Law in Papua New Guinea: A Melanesian View (1983), page viii.
6. A sobering account is found in Gerard Natera's "The Challenge of Establishing a Research Project on Customary Land", Should There Be Another Approach to the Employment of the Business Groups Philosophy (Business Group Adt. cap. 144, and Land Group Act. Cap. 147) For the Productive Economic Engagement of Customary Land in Papua New Guinea? (Seminar Report 1/87, Department of Surveying and Land Studies, Papua New Guinea University of Technology, June 1987), pages 1-12. On pages 7-8, he writes:

"Karkar Islands society is patrilineal based mainly on land ownership. Traditionally the clan was the unit in land ownership and utilization. However, the situation today is quite different, where individuals pursue their aspirations in land utilization for economic gains independently and ignorant of the interest of the clans cohesiveness which is tolerated as long as recognized boundaries are respected.

In retrospect the situation today was due to the land demarcation exercise in 1966-68 by the Lands Titles Commission and the exposure of people to the monetary sector of the economy and its incentives. Land demarcation was subsequently followed by allocation of land amongst the individuals within their designated 'safe' clan boundaries, leading to the fragmentation of the clans cohesiveness. The land demarcation also recognized land inherited from matrilineal uncles with no apparent heir as gifts which are a source of disputes but is mentioned here because it has also contributed to the weakening cohesiveness of the patrilineal clan and the scattered parcels of land. Individualism was further perpetuated through the establishment of smallholder family based coconut/cocoa blocks that is the main source of cash income on Karkar Island.

It is worth of noting also that the land demarcation exercise was inspired by the Development Bank lending policy on ventures based on co-operative societies. A lasting impression of these early attempts at commercial enterprise is that of bitter experience of infighting and arguments among individuals within clans and families over blocks of coconut/cocoa established

co-operatively. This is a negative reminder to people regarding such a venture as the 20-30 hectares project which requires group work and pooling labour and co-operation."

7. "Broadly these (forms of land tenure in Papua New Guinea) fall into two categories -- those in which there are group titles (vested in district group, clan, or lineage) without specific rights vested in the individual, and those in which there is a mixture of group and individual titles"." -- Ian Hogbin and Peter Lawrence, Studies in New Guinea Land Tenure (1967), p. xii.
8. To illustrate, Christianity imposes such negative duties upon strangers as not murdering or stealing, and such affirmative duties as sharing with the poor and aiding accident victims.
9. A dominant figure in this enterprise is Oliver Williamson. See, for example, his book Markets and Hierarchies, or any issue of the journal that he co-edits, The Journal of Law, Economics, and Organizations.
10. This paragraph only hints at a more complicated and subtle account of the interdependency between Ford and its suppliers that was investigated by David Teece.
11. National Planning Office, "Medium Term Development Strategy: Land Policy," Waigani, 1984, p.7
12. The steps are: i) an application must be filed; ii) notice must given with opportunity to protest; iii) if anyone protests, there must be mediation; iv) if mediation fails, the registration process does not go forward; if mediation succeeds, the Land Titles Commission officer makes a decision whether or not to convert the property; v) affected parties have 90 days to appeal decision.
13. I am grateful to N. F. Oliver, Commissioner, Land Titles Commission for supplying this data in response to my request. I am also grateful to Mr. Oliver for discussing the issue of conversion with me.
14. A Section 7 application is used when there is no dispute over the land.
15. A Section 15 application is used when there is a dispute over land between the government and the people.
16. Letter from N. F. Oliver to The Secretary, Department of Lands Survey and Environment, 30 May 1979.
17. This question is much discussed in East Sepik Province because of the passage of its Customary Land Registration Act. The leading proponent of registering clan lands, Tony Power, believes that clans can become viable incorporated land groups. Other officials concerned with land in East Sepik, such as Joe Arua and Venn Burley, believe that individualism is necessary to cash cropping. They all agree, however, that registering customary titles is desirable and that customary groups should be allowed to fashion their own response to new economic opportunities.

HOW TO MAKE CUSTOMARY LAW INTO THE COMMON LAW IN PAPUA NEW GUINEA

The British tradition in property law was developed for a society in which kin groups play an insignificant role. Clans, lineages, or tribes do not own land under British law. More generally, in countries of British descent, individuals deal directly with each other and the state, without the intercession of kin groups. The essential facts of social life in Papua New Guinea, however, are different. The clan, lineage, or tribe stands between the individual and many of his dealings with others. Customary groups have a role in ownership, use, transfer, and defense of customary land, although the precise role differs from group to group and place to place.

Little wonder, then, that Papua New Guineans perceive a gap in received British law.¹ Perceiving the gap in received law has proved easier than filling it. The Papua New Guinea constitution, by drawing heavily upon models of government from countries like Australia, embodies concepts of democracy and liberty that are some of the finest products of legal thought. Few people in Australia, however, belong to clans. The Australian model thus provided no guidance for the constitutional recognition and treatment of traditional corporate bodies like clans. Papua New Guinea was left to invent a formal law for customary groups.²

The constitution opens with a hymn to tradition, but the substantive rules that follow say nothing about the rights and powers of clans. The Law Reform Commission was established after independence in 1975 to bring formal law better into alignment with customary law. The proposals of the Law Reform Commission for legislation and constitutional amendments to improve the legal status of customary law stalled. There is no impetus to change a new constitution. Section s20 (1) of the Papua New Guinea constitution recognizes that received law is an imperfect expression of the Melanesian way of life and calls upon Parliament to declare the underlying law.³ After thirteen years, Parliament shows no signs of answering the call.

Even so, significant progress has been made towards creating law for customary groups. Legislation, some of which was proposed by the Law Reform Commission, has clarified and enhanced the legal status of clans, notably the legislation creating village courts and land courts that apply customary law to disputes. Furthermore, the process of decentralization, which is partly a legislative initiative and partly a by-product of the loss of technical expertise after independence, has dispersed power. The decentralization process in Papua New Guinea, by returning power to the provinces, seems likely to advantage customary groups and local traditions.

These changes have not, however, eliminated the perception of a gap between law and custom. Politicians and intellectuals often say that law should express the Melanesian way of life, and they feel frustrated with delays and puzzled over the obstacles.⁴ They do not appreciate how law assimilates custom. The problem is not to declare what people know, but to discover what is implicit in what they do. Anthropologists observe customary practices,⁵ but they cannot observe underlying law. The underlying law consists of general principles that sustain particular practices and rules.⁶ No one can declare the general principles underlying social practice. Instead, they must be discovered through a process that will extend over decades.

The village courts and land courts must decide cases on the basis of customary rules and principles. When rules and principles are explicit in custom, magistrates need only apply them to the facts to decide cases. More often, however, rules and principles of customary law are imbedded in practice and usage. These implicit rules and principles must be discovered, extracted, and refined by the courts. The courts that hear cases in customary law - village courts and land courts - are better placed than parliament to make authoritative findings about customary law. When these courts decide disputes, they should explain their decisions by reference to principles, which should be scrutinized by critics and reviewed by higher courts.

Melanesian legal principles are to be discovered by deciding cases in customary law. The "common law process", which refers to the courts working custom into formal law, involves litigation, not legislation. The magistrates, judges, lawyers, and scholars form a community of intellectuals who must sift through cases and separate ore from slag.

There is a vigorous common law process in British law. Indeed, the British law of property is originally, and still fundamentally, common law. The common law was not proposed by ministers or enacted by parliament. Rather, common law represents social practices and customary rules that have been discovered, refined, and enforced by courts. The phrase, "making customary law into the common law of Papua New Guinea," just describes the common law process as it must work in this country.

How effective and vigorous is the common law process in Papua New Guinea? I have spent two months visiting magistrates, mediators, and lands officials around the country. This note provides a progress report on the common law process in the land courts.

The process of resolving land disputes

The Land Disputes Settlement Act, Chapter No. 45, provides for the creation of a system of mediators and courts to resolve disputes involving land under customary ownership. The land courts are bound only by this Act and custom. The Act prescribes certain uniform procedures, although not in great detail. I will describe practices that I observed, which are consistent with prescriptions of the Act. Land disputes are first brought before a mediator or panel of mediators, who are nominally appointed by the Provincial Land Disputes Committee, although appointment in practice is often arranged by officers in the Department of Provincial Affairs or the Department of Lands. Most mediators are employed on a case-by-case basis, but the same mediators are repeatedly appointed ("ad hoc appointment from a permanent list"). The mediators are typically elderly men, usually uneducated, who command respect because of their experience and knowledge of custom. If a settlement seems possible after hearing the two sides, mediators will propose one. If the proposal is accepted, the legal process may end at that point, or the settlement may be referred to the local magistrate for approval. If, on the other hand, the proposal is rejected, mediators cannot dictate a decision to the parties. After unsuccessful mediation, the mediators may refer the dispute to the local land court for a decision. Land disputes are, in a word, settled by mediation or decided by trial.

At trial, a magistrate presides, but he sits with two or more mediators and decision is by majority vote. The land court hears disputes referred to it *de nouveau*, as if mediation had not occurred. Mediators are not ordinarily called upon in court to provide findings of fact based upon prior (unsuccessful) mediation. An effort is made to appoint mediators to the local land court other than those who originally heard the dispute. In

government stations, the land court magistrate is often the kiap who appointed the original mediators. In practice, however, the magistrate and mediators know a lot about the dispute before they hear the case, especially in government stations, as opposed to towns.

If one of the parties is dissatisfied with the decision of the local land court, an appeal can be lodged with the provincial land court. If the provincial land court hears the case, it will examine the written record from the local land court and possibly call additional witnesses. Another significant difference from earlier stages in the litigation process is that the party who appeals to the provincial land court must pay a fee, unless the presiding magistrate waives it.

Appeal from decisions of provincial land courts to the National Court is limited, and there are not many published cases.⁷ The National Court sees its role as overseeing the Land Disputes Settlement Act, but not interpreting custom. The National Court ostensibly proceeds as if custom were facts decided by lower courts. The most firm basis for appeal is, consequently, the claim that the provincial court departed from its statutory mandate in deciding a case.⁸ In practice, however, the distinction between overseeing the statute and interpreting custom is not very sharp, and the National Court has made substantive findings about the relative weight that different customary principles should receive in land disputes.⁹

How active are the Land Courts?

Are the land courts building up or winding down? This question demands a statistical report on the activity level of land courts. The Land Courts Secretariat collects returns from local officials on their annual activities. Local officials must report on how many disputes were lodged in land courts, how they were resolved, and the extent of the delays involved. The latest available figures are reported in Table 1.¹⁰ These figures suggest that, over the years, thirty-four per cent of disputes have been referred from mediators to the local land courts, and about 13 per cent of the cases decided in local land courts have been appealed to the provincial courts. These numbers are commensurate with experience in other countries.¹¹

The number of disputes recorded annually shows considerable variation from one year to the next, with a low of 188 in 1977 and a high of 3,330 in 1986. It is difficult to detect any trend towards building up or winding down. Whatever the trend, there are enough disputes for courts to make authoritative determinations as required to sustain the common law process.

The data in Table 1 is based upon summaries from three kinds of registers: the land dispute register kept by the local land officer in each district, the local land court register kept by the land court magistrate, and the provincial land court register. I examined these registers during my visits with local officials and my observations lead me to conclude that the data in Table 1 is unreliable. Table 1 is the summary of data from all provinces, including East New Britain. To illustrate the problem, Table 2 compares the data for East New Britain as reported by the Land Courts Secretariat with the total number of disputes that I counted in the Land Dispute Registry for Rabaul. I have chosen Rabaul because its records were more complete and accessible than other provincial capitals. Even so, there are blank years where no data was recorded. Equally disturbing is the fact that the two columns of numbers in Table 2 bear little relationship

to each other. It is puzzling how more disputes could be recorded in Rabaul than were reported by the Land Courts Secretariat for the whole of East New Britain.

It would be rash to make confident conclusions about trends in the land courts based upon this data. Perhaps the inconsistencies in the numbers reflect differences in interpretation of such key terms as "disputes" by different officials, as well as the proclivity of officials to record activities more conscientiously in some years than in others. Or perhaps interpreting the data required a deeper understanding of land court practices than I possess. There are, in any case, two sets of numbers that are likely to be quite accurate, specifically the number of decisions by the local land court and the provincial land court. For each of these cases, a folder is filled with the testimony of witnesses and the written decision of the court. These folders are less likely to be overlooked or miscounted. The written record of a court decision is treated as more valuable than a mediation. Table 1 records substantial, if irregular, flow of decisions by local land courts and provincial land courts.

Table 1
Land Disputes 1976-1987

1	2	3	4	5	6	7	8	9	10
Year	Mediation Prty	Sccs	Local Land Court Pnd	Dcd	Temporary order	Provincial Land Court Pnd	Dcd	Out- standing	Total
1976	190	238	29	71	6	9	11	9	563
1977	24	61	25	56	2	5	6	9	188
1978	27	139	22	45		2	28	50	313
1979	62	382	103		67	22	1	20	455
1980	188	810	110	111	1	1	19	867	2107
1981	88	864	87	38	3	13	14	594	1701
1982	160	259	68	35	9	1	6	429	967
1983	214	1253	186	80	37	23	14	272	2059
1984	152	182	91	31	24	4	10	29	523
1985	607	1132	279	71		18	8	105	2220
1986	1656	1122	377	101		57	17		3330
1987	437	800	215	46		19	2		1519
Totals	3805	7226	1592	756	104	153	155	2809	16600

Key to Columns

- 1 = year
- 2 = mediation failed or partly successful
- 3 = mediation successful
- 4 = case pending before local land court
- 5 = case decided by local land court
- 6 = temporary order issued by local land court
- 7 = case pending before provincial land court
- 8 = case decided by provincial land court
- 9 = case still outstanding
- 10 = total number of disputes registered.

Table 2
Land disputes

Year	Rabaul as read from Land Dispute Register	East New Britain as reported by Land Courts Secretariat
1979	361	4
1980	351	190
1981	265	5
1982	102	11
1983	124	blank
1984	blank	blank
1985	blank	315
1986	153	485
1987	61	blank

A different statistical issue concerns the extent of backlog and delay in settling land disputes. The Land Courts Secretariat reports that mediations take one to two months from referral to completion of the case, local land courts take two to three months, and provincial land courts take one to three years. The registers in Rabaul record the year the dispute was first registered, the year mediation was completed, and the year the local land court decided the case. These data suggest somewhat longer delays than reported by the Land Courts Secretariat, although the orders of magnitude are similar. In any event, the data suggests that disputes are mediated or tried in Papua New Guinea's land courts faster than trial can be obtained in the court systems of many other countries, including the United States.¹²

Are there principles of customary law?

Custom contains particular rules whose main difference from formal law is that they are unwritten. Many of these rules could become formal law with little change other than writing them down.¹³ These rules, however, are not the underlying law, which consists of general principles. General principles are broader in scope than particular rules. This is not, however, the only difference between them. Particular rules seldom admit exceptions, so they can be applied rather mechanically. Their application involves deciding whether the facts of a case bring it within the rule's scope. General principles, in contrast, cannot be applied mechanically because they admit exceptions. Deciding a case by general principles is a matter of giving proper weight to salient considerations.

An example will illustrate this point. Consider this rule:

A man may not marry a woman whose clan name is the same as his father's.

The only issue when applying this incest rule, which is customary among some peoples but not others, is the clan names of the wife and her husband's father. Once the decision is made that the case falls within the rule's scope, its application is mechanical. In contrast, consider this principle, which enjoys wide recognition in Papua New Guinea according to my examination of land court cases:

If the owner revokes permission for a tenant to occupy and use land, compensation must be paid to the tenant for the improvements that he made to it.¹⁴

Although the scope for this principle's application is very wide, there are many considerations that can defeat it. To illustrate, the principle may not apply when the owner and the tenant have an explicit agreement that compensation will not be paid for improvements. Similarly, the principle may not apply when tenant originally obtained permission to occupy and use the land by fraud.¹⁵

When thinking about custom, some people imagine that it consists of a heterogeneous collection of particular rules without any underlying general principles. According to this view, there is not much for the land courts to do except catalogue customary rules as reported to them by mediators and other experts on local customs. This belief is based upon a mistaken picture of custom. A good antidote is to think about custom as language. Speakers discuss many concrete subjects. General principles of grammar underlie particular speech, even though the speakers may have difficulty explaining what they are. The people who do something may not be fully conscious of how they do it. It seems unlikely that the human mind could operate by using particular rules in a complex system of customary law without any underlying principles.

There is in fact a simple proof that there are general principles of customary law in Papua New Guinea. The magistrates in the land courts are civil servants who move from time to time and often serve in districts far from their own homes. This system of assigning magistrates to districts would not work if customary law were a heterogeneous collection of particular rules. A magistrate who, say, comes from Madang, may find himself presiding over a property court in Chimbu. Magistrates do a reasonably good job in such circumstances because the underlying law is not so different in Chimbu and Madang. If there were no underlying general principles, a magistrate who was recently shifted from one place to another would be bewildered when faced with deciding his first land dispute.

The laws applied by the land courts can be described as regional variations upon a core of uniform practices. According to W.L. Dickson, "...there are as many nuances of customary title as there are language."¹⁶ This is true, but there are also shared principles both in grammar and in law. It is a mistake to imagine that customs differ so much from place to place that no general principles can be found. Finding underlying principles is a matter of getting the level of abstraction right.

The problem of abstraction can be illustrated by British common law. An important principle of British common law is that people are liable for the consequences of their own negligence. When courts cite this principle, they often say that behavior is negligent which falls short of the community's standard of reasonable care. Thus the negligence principle is general, but the standard of behavior that constitutes negligence differs from one community to another. There are, presumably, principles of customary law for Papua New Guinea which, like the negligence principle, are pitched at a level of generality that allows for local differences. To illustrate, the preceding principle requiring owners to compensate tenants for improvement leave scope for local variation in determining the circumstances under which someone becomes a tenant and the extent of compensation to which he is entitled.

Is custom static?

People who think that custom consists of heterogeneous rules also tend to imagine that it is rigid and static. If custom were a heterogeneous collection of rules, without underlying principles, it would not contain within itself the capacity for change and development. Custom, however, is alive, and no living body of law consists merely of a list of regulations. Besides regulating behavior, a living body of law encompasses procedures for its own development. The occasion for the development of law is presented by new and unforeseen choices.

I recently encountered an example of a change in custom that was recognized by the local land court in Rabaul.¹⁷ Before 1953, Tolai custom permitted the leader of a clan to decide whether or not to sell its land. As population pressed upon the land, and as cash cropping has increased its value, the custom has changed. The Tolai became alarmed that irresponsible leaders were disposing of clan land for their private benefit. To solve this problem, the customary rule has been changed and now clan land cannot be sold without agreement of all the affected members. The local land court has changed its decisions to conform with this change in customary law.

It would be a mistake to think that most customary law was static and unchanging before contact with the outside world. Legal changes are in part a response to unforeseen, novel problems of choice. Outside contact did not produce the first occasion for novel problems of choice and initiate change for the first time. Rather, outside contact increased the speed of change by confronting customary law with many novel situations.

Customs for regulating land arise in Papua New Guinea from practical interactions of kinsmen. A kinship group, which people are in intimate contact on a daily basis, does not require a set of formal procedures in order to adjust its rules, any more than a family needs a constitution to decide who can take food out of the cupboard. Custom often adjusts and responds to new situations spontaneously, without any governance structure. As clans become larger and more organization is needed, more formal procedures may be required, such as decisions by a council of elders. In any case, custom should be dynamic and responsive within the scope of its operation.¹⁸ We ought to think of customary law as living law, with the power to adapt, not as a static list of regulations.

Mobilizing customary land

Since independence, a consistent theme on the part of Papua New Guinea experts investigating the land question has been the need to establish control over land by customary authorities in conformity with customary law. Another theme has been the need to remove the clouds from the title to land so that market forces can operate in bringing about economic development. These two objectives - customary authority and development - often seem opposed to each other, so that investigators must strike a balance between them.

The Land Act tried to strike such a balance. Section 73 prohibits sale, lease, or disposal of land except to nationals in accordance with customary law. This section is partially undone by Section 15 which permits **government** to purchase or lease land from customary owners. Recently, Section 17 has been used to defeat Section 73 through the "lease-and-lease-back" arrangement, through which government leases land from customary owners, only to lease it back to them. This device uses Section 15 to free

land from the constraints of Section 73. While this legal device could, in principle, result in widespread leasing of customary land, its use in fact has been obstructed by a backlog of applications for lease-and-lease-back arrangements that are stalled in the Department of Lands.

The Task Force on Customary Land Issues proposed in its **Report** of March, 1983, to break this backlog, estimated at the time to be between 8,000 and 10,000 applications, by allowing direct dealings in customary land under certain conditions. The basic proposal is to allow customary groups to lease lands that have passed through formal registration. This procedure in essence requires hearings to establish that the customary group wishes its lands to be registered and that other groups do not object to registration. The actual registration process is quite detailed, with many procedural safeguards spelled out in the Report.

A national register for customary lands has not been created, but East Sepik Province has passed its own customary land registration act, under which clans can register their lands. Customary land registration converts unwritten records of boundaries into written records. Registration, however, does not change the substantive law of property. The substantive law of property continues to be custom as interpreted by the land courts.

To illustrate, consider a common confusion over the relationship between registration and freehold title. Freehold, as understood in British law, usually invests all ownership rights in a single person or group of persons ("unitary, absolute ownership"). Sometimes people have the mistaken belief that when land is registered in the name of a clan, the clan thereby acquires more power over the land than before, or perhaps registration even makes the clan the absolute and unitary owner of the land. That is false. After registration, property rights are still allocated according to customary law, and, under customary law, there is no absolute, unitary ownership.

Instead, customary law parcels out ownership among groups and individuals. To illustrate, customary law among some coastal groups requires the clan to give permission before a family erects a permanent house on land that the family is entitled to farm. In this example, ownership for purposes of farming and ownership for purposes of building are vested in different customary groups, the family and the clan. Clan registration does not strip the family of its customary ownership right for purposes of farming. The view that custom is alive suggests another perspective on transactions in customary land. There is general agreement in the legal profession that dealings in customary land among private persons are forbidden by statute. Perhaps Section 73 could be construed as not forbidding direct dealing as such, but rather forbidding direct dealing that violates customary law. Insofar as the customary law of a group permits leases or sales, Section 73 would permit them as well. The point of Section 73 is not to prevent direct leases or sales, but rather to prevent the violation of customary law.

Custom among some groups does not explicitly provide for sale or lease of land to outsiders. These possibilities were not even contemplated by its makers. Among groups that contemplated sale or lease, there are often limitations that have become problematic in modern conditions. For example, clans that previously allowed members to trade land among themselves now face the possibility of selling land to outsiders. In so far as we think of customary law as a static body of regulations, we will not find within it authorization for sale or lease of the type demanded by contemporary conditions.

No living body of law, however, consists merely of a list of regulations. Besides regulating behavior, a living body of law encompasses procedures for its own development. If customary law is alive, it must have within itself the power to develop rules regulating direct dealings in land.

An historical comparison is helpful for appreciating this fact. In medieval times the power of owners to lease or sell land in England was severely limited. Over many centuries the common law of England modified its concepts of property until the contemporary concept of freehold emerged. The fact that the concept of freehold emerged through the common law process proves that customary law in England was alive, not static.

The customary law of Papua New Guinea is confronted with new pressures similar to the ones that caused English common law to develop freehold ownership. The external pressures on customary law in Papua New Guinea are so powerful, and the circumstances are so novel, that customary law may adapt within a few decades in ways that took centuries in England. If customary law in Papua New Guinea is alive, it may solve for itself the problem of combining customary authority and development (to the extent that customary owners want development).

This discussion requires a careful evaluation of the adaptive capacities of customary land law in Papua New Guinea. Before turning to such an evaluation, however, some remarks are in order about the direction that the law's evolution may take. Some people naturally suppose that customary law will develop over time a concept of ownership that is similar to freehold. This is the view that customary law evolves towards absolute, unitary ownership by individuals.

An opposing view is that customary groups like clans can become viable units of production. According to this view, a clan acting as a corporate body should become owners and managers of the land. The authors of East Sepik's legislation envision clans forming incorporated land groups, with traditional leaders serving as board of directors and making business decisions. According to the architect of this plan, "The recognition of group ownership is simply honest admission of Melanesian custom."¹⁹ These business groups would be able to engage in land transactions, although contracts must be vetted before a provincial government committee. The hope is that registration of title will take the clan through an invigorating process that increases its ability for corporate action and eases the constraints upon borrowing for agricultural investment.

It is generally conceded that individualistic economic development aggravates inequality and causes crime by undermining traditional authority. On the other hand, experience with clan enterprise counsels for pessimism. An interesting first hand account of the problems of planning the rationalization of land administration by a customary group is provided by Gerard Natera. His report on efforts to help the Agricultural Bank establish clan enterprise in his village concludes:

My efforts in my own village situation was something of a failure firstly due to the limited time and my being "one of them" [and thus] lacking the recognition of an official status. But the most important factor it seemed was the fragmentation of the clan system. Customary land tenure is more individualistic than based on clan structure and so substantially handicaps the

Agriculture Bank's large scale 20-30 hectare cocoa development project loan scheme.²⁰

Several officers in the Department of Primary Industry expressed to me their skepticism that agricultural development can proceed through clan enterprise, as opposed to individual enterprise.

Individual versus clan enterprise is, I think, a question on which the land courts should be neutral. Their task is to discover, refine, and apply the principles and rules of customary law. Customary law will evolve towards clan enterprise or individual enterprise as people adapt custom to circumstances. People will work out for themselves the forms of entrepreneurial organization best suited to their needs and preferences. The land courts should assist them in getting what they want, not tell them what they ought to want.

Strengthening the common law process

How can the forces creating an indigenous common law, which are naturally at work in Papua New Guinea, be strengthened? Custom has always been alive, but its evolution reached a new stage with the establishment of formal courts to apply customary law. Papua New Guinea has reached the stage where the courts participate in the evolution of custom through the common law process. The courts do not invent custom, but, by articulating it, they shape it decisively.

Discovering the underlying law is facilitated by educating legal officials, requiring courts to offer principled explanations for their decisions, and circulating published decisions to be read, cited, and criticized by lawyers and judges in subsequent cases. Scholars participate in the process by writing treatises and commentaries on the work of judges. The articulation of the rules and principles of customary law is thus the work of an intellectual community consisting of mediators, magistrates, judges, lawyers, and scholars.

Such an intellectual community has not fully emerged for customary law in Papua New Guinea. The circulation of decisions by land courts is informal. The magistrates in land courts seldom read each others decisions and I know of no instances where one magistrate cites another's decision as the grounds for deciding a case. Furthermore, some magistrates explain their decisions by reference to particular facts alone, without trying to connect facts to rules or principles.

In some localities the land court officials suffer from severe problems of administration and insufficient resources. To illustrate, Erela Avea, a district officer in charge of magistrates for Madang Province whom I interviewed, told me that the mediators in his district have not been paid for months, so they are not responding to his requests to perform mediations. In Goroka, the mediators told me that they did not have a car at their disposal, so they spent much of their time getting to or from the site of mediations, and they were sometimes fearful when walking home after offering a controversial or unpopular opinion.

These are just examples of some of the complaints that I heard when interviewing land court officials. This brief essay cannot deal with all of the problems or complaints, so I will, instead, focus on a few that I think are most important. The most important problem with the land courts is that its officials have a very imperfect understanding of

the common law process. They have not been taught how to make custom into the indigenous common law of Papua New Guinea. Many magistrates have spent a year at the University of Papua New Guinea where they received training in law. Their training does not, however, touch upon the common law process as it works in the land courts. In fact, their only training relevant to customary land law is reading the Land Disputes Settlement Act. Thus the magistrates must hear their first case in land court without the benefit of reading transcripts from local land courts. Nor is there any discussion of the principles underlying customary land law.

One reason for this deficiency is education is the lack of teaching materials. To illustrate the problem, I examined all the books and journals on the shelves in the Rabaul courthouse library. I found 18 Australian law journals consisting of 805 volumes, and 16 English law journals consisting of 789 volumes. There were, in contrast, only three books immediately relevant to customary law in Papua New Guinea,²¹ and nine books on customary law in Africa. These figures may exaggerate the influence of English and Australian law in Papua New Guinea's courts, since these journals are seldom read. My point, however, is not to criticize the officials who buy books for Rabaul's law library, which has a better collection than in many other provincial capitals, but to point out that magistrates in the land courts do not have many written materials to work with. My first suggestion is for the Land Courts Secretariat to collect good examples of decisions by the land courts and circulate them for discussion among the magistrates. Magistrates should be encouraged to cite each other's cases in reaching decisions, and decisions should make reference to principles of customary law. The cases should, subsequently, be collected and used in training future magistrates.

An important question from the viewpoint of the common law process is whether lawyers should be permitted to participate in trials in the land courts. The careful scrutiny of trained professions with an interest in the case would improve the quality of decisions by magistrates and help to insure their consistency. The presence of lawyers has been essential to the common law process in countries within the tradition of British law. There is, however, a case to be made for excluding lawyers.²² Lawyers would greatly increase the cost of the litigation process. Excluding people from court by virtue of the cost would be bad for a country in which the property courts are still struggling to establish their authority.

In countries such as the United States, lawyers are excluded from small claims courts, where the stakes are small, but lawyers are allowed or even required in cases where the stakes are large. The rationale is that, when the stakes are large, the parties prefer to bear the cost of lawyers rather than running the risk that their case will be poorly presented. I would prefer for lawyers to be allowed to represent the parties in land court whenever both parties agree. If either party objected, lawyers would be excluded. I presume that the parties would not agree to admit lawyers unless the stakes were large. (This proposal would, however, require revision in the Land Disputes Settlement Act, which only admits lawyers when a party to the dispute happens to be a lawyer.)

The issue of whether to admit lawyers points to a more fundamental problem. The very existence of land courts represents a departure from custom. Scaglione's description of customary legal procedures bears little resemblance to a land court.²³ The land courts failed so decisively in Enga Province that magistrates could not be protected, so the courts have been suspended for years. Giddings tries to explain this fact by offering the view that mediation is far more successful than trial in the local land court, because

mediation adheres more closely to customary law.²⁴ Similarly, Paliwala offers the view that village courts depart from customary law in ways that are beneficial to an emerging village elite.²⁵ While the existence of land courts departs from custom, they do, never the less, have a beneficial role to play. To perform this beneficial role, however, they must bear in mind that they do not have the power to invent custom arbitrarily, and they have limited powers to impose decisions upon unwilling people.

Conclusion

The failure of formal law to comprehend kin groups sews confusion and doubt over property rights, which inhibits investment and retards economic development. Working customary law into the fabric of formal law will reduce uncertainty and promote investment, as required for economic development. Customary groups play a significant role, not just in the production of wealth, but in its redistribution. Beggars are a common sight on the streets of the United States where I live, but I did not encounter a beggar in two months of travel throughout Papua New Guinea. Kin groups in Papua New Guinea provide better security against destitution than government bureaucracies are able to deliver in some developed countries. Working customary law into the fabric of formal law will preserve an efficient system for distributing wealth and alleviating poverty. Finally, the most important form of social control in Papua New Guinea is customary authority, not police power. Working customary law into the fabric of formal law will strengthen traditional authority as required to combat crime. A theme of this essay is that strengthening customary law will promote economic development, redistribute wealth, and prevent crime.

To become such a positive force, a process needs to be established for working custom into the fabric of common law. Customs become common law when social norms are systematically interpreted, refined, and enforced by courts. The evolution of customary law into indigenous common law goes far towards regularizing traditional authority.

Officials in Papua New Guinea are far ahead of most countries in understanding the relationship between formal law and the law of kin groups, in part because of its unique historical circumstances. For example, Australia and the United States have failed to create a body of law that recognizes the significance of kin groups among the tribal minorities in those countries. The absence of prior models makes the task more difficult, and also more creative. The magistrates in the village courts and land courts should be inspired by the vision of making customary law into the common law of Papua New Guinea. Government should foster the development of the intellectual community needed to make this vision into a reality.

Footnotes

1. Bernard Narokobi, "In Search of a Melanesian Jurisprudence," *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Law Department, ANU, 1986), ed. Peter Sack and Elizabeth Minchin, p.215.
2. This is perhaps a source of inspiration for the well-known quotation, "We must rebuild our society, not on the scattered good soil the tidal wave of colonization has deposited, but on the solid foundations of our ancestral land." Constitutional Planning Committee, Final Report, 1973 Ch 2, para 98.

3. John Goldring's book, *The Constitution of Papua New Guinea (1978)*, is subtitled "A Study in Legal Nationalism." His discussion of the underlying law begins on page 149.
4. For example, *The Context of Contract in Papua New Guinea (1984)*, by Derek Roebuck, Dhirenabra K. Srivastava, and John Nonggarr, is a meditation on why customary law has not been worked into the fabric of contract law. See especially the concluding chapter.
5. See, for example, Richard Scaglion, ed., *Customary Law in Papua New Guinea: A Melanesian View (1983)*.
6. Anthropologists with legal training sometimes try to discover underlying laws in the practices of the communities they study. Papua New Guinea is fortunate in that one of its peoples was the subject of the best study of this kind ever undertaken. See Leopold Pospicil, *Kapauku Papuans and Their Law (New Haven, 1958)*; especially "Offenses Against Rights in Things," pages 176-208, and "Contract," pp 208-231.
7. I examined all the published cases of the National Court for the years 1979 to 1985, and I found only a handful concerning customary land.
8. Thus, in *Auguste Olei v. The Provincial Land Court at Port Moresby et al*, McDermott J. reviewed on purely procedural grounds a decision of provincial land court. In *Re Fisherman's Island*, Wilson J. had to decide whether adequate procedures were followed by government authorities in finding that land belonged to government, not to clans, in the Port Moresby area.
9. The landmark case is *The State v. Giddings*, in which Kearnes, Dep. C.J., decided that the principles used by the provincial land court to decide a dispute over ownership were not consistent with requirements of Land Disputes Settlement Act of 1975 or local custom. An equally important unpublished case, which was given to me by Justice Bredmeyer, is "In the Matter of Application for Review of a Decision..." of a District Land Court of the Land Known as Komonotoa between Ningalimbi No. 2 and Ilahita No. 3 clans (O.S.No. 24, 1987).
10. I am grateful to Jocelyn Millett of the Institute on National Affairs for obtaining this table from the Land Courts Secretariat.
11. David M. Trubek, Joel B. Grossman, William L.F. Felstiner, Herbert M. Kritzer, Austin Sarat. *The Civil Litigation Project: Final Report (Madison, 1983)*. ^EThe backlog in civil courts in the United States is monitored by the National Center on State Courts in Williamsburg, Virginia, which publishes summary data from time to time.
12. The backlog in civil courts in the United States is monitored by the National Center on State Courts in Williamsburg, Virginia, which publishes summary data from time to time.

13. Bernard Narokobi suggests that the following areas in customary law are clearly defined and could be easily worked into the formal law: marriage, adoption, obligations, land, crime/punishment, copyright, religion, ritual, and politics. See "History and Movement to Law Reform in Papua New Guinea," pages 13-24.
14. See case of Danga Mondo and Korugl Goi, dispute over land known as Par, Kundiawa District Land Court, 27 Nov. 1987, presiding magistrate R. J. Giddings.
15. See case of Relvi Utul and Allan Marat, dispute over land named Katkatung, Provincial Land Court at Rabaul, decided 12 January 1987, presiding magistrate Peter Sapeke. Also see case of Relvi IaUtul and Allan Marat v. Asael ToMimi, dispute over land named Pupunabubu, Provincial Land Court at Rabaul, decided 10 November 1979, presiding magistrate Theo Bredmeyer.
16. "The Changing Face of Land Tenure," Should There Be Another Approach to the Employment of the Business Groups Philosophy (Business Group Adt. cap. 144, and Land Group Act. Cap. 147) For the Productive Economic Engagement of Customary Land in Papua New Guinea? (Seminar Report 1/87, Department of Surveying and Land Studies, Papua New Guinea University of Technology, June 1987), page 6.
17. Case of Enos Malakit and Jonah Tourai v. Peter Tobung, concerning the land called Vunateten, local land court at Rabaul, 27 July 1987; also see case of Tobernat Tokuna and Ia Bore Maria, concerning the land called Rakakava of Tavuiliu, local land court at Rabaul, 1982.
18. H.L.A. Hart used the existence of secondary rules as the test for distinguishing custom from a legal system. This test seems fundamentally mistaken for the use to which it is put, because custom is living. But the distinction is still useful for understanding how law changes, including customary law. See *The Concept of Law* (19).
19. Private communication from A. P. Power to Robert Cooter, November 1988.
20. "The Challenge of Establishing a Research Project on Customary Land," Should There Be Another Approach to the Employment of the Business Groups Philosophy (Business Group Adt. cap. 144, and Land Group Act. Cap. 147) For the Productive Economic Engagement of Customary Land in Papua New Guinea? (Seminar Report 1/87, Department of Surveying and Land Studies, Papua New Guinea University of Technology, June 1987), page 12.
21. They were: Ian Hogbin and Peter Lawrence, *Studies in New Guinea Land Tenure* (1967), Law Reform Commission Monograph No. 4 1986, *Marriage in Papua New Guinea* (1986), Richard Scaglione, ed. *Customary Law in Papua New Guinea* (1983).
22. A discussion of such issues is in Peter Eaton, "Customary Land Disputes: Should Lawyers Be Kept Out? *Melanesian Law Rev.* around 1985
23. Scaglione says that "Conflict management takes place in moots..." (p. vi) in which there is no *Stare Decisis* but rather "guidelines" (p. vii). Richard Scaglione, ed., *Customary Law in Papua New Guinea: A Melanesian View* (1983).

24. Rick Giddings. "After Komanda: Implications for Land Dispute Settlement in Enga Province," Enga Integrated Rural Development Project (Dec. 1980); "Land Dispute Settlement in Enga: Where to From Here?" Enga Integrated Rural Development Project, May 1980.
25. Abdul Paliwala, "Law and Order in the Village: The Village Courts," Law and Social Change in Papua New Guinea (1982), eds. David Weisbrot, Abdul Paliwala, Akilagpa Sawyerr, page 191.

The courts are 'village courts' in the sense that the court officials are villagers selected by the village people themselves. They have a wide jurisdiction and, apart from the Village Court Act, it is customary law and procedures which form the basis for the operation of the courts.

The [Village Court] Act, therefore, appears to reinforce customary law and practice. Yet, as it is argued in this chapter, at the same time, the courts constitute a radical departure from pre-existing forms of dispute settlement, and social control generally, in rural society. The key changes are a greater involvement and control by the state and a degree of authoritarianism on the part of court officials. The result is relatively alienated settlement with little scope for community involvement and party consensus.

He goes on to say on page 211:

"The group which obviously has a lot to gain from the courts is the new village elite. This group is interested in law and order, the protection of their new property, such as trucks and trade stores, and in an efficient dispute settlement system."

MAKING SQUATTERS INTO TENANTS AND OWNERS¹

People are restless, always moving about, as recognized in Section 52 of Papua New Guinea's constitution, which gives citizens the right to move within the country or to reside in any part of it. Giving people the right to move does not, however, guarantee them a place to stay. There are more and more people moving to towns and cities in Papua New Guinea where they have no land. Most of these urban migrants are being accommodated by relatives who generously make a little room for them on someone else's land. Perhaps the original settler had an understanding with the owners to pay a modest rent for temporarily occupying the land, but the arrival of more relatives and friends soon resembles, not a rental agreement, but an invasion.²

Ownership of land must respond to mobility and population change. In Papua New Guinea, adjustments among kin and friendly clans are made through marriage, gift, and inheritance, or the elders reallocate land in accordance with the changing needs of families. Between strangers, adjustments can be made by sale or lease, although these practices are unevenly assimilated by customary groups in Papua New Guinea. Between enemy clans, however, the historical mechanism for balancing land and people was invasion and occupation.³ Contemporary migrants are drawing upon both the old principle that the strong possess the land and the new principle that owners must consent to occupation.

The two factors that most encourage migrants to occupy land illegally are their numerical superiority and the present disarray in property law. This Note explains how to ameliorate the problem of squatters by the gradual improvement of property law.

Why illegal occupation?

Numerical superiority gives settlers substantial powers to threaten owners and so encourages them to shirk rent payments. To illustrate by data from Wewak, there were an estimated 23,400 people living in the Wewak urban area in 1987,⁴ of whom at least 52 per cent were living in squatter settlements.⁵ The settlements are located on customary land owned by five villages whose combined population was 933.⁶ The settlers thus outnumber the customary owners by approximately 13 to 1.

Not only do squatters enjoy numerical superiority over owners in many towns and cities, but the balance is continually shifting in their favor. The census estimates population growth to be 2.3 per cent for the nation as a whole and 2.8 per cent for urban areas.⁷ A boot-strap inference is that migration shifts population to urban areas at a rate of at least 0.5 per cent per year. This suggests that the numerical superiority of settlers over owners would increase by at least 0.5 per cent per year. In some squatter camps, however, population has grown much faster than these figures suggest. The Boundary Road Settlements in Lae apparently grew at over 6 per cent per annum through the 1960s and 1970s, and by 1980 the growth rate had reached 11.7 per cent per annum. Similarly, the 1980 average annual growth rate in the Omili Settlement in Lae apparently exceeded 10 per cent.⁸

If the nation's population growth rate of around 2.3 per cent persists, population will almost double every 25 years. To be precise, the current population of 3.5 million will increase to 6.1 million in 25 years, 10.9 million in 50 years, and 34 million in 100 years. Perhaps population growth will decline spontaneously or perhaps government will encourage smaller families, which would throw these projections off, but any realistic forecast indicates that population growth will exceed resources for modernizing agriculture and educating children. Large numbers of uneducated people farming by traditional methods will assure a continuing flow of poor migrants to towns and cities. The number of settlers will thus grow through migration, as well as reproduction, whereas the number of owners will grow only through reproduction. So the numerical superiority of settlers over owners should increase in the coming years.

The second incentive for illegal occupation of land, after numerical superiority, is the present state of property law. Property law in Papua New Guinea gives migrants weak incentives to settle and pay rent, rather than squat and pay no rent. More than 97 per cent of the nation's land is in customary ownership.⁹ If the owners want to sell or lease land to migrants, neither party can be confident that an agreement between them will be enforced.¹⁰ Customary owners are reluctant to use police or courts to evict trespassers for fear of retaliation, and informal means of enforcement are not working well at present. Nor can the parties be confident that an agreement will cover the salient contingencies. These include the possibility that a third party will appear claiming to be the true owner of the land and demanding additional rent, the possibility that the original settlers will insist that the lease permits them to invite additional relatives to move on to the land, or the possibility that the owner will demand a much larger rent after the tenant improves the land. There is little point in striking deals that do not cover important contingencies and may not be enforceable. The most wasteful and inefficient relationship between owners and squatters occurs when the owners cannot

induce squatters to pay rent, but the possibility of eviction is sufficient to prevent squatters from investing in improvements like permanent houses or cash crops.

Non-solutions

The law should give migrants a better alternative than the traditional mechanism of acquiring land by invasion and occupation. Before suggesting a solution, I want to dispense with some non-solutions. There is a lingering hope among some people in Papua New Guinea that squatters will go back home voluntarily, or, if they are unwilling to go voluntarily, that coercive evictions will send them packing. There is also a hope among some people that mobility can be reduced, or at least prevented from increasing, by policies such as not extending the road system. Whatever the strengths and weaknesses of these proposals may be, it is important to realize that they are at best palliatives, not solutions. They are palliatives because there are far too many settlers to send a significant proportion back home, especially given Section 52 in Papua New Guinea's constitution, and population trends guarantee that there will be more in the future.

Another lingering hope is that government will solve the problem through planned development. Through government planning, disorganized squatter camps can be replaced by an orderly array of housing blocks. Unfortunately, it takes years to plan and implement developments, and in the mean time squatters continue to arrive. Planning cannot solve the squatter problem because government resources are permanently inadequate relative to the problem's scope. I doubt that government has enough resources for planned development to stay even with the influx of squatters, much less to gain on the problem.

To illustrate, there are several large squatter camps in Wewak on land belonging to Kreer village. Provincial and national officials have developed a plan to replace them with a new residential and commercial development.¹¹ Some squatters will obtain superior housing by moving into the development and paying modest rents, according to the plan, while those who are unwilling or unable to pay moderate rents will be evicted.¹²

Phase 1 of the Kreer project will affect approximately 200 houses occupied by squatters. Figuring about five people per house,* 1,000 squatters will be affected.¹³ If the squatter population of urban Wewak grew at the average rate for urban populations in Papua New Guinea, approximately 350 additional settlers arrived in 1987.¹⁴ Thus projects comparable to Kreer must be completed at least every three years in Wewak for the town to stay even with the influx of squatters. Discussion of the Kreer project first began in 1984, and its completion, which has been delayed by lack of funds that must be obtained by an as yet to be negotiated international loan, is now targeted for early 1990. It seems unlikely that funds will be available to complete such a project every three years, in which case more new squatters will arrive each year in Wewak than are accommodated through planned development.

The value of planned development is not to solve the problem of squatters, but to make the core of growing towns and cities attractive and orderly. The Kreer project, for example, will guarantee that the beach in the urban core of Wewak is a public park, and that the surrounding neighborhood is orderly. Planned development deserves support in order to make towns and cities attractive and orderly, even though it will not solve the squatter problem.

* Editor's Note: This number is probably quite low.

Understandings and contracts

The role of government in solving the squatter problem must be a modest one, consistent with available resources. Instead of a planned solution, government should try to remove obstacles to a private solution. The most significant obstacle is the weakness in property law that discourages bargaining and contracts between owners and settlers. Both owners and squatters stand to gain from improvements in the law of property and contracts. Customary owners often oppose the provision of any services to squatter camps by government or the squatters, themselves.¹⁵ Squatters want these services and are willing to pay for them.¹⁶ Squatters also want enough security to invest in improving the property that they occupy, and they want more land to accommodate new arrivals. For their part, customary owners, who have no real prospect of evicting squatters, would at least like to be paid rents and have agreements respected. There is an opportunity to cut a mutually beneficial deal if only the legal means for dealing are improved.

Owners and squatters make deals, or have made them in the past, called customary land leases. The most formal practice is for owners and settlers, having negotiated an agreement, to sign and make rental payments in the presence of a district officer, although less formal practices are also used. I have been unable to find any systematic data about these agreements, so my understanding of them is based upon discussions with district officers. They report that these agreements have been ineffective because they are frequently breached and enforcement is feeble.

To understand why these agreements are ineffective, it is helpful to distinguish between a contract and an understanding. Both provide a basis for cooperation, but the bases are different. Cooperation under a contract is based upon mutual obligations enforceable at law, whereas cooperation under an understanding is based upon mutual convenience. The terms of an understanding, being based merely on convenience, can be altered at any time by either one of the parties. In contrast, one party can alter the terms of a contract, once negotiated, only in ways that are consistent with the original agreement.

Situations change with time so as to reallocate the benefits and burdens of cooperation. If cooperation is based upon mutual convenience, the terms will adjust freely as circumstances change. If cooperation is based upon contract, in contrast, the terms will adjust to changed circumstances only to the extent provided in the original agreement.¹⁷ To illustrate, suppose a customary land lease calls for the settler clan to pay rent of K25 per month over a period of ten years. Now suppose the land appreciates very fast as the town expands and its rental value equals K100 per month by the fifth year. If the customary land lease is merely an understanding, the owners are within their rights to demand more rent. If, however, it is a contract, they must be content with K25 per month until the lease expires after ten years.¹⁸

Customary land leases are unstable because no one is quite sure whether to treat them as contracts or understandings. All customary groups presumably know what an understanding is, but many of them do not fully appreciate a contract to lease or sell land. It seems unduly harsh to hold a customary group to the terms of a contract whose obligations were not appreciated when it was signed. On the other hand, settlers take a risk who invest in improvements on the property they occupy on the basis of a mere understanding, rather than a contract. In so far as customary land leases are construed as understandings, not contracts, settlers will lack the security needed to invest in improvements. Similarly, in so far as customary land leases are construed as understandings, not contracts, banks and other lenders will lack the security needed to make loans for improvements. Thus fairness to customary groups commends treating

customary land leases as mere understandings, whereas development of land commends treating them as contracts.

Tenure conversion

One proposed solution is to remove land from customary law and apply the common law of contracts to it with full force. This approach has been pursued by the Land Titles Commission in accordance with the Land (Tenure Conversation) Act, which provides a mechanism for converting land from customary ownership by clans to freehold ownership by individuals.¹⁹ Before proceeding with conversion, the 1964 Act requires the boundaries to be surveyed and the Commission to confirm that all the affected parties agree to the conversion.²⁰

Proponents apparently contemplate conversion under two different circumstances. First, a clan may have surplus land that it would prefer to sell to others rather than retain for itself. Alienation of land greatly increases its sale value because the buyer is more confident that the title will be good. So the clan may request the conversion of a piece of its land in order to realize a good price when it is sold. Second, individualization may proceed to such a point that the members wish to reduce or end the clan's role as land owner. Clan management of property requires an effective political organization that makes decisions and disciplines its members. If political organization deteriorates, there may be too much internal disagreement for the clan to make deals. Under these circumstances, the transaction costs of dealing is greater for clans than individuals, so some members of the clan may want its land allocated to individual members in freehold.

Much of the recent work of the Land Titles Commission, however, has concerned, not conversion, but reversion.²¹ Land reverts to customary ownership when there is a successful challenge to the agreement by which it was alienated.²² As population increases, clans want to repossess converted land. Similarly, as land values increase, clans want additional payments for past sales or leases. In effect the clans are saying that past conversion agreements were merely understandings, not contracts. The success of their efforts before the Commission and the courts has left a cloud over many freehold titles.

These facts illustrate that tribunals are reluctant to construe contracts differently from the way they were understood by the people who made them. Indeed, some theories of contract law hold that the essence of a contract is the agreement which occurs when there is a "meeting of the minds". Minds cannot meet unless the parties share an understanding of the contract's terms. So, according to this legal theory, the existence of a contract depends upon a common understanding.²³

The words used in a contract are interpreted by courts in light of the way people who make contracts understand them. The best evidence about shared meanings is the practices of people. The legal implications of any contract thus depend, not just upon the words explicitly written into it, but upon custom and usage. Even in countries like Australia, property and contracts fall under the common law, which depends upon the practices of people, as opposed to statutes invented by politicians and civil servants.

An implication of these legal theories is that in order for customary owners to make deals that are enforceable as contracts, not as mere understandings, the customary owners must fully understand and appreciate what a contract is. Clans should not be held to contracts that they construe as understandings. This fact limits the enforcement of conversion agreements and customary land leases. Individual freehold goes against

custom and usage in Papua New Guinea to such an extent that attempts at conversion often create disputes rather than resolving them.

These facts have a clear implication for the direction in which property law must develop. To facilitate dealings, property law must stay within the general framework of custom and usage, not overturn it. Furthermore, custom and usage must be allowed time to evolve the concept of contract from experience with understandings.

Registering customary land

There is, fortunately, a bold legal innovation in East Sepik Province that could facilitate dealing in customary land. East Sepik's Customary Land Registration Act, which is the model for national legislation now being drafted in Waigani, provides for the registration of title in customary land to clans, not individuals. Registration of title is to be carried out systematically in the province by land mobilization officers whose task is to get clans to agree upon boundaries. Once boundaries are established, certain kinds of land deals will be permitted after vetting by a government committee.

This legislation, which has good prospects for reducing disputes and lubricating deals, will encounter obstacles where it affects squatters. Squatters feel that they have rights over the land by virtue of occupying and improving it, and from understandings with owners. There is ample support for their position in law. The legal term for squatting on land "openly and notoriously" against the interests of its owners is "adverse possession". Under British common law, adverse possession of property for a sufficient time transfers ownership of it to the occupier. Adverse possession is apparently a principle of customary law in Papua New Guinea, as revealed by land court cases.²⁴ The settlers who have squatted on land for a long time would stand a good chance of prevailing against the original owners in land court.

One obstacle to reaching a lease agreement is uncertainty about the true owners of the land. A purpose of customary land registration is to reduce or remove uncertainty. Registration of customary ownership is, however, only a means of recording current agreements to preclude future disputes. Current disputes, rather than being resolved by registration, are an obstacle to it. Adverse possession complicates the registration of customary land in urban areas since it creates a disagreement between historical owners and recent occupants. While registration will do little or nothing to solve the problems of current squatters, it may reduce the problems of future squatters. Future problems will be reduced because squatters who settle on registered land will know how to identify its owners.

The key to solving the problem of squatters is creating, not merely an understanding, but a contract between owners and settlers. Contracts are needed to resolve disputes definitively and to create a firm basis for future cooperation. As explained, customary groups do not fully appreciate the significance of land contracts, and contracts are not enforceable unless both sides understand them. Thus, to solve the problem of squatters, the registration of customary land and interests must become a vehicle for customary groups to increase their understanding of contracts and their ability to make deals.

The East Sepik legislation would accomplish this task in two ways. First, land officers would work directly with the clans of owners to determine their rights in land and register them. Determining rights is partly a matter of making findings under customary law and partly a matter of negotiating an agreement that reflects the relative strength of the parties. The outcome must reflect both customary law and the fact that coercive orders against squatters are very unlikely to be enforced. Mediators will have to impress

upon squatters the advantages of staying within the law, and they will have to impress upon owners that the squatter invasion is permanent, indeed it will get worse, not better.

Second, land deals would be vetted by a government committee. Under East Sepik's Land Act, no deal can be concluded directly between owners and squatters. Instead, all deals must go through government, much like the lease of freehold land to foreigners. A "Land Management Committee" must supervise the transaction by, for example, issuing the owners a lease document that they in turn sell to the squatters. Direct dealings are thus forbidden and indirect dealings through government are encouraged.

There is, I think, a flaw in this legislation that is similar to using planned development to solve the problem of squatters. Government resources do not appear to be adequate to the task. Too many government resources are needed to proceed to the stage of land deals by the route specified in the Act. Mediation by officials and vetting by the Land Management Committee may be feasible for only a fraction of deals. In another note I suggest ways to overcome this constraint by making the most of available resources. I recommend, in brief, that officials take steps to enable customary land owners to make deals themselves, with minimal government assistance.

Many deals come to grief because the parties do not contemplate the contingencies that will arise in the future, such as appreciation of land values or the arrival of squatter's relatives. A standard form contract should be developed, along with explanatory materials, that covers the common contingencies that give rise to disputes between owners and squatters. Parties using such a contract would have to contemplate in advance and make provision for the contingencies that cause most disputes. Deals using the standard forms should be approved and accepted by officials automatically. The Land Management Committee should scrutinize, not all deals before they occur, but only those deals that cause disputes after they occur.

Making customary law into common law

Beside customary land registration, the direct way to reduce the problem of squatters in the future is improving customary land law. Custom is already vigorously at work in the squatter camps extending land law by informal means. Some pertinent facts were described to me by Job Suat, Assistant Lecturer in Cartography at the Technical University in Lae. Mr. Suat owned a house in Bumbu settlement in Lae (also known as Buko settlement), where he lived for five years with his fellow Sepiks. He subsequently sold the materials constituting his house for K1,700 in cash with the stipulation that they be removed within three days. With funds from the sale, he bought another house in the settlement and the ground under it from his brother-in-law. This house he currently rents for K50 per month to a school teacher, who is not a relative. The rental agreement was drawn up by a lawyer in Port Moresby. Job now lives in university housing on the Unitech campus, but plans to move back to the settlement in the near future where he feels more secure.²⁵

These houses are permanent structures. Indeed, Job's uncle, Silas Gawi, has built a house in the settlement that is higher quality than university housing. Although the sums of money involved are substantial, it is not clear whether the contracts are enforceable in court. That does not prevent property rights from being respected. To illustrate, people are packed into the camp so tightly that they have no space for gardens, yet there is a large patch of land that remains vacant because its owner is one of the original settlers in the camp who wants the space. According to Mr. Suat, no one

in the settlement has any written title or similar document. Perhaps the effectiveness of the informal system of property law and land contracts is enhanced by the fact that the camp consists almost entirely of Sepiks. Furthermore, the camp has a committee established for its self-government that reduces frictions among its residents.

Long-time occupation of the land gives individual squatters a sense of secure ownership. (Recall the principle of adverse possession.) It seems that the older residents feel secure enough to make permanent improvements on the land, whereas newer residents hold back on improvements. Furthermore, the Bumbu settlement receives no services from the city -- no water, electricity, road maintenance, garbage pickup, sewerage, police services, and no surveying of land into blocks. The original owners of the land even stopped the squatters from gathering gravel from the river to cover holes in their mud roads.²⁶ Greater security of title would give new residents the confidence to improve their property and would also permit the camp to receive city services.

The situation of the squatters would be improved if lands officials provided the means for formalizing contracts, as for example, by witnessing customary land lease agreements. Also the mediators and courts should be willing to hear disputes arising over informal contracts among squatters. The removal of uncertainty through better property law would result in quicker and more lasting improvements of the camps than government planners can ever accomplish.

Perhaps the most important legal development, however, would be clarifying the principle of adverse possession in customary law. Clarifying this principle would enable everyone to have a better understanding of when legal title passes to occupants by virtue of long-standing possession of the land. Once the conditions of transfer were known, the original owners and the settlers would know what to expect from each other. Such an understanding would improve their ability to negotiate contracts. Furthermore, if government knew when occupation became ownership, it would know when services should be extended into the camps.

It would be a mistake to think of adverse possession as mere lawlessness. Its historical role in Papua New Guinea has been to redistribute land according to needs. Papua New Guinea is one of the oldest agricultural regions in the world, yet it never developed a permanent class of landlords and tenants, masters and slaves, or nobles and serfs. A substantial degree of equality has been achieved because people who needed land the most acquired it from those who needed it less, sometimes voluntarily and sometimes by forcible occupation. There is little doubt that the squatters need the land they occupy far more than the traditional owners. Customary law has responded to this fact in the past and it should continue to do so in the future.

Footnotes

1. I am grateful to A. P. Power and John Millett for comments on an earlier draft.
2. "Customary Land owners are unwilling to part with their land and feel threatened by the ever increasing pressure for urban development. At the same time customary land owners are fighting a constant battle to keep migrants from settling on their traditional lands." -- B.J. Walsh, "The Demography of Squatter Settlements in Lae, Papua New Guinea," (The University of Technology, Department of Surveying and Land Studies, Nov. 1985) p.20.
3. "Throughout New Guinea fighting...was probably an important, though usually indirect, means of adjusting population to land resources."-- Ron Crocombe and Robin Hide, "New Guinea: Unity In Diversity", Land Tenure In the Pacific (1971), ed. Ron Crocombe, page 296.

"...acquisition by conquest can be said to have produced a rough measure of social justice in that the larger groups with greater numbers supplied their requirements for expansion by annexing the lands of less populous and less powerful neighbors."--J.S. Fingleton, "Land Policy in Papua New Guinea", Law and Social Change in Papua New Guinea (1982), eds. David Weisbrot, Abdul Paliwala, Akilagpo Sawyerr, page 115.

"Although the Chimbu did not set out to conquer land, conquest was in fact an important traditional means of redistributing land according to the laws of supply and demand." -- J. Niles, "Law Enforcement or Land Reforms," Problem of Choice: Land in Papua New Guinea's Future (1974, ed. Peter G. Sack), p135.
4. Based on 1980 census figures projected to 1987 at the annual urban population growth rate of 2.8 per cent.
5. Joe Jareka, statistician for East Sepik Provincial Government, determined from 1980 census data that 51.8 per cent of the population in urban Wewak were living in settlements. If settlements have grown at least as fast as the other areas in the period from 1980 to 1987, the ratio must now exceed 52 per cent.
6. Identification of the five villages that are customary owners of urban land in Wewak was made by Joe Jareka, East Sepik Provincial Government statistician, who also supplied 1987 population data for those villages.
7. These numbers were provided to me by Joe Jareka, statistician for the East Sepik Provincial Government, based upon the latest revision of census data. Several kiaps expressed to me the belief that population is growing faster than official statistics indicate.

8. "Rofe (1967) estimated the population in Bumbu (Buko) settlement at 400 in 1963, which according to Jackson (1976) had grown to over 3000 by 1974. At the 1980 census the population of the Bumbu settlement stood at 4460 persons living in 847 self-help housing units..." -- B. J. Walsh, "The Demography of Squatter Settlements in Lae, Papua New Guinea", (The University of Technology, Department of Surveying and Land Studies, Nov. 1985) page 25. Also see Table 7 and Table 8, pages 30 and 31.
9. R. W. James, Land Law and Policy in Papua New Guinea (1985), contains a table on page 33 that shows 97.25 per cent of land unalienated, and 2.75 per cent alienated. The primary source of the data is not given.
10. "The principal rationale for a system of registration of interests in customary land in Papua New Guinea revolves around the need to reduce uncertainty and therefore risk associated with economic activities involving land..." Task Force on Customary Land Issues, Report (presented to Minister for Lands, 1983), page 8.
11. Department of Housing, Government of Papua New Guinea, "Urban Settlement Planning Project: Feasibility Study, Volume 1", March 1988, Consulting Engineers and Planners AS. The plan is continually evolving. I heard a presentation of the most recent version to the Kreer landowners by a Department of Housing official on June 16, 1988 in Wewak.
12. According to town planner Joe Mark, there are about 70 squatter houses on beach front property that must be removed to make way for open park land. There are also about 130 more squatter houses that are inside the boundaries of the development planned for Phase 1. These houses must be rationalized to conform to the plan and they will receive city services, but they will also be charged rents by the owners of the property.
13. These numbers were supplied by Joe Mark, town planner for Wewak. The number of houses is based upon a count that he made. Five persons per house is also his guess based upon averages for Papua New Guinea.
14. A conservative estimate of the 1987 squatter population in Wewak town, based upon projecting 1980 census data forward at the annual rate of urban population growth of 2.8 per cent, equals 12,576. Thus a 2.8 per cent population growth rate would yield an increase of 352.
15. "The landowners refuse to allow services to be brought to the settlements (by squatters or government) as this could be construed as implicit recognition of legal squatting rights..." -- B. J. Walsh, "The Demography of Squatter Settlements in Lae, Papua New Guinea," (The University of Technology, Department of Surveying and Land Studies, Nov. 1985), p.20.
16. "Respondents (approximately 200 squatters surveyed in each of Moresby, Hagen, Wewak, Madang) were asked to choose up to five desirable housing characteristics from a list of ten as being the most important to them. They were then asked which of those selected they would be willing to pay for. Security of land tenure and piped water emerged as the top priorities over all followed by electricity and garbage collection." -- Department of Housing, Government of Papua New Guinea, COWI consult, "Annex 4. Socio Economic Analysis", Urban Settlement Planning Project: Feasibility Study: vol 1, March 1988.

17. There is a common law doctrine according to which contracts can be set aside when changes in circumstances destroy their purpose. Most changes in circumstances, however, do not destroy the purpose of the original contract.
18. Of course, the contract might have been written differently and the rent set at, say, 5 per cent of the unimproved value of the land, in which case the monthly rent would rise automatically with land values.
19. The Land (Tenure Conversion) Act of 1964 and the Land (Tenure Conversion Amendment) Act of 1987.
20. See section 9 (1).
21. The files of the Land Titles Commission contain interesting examples of customary groups re-asserting their claims to government land. For a recent decision that vastly expands government liability, see Theodore Miriung, "Bwagoia Township", Land Title Commission Application No. 1987/73 (13 July 1987).
22. "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 and their community." R. W. James, Introduction to the Laws Governing the Ownership of Land in Papua New Guinea (Port Moresby, 1978), page 90.
23. The "meeting of the mind" approach received its purest expression in the "will theory" of contract. In America the theory was modified to stress the objective signs by which people indicate agreement. The signs are the conventional elements of offer, acceptance, and consideration. A recent comparison of alternative theories of contract, including the will theory, is found in Randy Barnett, "A Consent Theory of Contract," 86 Columbia Law Rev. 269 (1986). The American theory discussed above is explained in Melvin A. Eisenberg, "The Bargain Principle and Its Limits", 95 Harvard Law Rev. 741 (1982). ^ E
24. See case of Hogeteru, Kamate, Kema, and Hipu Henagaru, local land court at Kami, presiding magistrate R. J. Giddings, dispute over ownership of rights to Aupe'e Hill, Guguva'vimato Ridge, etc., decided 19 Jan. 1978; also see case of Tobuka and Anglimka, dispute over land called Minba, provincial land court at Minj, presiding magistrate R. J. Giddings, decided 12 June 1986. Relevant National Court cases are *The State v. Giddings* 1981 P.N.G.L.R., and Justice Bredmeyer's decision in "In the Matter of Application for Review of a Decision...." of a District Land Court of the Land Known as Komonotoa between Ningalimbi No. 2 and Ilahita No. 3 clans (O.S. No. 24, 1987).
25. Job acknowledges that the camp is a "breeding ground for rascals," but they do not harm people within the camp. Its residents apparently feel secure, even without any police services.
26. The original owners of the camp also own a gravel company.

THE CASE AGAINST GOVERNMENT MONOPOLY IN CUSTOMARY LAND DEALS¹

In many nations, government is the only supplier of certain kinds of goods such as hospitals, piped water, schools, universities, military security, mail, telephones, trains, airports, and electricity. In addition, government sets the prices or terms of sale on many goods that are privately supplied, such as medicine, health care, alcohol, guns, airplane tickets, unskilled labor, and legal services. Thus government exercises monopoly control over many goods as sole supplier or regulator of the terms of sale.

Papua New Guinea has created a government monopoly over many land deals. Customary land that has been converted to freehold and registered cannot be transferred or leased for more than 25 years without approval of the Land Board.² Land remaining under customary law cannot be sold or leased to anyone other than customary groups except through the state.³ Before a customary group leases land to the state, the Minister for Lands and Physical Planning must be

"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."⁴

Most transactions in land, however, are between customary owners. The formalization of customary law by the land courts has not proceeded far enough to eliminate many of the uncertainties and risks attending these transactions. In the meantime, while customary owners await such developments, their attempts to legally bind themselves to the terms of a sale or lease are imperfect, so sales and leases of customary land are unnecessarily risky.⁵

The effect upon development is stifling. To overcome this risk, East Sepik Province has enacted legislation to register land titles in the names of the clans that are its customary owners and to facilitate its lease to others for use. This legislation, which is the model for national legislation that is currently being drafted, requires all deals involving customary land to be vetted by a government committee.⁶ Thus government's monopoly power will extend to formal dealings in land under customary ownership.

Economists have developed theories over the years to predict the behavior of government monopolies. This note applies these theories to dealings in customary land. I argue that government monopoly is too cumbersome and creates a grave risk of corruption. A more promising approach would rely more on land courts to safeguard customary land dealings.

Rationale for government monopoly

What characteristics distinguish goods whose supply is best monopolized by government? Government monopolies serve a variety of needs such as health, education, safety, and communications, but these needs are also met by goods produced privately in relatively unregulated markets, such as food for health, books for education, guard dogs for safety, and private radios for communications. Thus the boundary between private and public sectors cannot be drawn on the basis that each serves different needs.

So how is the boundary to be drawn? After struggling with this problem for many years, economists developed a theory based upon the production characteristics of different goods.⁷ When a market works well, buyer and seller both benefit from exchange to the maximum possible extent.⁸ When a market fails, however, the benefits of exchange fall short of the maximum, or one of the parties may even be harmed by exchange. One tradition in economic theory holds that government should intervene when markets fail. The basic rationale for government monopoly is that it provides the best remedy for failures in private markets caused by the production characteristics of certain goods.

I will discuss several forms of market failure that are relevant to land deals in Papua New Guinea. One significant form of market failure occurs when the cost of producing a good falls as the producer grows larger. To illustrate, the cost of telephone calls in Papua New Guinea will probably fall as the telephone network expands.⁹ Such an industry is said to have "increasing returns to scale" because productivity increases with the scale of production. Increasing returns to scale characterize goods supplied through networks, such as telephones, electricity grids, water pipes, and railroads.

When production is characterized by increasing returns to scale, competing firms can produce more efficiently by merging into a single large firm. The gain in efficiency, however, is accompanied by risk to consumers. The single firm created by such mergers is a private monopolist who can maximize profits by keeping prices high and restraining production. To protect consumers, government may regulate prices and terms of sale for goods produced by a private monopolist. Thus government takes monopoly power away from the private producer and retains it for itself, ostensibly to protect consumers. Alternatively, the private monopoly may be nationalized and the good supplied directly by a government monopoly. The existence of increasing returns to scale thus provides a rationale for government's monopoly control over some of the goods listed above.¹⁰

Another form of market failure occurs when a private transaction significantly affects people who are not parties to it. To illustrate, I may purchase cigarettes for my own enjoyment, but my smoking may bother you. Similarly, I may purchase a car for my private use, but my bad driving may endanger you. I may dump sewerage into the river where you wash your clothes. Guns or alcohol sold to one person may enable the buyer to harm others. In each of these cases, an economic transaction harms people who are not parties to it. Since harm is not the purpose of the transaction, but only an accidental by-product, it is called an "external effect" or an "externality".

Some externalities, unlike the ones listed in the preceding paragraph, are beneficial rather than harmful. To illustrate, if I put a light in front of my house to deter thieves, the light may also make the street safer for pedestrians. Improved safety for pedestrians is an incidental by-product of my installing the light. Similarly, if I hire a private guard to protect my house at night, pedestrians walking in front of my house may also be safer. Another example is education, which is widely believed to benefit society as whole, not just the recipients of it, by making people better citizens.

In private market transactions, the parties look to their own benefits and pay little heed to external effects. Left to itself, the private market will, consequently, supply too many goods that cause harmful externalities and too few goods that cause beneficial externalities. To illustrate, without government there will be too much pollution and too few street lights. There is thus a potential advantage from

government supplying or regulating the supply of goods that have significant external affects.

The third, and final, form of market failure that I will discuss occurs when one party to a transaction has far more knowledge than the other party about the quality and value of the product. To illustrate, the consumers of medical drugs, who usually know little about them, must have confidence that the drugs are effective and safe when used according to directions. If unscrupulous sellers, who know far more than consumers about drugs, were allowed to dump dangerous and ineffective drugs on the market, consumers might lose confidence in the industry and manufacturers might be discouraged from producing safe and effective products.¹¹ Government regulation allegedly provides uninformed consumers with a guarantee of the safety and effectiveness of drugs.¹²

Medical drugs are just one example in which the consumer knows far less about the product than the seller. There are many examples, such as used cars or the services of physicians and lawyers. In some cases the reverse situation arises in which consumers know far more than the sellers. For example, consumers who purchase life insurance policies know far more about their own health than the life insurance company who writes the policy.

In general, if one of the parties to a transaction does not understand the characteristics of the good, the benefits from market exchange will not be maximized, or one of the parties may even be harmed. "Asymmetrical information" between buyer and seller can cause private markets to fail. Government regulation can protect the uninformed party and thus increase the scope for exchange.

Of the three forms of market failure -- increasing returns to scale, externalities, and asymmetrical information -- two are directly relevant to deals involving customary owners of land in Papua New Guinea. The fundamental rationale for government vetting of land deals is that customary owners do not understand or appreciate fully the consequences of leasing or selling their land. They might, consequently, fall prey to hard-bargaining or unscrupulous buyers. This is an argument based upon asymmetrical information, much like the argument for regulating the sale of medical drugs.

A second argument for government vetting of land deals is that sales and leases of customary land affect a whole network of kinsmen, including future generations. By protecting the integrity of the kin group and strengthening it, government can diminish social problems associated with the loosening of social bonds, such as rascalism and drunkenness. Thus a government monopoly on deals in customary land can be defended on the grounds that government is responsible for protecting the interests of people affected by the transaction who are not parties to it. This is an argument based upon externalities.

Critique of government monopoly

The preceding section developed an economic rationale for government vetting of customary land deals based upon two types of market failure -- asymmetrical information and externalities. Market failure theory casts government in the role of public benefactor who, like the wise clan elder, intercedes to prevent private transactions from causing harm. Market failure theory, however, is just the first of two accounts of government monopoly that I will develop. The second theory depicts government very differently. Rather than viewing government monopoly as

public benefactor, the second theory views it as a device by which politicians and civil servants extract private advantage at the expense of the general public. The second theory thus provides a critique of government monopoly, not a rationale in favor of it.

The starting point for a critique of government monopoly is the realization that civil servants and politicians, like businessmen, have their own ambitions and private goals. Government is not wholly benevolent because it is staffed by human beings. Faced with a conflict between the best interests of the public and their own best interests, civil servants and politicians often look to their own interests first. Monopoly control can be used by government to correct market failure, which benefits the public, but it can also be used to benefit civil servants and politicians.

The private goals of politicians have a characteristic form. Just as businessmen try to maximize profits, so politicians try to maximize their own political power. In so far as politicians are in control, monopoly power in economic life will be directed at maximizing the political power of reigning politicians.

A similar argument applies to civil servants. Just as politicians try to maximize their own political power, so civil servants try to increase the size and influence of the agencies that they staff. In so far as civil servants are in control, monopoly power in economic life may be directed, not at the public good, but at maximizing the size and influence of government agencies.

I have discussed the possibility that the monopoly power of government will be used to benefit civil servants and politicians, rather than benefitting the public. There is another possibility that must be mentioned. Competition between businessmen keeps prices low and profits down. If businessmen can stop competing with each other and agree to keep prices high, their profits will increase. It is thus in the interest of businessmen, but not the public interest, to conspire together to keep prices high. This fact was noted earlier when I said that high prices and high profits are a characteristic of unregulated private monopolies.

When businessmen agree to keep prices high and not to compete with each other, their agreements often break down. The breakdown occurs because any business that cuts its price will attract customers away from other businesses that stick to the agreed price. Thus individual businesses have an incentive to sell below the agreed price, even though business as a whole enjoys higher profits by observing it. In brief, agreements not to compete are unstable because cheaters win.

To illustrate, nations belonging to the Organization of Petroleum Exporting Countries (OPEC) periodically negotiate an agreement to keep oil prices high. Conforming to the official OPEC price increases the profits of all the oil producing nations. Each individual country that produces oil, however, can make even more profit by undercutting the official OPEC price and attracting extra customers. Thus OPEC has great difficulty preventing its members from cheating on the agreement. The nations of OPEC are, in this respect, just like businesses who have difficulty enforcing an agreement not to compete with each other.

To solve this problem, businessmen often try to get government to enforce high prices. Businesses in an industry may give donations, gifts, or bribes to induce politicians to pass a law that sets a minimum price for a certain good and ask government to prosecute anyone who sells below the legal price. Thus businesses

can prevent competition and avoid price cutting by getting government to enact monopoly prices. In the preceding section I explained that private monopolies keep prices high and that government regulation may be needed to protect consumers. The opposite possibility is contemplated here. Instead of lowering prices to protect consumers, government price regulation is often a device for raising prices and exploiting consumers.

In this section I have discussed three possible objectives: i) maximizing the power of reigning politicians, ii) maximizing the size of government agencies, and iii) maximizing the profits of private businesses. The history of government regulation in countries like the United States provides examples of each. To illustrate, the Civil Aeronautics Board kept air fares high for many years and stopped competition among airlines, as assumed by objective (iii). The Civil Aeronautics Board was described by its critics as the "captive" of the airline companies. The Interstate Commerce Commission, in contrast, imposed a vast array of cumbersome regulations whose main effect was probably to create more work for itself, as assumed by objective (ii). Finally, many of the internal rules that govern regulatory agencies in America appear to increase the political power of Congressmen, as assumed by objective (i). Congressional power is increased because the existence of the regulations makes it possible for Congressmen to do favors and perform valuable services for constituents. No wonder that deregulation has been so popular among Americans recently.

Application to land in Papua New Guinea

These three accounts of the objectives of government monopolies have immediate application to land deals in Papua New Guinea. Assume that a prerequisite for making deals in customary land is registering title and obtaining approval from a government committee. There is always a line in the post office, there are always cases waiting for months to be tried in courts, there are applications for land conversions awaiting action at the Land Titles Commission,¹³ and there will assuredly be a backlog of customary land deals awaiting vetting.

It is not hard to see some reasons why a backlog will develop. Officials never have enough staff to monitor the full range of market transactions. Besides insufficient resources, officials seldom have the motivation needed to stay abreast of the market. Dedicated civil servants proceed with caution for fear of making a mistake that will harm their careers. The benefit of proceeding with caution on land deals accrues to civil servants, whereas the cost of delay falls upon private parties. If civil servants control the pace, their caution (not to mention their sloth) will impose excessive delays upon land deals.

With a backlog of land deals awaiting approval, costly delays can be avoided by moving to the front of the queue. Powerful people will be tempted to use their influence to do so. To get to the front of the queue, businessmen will enlist the support of politicians. The power of politicians will be increased because of their role in getting valuable approvals for land deals. Finally, some people who own land may realize that they can keep the prices of leases very high by restricting the number of deals actually completed. Thus they will try to influence government to approve their own deals and to obstruct deals involving their competitors. In this way government will create monopoly profits for favored businessmen.

Proposed solution

I began this note by acknowledging that there is a market failure in customary land deals due to the ignorance of formal law on the part of some customary land owners

(asymmetrical information) and due to the effects of land deals on clan discipline and future generations (externalities). A government monopoly might pursue the public interest and try to correct these market failures, or a government monopoly might be used to increase the power of politicians, the importance of civil servants, and the wealth of favored businessmen. Even if the government monopoly proceeds with the best of intentions in all cases, it is unlikely to have enough resources for the task.

The two problems of diversion of objectives and insufficient resources might be overcome by streamlining processes and reducing government's monopoly power. The key to streamlining is enabling owners to do much of the work of vetting deals themselves, and putting more faith in mediators and courts to protect the clans. I suggest three steps that might help to achieve these goals.

First, the land mobilization officers should draft standard forms which land owners can use to make deals. The forms must direct owners to consider and make provision for the contingencies that give rise to disputes. To illustrate, customary land leases often fail to make provision for increases in the value of the land or the arrival of additional relatives of the people leasing the land. Thus the customary agreements tend to break down when land appreciates and more relatives join the original squatters. The standard form for leases should invite the parties to specify how they will handle such contingencies. The parties should be directed by the registration form to contemplate in advance the contingencies that cause most disputes.

Second, the government committee charged with vetting land deals, such as the Land Management Committee in East Sepik Province, should give preliminary approval automatically for all deals that use standard forms. Instead of civil servants scrutinizing every deal, detailed examination should be restricted to cases involving disagreement. When disputes arise, the vetting committee such as East Sepik's Land Management Committee would be well advised to limit itself to making a recommendation to mediators or the Lands Court. After all, Papua New Guinea does not need yet another judicial body besides mediators, village courts, land courts, and local courts.

Third, a central file should be established containing a card describing the boundaries of each registered clan, and recording any disputes or deals. Boundaries could be traced upon a master map as the file grows. Much hope is held out by East Sepik officials for establishing a computer system to record such information. Most computer systems have a software package with a name like "Filebox" or "Filecard" that provides an electronic method for recording and sorting file cards. Thus the file cards could be entered into a computer when the technology becomes available. My inspection of land records at courthouses around Papua New Guinea found them to be uneven in quality and quantity. It seems that many officials just cannot be bothered to record and file information promptly. The actual filing system must be devised with these human failings foremost in mind.

In East Sepik Province the legislation is already in place to proceed with these proposals. East Sepik's Customary Land Registration Act may be copied by other provinces or it may become the basis for national legislation. In any case, the changes that I recommend are primarily matters of administration, not legislation. Customary land deals are already being made throughout Papua New Guinea with little legal support. Land officials can develop standardized forms and procedures to assist these deals, while remaining within the scope of their power, even without

new legislation. The land courts can proceed to develop standards for enforcing these deals as part of its responsibility for formalizing customary law.

There have been too many legislative daydreams among politicians and administrators in Papua New Guinea who delude themselves into thinking that they can direct the efforts of the nation by their commands. Many of the laws, directives, rules, and regulations concerning lands are, fortunately, ignored at the local level. The most important thing that national politicians can do for smallholders is to provide the legal framework and infrastructure for marketing agricultural products, and not burden smallholders with taxes. Agricultural development, including the improvement of property law, will proceed on a pace set by clans and families themselves, according to their interest in its various aspects, not according to a master plan set by a government monopoly.

Footnotes

1. I am grateful to Tony Power for comments on an earlier draft. I am not the first economist to oppose government monopoly on dealings in land. Trebilcock, and Trebilcock and Knetch, proposed limited direct dealings with restrictions designed to protect customary owners, such as prohibiting sales but allowing leases with a cap on the maximum length. See Michael J. Trebilcock and Jack L. Knetsch, "Land Policy and Economic Development in Papua New Guinea, 9 Melanesian Law J. 102 (1981); Michael John Trebilcock, "Customary Land Law Reform in Papua New Guinea: Law, Economics and Property Rights in a Traditional Culture, 9 Adelaide L. Rev. 191 (1983); Michael J. Trebilcock, "Communal Property Rights: The Papua New Guinean Experience," U. Toronto L.J. 377 (1984).
2. See section 12 of Land (Tenure Conversion) (Amendment) Act of 1987 that replaced section 26 of the Land (Tenure Conversion) Act of 1963. In lease lease-back, the annual value of the lease is ordinarily set at 5 per cent of the unimproved capital value of the land.
3. Land Act, Ch. No 185, section 15.
4. Land Act, Ch. No. 185, section 15.(3). The other face of this paternalism is that government cannot acquire native land by compulsion except for a public purpose. See "Compulsory Acquisition", C.E.P. Haynes, Land Law and Land Policy in Papua New Guinea: Text, Cases and Materials (U.P.N.G. Printery, 1986) section 2((ii) page 7-9.
5. "The principal rationale for a system of registration of interests in customary land in Papua New Guinea revolves around the need to reduce uncertainty and therefore risk associated with economic activities involving land...", Task Force on Customary Land Issues, Report (presented to Minister for Lands, 1983), page 8.
6. The East Sepik Province Land Act defines a sale or lease to anyone but the government as a "controlled dealing", which requires the approval of the "appropriate authority". The "appropriate authority" is the Provincial or District Land Management Committee, possibly as reported to and approved by the Provincial Secretary. The procedure is for the acquiring party to forward the

instrument to Assistant Secretary (Lands), who forwards it to the appropriate authority, who establishes that eleven conditions are satisfied, the most important being

- (i) The transaction "is generally agreed to by the customary owners of the subject land and has been entered into in the manner provided for by the custom applying to the land";
 - (ii) adequate reason for sale or lease is given;
 - (iii) the boundaries are adequately identified;
 - (iv) adequate provision is made for road access to the property;
 - (v) appropriate authority is satisfied that the dealing is in the interest of customary land owners.
7. A clear formulation of the market failures theory is found in Charles Schultze, The Public Use of Private Interest (Brookings, 1977). The synthesis in theory explained by Schultze developed from two important strands of economic theory. First, general equilibrium theory produced a deep understanding of perfect competition. See for example K. J. Arrow and F. Hahn, General Competitive Analysis (1971). Second, the concept of public goods was given a rigorous formulation by Paul Samuelson in "The Pure Theory of Public Expenditure," 36 Rev. of Econ. & Stat. 387-389 (1959). A synthesis of thinking about public goods is found in Richard Musgrave's The Theory of Public Finance (1959).
8. Thus mathematical economists routinely prove that perfect competition is Pareto efficient. See Arrow and Hahn cited in preceding footnote.
9. Networks usually have a central switch and there are large economies of scale in switching equipment.
10. A more complete discussion would cover several important qualifications of this proposition. For example, natural monopoly explains why government may be the only supplier of a good, but it does not explain why the law should forbid private suppliers from competing with government. Similarly, there are ways to handle natural monopoly other than by government monopoly, such as auctioning production rights and selling them to the highest bidder.
11. Declining sales due to loss of buyers' confidence and discouragement of high quality suppliers is called "adverse selection." There are many economic models of adverse selection. The first such model was George Akerlof's "The Market for Lemons: Quality, Uncertainty, and the Market Mechanism", Q. J. Econ. August 1970.
12. There are, of course, many devices other than government regulation for supplying such a guarantee. Manufacturer's warranties and liability laws may have the same effect.
13. "...an estimated 8,000 to 10,000 lease applications are now stalled in the Department of Lands." Task Force on Customary Land Issues, Report (presented to Minister for Lands, 1983), page 26.

GOVERNMENT LIABILITY FOR ERRORS IN CUSTOMARY LAND REGISTRATION⁷

Registration of land under customary ownership is supposed to convey clear and certain title to the rightful owner. To identify the rightful owner, principles of customary law must be combined with facts relevant to the circumstances of each case. Neither the principles of customary law nor the relevant facts can be found in written records, which increases the vagueness and uncertainty that generally afflicts the law. Ascertaining rightful ownership under customary law requires expertise in anthropology, genealogy, surveying, and a great deal of local knowledge. Given these facts, officials responsible for carrying out registration, no matter how conscientious and knowledgeable, are bound to give title to the wrong party from time to time.

Mistakes in determining ownership of real property can be very costly, especially for a people living off the land. Indeed, the future reduction in such mistakes is one goal of registration. People in Papua New Guinea are so attached to the land that even a small probability of mistake can foster a large number of disputes. The parties aggrieved by registration will undoubtedly try to hold government liable for their disappointment. The compensation payments resulting from liability could be so large as to jeopardize the registration process by making it too risky for government. There is, consequently, much concern among officials in East Sepik Province and the national government concerning liability for mistakes in registering customary ownership of land. This note argues that, absent a deliberate decision by government to assume extensive liability, its liability is limited.

Two roles of government

A distinction in American jurisprudence is valuable for identifying the appropriate liability standard for mistakes in customary land registration. The distinction is between the state in its role as arbitrator between private interests and the state in its role as public enterprise. To illustrate, suppose that one property owner installs a drainage system that dumps excess water on to someone else's property. If the injured property owner sues, a court must decide whether the property owner who installed the drainage system was within his rights. More generally, government must decide through the courts or by legislation whether property owners are free to expel water from their land, or whether, instead, owners have a right not to have water expelled on to their land.

The allocation of a right between contending parties can be described as an arbitration of a conflict in their interests. The allocation might be made by a fresh bill enacted by the legislature, a new precedent decided by a court, or a new regulation issued by an administrative agency. When such decisions are made, whether by courts, legislatures, or administrative agencies, the government is performing the role of arbitrator.

In contrast, suppose government decides to build a hydroelectric project that will flood private property and makes it worthless. The owners of the flooded property will no doubt expect compensation from the government. In this situation, government is not allocating a right between private parties who are in conflict. Rather, government is taking ownership rights away from private parties in order to promote a public enterprise. Government performs its role as public enterprise when it acquires resources for a productive activity.

The distinction in government roles between arbitrator and public enterprise is central to the issue of compensation, at least according to a theory of property prominent in America.² When government acts as an arbitrator, according to this theory, it need not pay compensation. Thus government may allocate disputed property rights between private parties in conflict without compensating the losers. It would be inappropriate to require government to pay compensation when it merely arbitrated a conflict in private interests. On the other hand, when government acts as an enterprise, it takes valuable rights from private parties in order to create a public benefit. The cost of public enterprise should fall upon its beneficiaries, the general public, not upon particular property owners. By requiring compensation for resources needed for public enterprise, the burden of paying for public goods falls upon tax payers in general, not upon private persons whose property happens to be needed by government.

The distinction between arbitration and enterprise has immediate relevance to customary land registration. The registration process is intended to resolve outstanding disputes and preclude them in the future. When government registers customary land, it is performing the role of arbitrator. In performing its role as arbitrator, the government should not normally be held liable for compensation to the losing party. This point, however, is not really in dispute. No one argues that government should compensate everyone who is aggrieved by the registration of customary land. Rather, the issue concerns the extent to which government should be liable to the rightful owners for giving title to the wrong party. Fortunately, this issue can be resolved by drawing upon the preceding analysis.

(Suppose the court forbids someone from trespassing upon another's land, and subsequently discovers that the owner of the property had agreed to allow the person to cross the land in exchange for a fee. This is an example of a mistake committed by the court in deciding a property dispute. The court should re-open the case and revise its decision in light of new evidence. The court's mistake in the original dispute, however, may have imposed costs upon the wronged party. In this example the party who was wrongfully prevented from crossing another's land may have been prevented from cultivating it for several years, thus forgoing profits from the crops that could not be grown.

The court's mistake would not ordinarily give rise to liability on the part of the government or court officers. Courts are not generally liable for mistakes they make. In the example, the injured party must look for compensation, not from government, but from the land owner who wrongfully excluded him. When government arbitrates private disputes, the burden of the risk of error usually falls upon the disputants themselves. This principle seems applicable to mistakes in registering customary land. The officials who register customary land are performing a task of arbitration much like the job courts perform in civil disputes. It seems inappropriate to hold government liable for mistakes that it makes when the registration process is performed conscientiously and in good faith.³

Alternative standards of liability

Government officials, however, do not always perform their duties conscientiously and in good faith. There may be circumstances in which officials make such a bad mistake in registering land that government should be held liable. An analogy to the law of accidents is helpful. Suppose that a car collides with a pedestrian who is injured. There are several different standards of liability that could be applied. A rule of strict liability would mean that drivers are always responsible for injuries

suffered in collisions with pedestrians. A rule of negligence would mean that **drivers are** only liable if they are at fault. A rule of gross negligence would mean that **drivers are** only liable if they are grossly at fault. Finally, a rule of criminal liability would mean that drivers are only liable who intentionally hit pedestrians.

To appreciate the difference, consider some hypothetical situations. Suppose the driver was proceeding with caution but was unable to stop when the pedestrian ran out in front of the car without looking. Given these facts, the driver would be liable under a rule of strict liability, but not under the negligence rule. If, on the other hand, the pedestrian were walking cautiously but could not get out of the way of the speeding driver, the driver would be liable under a negligence rule. Although speeding constitutes fault, it may not rise to the level of gross negligence. To be liable under a rule of gross negligence, the driver's fault must be gross, as would be the case if the driver were not merely going a little too fast, but were driving recklessly. Finally, under a rule of criminal liability, even a court finding of gross negligence would not be enough to establish liability. Instead, the pedestrian would have to prove to the court that the injury was no accident, but rather the driver struck him on purpose.

Notice that the four standards -- strict liability, negligence, gross negligence, and criminal liability -- are arranged in order of increasing burden of proof upon the plaintiff. It is easier for plaintiffs to recover under a rule of strict liability than under negligence, it is easier for them to recover under a rule of negligence than under gross negligence, and it is easier to recover under gross negligence than under criminal liability.

Which standard applies to government registration of land in Papua New Guinea? The British legal tradition suggests that, in the absence of deliberate action to extend its liability, the government's liability is very limited. Government liability was traditionally limited by the doctrine of sovereign immunity, which says that private citizens cannot sue the state for harm it causes them. This doctrine has been eroded in most jurisdictions in recent years, so government might be held liable for bad mistakes or criminal wrong-doing in the registration of titles.

The doctrine of strict liability, however, does not apply unless government imposes this standard upon itself through a legislative act. There is a system of property registration, known as the Torrens system, under which government holds itself strictly liable for mistakes over land titles. Government holds itself strictly liable under the Torrens system by guaranteeing the goodness of the titles it issues.⁴ In some countries like Australia, government guarantees title, but in other countries that have not adopted the Torrens system, instead of a government guarantee, a purchaser who wants a guarantee must buy land title insurance from a private insurer.

Conversion of land to freehold and its registration are thought to create strict liability for government with respect to errors it has made, although uncertainties persist about this issue.⁵ Many mistakes have been alleged in recent years by customary landowners seeking compensation or return of converted land.⁶ Government has not been vigorous in resisting these claims. There may in fact be important legal defences that government has not employed.⁷ In any case, it would be wrong for courts to hold government strictly liable for mistakes in the registration of customary land unless government deliberately extends liability by fresh legislation.

It is uncertain whether the current legislation in East Sepik has extended the provincial government's liability. Section 24 offers registration as conclusive evidence of title. The explicit provision concerning liability in the East Sepik Provincial Customary Land Registration Act (No. 198) is section 28, entitled "Compensation for deprivation of interests", whose full text reads -

Where, by a court of competent jurisdiction, a final order is made for payment of compensation or damages to a person who is deprived of any land by a registration of ownership under this Part, payment shall be made, upon certification of judgment, from moneys of or under the control of the Provincial Government.

An official in the Department of Lands and Physical Planning, Chris Turtle, interprets this section as making the provincial government liable for deprivation of "absolute ownership".⁸ Although Section 28 states that compensation will be paid from Provincial Government funds, it says nothing about the kinds of actions that will give rise to liability or the basis for computing compensation in the event of liability. In the absence of explicit provision in the legislation, the East Sepik government apparently may not be strictly liable for mistakes made in registration.

The appropriate standard

I have argued that government can decide whether or not to assume strict liability for errors in registering customary land. Should government go ahead and guarantee title, or should it retain limited liability?

The advantage of guaranteeing title is that many uncertainties would be removed that impede land dealings. One purpose of registering customary land is to enable its owners to offer security for bank loans. If a mistake is made in registering a piece of land, the security offered to the bank may prove worthless. To illustrate, suppose a smallholder who wished to borrow money to plant cocoa trees offered a five year lease on the land to the bank as security. Suppose that subsequent facts prove that government officials acting conscientiously and in good faith made a mistake in registration and the borrower does not really own the land offered as security for the bank loan. If the error is corrected and the land is returned to its rightful owner, the borrower may default on the loan and the lender will be left without any security.

Can the lender recover from government in such circumstances? I have argued that the lender cannot recover from government unless the latter explicitly guaranteed the title. Just as courts are not liable to the principal parties for errors made in deciding private disputes, so government is not liable to third parties like lenders for registration mistakes. Indeed, it can be argued that government should not be liable to third parties even when registration is tainted by negligence or corruption. The lender must look to private protection against flaws in land titles unless government explicitly extends its guarantee.⁹

Although strict government liability would increase the willingness of banks to lend to parties holding title over land, the public policy objection to a government guarantee of customary title is overwhelming.¹⁰

A rule of strict liability would impose such heavy costs upon government that the registration process would be crippled. Some of the risk of error must fall upon private parties who are the beneficiaries of the registration process if it is to proceed.

On the other hand, it makes good sense to hold government liable for bad mistakes or criminal wrongdoing in the registration process. Some government officials will be grossly negligent in carrying out their duties and they will consequently give title to the wrong people. Some government officials may try to take advantage of their position by deliberately giving title to the wrong people as a way of favoring a relative or paying off politicians. Such an act is a crime for which the official should be prosecuted. Government should be liable for the harm caused by the gross negligence or criminal acts of its officials, and government should pay compensation for consequential damages suffered by private persons.

Government liability for bad mistakes and criminal acts creates a strong incentive for authorities to be careful in the registration process and not to attempt registration without the supervision of trained staff. Government liability also affords some protection against corruption of the registration process by politicians. It seems, then, that government should not be held liable for mistakes arising in the registration process that are not its fault, but, to protect against sloth and corruption of officials, government should be liable for bad mistakes that are its fault. Thus the proper standard of liability resembles, not strict liability, but negligence or perhaps gross negligence for mistakes, and criminal liability for deliberate wrong doing.

If officials make bad mistakes in registration, so government is held liable, how much compensation should be paid? The extent of compensation that government should pay in such cases should be limited to the actual harm suffered by the party who was wrongfully denied property rights as a consequence of the bad mistake. In other words, compensation should be limited to the actual harm that the victim can prove that he suffered due to government's bad mistake.

Consider how such a standard would affect proceedings against the government. The victim would first have to prove that officials conducting the registration allocated ownership or interest in property to the wrong party. Having proved that a mistake was made, the victim would next have to prove that the mistake was the government's fault. Such a proof would involve showing that the official was unreasonable or derelict in carrying out the investigation upon which the allocation was based. If, say, government officials acting in good faith were persuaded by testimony that subsequently proved to be perjured, government would not be at fault and the injured party could not recover from the government. On the other hand, if government officials had good reason to suspect perjury and if they were careless in not scrutinizing the perjured testimony, fault might be proved. Having proved fault, the final step would be to prove that it caused a loss to the victim. The loss would consist in temporary deprivation of value yielded by the land. To illustrate, if the wronged party were deprived of five years of profit from coffee crops, the government might be required to pay this sum. (The government in turn might attempt to recover the sum from the false owner who offered the perjured testimony and wrongfully enjoyed the use of the land for five years.) On the other hand, if the land were waste, that is not currently in use, temporary deprivation of ownership rights might not have caused any loss, in which case no compensation would be owed.

Conclusion

I have proposed a standard for determining government liability for errors in the registration of customary land. According to this standard, **government liability for errors made in registering customary land is limited to the actual harm proved to have been caused by negligence or crimes committed by government officials.** I

presume that this standard could be enacted into law by fresh legislation, or, in the absence of fresh legislation, the courts could develop such a standard on their own as they decide cases. Legislation has the added advantage of offering a directive to courts that are unsure about liability law. The constitution of Papua New Guinea is, however, a singular document with intricacies that I have not mastered, so I must leave to others the task of specifying the pathways through the law by which such a standard could be adopted.¹¹

Footnotes

1. I am grateful to Tony Power for reading an earlier draft of this paper. I benefited from discussions with Norm Oliver and Peter Donigi.
2. See Joseph Sax, "Takings, Private Property, and Public Rights," 81 Yale Law Journal 155 (1971).
3. This is essentially the position taken by the Task Force on Customary Land Issues in its Report (presented to Minister for Lands, 1983) on page 22. The Report, however, contains no detailed argument.
4. Torrens who was a Collector of Customs in South Australia realised that the system of transferring ownership of vessels was facilitated by the register of shipping. When he became Registrar General in 1853 he decided that this system could be adapted to apply to transfers of land which at the time was an expensive legal process and even after the legal process had been followed there was still no guarantee that the title would not be disputed. All that could be said was that the lawyer concerned had searched past documents and was assured of the correctness of the interests said to be the subject of the transfer as far as he was able. Torrens saw that a once and for all State guarantee of title once registered would make the whole process easier...the term a "Torrens Title" is in common use by the public and estate agents to define a title which has a State guarantee". -- W. L. Dickson, "An Introduction to Land Registration" (The Papua New Guinea University of Technology, Department of Surveying and Land Studies, May, 1986), page 11.
5. Land registration is described as a mixed Torrens system because the government's guarantee of title is incomplete??? The relevant legislation is the Land (Tenure Conversion) Act and the Land Registration Act. I have not mastered the intricacies of interpreting these statutes.
6. "The Torrens system is presently followed in Papua New Guinea. Is this system to be modified in the case of customary land?" --Raymond Noronha, "A Report on A Proposal to Register customary Lands and Other Related Matters" (1985) page 7.
7. I am no expert on the intricacies of Papua New Guineas property law, but I cannot find where liability is explicitly assumed in the Land Registration Act. I argue in this essay that government is not liable for mistakes in registration unless it has explicitly assumed liability.
8. Private communication from Turtle to Cooter, 25 November 1988. I am grateful to Chris Turtle for correcting my earlier, overly-simple interpretation of the Act.

9. In the United States, lenders demand that borrowers purchase title insurance as a guarantee that the title for property offered as security is good.
 10. "In Papua New Guinea..the real problem (of land registration) is sorting out the multitude of overlapping interests...(These overlapping interests) makes Torrens registration so open to overriding interests that if title was guaranteed by the State it would be laying itself open to very difficult compensation claims. Nevertheless for the past twenty five years the thrust in land tenure reform has been towards surveying and registering parcels of land rather than identifying interests and consolidating them in order to obtain a more exclusive interest in any one piece." -- W. L. Dickson, "The Changing Face of Land Tenure", Should There Be Another Approach to the Employment of the Business Groups Philosophy (Business Group Act, cap. 144, and Land Group Act, Cap. 147) For the Productive Economic Engagement of Customary Land in Papua New Guinea? (Seminar Report 1/87, Department of Surveying and Land Studies, Papua New Guinea University of Technology, June 1987), pages 4-6.
 11. See A.J. Regan, "Provincial Land Laws -- Their Basis in the Organic Law on Provincial Government", Notes for the Provincial Legal Officers Seminar, Kimbe, West New Britain Province, 13-15 April 1988.
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SECTION B
CASE STUDIES

Case of Danga Mondo and Korugl Goi

Court: Kundiawa District Land Court
Presiding magistrate: R. J. Giddings
Parties: Danga Mondo of Bowai'kane sub-clan and Korugl Goi of Awa'kane sub-clan
Interest: ownership of land known as "Par"
Date of decision: 24 Nov. 1987
Case in brief: **Facts:** One member of a subclan disputes the right of a member of another subclan to occupy common land that belongs to the clan as a whole.
Decision: The local land court decided that the occupant could continue occupying the land until ordered to vacate by the clan as a whole, but he should not improve the land.

Edited transcript of the case:

(Mr. Korugl-Goi was ordered by Mr. Kanga-Mondo to remove himself and his property from land belonging to the Kamanenku Clan. The local land court (LLC) decided that Mr. Korugl-Goi could be evicted by the clan as a whole, but not by Mr. Kanga-Mondo. The decision of the LLC was appealed to the provincial land court, who rendered the following decision.)

"The evidence before the LLC and before me shows that the Kamanenku Clan (?) is formed of four sub-clans...The evidence indicates that the subject land (which is a quite small area of no economic significance in terms of what it might produce in cash crops) was part of a common ground on which pig-kill ceremonies were conducted in past years. The generally eastern side of it has been encroached upon by a cemetery established by the Bomai'kane sub-clan. The western (disputed part) has been taken over by Mr. Korugl-Goi who has planted coffee, bananas, food and built two small bush-material houses on it...

...[T]he LLC made a reasonable decision. In essence the court decided (ordered) that Mr. Korugl-Goi should remain on the land until ordered to vacate it by the Kamanenku clan (tribe is the word used) as a whole. He should not improve the land further. Because Mr. Kanga-Mondo has no improvements on the land he should remain out of it...

...It could be that the time will come when the clan will want to ...develop [the land in dispute] ...with, say, a community centre, aid-post, school, police station or whatever. If that happens I believe that, in view of prevailing custom, the clan should be prepared to compensate Mr. Korugl-Gopi, his heirs or their successors..."

Analysis of the case:

The decision of a corporate body like a clan to exclude trespassers from its land must be made in accordance with its internal rules of decisionmaking. A clan, like the British nation, has an unwritten constitution specifying how collective decisions are reached. Customary law precludes the exercise of the clan's prerogatives by the unilateral action of an individual. Thus the magistrate's decision appears to draw upon the following principle.

eviction from common land: The clan or tribe acting as a whole, but not individual members of it, can order individuals off its common land.

A subsequent case, *Mundua Imbo and Dambayagl Endemongo*, discusses the consequences of a member of a clan exceeding his authority and trying to act on behalf of the clan as a whole.

Here is another principle that appears to underlie the court's decision:

mitigation of damage: The occupant of disputed land may be ordered not to make further investments pending resolution of the dispute.

This principle permits the court to prevent further damage from being done and thus to minimize the compensation that one party will owe to another.

The magistrate also makes some remarks about compensation that are not directed to what has occurred in the case, but rather to what might occur. Such remarks, whose technical name is "dicta," have no binding legal effect, although they can be persuasive. The magistrate's remarks about compensation appear to rest upon this proposition:

compensation for improvements: If the owner revokes permission for another to occupy and use land, compensation must be paid for improvements made to it.

For land to be fully productive, an investment of effort and possibly money is needed to improve it. The occupant of land owned by another is naturally reluctant to make such improvements for fear that he will be evicted and lose the investment. To overcome this reluctance, the occupant must be confident that he will enjoy the value of his efforts, rather than someone else expropriating them. This principle provides such a guarantee.

Case of Relvi Utul and Allan Marat

Court:	Provincial Land Court at Rabaul, East New Britain
Presiding magistrate:	Peter Sapeke
Parties:	Relvi Utul and Alla Marat versus Tavuu Herman
Interest:	land named Katkatung
Date of decision:	12 Jan. 1987
Case in Brief:	<u>Facts</u> : Owner seeks to recover land from trespasser who has improved it. <u>Holding</u> : Owner may evict a trespasser without paying compensation for improvements made to the land.

Transcript of the case:

"This is an appeal by Relvi Utul and Allan Marat over the decision of the Local Land Court in respect of compensation order made in favour of the Respondent Tavun Herman for food and cash crops planted by him and his relatives on the land known as "Katkatung". This land was given back to the Appellants after the Local Land Court found that the Appellants were the rightful owners by traditional Tolai custom. The main ground of appeal lodged was that: "In the circumstances of the case no Court doing justice between the parties would have made such an order for compensation."

In the opening addresses of both parties at the hearing of this appeal there were three main issues raised.

- 1) That if (A) gives permission to (B) to use his land and if ever in the future (A) decides to take back the land from (B), he (A) must pay compensation to (B) for the crops and the hard work he has put into developing the land.
- 2) However if (B) takes and uses the land without the express permission of (A), (B) is not entitled to compensation if (A) takes back the land.
- 3) The value of the cash and food crops on the Katkatung land as assessed by the two different D.P.I. Officers differ very greatly.

It was felt by this Court that evidence was required to establish these issues, so it requested both parties to call witnesses. It proceeded to take evidence from witnesses in respect of the first and second issues, but to our surprise neither of the parties called any witnesses to substantiate their claim on the value of the crops on the land. For the reason I shall give later, it is not necessary for this Court to find out the exact value of the crops on the land anyway.

After hearing evidence of witnesses from both sides, this Court is satisfied that it is Tolai custom that if a person gets permission from the owner of a piece of land and an agreement was made that he should use that land, and if for some reason the owner of the land decides to remove the user of the land from it, the owner must pay compensation for the developments made by the user. Likewise we have found that it is also Tolai custom that a person who uses the land of another without the express permission of the owner is not entitled to get compensation for the crops he has planted on the land if the owner of the land takes back the land. He just goes, leaving the land and the crops to the landowner. Both the appellant's and the respondent's witnesses have ascertained that in traditional Tolai custom if one uses the land of another without permission and if he is later removed from that land by the traditional land owner, he leaves the land without asking for compensation, because he has used somebody else's land for some years without permission. I'd like to highlight here that there is no evidence before this Court to show whether it is also a Tolai custom that the one who uses the land pays any compensation to the traditional land owner for the length of period he has used the land without permission. In this case it is not known exactly for how long Herman had used the land, but from the evidence before this court, it can be assumed that he used it for more than twenty years.

This Court finds there is no evidence before it to show that Herman used the land after entering into any agreement with Mesat and Toilai. And so his use of Katkatung land was without the express permission of the land owners. His subsequent sale of the land to his son Tovun, if there was any such case, was invalid, because it wasn't his to sell. Because Herman had illegally or without permission used the land in Tolai custom, Herman and his relatives would not be entitled to compensation for the food and cash crops they have planted on Katkatung land. If this Court had upheld the decision of the Local Land Court for compensation to be paid, it certainly would not have allowed compensation in excess of K38,000. This amount is certainly excessive.

This Court thus makes the following order:

Court Order:

The second part of the **Local Land Court** order awarding compensation is hereby quashed. No compensation be made to the Respondent, Tovun Herman. The appeal fee lodged be refunded to the appellants."

Analysis of the case:

In a subsequent case (Genaboru-Kibiso and Paul Lora Boiyango), compensation for improvements made to land was ordered when the owner revoked permission to occupy and use it. In this case, the land was occupied and used without the owner's permission, so the magistrate holds that the trespasser need not be compensated for improvements made to the land. The principle suggested by the case may be formulated as follows:

trespasser not compensated: Owner may evict a trespasser without paying compensation for improvements made to the land.

This principle raises some interesting questions. Suppose the trespasser made a mistake about ownership and accidentally occupied and used another's land. Could the owner evict him without paying compensation? Suppose the owner never protested when he saw the trespasser making improvements, but, instead, waited until the improvements were completed before attempting to evict the trespasser. Could the owner still evict the trespasser without paying compensation?

Case of Nerius Balanguan and Michael Varting

Court:	Local Land Court at Rabaul
Presiding magistrate:	M. R. Golu
Parties:	Nerius Balanguan and Michael Varting
Interest:	land called Ulaka
Date of decision:	5 August 1986
Case in brief:	<p><u>Facts:</u> Buyer paid Seller A for land and improved it. Seller B subsequently claimed that he was the customary owner and buyer also paid him. Now Seller B asserts that he retains some ownership rights in the land.</p> <p><u>Decision:</u> Buyer may continue using the land. Final issue of ownership is undecided. If Sellers A and B ask the court to decide who was the original owner, the loser will have to return the purchase price to Buyer.</p>

Edited transcript of the case:

"This is a land dispute over the land known as Ulaka on Toma Mediation Division in East New Britain Province. The dispute is over two things, customary ownership and usage rights. The parties to the dispute are Nerius Balanguan of Rapitok No. 2, and Michael Varting of Kandaulung Village.

There is no dispute over the purchase of Ulaka land by Nerius Balanguan from two separate persons, who claim that they are the customary owners of Ulaka land. The first payment was made to a person by the name of Poliat Toviavi of Gaulim. Poliat Toviavi said in evidence that he received from Nerius Balanguan the sum of K600 cash for a piece of land that Poliat said his father was the original owner in accordance with the custom through grand, grand mothers and fathers. The first

payment then authorized the use of the land and the possession of it by Nerijs Balanguan, the purchaser. Nerijs then cleared the bush and planted coconut trees, which are very tall now.

As years past, the other party, Michael Varting, disputed the use of the Ulaka land by Nerijs Balanguan, saying that Poliat, who sold the land to Nerijs, was not the customary owner...Without genealogical history of his descendants or any features or marks on the land, Michael Varting still claims customary ownership. Michael Varting admitted in evidence that he received the second payment of the land in the sum of K400 from Nerijs Balanguan....Nerijs Balanguan mentioned in evidence that, even after receiving the second payment, Michael Varting interfered with the rightful use of the land. Michael Varting told a highlander to plant cocoa trees for him under Nerijs Balanguan's coconut trees. The right to these cocoa trees is now in dispute.

The question is now raised as to whether Michael Varting has the right of usage of Ulaka land, including planting cocoa trees on it, after Nerijs paid him K400. My two ad hoc mediators and myself confirmed that Michael Varting does not have the right of usage after the purchases of the use of the land by Nerijs Balanguan. The use of the land in dispute is vested in Nerijs Balanguan and no one else...The point is Nerijs Balanguan has the right of possession of things on the land, including cash crops of his own or cash crops of another growing on the land, as well as things growing on the unimproved part of Ulaka land.

[As for ownership,] ...two persons, Poliat and Varting, placed Nerijs Balanguan into confusion over customary ownership of Ulaka land. Poliat says he owns the land by custom; that is why he sold it to Nerijs. Varting says Poliat sold land that Varting owns through his ancestor; that is why he asked Nerijs to pay him K400 for the land usage.

Because of lack of evidence from Poliat and Varting over customary ownership, the customary ownership is not considered at this hearing. If either Poliat or Varting dispute ownership between themselves, this court may decide that issue in the future. Should it be determined in accordance with Tolai custom that ownership belongs to one of them, a refund of either K600 or K400 will be made to Nerijs Balanguan, and payments for improvements will also be made to him.

In the mean time, ownership of land remains undecided, but the right of usage is granted to Nerijs Balanguan, except that Varting shall have access to the collection of cocoa beans commencing the date of this order until 5 years time. After 5 years, Nerijs will take possession of Varting's cocoa trees. Nerijs may clear the unimproved area as he wishes to grow whatever he would like to grow."

Analysis of the case:

This case points out the tragic difficulties that can arise when ownership of land is not registered authoritatively. By deciding cases of this kind, the court is, in effect, carrying out the registration of land ownership at the instigation of private disputants. The land courts must attend very carefully to their responsibilities for discovering and recording ownership so that disputes of this kind do not occur in the future.

Notice that in this case Michael Varting accepted payment from Nerijs Balanguan for the right to use the land and now denies that Nerijs has the right to use it. Perhaps Michael Varting feels that he was paid less than he deserved because his

ownership rights were clouded by Poliat. The court, however, correctly recognizes that Michael Varting contradicts himself. Michael Varting cannot claim that he is the owner and also claim that he did not sell the use rights to Nerius Balanguan. The form of the contradiction, which is called "estoppel" in British law, is described by this principle:

estoppel: In a dispute over a contract, a party cannot deny in court the facts of a representation that he made to the other party as a basis for the contract.

If Michael Varting wanted to recover his rights to the property unimpaired, he should have refused to accept money from Nerius Balanguan. Notice that the court cleverly refused to decide the issue of ownership, but stipulated that if the two putative owners insisted on deciding that question in a subsequent case, the loser would have to pay back the money he received from Nerius Balanguan.

Case of Genaboru-Kibiso and Paul Lora Boiyango

Court:	Local Land Court near Lindima Village
Presiding magistrate:	R. J. Giddings
Parties:	Genaboru-Kibiso of Lindima Group and Paul Lora Boiyango and others of Korfena Group
Interest:	rights to land "Komia" and parts of "Mongomenda"
Date of decision:	20 Dec. 1978
Case in brief:	<p>Facts: Two parties who are relatives shared some land for years whose ownership they each claim. One of them transferred his interest to a third party who asserted exclusive ownership and tried to develop the land.</p> <p>Decision: The land is to be returned to shared ownership unless both parties agree to a plan for its development.</p>

Edited transcript of the case:

"[The two people who are the disputants in this case, Genaboru and Kafo, are related to each other. Because of their common ancestor, both could assert some claim to the land now under dispute.] When Genaboru took up occupation within the dispute area, Kafo did not complain, nor, it would seem, question his right to do so, as he undoubtedly would have had [Genaboru] no traditional rights to be there...When Kafo planted his coffee grove within the disputed land Genaboru, did not complain. In that he recognized Kafo's right to cultivate the land. The evidence [thus]...points to the fact that they lived in harmony...sharing the land there and not arguing...[B]oth admit that had Paul Lora not erected a fence around the disputed land there would still be no trouble between them over it.

Paul Lora Boiyango is a nephew of Kafo...Paul is an astute business-man. He has a very large coffee grove, of plantation proportions, immediately adjacent to the disputed land...Paul sought Kafo's permission to fence the disputed land and to plant coffee there...Paul claims he did this in the belief that Kafo had sole controlling rights over the land and that once his permission had been granted to the project there would be nothing stopping it from going ahead. He did not seek, nor acquire, Genaboru's permission to fence the land. Neither would he have obtained it, for as soon as he commenced fencing it, Genaboru complained...

...[I]t seemed obvious to the Court that for a considerable period of time in excess of twelve years, Kafo and Genaboru had jointly controlled, occupied and used the disputed land, in harmony and without tension. It was only after Paul Lora persuaded Kafo to allow him to fence it off, without any reference to Genaboru, that their previously harmonious relationship fell apart. It became obvious to the Court that what was needed was a return to the status-quo. That can only be attained by Paul Lora removing his fence and coffee trees from the dispute area and allowing the exercise of controlling rights over it to remain jointly with Kafo and Genaboru. In future, if the land is to be used for any purpose other than that for which it is now being used ..., particularly if it is to be planted up with permanent cash crops such as coffee, both men must agree to its use.

One way out of the impasse would be for Kafo and Genaboru to decide on a sub-division of the disputed land. If they did this they would be free to exercise control over their respective portions. If they are not willing to do this they must return to exercising joint control over it...

The Court was also concerned to see the large amount of development taking place in the area belonging to one man, Paul Lora...If, through wheeling and dealing, men like Paul Lora are able to gain effective control of such large areas where will the little men go...?"

Analysis of case:

Economic development in rural areas involves adopting novel techniques to produce and market new crops. When the process of development commences, some people are quicker than others at grasping the new techniques. The people who respond quickest accumulate wealth faster than others. In most countries of the world, wealthy farmers acquire control over land. Thus smallholder production on family farms has declined in favor of large scale corporate farms ("agribusiness") in much of the world. The farmers who adapt slowly just get swallowed up by larger enterprises and become agricultural wage laborers or move to town.

The rapid transfer of land ownership to entrepreneurs speeds development, but it also aggravates inequalities among farmers. No wonder the policy choice is sometimes described as a tradeoff between development and distribution. The issues posed by this tradeoff are vast. On the one hand, traditional society in Papua New Guinea retains a larger measure of freedom and equality for more of its people than other agricultural societies of similar antiquity. Unlike Egypt, Mesopotamia, India, and China, or newer agriculturalists like the Europeans, people in Papua New Guinea were never divided into permanent classes of landlords and tenants, nobles and serfs, or masters and slaves. On the other hand, traditional society in Papua New Guinea did not create a high standard of material life or a dynamic of economic progress. The nation has determined to remedy that deficiency by setting economic development into motion. The price that future generations will pay in terms of inequality and class strife (as well as environmental degradation) remains to be seen.

Different people have conflicting views about the relative importance of development and distribution. The proponents of development at all costs advocate removing the obstacles to the accumulation of land in the hands of entrepreneurs, whereas the defenders of traditional society tend to favor creating obstacles to the sale of land by its customary owners. Where the law must decide cases like this one, developers want people like Paul Lora to be allowed to accumulate land rapidly, whereas traditionalists want customary owners like Genaboru to retain their land. This

tradeoff was obviously in the mind of Magistrate Giddings when he wrestled with this case.

There are, however, reasons to think that the tradeoff between development and distribution is more apparent than real in Papua New Guinea. Judge Giddings points out that Paul Lora can proceed to develop the land for a coffee plantation after obtaining the agreement of Genaboru as well as Kafo. Thus the developer will have to bargain with two people instead of one. This is not, however, a very heavy burden. Development of the land for the production of coffee will greatly increase its value. Paul Lora will enjoy ample profits from coffee production to compensate Genaboru as well as Kafo.

There is a famous proposition that underlies the proceeding argument. Most business transactions benefit the parties who participate in them. The total benefit enjoyed by the two parties is called the surplus. To illustrate, suppose I own a truck whose use is worth K3,000 to me. However, the use of the truck would be worth K4,000 to you in your business. If I sell the truck to you for K3,500 we will both benefit. My benefit equals K500 and so does yours. The total benefit of K1,000 is the surplus from the transaction.¹

Now consider the legal consequences of surplus. Instead of assuming that I own the truck, suppose that someone else owns it who dies. At his death, you and I have a dispute over which of us is the heir and the dispute goes to court. If the court decides that the truck is yours, you will take possession of it and use it, which is assumed to be worth K4,000. On the other hand, if the court decides that the truck is mine, I will have the right to use it, which is only worth K3,000. However, if the court decides that I own the truck, I will also have the right to sell it to you. If I sell it to you for K3,500, we will both be better off than if I keep it for my own use. Thus, if the process of exchange works, the truck will end up being used by you regardless of how the court decides the case.

The generalization underlying this argument is:

maximum value: Exchange of ownership rights will put resources to their most valued use regardless of how courts initially distribute them.²

When this argument is applied to land, there does not seem to be a severe tradeoff between development and distribution. Developing disputed land will create a surplus. If the court decides that entrepreneurial farmers own disputed land, they will proceed directly to develop it. If the court decides that traditional farmers own it, they will lease or sell it to the entrepreneurial farmers. In either case, development will proceed under the direction of the entrepreneurial farmers. In this case, if the court had decided that the land belongs to Paul Lora, he would proceed to develop it. Instead, the court decided that Genaboru has an interest in the land. After the decision, Genaboru will probably sell or lease his interest in the land to Paul Lora or someone else for development. In either case, development of the land will proceed because it creates a surplus for everyone.

There is another reason why protecting the rights of traditional property owners may promote economic development rather than retarding it. The highlands is an area where disputes over land can quickly escalate into tribal fights. Bush houses and subsistence crops that are destroyed in such fights can be replaced more quickly and at less cost than permanent crops, fences, and buildings. So rural violence is

more damaging to the cash economy than to subsistence farming. Indeed, the possibility of rural violence deters farmers from making investments to improve their land, especially at the boundaries between tribes where vulnerability is greatest. Using the law to facilitate the transfer of land from traditional agriculturalists like Genaboru to developers like Paul Lora might provoke more tribal fights, which would retard development.

I have discussed at length the policy tradeoff between development and distribution. This tradeoff is not, however, the only consideration that guides Magistrate Giddings's decision. In addition Magistrate Giddings is influenced by the rules and principles of customary law that control inheritance and the transfer of land. A principle of customary law in Papua New Guinea is apparently

loss by transfer: Transfer of an interest in disputed land diminishes the strength of the claim to it.

Thus Genaboru and Kafo apparently had roughly equal claims to the land, but when Kafo transferred his interest to Paul Lora, the underlying claim was weakened. Perhaps Magistrate Giddings would have allowed Kafo to develop his land himself, or perhaps not, but the magistrate would not in any event allow the transfer of this power to Paul Lora.

The principle invoked by Magistrate Giddings is very important because it applies to many cases, and also because it conflicts with the British common law tradition, in which the transfer of an interest in disputed land does not affect the strength of the claim.³ For further discussion of this principle, see the case of Hogeteru et al.

Instead of discussing this particular principle, I want to discuss the general relationship between principles and public policies. The difference between principles and policies relates to the difference between applying law and making it. Policy considerations are foremost when making new laws, whereas legal principles are foremost when deciding disputes. Thus when Parliament debates whether or not to make a new law, much of the debate concerns the best public policy to follow. On the other hand, when most judges decide cases, they refer to established principles and rules of law, especially those used in previous cases. Judges are not so free as legislatures to invent new laws. Instead, judges routinely apply laws that already exist.

Notice that Magistrate Giddings devotes most of his opinion to considering the facts of the case and their relationship to the customary law for distributing land. The policy considerations about distribution and development come up at the end of the case, as reflections upon it. He describes the entrepreneurial skills of Paul Lora and wonders where the development process will leave traditional farmers like Genaboru. Thus Magistrate Giddings was primarily guided by customary law, whereas the policy issue affected his interpretation of it. This is the appropriate relationship between law and policy in court. On the one hand, a judge is obligated to give primary weight to received law, but on the other hand he must reflect upon its interpretation in light of the important policy issues of the day.⁴

Sometimes applying pre-existing law is just a matter of carefully following the words in a statute, which is a mechanical process. In other cases, however, applying pre-existing law is very difficult and creative. Creativity comes from the fact that the law to be applied in hard case has never have been stated in an explicit, authoritative

form. To illustrate, a rule of customary law may be followed for centuries without ever being explicitly stated. Or it may be stated in different ways by elders and big men, none of whom have the authority to make an official statement of it.

Only the courts can give explicit, authoritative statements of the principles of customary law. The task faced by judges in the lands courts is to discover explicit principles of customary land law. Politicians and intellectuals often say that the law should express the Melanesian way of life, but it is a mistake to think that the underlying law can be declared by Parliament, or anyone else. The problem is not to declare what people know, but to discover what is implicit in what they do. Melanesian legal principles are to be discovered while deciding cases in customary law, which can only be done by courts, not by Parliament. The magistrates in the land courts should be inspired by the creative and exciting task of making customary law into the common law of Papua New Guinea.

Case of Mundua Imbo and Dambayagl Endemongo

Court: District Land Court at Kundiawa
Presiding magistrate: G. C. Laphorne
Parties: Gena Clan and Siambuga Clan
Interest: decision of local land court in regard to Taramugl land
Date of decision: 15 Feb. 1982
Case in brief: Facts: Each party has some claim to disputed land, but one party is uniquely situated to defend it and deny access to it by others.
Decision of Local Land Court: The party uniquely situated to defend the land is given ownership and ordered to compensate the other party for improvements and loss of use rights.
Decision of District Land Court: The party given ownership is also forbidden to enter the land until compensation is paid to the other party.
Holding: "There is little point in a Land Court awarding a piece of land to a group if they will be unable to use it through intimidation or other pressure from rival groups."

Edited transcript of the District Land Court's Decision:

The appellants gave three grounds for their appeal against the decision of the Kundiawa Local Land Court...which awarded this land to the Siambuga clan. For the appeal to be successful at least one of the grounds of appeal would have to be established. I will deal with each in turn.

1) The first ground is a very serious allegation about the partiality of the Local Land Court and in particular Land Mediator Mr. Wande Gundu. It was claimed that Wande Gundu was closely related to and had connections with the Siambuga. The Gena witnesses were unable to substantiate these claims in any way...

2) The second ground of the appeal was that the Local Land Court disregarded customary rules and usage...In his reasons for judgment, the Local Land Court Magistrate said, "Both parties have got valid reasons for arguing over the land" and "The Court considered it proper to base its decision on the locality of the land..." The evidence given in the Local Land Court and in this court showed that the Taramugl

land has been occupied by both Gena and Siambuga. It was also shown that the Gena living at Taramugl appeared to have been invited there by Siambuga as a result of a Gena woman marrying a Siambuga man. It is also evident from the witnesses of both parties that the Gena living at Taramugl did not feel secure there and had to retreat back inside Gena territory in times of fighting or trouble. Two witnesses for the Gena stated in the Local Land Court that the Gena had been chased out of Taramugl by the Siambuga before the coming of the white man and only returned after the kiaps had established peace.

There is little point in a Land Court awarding a piece of land to a group if they will be unable to use it through intimidation or other pressure from rival groups. In the case of the Taramugl land, it is bounded on three sides by land occupied by Siambuga...The remaining boundary...is a high steep ridge...The only easy access to Taramugl is through Siambuga land. It would be very easy for Siambuga to make the life of any Gena at Taramugl uncomfortable by denying access...This Court is satisfied that the second ground for the appeal has not been established.

3) The third ground for the appeal was that the compensation of K1,000 and 5 pigs [which the Siambuga were ordered to pay the Gena] was too small...The Local Land Court made it clear that this payment is for "Trees, pandanas and historical rights to the usage of the land." It is not payment for the land...This court feels that the amount set by the Local Land Court is generous...[The Court goes on to sharpen the decision of the Local Land Court by awarding the land to a named individual in the Siambuga clan and requiring him to compensate a named individual in the Gena clan. The District Court added the order that "Until this payment is made no one is to enter upon the land Taramugl unless they first obtain permission from [the Gena individual entitled to the payment]..."

Analysis of the case:

The court finds that ownership of land in customary law depends in part upon who can defend it. The court also finds that when a party acquires a piece of land by owning adjacent land essential for its defence, the party forced to withdraw should be compensated. This principle of customary law might be formulated as follows:

ownership of uniquely defensible land: If several groups have legitimate claims to disputed land and one group is uniquely situated to defend it, ownership shall vest in the later, who must compensate the others for loss of their use rights.

Notice that this kind of principle has no place in the law of countries like Australia. In Australia the state is so powerful that property owners can rely completely and confidently upon the state to protect their property from invasion and occupation by others. The Australian state is "uniquely situated to defend" everyone's land. The fact that the Siambuga are uniquely situated to defend the disputed piece of land relative to the Gena would be irrelevant in Australian law, because the state could provide adequate defense to either party. Furthermore, deep in the Australian understanding of law is the view that no private person should be able to take land involuntarily from someone else. Among private persons, as opposed to the state, legal transactions are voluntary and involuntary transactions are illegal. There are no principles in Australian law by which an Australian court could allow a group like the Siambuga to pressure a group like the Gena into abandoning their use rights and ownership claims over land.

Lawyers accustomed to the Australian system will naturally suppose that their own law reflects a superior, better developed legal system than the customary law of the

Highlands. Legal theorists are fond of saying that the state has a monopoly on force, which naturally leads to the further conclusion that all involuntary transfers of land under private threats are illegal. This line of thought leads to the conclusion that principles of customary law that allow private power to affect ownership should be abandoned by the courts as soon as the state can enforce court judgments.

This line of argument is, however, too narrow. The highlands of Papua New Guinea was one of the first regions to be farmed by man. Unlike Mesopotamia, Egypt, India, and China, agriculture was practiced in the highlands for thousands of years without degrading the ecology or creating a class system. There are no man-made waste lands or deserts, and there is no permanent class of slaves, serfs, landless beggars, nobles, or landlords in the highlands. This great accomplishment is the work of customary law. Customary law in the highlands redistributes land involuntarily in response to changing power relationships among social groups. Weak groups that are dispossessed of land by their enemies get absorbed by others to bring power back into balance. By keeping groups small and constantly re-aligning them, no group gains complete dominance over others.

The principle that I called "ownership of uniquely defensible land" is an example of customary law supporting redistributions in accordance with private power. If the land courts were to abandon customary law and adopt the Australian view that private power is irrelevant to ownership, the mechanism for redistributing land would be broken and a system of landlords and tenants would emerge in a few generations. Perhaps customary law has already been disturbed sufficiently to produce such a result in the near future. It is thus imperative that the land courts develop the principles of customary law, so alien to Australian law, that facilitate involuntary land redistribution in favor of those who need it.

The District Court in this case also issued a temporary order restraining one of the parties from entering the land. R.J. Giddings made this recommendation about temporary orders in his "Regional Land Court Circular Number 20"(2/80):

I am in favour of using Temporary Orders to defuse tense land dispute situations over unoccupied and fallow land. Both parties can thereby be kept off it and this allows them time to become reasonable with one another and seek a peaceful settlement of their dispute. However, Temporary Orders should not be used indiscriminately over land which has long been occupied by one party and their occupational rights have only recently been challenged by another party.

(How does this use of temporary orders tie in with the principle of mitigation of damages discussed in connection with the case of Danga Mondo and Korugl Goi?) One of the grounds for appealing this case was corruption of a mediator. R.J. Giddings says the following about this basis of appeal in his "Regional Land Court Circular Number 17" (2/80):

"...The integrity and reputation of the land courts suffer as a result of these allegations...I suggest that before Magistrates commence hearing a Local Land Court Case they question the mediators to see if any of them have close relationships with either of the parties involved. They should not be clansmen of, related by marriage to, having exchange relationships with, or be traditional enemies of, either party involved in the case...As an increasing number of land dispute cases are being presented in court by literate young men...I suggest that magistrates might ask them for statements in writing that their people do not object to those mediators appointed to sit on their case..."

Case of Hogeteru et al

Court: Local Land Court at Kami (Lufa)
Presiding magistrate: R. J. Giddings
Parties: Hogeteru, Kamate, Kema, and Hipu'Henagaru
Interest: ownership of rights to Aupe'e Hill, Guguva'vimato Ridge, etc.
Date of decision: 19 Jan. 1978
Case in brief: Facts: Several groups made plausible claims to a piece of unoccupied land. Group A [Kamate] moved onto the contested land and invited its allies, Group B [Kema], to settle there as well. These moves by Groups A and B were supported by Group C [Kami], who were afraid of Group D [Hipu'Henagaru]. Group D, who also claims the land, subsequently invited its allies from Group E [Hogeteru] to move onto another part of the contested land. Thus groups A and B dispute the right of Group E to occupy the land, and groups D and E dispute the right of groups A and B to occupy it.
Holdings:
no unqualified right of return: "[O]nce a group has abandoned its ancestral land by cutting all ties and associations with it they cannot return and claim it at a much later date without the agreement of those who prior to that date have assumed controlling rights to it."
right to resist attempt to return: "The extent to which people attempting to return to the land of their ancestors are opposed is largely dependent upon the extent to which their land has been taken over and used by others, and the extent to which they have been able to forge friendly relationships with those now in control of it."
maintenance of interest in land: An interest in land is maintained by building houses and settling on it and "by gardening, grazing or burning it off, collecting from it or forbidding others to occupy and use it."
last-is-first: "If land is not used for successive generations the claim of those furthest removed from those who vacated it becomes, as the years pass, of diminishing importance."
earmarks of ownership: Land can only be said to "belong" to a group when it is shown that either:-
(i) Neighbouring groups acknowledge their claim by not challenging it, or,
(ii) By their ability to occupy and use the land, and to stop others from doing likewise, they show that they exercise controlling interests over it.

Transcript of the case:⁵

"The problem giving rise to this case arose when some Kamate men attempted to settle on Guguva'vimato Ridge on land which they claimed belonged to their ancestors. Ownership of this land is also claimed by the Hipu'Henagaru Group who live nearby. This dispute soon involved the Kema Group in support of the Kamate as both groups have common ancestors. At about the same time a group of Hogeteru people [allied to the Hipu'Henagaru] moved onto Aupe'e Hill onto land claimed by the Hipu'Henagaru. Their right to take up residence there was immediately disputed

by the Kema on grounds that they had occupied this land more recently than had the ancestors of the Hogeteru.

These disputes were not independent of one another and an attempt to deal with one immediately implicated the others. The factors giving rise to them were political centering on local power politics, not economic or strictly appertaining to questions of disputed land tenure...

Origins of the dispute

An appropriate starting point in time from which to examine land ownership questions ...is 1950. By then the larger groups now established as identifiable census units had returned to their home territories from their respective dispersions...By 1950 the land over which these disputes have arisen was largely vacant and unoccupied. Pigs belonging to surrounding groups may have ranged across it but there is no evidence of gardening being carried out upon it...[Around the disputed land lived groups who] farmed the land near their hamlets and left the remainder of their territory largely unused and unoccupied. Within each of these groups, though, the people maintained varying degrees of emotional attachment and historical association with the land now in question. They and their forebears had nearly all fought across it at sometime or another and some of them had occupied parts of it sometime in the past.

Within [these groups] there were Hipu and Henagaru people who claimed a closer association with the land. They had once lived on it, probably as a consolidated Hipu'Henagaru Group as they now claim, until they were forced to flee and seek refuge with their adoptive groups to survive the attacks and predations of their enemies. These dispersion took place over a long period of time culminating in a final migration which probably took place sometime between 1920 and 1940.

In the early 1960's the first post-War attempt to establish an independent Hipu'Henagaru presence on this land came about when ...[someone established] a nucleus hamlet within the dispute area...He was later joined by other migrants...

I am unaware of any tradition of animosity between the Hipu and the Henagaru groups. Indeed they say they are one group but I suspect this claim to be an expedient to satisfy their best interests at this time...[They were] small in numbers and unable to effectively occupy and control the land they claimed...For this reason they sought to recruit others whose ancestors were Hipu'Henagarus'. These people ...swelled their hamlet in population numbers, and commenced expanding their gardens across the face of the land...

It is significant that the only attempt the Hipu'Henagaru have made to develop their land with other than subsistence gardens was ...a coffee grove...[A rival group] promptly pulled the seedlings out and continue to do so whenever he replants...The Hipu'Henagaru say that much of their land within the dispute area is unsuitable for coffee growing. This may be true but it may also be their way of rationalising the uncertainty of their tenure of the lands.

It would be inaccurate, though, to give the impression that the only people associated with this land are the Hipu'Henagaru. [Other groups, including the Kema] could also assert rights within the same area if they so desired...the Kamate (Kema) Group ...moved onto the land with the connivance of the Kamis' and established a presence in the west on Guguva'Vimato Ridge.

About the same time that this was taking place a group of Hogeteru people...moved into the area and with the connivance of the Hipu'Henagaru established themselves in the east on Aupe'e Hill.

The present land ownership dispute has arisen as a result of these two movements and it has two facets to it. Firstly, the Hipu'Henagaru dispute the right of the Kema-Kamate Group to establish themselves on any of this land stating they have no traditional ownership rights there. Secondly, the Kema-Kamate oppose Hogeteru rights to settle at Aupe'e Hill claiming that the land thereabouts is Kema land as at one time the Kemas lived there.

The Kamate case

Although none of their opponents supported the Kamate claim that their ancestors once lived within the dispute area, neither did any of them have knowledge sufficient to categorically deny it...[a detailed account of the group's genealogy is omitted]...What motivated a Kamate return to the dispute area? Primarily they saw it as being to their advantage to move nearer Goroka. The desire to have ready access to the main centre with its market and other attractions tends to draw people from the outlying Districts...They also believed that because of their ancestral connections with the area they had a right to be there ...These same reasons also apply to the Hogeteru....

The Kamate presence has its value to Kami ...Sitting as they are on the fringe of both Kami and Hipu'Henagaru territory the Kamate become, in effect, a "buffer" between them, obliged to foster and maintain harmonious relationships with both parties but particularly, of course, with their patrons the Kamis'. Historical tradition suggests, however, that under stress alliances sometimes collapse...In the present situation the Kamates' at Guguva'Vimato represent the front line of Kami opposition against the Hipu'Henagaru -- mercenaries though they might be...

...Kamate migration into the dispute area on the basis of their traditional association with it gives a new slant to the contest and not one that is readily decried by the Court whose duty, in effect, if not in jurisdiction, is to maintain peace by the equitable settlement of disputes such as these...To counter what, in their opinion, is the greater threat of Hipu'Henagaru expansion eastwards towards their land, ...[Other nearby groups who also claim rights within the disputed area] appear willing to run the risk that a Kamate-Kema presence on their borders necessarily poses.

...[W]hat right has the Kamate Group to expect that their claim should be upheld by the Court?

Local custom is explicit that once a group has abandoned its ancestral land by cutting all ties and associations with it they cannot return and claim it at a much later date without the agreement of those who prior to that date have assumed controlling rights to it...

People could, indeed do, return to the land their ancestors vacated generations ago and the degree to which they are opposed in doing so is largely dependent upon the extent to which their land has been taken over and used by others, and the extent to which they have been able to forge friendly relationships with those now in control of it. Too often in past years migrant groups returned to their ancestral lands believing it to be their inalienable right to do so without taking into account the social implications of such a move. This has resulted in the creation of tensions

which often escalate into violence. An examination of Government land dispute records accessible to this Court tends to support this premise...

In terms of traditional attitudes about land it is extremely debatable, indeed suspect, when one group insists that it, and it alone, has the right to decide if it will return to land vacated by its ancestors. This is not so; the attitudes of others must be considered.

...there are few examples quoted of pre-contact times where people deemed it worthwhile to risk conflict by insisting upon returning to land they had been dispersed from more than two generations ago. It is only since pacification and the introduction of cash crops which gave an economic dimension to the importance of land, that people have found it worthwhile arguing over. The evidence before the Court suggests that questions about the ownership of land per-se were not normally issues over which people fought. In traditional times honour was not bound up with the ability to control land but rather with other more personal issues such as those associated with sorcery, adultery and property, principally in the nature of food and pigs.

Because their forebears vacated the area such a long time ago the Kamate Group cannot claim an inalienable right to return there if those who have subsequently controlled that land deny that right to them...The Kamate Group have not maintained interests in the land by gardening, grazing or burning it off, collecting from it or forbidding others to occupy and use it...There are no Kamate people living in the vicinity of this land who, by virtue of their presence there, might be said to have maintained an interest in it...Because the evidence clearly supports the Kamate contention that their ancestors migrated away from the dispute area the Court provides that they may return there and unite with the Kema if application to do so is approved by the Local Land Court. The Court makes this proviso in recognition of local custom whereby off-shoot groups may, subject to the approval of the main descent group, be invited to re-occupy land vacated by their common ancestors.

The Kema case

[Genealogical details omitted]

It appears that about the time of the First World War, but probably no later than the early 'twenties, the Kema were attacked by a confederation including ... Hipu'Henagaru ... and driven ... to Aupe'E Hill which was tactically more secure...The trouble which gave rise to this fight arose when a Kema boar was found copulating with Hipu'Henagaru sows which were being fattened for slaughter...[S]ome of the Kema [decided to] return to the vicinity of their home territory and seek refuge with the Kami. It was while living with the Kami that the Kema fought as their allies against neighbouring groups including the Hipu'Henagaru...

Evidence supports the Kema claim that their elders and forebears had controlling rights to land in the generally eastern sector of the dispute area earlier this Century...the Kemas' fought across this land and at times occupied and used parts of it [until pacification in 1945]...Because of their recent association with it they have the right to return, occupy and use land within the dispute area. If the Kemas' really intend to re-establish themselves on their ancestral land they will show this by making houses, gardens, fences and roads where they are in occupation. Once they have shown their intentions in this way they may apply to the Local Land Court for permission to invite their Kamate relatives to join them...

The Hogeteru case

The circumstance surrounding the Hogeteru return to the dispute area is somewhat similar to that of the Kamate return in that it is a ploy on the part of the Hipu'Henagaru...aimed at re-dressing a supposed in-balance of power...During the same May-August period that the Kamate commenced establishing themselves on Guguva'Vimato Ridge the Hogeterus' commenced building houses on Aupe'e Hill...

[The Hogeteru] maintained no associations whatsoever with the land following their migration away from it. Their absence was so protracted they could not have expected to resume occupation there short of being invited to do so by the Hipu'Henagaru, which in fact happened...

The Hogeteru settlement is within an area that the Court accepts as being Hipu'Henagaru land. For this reason the Kema claim that they should be recognized as having sole rights there cannot be upheld. By the same token the Court believes that Hogeteru rights to be there have been extinguished by the passage of time and that insufficient reason for their being allowed to remain there have been given by their patrons, the Hipu'Henagaru. Their presence is a provocation to the Kema and in being so it is an unsettling influence on the fragile state of social stability...

On the basis of its experience in this case the Court predicts that if the notion that it will unequivocally support the return of any group that has some form of historic connection with land in this area takes hold, there will be no end to the number of people who will try to take up residence there, contrary to the wishes of those who have exercised controlling rights over the same land more recently and who now consider it to be within their own spheres of influence...

A group can only return and occupy land vacated by their forebears many generations removed subject to their receiving the permission of those who now have controlling right to it, or at least a more recent claim to those rights. If land is not used for successive generations the claim of those furthest removed from those who vacated it becomes, as the years pass, of diminishing importance...the Kema Group...have a better claim to [Aupe'e Hill] than do the Hogeterus' who departed from there sometime during the last Century...Their continued presence at Aupe'E hill is a provocation to the Kema Group. For these reasons the Court decided that the Hogeteru Group, having had all their rights to this land extinguished by the passage of time, must vacate the dispute area and not return to it.

The Hipu'Henagaru case

In the past the Court has found great difficulty in convincing the Hipu'Henagaru that to lay claim to land without providing tangible proof of ownership is insufficient in itself to allow the Court to uphold those claims. Land can only be said to "belong" to a group when it is shown that either:-

- (i) Neighbouring groups acknowledge their claim by not challenging it, or,
- (ii) By their ability to occupy and use the land, and to stop others from doing likewise, they show that they exercise controlling interests over it...

On numerous occasions during the past four years the writer has advised the Hipu'Henagaru that if they really believe they have land rights in the ...[disputed] area, they should make at least token efforts to develop the land to show their adversaries that they do, in fact, have the rights to "control, occupy and Use," the land they claim. They have made no attempt to do this knowing full-well that they

cannot uphold their claim in traditional terms of power. Nor through their diplomacy with their neighbours are they able to convince them of the veracity of their claims. In other words, an attempt to develop the extremities of the land they claim to be theirs would result in troubles with their neighbours...The Hipu'Henagaru cannot expect the Local Land Court to fight its battles for it...

Analysis of case:

Evidence grows stale with time, so legal claims based upon events that occurred in the distant past are difficult to prove or disprove. For this reason the failure to assert a legal claim can extinguish it. For example, a criminal cannot be prosecuted for a crime after the statute of limitations has expired, which might be five years. The same principle extends to property rights. If one party resides on another's land long enough, without the owner asserting his rights, then the original owner loses his claim and ownership passes to the occupant. This principle is called "adverse possession" because the transfer of ownership is triggered by the possession of property against the interest of its owner.

The British rule of adverse possession states that a party in "open and notorious" possession of property for a specified number of year, against the interest of the original owner, acquires ownership of it. This rule was enacted by the Normans to remove any clouds over their title to the land they took from the Saxons after invading England in 1066. The principle has subsequently been enacted by legislatures in order to dispossess the conquered wherever British law has reached. For example, it was used extensively in the United States to dispossess Indians of their land.

Magistrate Giddings appears to invoke such a principle in this case, which might be formulated as follows.

adverse possession: A group who resides upon or improves land for a sufficient period of time without the permission or active opposition from others thereby owns it. A group that uses land for a sufficiently long period of time without the permission or active opposition from others, but does not reside upon or improve it, thereby acquires a use right in it.

This is similar to the rule in British law but without a definite statement of the number of years of possession needed to acquire ownership or a lien on the land.

Notice that a person cannot acquire rights in property under this principle by residing upon, improving, or using land with the owner's permission. That is why a renter does not become an owner simply by the passage of time. Nor can a person acquire rights in property under this principle by possessing it in spite of the owner's active opposition. That is why a trespasser does not acquire ownership merely by fighting off the owner's attempts to evict him. Rather, these acts convey rights under the principle of adverse possession when the owner does not give permission or persist in active protest.

This rule of customary law can be compared to the rule of adverse possession in section 67 of the Land Disputes Settlement Act, which imposes a 12 year statute of limitations:

"(1) Notwithstanding the provisions of any other law, proof that a party to a dispute has exercised an interest over the land the subject of the dispute for not

less than 12 years without the permission, agreement or approval of any other party or person sets up a presumption that the interest is vested in that party. (2) Where a presumption is set up under Subsection (1) it may only be rebutted by evidence leading to clear proof that the interest is vested in some other person."

Notice that this statute creates a presumption in favor of the person in adverse possession of the land. In other words, this statute shifts the burden of proof to the person not in possession of the land. The customary principle formulated above goes further and recognizes the ownership right of the person or group in adverse possession of the land.

In another case, Giddings draws an explicit connection between adverse possession in customary law and in the Land Disputes Settlement Act:

"The Kumbo lay claim to much land which the Tramui have developed with houses, gardens and coffee groves. This land should be left with the Tramui. They have had control over it for a long time and no doubt their claim to it under s.65 of the Land Disputes Settlement Act of 1975 would be recognized by a court."⁶

This passage suggests that Magistrate Giddings believes the principle of adverse possession in customary law and in the statute reinforce each other. The statute of limitations imposed by this Act is 12 years. In another lands court case, Magistrate J. Singomat suggested a somewhat longer period:

The Emagaves have had no interest of any kind over the last twenty (20) to forty (40) years...Therefore, this Court found that the Emagave have no real claim to the land at all..⁷

In an interesting case, Magistrate Marcus Bayam found that possession of land for a sufficiently long time could overcome claims of the usual heirs.

"...Gosaragabos contended that, according to the custom and the tradition commonly recognized by highlands societies, the descendants on the maternal side are not recognized as the as graun people or land owners. Instead, descends on the maternal side are recognized as people granted permission to occupy some land belonging to the descendants on the paternal side, who are the as graun or land owners ...Though the paternal side are considered as the as graun or land owners according to custom, this notion is rebuttable, because customarily it is also correct to accept the maternal side as owners if they have lived on the land over a substantial period of time, say over one hundred years." -- In Re the land called Mohaviga, Provincial Land Court at Goroka, Natan Aupe of Gosaragabo Village and Upeguto of Upeguto Village, 24 Oct. 1987.

This finding is clearly related to adverse possession.

The principle of adverse possession conveys ownership upon the party who possesses land. Thus the principle presupposes an account of the acts that constitute the possession of land. The case suggests what these acts might be.

possessory acts: The acts that constitute possession of land for purposes of asserting ownership include gardening, grazing or burning it off, planting

permanent crops, collecting from it, building houses and settling on it, or forbidding others to do these things.

The weight given to different elements in this list depends upon the manner of life of the people claiming ownership. An agricultural people will emphasize gardening and planting permanent crops, whereas a society of hunters and gathers would not mention these activities. It is often said that "possession is the origin of ownership," which may be true, but each society has its own definition of the acts constituting possession for the purpose of establishing ownership.

There are two notable applications of the principle of adverse possession in this case:

- (i) no unqualified right of return: A group has no unqualified right to return and re-occupy currently unoccupied land in which another group has acquired an interest.

When different people reside upon, improve, or use land in succession over a period of years, the most recent occupants will ordinarily establish ownership or use rights by virtue of the principle of adverse possession. Thus the original or ancient occupants can not have an unqualified right of return. Rather, the original or ancient occupants retain rights only to the extent that they have not been extinguished by the adverse possession of subsequent groups.

- (ii) last is first: When several groups seek to occupy and use land that is currently unoccupied and unused, more weight is to be given to recent use and occupation than to original or ancient use and occupation.

This principle constitutes a rejection of the rival principle of "first in time, first in right," which was called the "as graun" principle when rejected by the National Court in *State v. Giddings*. It is similar to section 67 of the Land Disputes Settlement Act in that possession creates a legal presumption that shifts the burden of proof to the party challenging the right of the current residents to continue on the land.

In deciding that the Kemate have a stronger claim to occupy the disputed land than the Hogeteru, Magistrate Giddings appears to draw upon this principle

- loss by transfer: Transfer of an interest in disputed land diminishes the strength of the claim to it.

For example, a group that is invited to occupy disputed land in which it has no interest has a weaker claim than party who extended the invitation.

This principle was already discussed in the case of Genaboru-Kibiso and Paul Lora Boiyango. I would now like to suggest a rationale for this principle. In Papua New Guinea a group's need for a piece of land strengthens its claim to have an interest in it. The resulting redistribution of land is one factor that prevented the emergence of permanent classes of landlords or serfs in Papua New Guinea. (There is no equivalent principle in British law because need for land has no effect what-so-ever on ownership.⁶) The connection between need and right becomes relevant when one group invites another to use its land. A group would not invite others to use its land unless it did not need the land for its own use. The fact that a group does not need land for its own use diminishes the strength of its claim to the land. Thus the fact that a group is willing to transfer land to others weakens the ownership claim.

Case of Mundua Imbo and Dambayagi Endemongo

Court: Local Land Court at Goroka
Presiding magistrate: Phillip Takori
Parties: Kamaiyufa versus Napaiyufa
Interest: land named Sekere'Roka
Date of decision: 19 March 1985
Case in brief: **Facts:** Members of the Napaiyufa clan were invited to move onto land belonging to the Kamaiyufa Clan by a member of the Kamaiyufa, who wanted allies in a quarrel with his own clansmen. The Kamaiyufa Clan subsequently sought to repossess the land for a coffee plantation.
Decision: The Napaiyufa are to move off the land and to receive compensation money from the Kamaiyufa Clan and pigs from the member of the Kamaiyufa who invited them to move onto the land.

Edited transcript of the case:

"...Prior to 1982, the Kamaiyufa's were the sole owners of the land in question...[T]hat particular clan wanted to develop the land where a coffee plantation was to be established. The Kamaiyufa's then contacted the government officers, who did the surveying of the land...This was in 1979 and a business group known as Inarehusi was formed...[W]hile waiting for the approval and registration of the business group, one of the seven (7) directors of the business group, namely Utere Kabeha, ...brought the Napaiyufas into the land in dispute... [B]y 1982 they had started building their houses there. The business group was finally registered and a total of K90,000-00 loan was obtained from the World Bank and the Kamaiyufa's started planting coffee on the land, but the Napaiyufas claim the land as theirs...From the evidence we have received, we find that there was no one man from the Napaiyufa clan living on the land before 1982, much less before the arrival of the first white man, namely Jim Taylor.

The Napaiyufas claimed that one of their [clansmen,] Tubuna Waliso, was on the disputed land...It could be true that Waliso's father Asita and grand father Upato lived there on the land, but if so then this court takes the view that that man went there after having affairs with his brother's wife...[H]is life was in danger [so] he ran away and lived with the Kamaiyufas on their land...[T]herefore the Court found that neither Waliso, nor his father and grand father, had any ownership to the disputed land...

The court asked the question of why then the Napaiyufas came in and claimed the land as theirs...The Court has come to the finding that after the business group was formed in 1978-79, Utere Kabema was badly bashed up by his fellow Kamaiyufas after having some affairs with a married woman...Utere-Kabema went and brought the Napaiyufas to the land now in dispute...to get the support of the Napaiyufas so the Kamaiyufa, his own fellow clansmen, could not hurt him any more...[When the Napaiyufas were brought on to the land in dispute by Utere-Kabema,] some marata and food stuffs were prepared by the Kamaiyufas and given to the Napaiyufas as a sign of welcome, but the Kamaiyufas did not expect any claim of land ownership by the Napaiyufas...

This local land court by majority decision finds the land in dispute belongs to the Kamaiyufa Clan ...As the fault lies with Utere Kabema in bringing the Napaiyufas to

the land to cause the dispute, he is ordered to kill pigs, and ...the Kamaiyufas to contribute a total sum of K300-00 ...[to give to the Napaiyufas] for their improvements during the two (2) years of occupation there."

Analysis of the case:

The decision in this case is based upon two implicit principles that are important.

ultra vires: A clan can only transfer use or ownership rights over land to members of another clan by the proper procedures through which it is governed. An individual member of the clan who attempts to transfer the clan's land on his own exceeds his authority, so the transfer is void.

Every corporate body, including business corporations, churches, or governments, has rules for its governance. Customary groups like clans are governed by their own customary laws and by any formal laws they assume. Formal laws are assumed when a customary group formalizes its structure, as when a business group is formed. The rules of governance specify the powers that the members of the group can exercise. When a member of a group acts in its name, the actor is said to be the agent and the group is said to be the principal. The rules of governance of a group specify the powers that agents can exercise for the principal.

Agents sometimes do acts that exceed the authority given to them by the corporate group's rules. Thus an individual may attempt to sell land belonging to his clan without their permission, or the treasurer of a company may try to use funds for an unauthorized purchase, or the Prime Minister may attempt to impose a law that Parliament has not passed. These acts are said to be "ultra vires," which means "too strong" or "exceeding authority." In this case, Utere Kabema exceeded his authority as a member of the Kamaiyufa Clan when he invited the Napaiyufas to move onto Kamaiyufa land.

There are usually at least three parties affected when a person acts beyond his authority: the agent, the corporate body for which he is an agent, and the party who relies upon the agent's authority. In this case, Utere Kabema acted beyond his authority, the corporate body in whose name he acted was the Kamaiyufa, and the party who relied upon his representation of authority was the Napaiyufa.

Harm results when a person acts beyond his authority. After the harm has occurred, a dispute may arise concerning who is to bear its cost. To illustrate, suppose the treasurer of a corporation makes an unauthorized purchase with a company check and then uses up the goods. Should the corporation be required to honor the check and pay the vendor who supplied the goods? Or can the corporation ask the bank to stop payment on the check and make the vendor recover the money from the personal account of the treasurer? In general, courts must establish rules to allocate such losses among the person who acted beyond his authority, the corporate body on whose behalf he claimed to act, and the parties on relied upon his authority to act for the corporate body. In this case, the court found that Utere Kabema acted beyond his authority and the resulting losses should be paid by him and clan to which he belonged. This is similar to finding that the harm done by an employee who acts beyond the authority given to him by his employer should be borne by both of them.

Case of Enos Malakit and Jonah Tourai v. Peter Tobung

Court: Local Land Court at Rabaul
Presiding magistrate:
Parties: Enos Malakit and Jonah Tourai versus Peter Tobung
Interest: land named Vunateten
Date of decision: 27 July 1987
Case in brief: Facts: Clan seeks to recover land from buyer who purchased clan land from one member of it without the agreement of all.
Decision: Land reverts to clan.
Holding: The seller of land cannot convey ownership rights to the purchaser that he did not himself possess.

Edited transcript of the case:

"The dispute is over the ownership of the land called Vunateten. The land was originally owned by the clan of Jonah ToUrai and Enos Malakit. Peter Tobung claims that he is now the rightful owner because he bought the land from Nelso ToUpai. Enos Malakit and Jonah Tourai dispute this claim saying that the payment was returned and never accepted.

[The preceding paragraph is followed by a very complicated descriptions of the facts, which involves many parties, which is omitted here.]

...
The court finds that there was no proper arrangement in buying the land. Since it was a clan's land, what should have been done was for Peter ToBung to approach ToUpai and offer to buy the land. ToUpai should then have called the clan elders and informed them about the offer. The clan elders should have discussed the offer to decide whether to accept it, and, if accepted, to decide how to divide up the money. A decision should be made through all elders agreeing. Such arrangements as this will avoid future disputes.

Due to the above reasons, the land Vunateten must be returned to the customary owners, Enos Malakit and Jonah ToUrai."

Analysis of the case:

This is another case of the following principle.

ultra vires: A clan can only transfer use or ownership rights over land to members of another clan by the proper procedures through which it is governed. An individual member of the clan who attempts to transfer the clan's land on his own exceeds his authority.

In a similar case, Magistrate P. Tirese found that

"...In Tolai custom, agreements concerning lands are only reached after all the parties concerned have been consulted. Nothing of this sort was done by Tunait before paying K1,200 to Tomage...As such, the payment made by Tunait to Tomage is void."

Some critics of customary law imagine that it is static and incapable of growth, which is totally false. In fact, Tolai custom has changed in recent years. A clan's leader formerly could sell clan land without agreement by the clan as a whole. In a related

case, a magistrate found that Tolai land could be sold at the discretion of each clan's leader prior to 1953:

"...Obviously in the Gazelle Peninsula of East New Britain Province, the right of inheritance of property goes from mother to off spring (matrilineal society)...The issue here before the court is not who has the right to inherit the land Rakakava...The land is not "Madapai" [that is, land not open for purchase], so it was open for purchase...The issue before the court is whether this land was purchased by the defendant or not.

[The evidence indicates that...] purchasing of lands in those days before 1953 was at the discretion of each clan's leader..." [The case goes on to discuss the testimony of various witnesses as to whether or not money was actually paid to the clan leader for the purchase of the land. The court subsequently ruled that payment was in fact made and the land was in fact purchased.]¹⁰

The custom had changed before 1987 when the case of Enos Malakit and Jonah Tourai v. Peter Tobung was decided, at which point in time an attempted sale by a Big Man acting on his own was ultra vires. According to land officials at Rabaul, the custom changed and, instead of sale being up to each clan's leader, the current custom is that everyone in the clan must agree to its sale. This change is said to have been brought about by the growing value of land and the increasing shortage of it.

Case of Notofana and Kofika Clans

Court:	Local Land Court at Goroka, Eastern Highlands
Presiding magistrate:	Phillip Takori
Parties:	Notofana and Kofika Clans
Interest:	ownership and occupation of Zoiparoka and Gapilibatoka
Date of decision:	26 Nov. 1984
Case in brief:	<p><u>Facts:</u> The Notofanas were badly defeated in a tribal fight. The Kofikas took pity on the surviving remnant of Notofanas and gave them land. The Notofanas cleared the land and occupied it for many years. Now the Kofikas want the land returned and the Notofanas to leave.</p> <p><u>Decision:</u> "This Local Court endorses and upholds the decision made by the grand, grand fathers of both the Kofika and Notofanas, that the disputed land be given to the Notofana Clan."</p>

Edited transcript of the case:

"...From the evidence given by both sides we have noted that there was a big tribal fight between the Notofana's clan and the Makitoka clan, and lots of Notofana's were killed. The Kofika clansmen felt sorry for their neighbours, the Notofanas, and so took some of them, including such men as Kerepenimo and Kotekemaiga, and gave them the northern side of the Kofika land to settle on. The Kofika's themselves continued to occupy the southern side of their land.

At the time when the Notofana's first settled on the Kofika land, there were no houses, gardens, fences or trees on the areas given to them by the Kofikas. The Notofanas had to clear the old Kunai land to make their first houses and gardens. While living there, Kerepenimo married to a woman from Kofika who is the mother of Vano, and about the same time a Kofika man married to a Notofana woman

whose son is Kokobopi. Because of these inter-marriages, ties between the two parties became firmer to such an extent that the existence of strong ties cannot be denied. This relationship was already in existence when the first white men came to the highlands, which was in 1933, about 51 years ago...On these bases we estimate that the Notofanas were in the disputed land for more than 100 years...

We conclude that the land in dispute originally belonged to the Kofika clan. However the disputed areas were given to the Notofanas by the Kofikas themselves at the time of tribal fight, even before contact with the outside world...If so, what right does the present generation have to chase the Notofanas out?..This local land court endorses and upholds the decision made by the grand, grandfathers of both Kofika and Notofanas, that the disputed land be given to the Notofanas clan...

Analysis of the case:

Can a clan acting under customary law give up some of its land finally and irrevocably? In this case the original owner insists that the land was merely loaned for the beneficiary to use for an indefinite period of time. If Magistrate Takori had agreed that the land was loaned indefinitely, he would have permitted the owners to repossess the land after compensating the present occupants. The present occupants, however, insist that the land was given to them finally and irrevocably. Magistrate Takori agrees. Thus Magistrate Takori has found that the land was given away finally and irrevocably in accordance with customary law. So the case establishes a principle of customary law:

irrevocable gift: One customary group can give land finally and irrevocably to another.

Magistrate Takori defends this conclusion by pointing to the improvements the present occupants made to the land. There are two different roles that the improvements could have played in the transfer of property. First, the improvements could be evidence that the land was given finally and irrevocably. After all, no one would make such improvements on someone else's land. Under this interpretation, the gift of the land was, itself, final and irrevocable, so the transfer of ownership would have been final and irrevocably even if the present occupants had not made the improvements.

Second, making the improvements could be interpreted as the act which caused the gift to become final and irrevocable. Under this interpretation, the original gift was not final; the givers of it could have taken it back at any time up until the improvements were made. However, when the recipients started making all the improvements, and the original owners did not protest, the gift became final and irrevocable. Under this interpretation, the gift was made irrevocable and final by improving the land.

It is not clear from the text of the case which interpretation is correct. So the question of whether the gift of land by one customary group to another can be final and irrevocable from the time it is given, or whether the land must be improved to make the gift irrevocable, remains unanswered by this case.

**Case of Mundua Imbo and Dambayagl Endemongo
Concerning the Land Gagl**

Court: Kerowagi Local Land Court
Presiding magistrate: S. Antonio
Parties: Mundua Imbo and Dambayagl Endemongo
Interest: ownership of land "Gagl"
Date of decision: 17 June 1983
Case in brief: **Facts:** Owner of land made verbal agreement that tenant could occupy and use it to keep cattle. After ten and a half years, owner had received little in rent, so he asked tenant to leave and tenant refused. Tenant prevented owner from planting a garden on the land and tenant tried to get owner's clan to expel him.
Decision of Court: Tenant to vacate property and remove valuable improvements, and owner to pay tenant K800.00 in cash as compensation.
Holdings
(1) "There is no such custom as expelling a clansman from a clan."
(2) "The primary reason for us ordering...[the owner to pay] such a large sum of compensation [to the tenant]...is to avoid further harassment by the latter and his men."

Trial transcript:

"It is clear from the evidence that the land belong to Mundua Imbo. Mundua planted coffee trees and built two kunai houses on the land. In 1972 he arranged with Dambayagl Endemongo to use the land for cattle farming...There is no evidence that Mundua sold the land to Dambayagl, nor was there evidence that the land was handed over as share or asset for the venture...

Dambayagl and his family moved into the houses built by Mundua on the land. Mundua in turn returned to Wauga. Dambayagl bought fencing wire and built a fence around the land and he put cattle into the fence. Mundua did not help in the construction of the fence or the tendering of the cattle. Dambayagl gave one (1) cow to Mundua. It is not clear whether this was for the purchase of the land or merely to show to Mundua that they were still partners in the venture. However, Dambayagl sold the cow for K300.00 and gave the money to Mundua. Sometime later, Dambayagl took back K200.00 of the K300.00 and bought two cows and one sheep for Mundua. So Mundua had two cows and one sheep in the fence. But these were sold by Dambayagl, with or without the consent of Mundua. The proceeds were never given to Mundua.

There is evidence that Dambayagl took in some cattle from other people from Gena...it is clear from the evidence that the only money Dambayagl spent on the business was for the purchase of the fencing wire and the first lot of cattle...But he was using all the proceeds from the venture for himself. Mundua only had K100.00 during the ten and one half years the venture operated...

...[Mundua] tried to make gardens on that land but the drains and plots or mounds were covered and levelled by [Dambayagl] ... and his men... [Dambayagl] tried to influence members of the Gena clan to expel the former from Gena...We requested two village magistrates to give evidence on custom about this...Mondo said that there

is no such custom as expelling a clansman from a clan. He may be shunned by his clansmen but not expelled...

[Dambayagl] was order to return the possession of the land to the former within one (1) week. He was told to remove the fence, including the posts and the wire. Also to dismantle and remove all houses including the frame of one of them. He was also ordered to remove the cattle, chickens and all domestic animals. However, he was ordered not to remove or destroy all the cardamom, banana, taro and elephant grasses planted on the land. He is to leave them to the former. The former was ordered to pay K800.00 CASH to the latter by way of compensation for improvements done by him on the land...Further for the loss the latter is to suffer between the time he moves out of the land until his new crops and plants can be harvested...

The primary reason for us ordering the former to pay such a large sum of compensation to the latter is to avoid further harassment by the latter and his men to the former, once the former uses or settles on the land again..."

Appeal

Court: Kerowagi Provincial Land Court

Presiding magistrate: G. C. Lapthorne

Decision: Local land court's decision quashed and replaced by a new decision different in one respect: Mundua does not have to pay compensation to Dambayagl. Instead, the improvements on land made by Dambayagl now belong to Mundua as payment for the use of the land over the past 12 years.

Excerpts from Appeal Court's transcript of trial:

"...This court is opposed to Mundua having to pay Dambayagl to keep the peace. This is just extortion if he causes any trouble then he and his hooligan mates can go to gaol..."

...LLC that heard & determined this matter was incorrectly constituted as it was formed with the Magistrate and only one mediator..."

Analysis of the case:

The local land court decision in this case appears to rest upon the following principles of customary law:

no expulsion from clan: A clansman cannot be expelled from a clan.

Evidence established that this is a customary rule of the clan involved in this case. Perhaps the rule applies to other culturally related groups, but the exact extent of this rule remains to be determined. The scope of customary law generally varies from principles that are universal in PNG to rules limited to specific clans.

There is an important principle of compensation drawn upon by the local land court:

compensation for lost opportunity: An evicted tenant is entitled to compensation, not only for improvements made to the land, but for the lost opportunity to plant crops elsewhere.

An important task for judges is to determine the principles governing the extent of compensation required in land cases. Full compensation of an evicted tenant generally puts the tenant in the same position that he would have been in but for the rental agreement. A person who improves land will make direct investments upon it. If the person is subsequently required to vacate the land, the person ordinarily retains all the improvements that are moveable and receives compensation for improvements that cannot be moved. In this way the tenant is placed in the position that he would have been in but for making improvements upon the owner's land. Compensation for immovable improvements also prevents the owner from realizing a gain from eviction at the tenant's expense. Thus compensation for immovable improvements can be regarded as a form of restitution.

There are, however, additional costs of eviction born by the tenant. One additional cost is that the tenant may have lost the opportunity to make another profitable investment. In this case, the tenant lost the opportunity to plant crops elsewhere and harvest them. The preceding principle allows the evicted party to recover for lost opportunity. The principle that an evicted tenant can recover, not only for out of pocket costs, but for opportunity costs, is also found in the British common law of contracts.¹¹

Finally, there is a third principle drawn upon in this case by the local land court:

removal but not destruction: An evicted tenant may remove all movable improvements that he made to the property, but improvements that cannot be removed must be left unharmed.

This principle prevents the evicted tenant from taking revenge upon the owner. Without this principle, owners might be afraid of evicting tenants.

Besides these three principles of customary law, the court draws upon a principle from the Land Disputes Settlement Act:

improperly constituted court: The decision of a local land court can be quashed if it is improperly constituted by having too few mediators.

The principles of compensation used by the lower land court, which were cited above, were not employed by the Provincial court. Instead, the Provincial court took the view that the compensation order was a bribe to maintain the peace, not really compensation. The court consequently invokes a principle concerning the extent to which the parties to a property dispute can use force against each other:

extortion: Payment by one party to another will not be ordered by the court just to keep the peace.

This principle is obviously in the British tradition, which condemns the use of force in property transactions and refuses to recognize any transfer of property that is not voluntary. However, force in property disputes is one of the traditional mechanism for redistribution of land in the highlands that has prevented the emergence of a landlord class or a class of destitute people. Developing general rules about the role of force in the customary law of property is a very difficult and important task. See the case of the same parties, Mundua Imbo and Dambayagl Endemongo, in which the court decides their dispute over the land Taramugl by giving ownership to the party uniquely situated to defend it.¹²

Case of Tobuka and Anglimka, Customary Groups

Court: Provincial Land Court at Minj
Presiding magistrate: R. J. Giddings
Parties: Tobuka and Anglimka customary groups
Interest: disputed ownership of parcel of land called "Minba"
Date of decision: 12 June 1986
Case in brief: **Facts:** Land in dispute was originally marginal riverine swampland over which village pigs enjoyed free range. It was subsequently developed jointly as a cattle project by the two parties to the current dispute. The land has now become valuable as a possible coffee plantation, so the two groups dispute ownership of it.
Decision: Each group given an equal interest in the land and they must agree between themselves upon how to proceed with its development.
Holding:
limited power of precedence: "The Local Land Court sought to determine which group had entered the general dispute area first of all and to find in favour of that group...the fact that by chance...[one group's ancestors preceded the other onto the land] does not necessarily mean that proprietorship of everything they claim is vested in them."
ownership presupposes control: "Proprietorship, or 'ownership' of land...implies an ability to control, occupy and use land and to stop others from interfering with it. That ability is either real, in that the proprietors are actually and currently exercising their proprietorship, or potential, in that they have the ability to exercise proprietorship and will do so if their right to do so is challenged."
efficient remedy: "It could be argued that both parties have rights of a limited nature...but the purpose of this action – to make ...[the land] available for economic development – is best served by finding equal rights of the highest order (proprietorship)..."

Edited transcript of the case:

"This dispute is between Anglimka and Tobuka sub-groups of the Berebuka customary group...The dispute ended up in the Local Land Court (LLC) when the Anglimka claimed exclusive possession of [part of the disputed land] ...upon which they wished to establish a coffee development project. Tobuka clansmen...disputed their right to do this and counter-claimed that exclusive possession was vested in Tobuka alone...[T]he LLC decided that ...[the disputed land] belonged to Anglimka...The Tobukas would not accept this decision and appealed it...
...[T]he Anglimka have been unable to develop it [the disputed land] to the exclusion of the Tobuka...[A]s soon as the Anglimka decided to establish a coffee project there the Tobuka insisted upon being included...[I]t should have become obvious [to the Local Land Court] that a decision which did not recognize equal rights vested in both parties would be rejected by the loser, which of course, is exactly what happened...

The Local Land Court sought to determine which group had entered the general dispute area first of all and to find in favour of that group. It found that the Anglimka preceded the Tobuka there, so found entirely in their favour. I don't think

that land dispute determination is as simple as that. The Anglimka may have had the more convincing evidence but the fact that by chance their forefathers preceded those of the Tobuka into the general area does not necessarily mean that proprietorship of everything they claim is vested in them.

Proprietorship, or 'ownership' of land as it is popularly called, implies an ability to control, occupy and use land and to stop others from interfering with it. That ability is either real, in that the proprietors are actually and currently exercising their proprietorship, or potential, in that they have the ability to exercise proprietorship and will do so if their right to do so is challenged.

It could probably be shown that the Anglimka enjoy proprietorship both real and potential in and about their settlement and garden areas. In the [dispute area]...the issue in favour of the Anglimka is not so clear-cut. Any attempt on their part to take exclusive possession of that land was and will be countered by the Tobuka. Likewise, any attempt by the Tobuka to take exclusive possession of it was and will be countered by the Anglimka.

It could be argued that both parties have rights of a limited nature, perhaps restricted to those of grazing and possibly hunting, but the purpose of this action – to make ...[the disputed land] available for economic development – is best served by finding equal rights of the highest order (proprietorship) being vested in both parties equally and in common...

...[The disputed land] was, prior to being developed as a cattle project [in a joint venture by the two parties to this dispute], mainly comprised of marginal riverine swampland over which village pigs enjoyed free range...

...[One of the grounds for appeal was the alleged bribing of a mediator.] The problem [of bribery charges] takes the nature of a three horned dilemma: One insists that not only must justice be done it must be seen to be done, therefore, to accept the offer of light refreshments by one party to the dispute might conceivably be misunderstood by the other. The second says that the ancient Melanesian custom of providing food to needy strangers and the sharing of food with friends is a virtue which should be nurtured rather than stifled. The third warns that acceptance creates obligation and the need for reciprocity.

For a contestant to arrive at a court official's house after dark with a leg of pork as an unsolicited gift might well be interpreted as an attempt to bribe, and the acceptance of that gift would be grossly improper...On the other hand, ...to suggest that [the mediator] Mr. Appa traded his integrity for a bottle of Coca Cola and a bisquit does less credit to the accuser than to the accused..."

...One wonders how, for instance, the mediator who mediates a dispute can come to the Bench with an open mind after his mediatory attempts have failed...Likewise, ...might not those other mediators from the Area or Division in which the dispute arose come with preconceived ideas on the merits of the case if they are well versed in the history...? My experience suggests that land court mediators should not be full members of the LLC; that a magistrate alone should decide at the Bench..."

Analysis of the case:

Courts in Papua New Guinea often face a situation in which one customary group **claims** ownership of a piece of land on the grounds that their ancestors first **acquired**

it, whereas another group claims ownership of the same land on the grounds that they occupied and used it most recently. There is apparently a conflict between two competing principles, which could be called "first in time is first in right" and "last in time is first in right."

The contradiction, which is more real than apparent, can be resolved by stating the underlying principles carefully, as follows:

first possession: The first group to possess land acquires ownership of it.

adverse possession: A group that possesses land for a sufficiently long period of time without the permission or active opposition from others thereby acquires ownership of it.¹³

From these two principles it is clear that the first in time is first in right, but only if the first party in time continually asserts its rights. A sufficiently long lapse in the assertion of those rights can result in their transfer to the party who adversely possesses the land.

There is, of course, ambiguity in these two principles. One source of ambiguity in this version of the principle of adverse possession is its failure to state the precise number of years needed to transfer ownership rights.¹⁴ A second ambiguity is its failure to specify the acts that count as possession of land for purposes of acquiring ownership of it.¹⁵

A third source of ambiguity, which is more profound, concerns land that is possessed with the persistent and active opposition of the original owner. In Papua New Guinea the relative strength of the parties affected their judgment about the ownership of land. The redistribution of land in response to relative changes in power among competing clans was one of the mechanisms which prevented the emergence of a landlord class or a class of landless serfs. In this respect, the tradition in Papua New Guinea is very different from British law, which does not allow land to be redistributed involuntarily according to the strength of the parties. Perhaps the British principle of adverse possession must be modified for Papua New Guinea by replacing the phrase "without the permission or active opposition from others" by the phrase "with or without the permission or active opposition from other." Developing the principles of involuntary land redistribution in customary law is one of the great challenges that the land courts face in developing the uniquely Melanesian aspects of land law.

The magistrate in this case suggests the following principle of involuntary redistribution:

ownership presupposes control: Ownership implies the power, whether exercised or latent, to occupy and use land, and to stop others from doing so.

This principle disallows ownership without actual or potential power to control it. The logical consequence of this principle is that customary groups who lack the power to exclude others from occupying and use land do not own it. Debating and refining this principle is obviously a very important intellectual task.

This principle resembles one that Magistrate Lapthorne drew upon in deciding another case, which can be formulated as follows:

ownership of uniquely defensible land: If several groups have legitimate claims to disputed land and one group is uniquely situated to defend it, ownership shall vest in the later, who must compensate the others for loss of their use rights.¹⁶

Magistrate Giddings takes a practical approach with respect to ownership, that emphasizes the needs of development, rather than exemplifying a high ideal of justice. Perhaps this practical approach to land disputes relates to the conception of the purpose of property law that Magistrate Giddings expressed in another case:

"I believe that the aim of the Local Land Court should be to settle land disputes in such a way that the people involved will be able, as a result of the Decision, to enjoy happier, freer and more secure lives living on their land. The Court should refrain whenever possible from bringing down retributive judgments upon one party to the gratification of the other and so help perpetrate old animosities and conflicts."¹⁷

This practical approach also has implications for how aggressively courts should try to resolve boundary disputes. Giddings view is that boundary disputes in the highland are best resolved by mediation, not by authoritative judgments of land courts. In one case, he expressed the that courts in the highlands should avoid drawing boundaries beyond the immediate compass of the dispute for fear of provoking a tribal war:

"I believe the Local Land Court fell into a trap by allowing itself to be drawn into placing a long boundary between both clans when there was no apparent reason for doing so. The argument over the position of an inter-clan boundary...was, in my view, secondary to the issue of the rights [of one party]...to re-establish a garden n the site..." "[One party] cleared off a small parcel of land..He claims that it is a site upon which his father...once planted a garden...[Another party] disputed his right to do so.] In cases such as this a dispute rarely remains between those who commenced the argument but expands to encompass both clans who rise in support of their respective members."¹⁸

An implication of Giddings view is that systematic registration of property boundaries in the highlands should not be attempted. Bear in mind that the state can determine boundaries authoritatively, but not finally. The parties are likely to vary and modify boundaries established by the state. The consequences for courts are mentioned by Giddings in "Regional Land Court Circular Number 15" (May, 1979):

(1) The fact that a Court has placed a boundary between disputing groups, or awarded ownership of a disputed block of land to one party to the dispute, does not mean that the people involved cannot change that boundary or block ownership, either wholly or in part, in accordance with traditional custom.

(2) Sometimes it happens that the group which 'won' the land in Court is willing to give some of it to the other party. Some people fear that this would be illegal seeing that a Court previously decided the ownership question. This is not so. Not only is it allowable but it should be encouraged whenever in doing so the dispute will truly end in the minds of the people concerned.

(3) Section 81 of the Lands Act 1962 recognizes customary transfers of land to be valid. A land transaction under these circumstances would represent a customary transfer.

The importance of the state not drawing boundaries in some circumstances directly relates to Giddings' view that a local land court can adjourn without deciding the case before it:

The following question was recently asked me: Can a Local Land court adjourn the case it is hearing sine die and not hand down a decision?...As a general principle a case once opened should be taken to its conclusion, however, if the court believes that it should adjourn sine die it may do so. Section 27 (2) of the Land Disputes Settlement Act 1975 states: "A Court may adjourn a hearing, if it appears that by doing so an agreement may be arrived at between the parties."¹⁹

Case of Liviko-Karafa and Namori-Sibite

Court:	Local Land Court at Kapakamarigi
Presiding magistrate:	R.J. Giddings
Parties:	Liviko-Karafa of Kapakamarigi and Namori-Sibite of Hofaga for and on behalf of the Kapakamarigi and Hofaga native groups
Interest:	ownership of land Iagaribiribi and Gusaro
Date of decision:	12 January 1977
Case in brief:	Facts: Two customary groups dispute the ownership of land. The evidence does not seem to favor one clan over the other. Decision: Divide the land roughly equally between them and make the border defensible.

Edited transcript of the case:

"...Evidence...indicates that at times members of both groups vacated their home areas under pressure and sought refuge with friendly groups. In times of social stability both would return to their home areas. Both the Kapakamarigi and Hofaga groups have resided continually in the general area they now frequent since about the time of World War Two. By the time the writer visited them first in December 1964 their settlements were long established and surrounded by sizeable plantations of coffee and timber.

I have been in close contact with these groups over the past thirteen years. Throughout that time I have been aware of the poisoned social atmosphere in which they have co-existed in an uneasy peace periodically sullied even further by outbursts of fighting...

...[N]umerous attempts were made...to mediate a settlement between the Hofagas' and the Kapakamarigis but to no avail.

In June 1973 the hearing...commenced before Mr. Senior Commissioner Orken. Written evidence was taken from both groups. Because Mr. Orken saw that both groups had equal rights to share the ownership of the disputed land he asked them to put aside their animosities and reach a boundary settlement of their own. Of course no action was taken in this request for if it had been possible for the disputants to compromise with one another they would have done so years before...

The Court made known its belief that the only way it could settle the dispute was to divide the disputed land as equitably as possible between both groups. This move was supported by the spokesman for both groups...From the assembled clansmen ten men from Kapakamari and ten from Hofaga accompanied the Court which then proceeded to the disputed land and established a boundary mark from Igaribiribi to Gusaro. The boundary traversed vacant swampland and did not intrude into any cultivated areas.

After the boundary had been established leaders of both groups voiced their satisfaction with the boundary with the exception of ...[A] bow and arrow fight erupted between the Hofaga and Kapakamarigi people...There is now a commonly held belief amongst the Hofaga and Kapakamarigi people that the disputed land should be divided equitably between them. Because both groups have long-standing land ownership and usage rights in the immediate area these may be assumed to extend into the subject land notwithstanding the fact that it is in effect 'waste and vacant' marsh land."

Analysis of the case:

Courts are supposed to do justice and they are supposed to decide disputes. Justice in court usually means applying established law to cases. In some situations, however, the established laws do not yield any results at all. Under these circumstances, the court cannot settle the dispute unless it goes beyond established rules. The court may decide such cases by reaching beyond established rules and calling upon vaguer principles of fairness. These principles of fairness are sometimes called the rules of equity. In the British tradition, rules of equity can be applied to circumstances in which there are no established rules of law.

Liviko-Karafa and Namori-Sibite is such a case. Magistrate Giddings was faced with a long-standing land dispute between two groups which they could not resolve peacefully on their own. Furthermore, the history of dispute between the two groups was so tortuous that Magistrate Giddings thought it could not be resolved by applying customary law to the facts. For example, neither side could claim that its ancestor was the first to cultivate the land, and neither side could claim continuous occupation of the land.

In these circumstances, Magistrate Giddings tried to do what seemed fair and workable. He thought that a fair and workable solution was to divide the land equally, while taking into account also the need for clear boundaries that can be defended. Thus Magistrate Giddings decided this case on fairness rather than established rules, or, in the terminology of the British legal tradition, he decided the case on equity rather than law. This case thus suggests the following principle of customary dispute resolution:

compromise and defensibility: When a dispute cannot be resolved by combining the facts with an established rule of customary law, it may be resolved by reference to vaguer principles of compromise and the ability to defend boundaries.

Case of Ipao of Okiyufa and Apele of Masilakaiyufa

Court: Local Land Court at Goroka
Presiding magistrate: Phillip Takori
Parties: Ipao of Okiyufa and Apele of Masilakaiyufa
Interest: land known as Gipeka
Date of decision: 28 Feb. 1985
Case in brief: Facts: Dispute over land that was defended by the clan as a whole.
Decision: Land belongs to the clan who defended it.

Edited transcript of the case:

"We have considered that in Papua New Guinea land is owned on a communal basis, i.e. the ownership of land lies in the name of the big tribe, or houseline, and within this ownership each and everyone within that clan, or community has the right to use a portion of land. If any outsiders tries to get some of their land then the whole clan takes part in the dispute...On these bases, this Court comes to the finding that the land in dispute lies within the Masalakaiyuf's land; and therefore it belongs to the Masalakaiyufa houseline..."

Analysis of the case:

This brief excerpt from Magistrate Takori's decision raises one of the most perplexing questions about customary law: Who owns the land? This general question provokes disagreement, even though there is much agreement about concrete details of ownership rights and responsibilities. Everyone agrees that the clan as a whole defends its land, that inheritance follows prescribed rules that can be divided broadly into patrilinear or matrilinear, that land can be given as compensation by one group to another, that one group can invite another to live on its land, that a family's claim to a piece of land is strengthened when its blood is spilled on it, its dead are buried in it, or its labor and capital are invested in planting permanent crops, building houses, or making other immovable improvements on the land.

In spite of agreement about these details, people still disagree about whether customary land is owned by clans or individuals. Agreement about particulars and disagreements about the underlying generalization is paradoxical. The paradox arises because different people have different rights and responsibilities in mind when they give an answer to the question, "Who owns the land?" Those people who think about the responsibility to defend the land say it belongs to the clan. That is apparently what Magistrate Takori had in mind when he wrote his opinion. This conclusion is also reached when people think about the fact that in most coastal societies the individuals must ask the clan's permission to put in a garden or plant permanent crops. But those people who think about land that a particular family or lineage group or subclan has used for a long time -- planted a garden, built a house, put in permanent crops, buried the dead -- will say the land belongs to the individual.

Neither answer is wrong. The difficulty lies, not in the answers, but in the question. In British law there is a concept of absolute, unitary ownership, as exemplified by fee simple or freehold title. Ownership is absolute in that the owner has a very broad set of rights to do whatever he wants with the property. Ownership is unitary in that all these rights are exercised by the owner, not by anyone else. In most contexts, the question, "Who owns the land?", is equivalent to the question, "Who is the absolute, unitary owner of the land?"

This is, I think, the wrong question to ask about customary land in Papua New Guinea, as can be seen by distinguishing two concepts of property: market property and relational property. Market property is the concept that is relevant for dealings between strangers. Relational property is the concept that is relevant for dealings with kin. Absolute, unitary ownership applies to dealings between strangers, but does not apply to dealings among kin. Land dealings in Papua New Guinea's customary law, however, are never between strangers. Rather, they are primarily between kin, and, if not between kin, then between people with long standing personal relationship. It is characteristic of kinship relations that they form a complex web of mutual responsibilities and rights. In a web of kin relations, nothing is absolute or unitary.

To illustrate, if I own freehold land and a stranger asked to buy it from me, I am free to say yes or no. My freedom to do as I please comes from the fact that I have no obligations or duties to strangers with respect to selling my land. But suppose my nephew asked to buy part of my land from me. I may know, for example, that my nephew has little land and a growing family, so his need is greater than mine. I may also know that I owe his father, who is my brother, for favors that he did to me. I may also realize that my nephew will pay for the land with a feast, and that he might be obligated to return it to me in the future if I repaid him for the feast. All these considerations must weigh upon my decision to sell the land to my nephew or keep it. Thus I am not free to do just as I please when the buyer is my nephew rather than a stranger.

When transactions are restricted to kin, I call the property "relational" because it involves relatives. There is no absolute, unitary owner of relational property because kin responsibilities are mutual and overlapping. Thus we may formulate a principle of customary law:

relational property: The customary ownership of land is not absolute when transactions involve kinsmen.

It is a mistake, then to try to resolve land disputes among kin by trying to discover who is the absolute owner.

There is room for disagreement over whether or not customary ownership allowed for the sale of land to unrelated persons. Whether or not sale was allowed, customary groups sometimes gave land to other groups with whom kin ties were weak. And settlements of tribal fights between enemies often involved the transfer of land. These transactions with unrelated groups were strategic decisions that typically involved the whole clan. These considerations suggest another principle of customary law.

market property: The customary ownership of land by the clan as a whole is absolute in dealings with unrelated groups.

When resolving land disputes between groups that are unrelated by kinship, or only weakly related by kinship, it is appropriate to ask who is the absolute owner of the land.

Case of Kefamo and Nagamiufa

Court: Local Land Court at Goroka
Presiding magistrate: Gesling
Parties: Kefamo and Nagamiufa
Interest: land called Letekahalo
Date of decision: 18 Dec. 1987
Case in brief: Facts: A colonial kiap cut a boundary through the "no man's land" between two contending groups. Both the ownership of the land and its boundary are now contested.
Decision: The kiap's decision with respect to the boundary and ownership is affirmed.

Edited transcript of the case:

"The nature of the dispute is twofold...the ownership of the land called "Letekahalo" and, secondly, one of its boundaries. The disputed boundary was marked by Patrol Officer J.L. Thyer on the 4th of November, 1955 with the consent of luluais and elders of both Kefamo and Nagamiufa. ...Subsequently a District Officer, namely Ian McLachan, surveyed the land and cut a boundary across Letekahalo on the 1st of October, 1969, which affirmed Mr. Thyer's boundary...

There have been countless disputes over the entire land Letekahalo, which was described as a "no man's land" by anthropologist Dr. K. Read in his book entitled The High Valley....He detailed in his book that the said Letekahalo land was used largely for tribal warfare...

[Kefamo argued the boundary cut by Thyer was not in the right place.] Kefamo relied very much on two arguments, first that Patrol Officer Thyer shouted his side them down and did not obtain their side of story before effectuating the land cut boundary across Letekahalo land. Second, that Thyer did not tell them that they did not own the other side or portion of land to the north towards Kefamo hamlets commencing at the cut across land boundary...

The boundary and ownership issues became hot issue when Mr. Kone Kokoe fenced the existing land boundary in the year 1985, 30 solid years after the land cut boundary was originally effectuated by Kiap Thyer...

In relation to the assertion that Kiap Thyer forced the land boundary, only three (3) witnesses from Kefamo testified to that effect, whereas nine (9) witnesses either gave evidence in favour of the other party -- Nagamiufa -- or simply did no touch on the said issue...

A total of seven (7) witnesses unrelated to Kefamo, plus eight (8) to nine (9) Kefamo witnesses, affirmed that luluais and elders of both Kefamo and Nagamiufa consented to the land cut boundary across Letekahalo land. There had apparently been a dispute over it that they wanted to settle...

The majority decision of this court can only affirm once again the justified boundary cut by Patrol Officer J.L. Thyer on the 4th of November, and further affirmed by District Officer Ian McLachan on the 30th of October, 1969."

Analysis of the case:

The Land Disputes Settlement Act requires land courts to decide cases according to customary law. To achieve this goal, the Act stipulates that lawyers are to be excluded from the court, the magistrate is to sit with at least two mediators, and that the court's decision is to be made by majority vote of magistrates and mediators. The Act does not, however, say anything substantial about the procedures the land courts are to follow or the standard of proof that is to be applied.

How are spokesmen to be chosen for contending groups? In what order are they to speak? How long can they speak? Can their speeches be interrupted by questions, or must questions wait until their speeches end? Are the magistrate, mediators, and participants all free to ask questions? How many witnesses can be called? Must witnesses restrict their testimony to events they actually saw or heard, or can they report second hand information or rumors? Must the court decide the case only on the evidence present during the trial, or can the court draw upon facts known to it that were not presented during the trial? How convincing must the evidence be before the court accepts it as true? These are some of the questions that must be answered by the magistrate and mediators, since the Act has nothing to say about them.

Presumably the answers are to be found by making customary law more explicit. In other words, the procedures and standards of proof already applied by elders or big men in deciding disputes are to be refined by the land courts. The case of Kefamo and Nagamiufa illustrates the standard of proof to be used by the land courts. Magistrate Gesling heard several witnesses on both sides, as well as neutral witnesses. The witnesses contradicted each other. Thus he had to decide the case by balancing their testimony and deciding which side had more weight.

Some distinctions in British law are useful for understanding how to strike a balance in the evidence. There are several standards of proof in British law that apply to different types of cases. The highest standard is "proof beyond a reasonable doubt," which applies in criminal cases. The prosecution must provide proof such that no reasonable person would doubt that the defendant was guilty. Another standard which is high, but not so high as proof beyond a reasonable doubt, is "clear and convincing evidence." Sometimes a government regulatory agency that rules against an individual must base its decision on clear and convincing evidence -- e.g. the government telephone company revokes service from someone for whom clear and convincing evidence shows that he is making nuisance calls. The standard of proof that must be achieved in civil disputes in court is lower still. In order to prevail in a civil dispute, the plaintiff must prove his case by the "preponderance of the evidence." In other words, the plaintiff's case must be more believable than the defendant's on the basis of the evidence that they present. An even lower standard is the "rational basis" test. Thus a court will not overturn a jury's finding of fact unless it would be impossible for a rational person to reach the jury's conclusion on the evidence before it.

I have briefly mentioned four standards of proof, that can be arranged from high to low: proof beyond a reasonable doubt, clear and convincing proof, the preponderance of the evidence, and rational belief. It is the "preponderance of the evidence" standard that applies in civil disputes under common law. These are the disputes in British law that resemble most closely the cases decided in Papua New Guinea's land courts. It is not surprising, therefore, that Magistrate Gesling appears to apply the preponderance of the evidence test in deciding this case. When

Magistrate Gesling was confronted by contradictory evidence, he weighed it to see which side had the stronger case. Indeed, he explicitly took account of the number of witnesses on each side. It would seem from this case, then, that the standard of proof for deciding cases in customary is similar to the standard of proof for civil disputes in British common law. Thus we can formulate a principle of customary law:

preponderance of the evidence: In customary land disputes, the party shall prevail whose case is supported by the preponderance of the evidence.

Case of Ningalimbi No. 2 and Ilahita No.3 Clans, versus Mamlimbi Clan

Court:	National Court of Justice, Wewak
Presiding judge:	J. Bredmeyer
Parties:	Ningalimbi No. 2 and Ilahita No. 3 Clans, versus Mamlimbi Clan
Interest:	land called Komonotoa
Date of decision:	24, 25 Feb. 1988
Case in brief:	<u>Facts</u> : National Court reviewed a decision of a District Court for mistakes in applying the law. <u>Decision</u> : Decision of lower court sustained.

Edited transcript of the case:

This is an application for judicial review of a decision of the District Land Court given at Maprik on 20 May 1986. Leave to apply has already been granted by Mr. Justice Hinchliffe. I want to explain that this application for review is very different from an appeal and is very different from a re-hearing. If this was a Land Court hearing I would have to spend a number of days on the land, I would have to hear a number of witnesses, and I would have to make a good map of all the places on the land, including the location of old and current villages. I would have to know where the boundary line was put at different times by the kiaps and the Land Titles Commission and the Demarcation Committee and so on. But this is not a land hearing and is not even an appeal. This is a review which is something different and is very limited in scope. When the Local Land Courts and the District Land Courts were brought into force in 1978 they replaced the Land Titles Commission and, when Parliament created the Local and District Land Courts, it said that there was to be no appeal and no review. It was intended that the District Land Courts decision would be absolutely final. However, in one case some lawyers argued that, although the law here at s.60 says that the decision of the District Land Court is final and not subject to appeal and that was what Parliament wanted, nevertheless under the Constitution, which is a higher law, the court has some right to review a decision. So all I have done in this case, as the parties know, is to have read the papers very carefully and I have listened to the lawyers to see if there is any mistakes in them. I have not myself tried to find out who the real owners of this land are. My job is just been to see if the District Court made any mistakes. Now I start with the Local Land Court. From reading the papers and listening to the arguments I believe that the Local Land Court did its work carefully. It heard 18 witnesses and it prepared 114 pages of written notes of evidence in respect of the land and the court gave 5 paged reasons for decision and key paragraph is this:

"Finally I would stress that this court has been convinced by the Mamalimbi witnesses that the land Komonotoa is the Mamalimbi's and is now the Mamalimbi's land."

Now prima facie in my view there was nothing wrong with this decision. It was open to the court to believe the Mamalimbi witnesses, to believe that their talk outweighed the Ningalimbi and the Ilahitas. As the magistrate said the Mamalimbi were supported by a number of witnesses from villages surrounding the land - not simply from the three villages in dispute. It can also be said that two witnesses from Ningalimbi No. 2 gave evidence against their own village's claim, and one witness from Ilahita No. 2 also gave evidence in favour of the Mamalimbi. Now I know that Ilahita No. 2 is different from Ilahita No. 3 which is the party in this dispute. But nevertheless that is evidence in favour of the Mamalimbi's claim from an independent witness or from a man whom I would expect to favour the Ilahita claim. Normally I would expect a man from Ilahita No. 2 to generally be a supporter of people from Ilahita No. 3. And the local magistrate also pointed out that the Ningalimbi and the Ilahitas have very little on the land. I will read what he said about that.

"The Ningalimbi and the Ilahitas have nothing planted on the disputed land except the two small villages Ula and Malingaboa and also part of Ilahitas No. 3. There are coconuts near these villages with a few young coffee trees which I can estimate were planted not long ago.

Now present day occupation of the land is one of the factors which is to be considered in giving a land decision. It is not conclusive, it is not determinative of the result, but it is one of the matters to be considered.

Having read this Local Land Court's decision carefully and all the evidence on which it is based I cannot say that it is one in which:

"No court doing justice between the parties could have made that decision."

This appeal is against the District Land Court decision. I now turn to that. The District Land Court heard further witnesses and in at least one case, further evidence from one of the witnesses who gave evidence before. It gave its reasons in typed form and again there are no obvious errors of law in the way it tackled its task. The crux of the District Land Court decision on the merits is contained in two passages which I quote. At p.3:

"The court considered all evidence given and decided to rely on the evidence given by the respondent and their witnesses and made its decision. The court was then entitled to place a lot of emphasis on the respondent's witnesses and I think correctly because the witnesses are the appellant's clansmen and no evidence was called at that time to discredit these witnesses. What they said remains undiscredited and contradicted what the appellant said. I am also satisfied that the return of the land by BAPO to the respondent was done customarily with a feast held to mark the occasion. This is being supported in the Local Land Court by the witness Aundassan Wasandu, the appellant's witness who said a ceremony was held according to custom to help stop any problem or dispute which may arise in the future. He said that all the clans agreed to return the land; they are: Ningalimbi No. 1, No.2, Ilahita Nos. 2, 3, and 4."

And on p. 4 this is what the District Land Court said:

"It is further contended that the said court ought to have given credence over the evidence of witnesses for the appellants who said that the land was won in battle with the respondents on or about 1920 before the then Administration imposed

control over the parties' area. In accordance with the custom of the area the title on the ownership of the said land would then vest with the victors who were the appellants. The said court erred in holding to the contrary. I especially agree with the unwritten customary law in regard to the circumstance contended. It is correct and the land would remain the property of the victors, unless another fight ensued and the land was won back in battle or some custom is performed to forfeit the title and ownership. In this case the land was won in battle and the appellants who were the victors assert title and ownership to the land. But in 1969 BAPO from the appellant's clan entered an agreement with the respondent to return the land and a feast was held according to custom to mark the occasion. As I have held in ground 1A that feast held was to mark the return of the land to the respondents and the custom has been complied with. The appellants therefore forfeited their title and ownership of the said land at the ceremony to the respondent."

So those two quotes really set up different bases for the District Land Court's decision.

1. Is that the MAMALIMBIS were the original Tumbuna owners. That is what is said on p. 3 and is what the Local Land Court found.
and/or,
2. That the MAMALIMBIS lost ownership in a fight in about 1920 when they were chased off but they got it back when it was given back to them by BAPO in 1969. I do not agree that the conquerors necessarily gain ownership by custom. There are two competing rules of law here on custom. One is that the victors own the land i.e. the people who conquer land own it. The second is that the losers do not lose ownership. The losers may be temporarily out of possession but they do not thereby lose ownership rights forever. They are just waiting their time before they can assert their rights and get back. And the correct law is that whoever had the land when the government came, when the Administration first came, is but one of the factors to be considered in deciding a land dispute. It is not the only one. And that was said in another case *The State v Giddings* (1981) P.N.G.L.R. p. 423 at 430. The relevant factors are:
 1. Who was there when the government came?
 2. Use and occupation. Who is using the land?
3. What are the competing histories of the land and which is the most likely version. That has been decided a number of cases. You test competing traditional accounts of the land by reference to recent and existing facts and see, in the light of those, which of the two accounts is the more probable. The authority for that called *Veakabu Vanapa* (1969-70) P.N.G.L.R. 234.
4. You see which of the parties has an intimate knowledge of the land, of old garden sites, old village sites, burial sites, sacred places and the names for the different plots and so on. That was decided by *Phillips J. in Re Jomba* (1971-72) P.N.G.L.R. 501.
5. By s. 40 of the Land Disputes Settlement Act you can also take into account land needs; which group may have a need for the land and that section also allows compensation to be paid if there is a group which has the need for the land but which is out of possession.

6. The court shall endeavour to do substantial justice between all persons interested in accordance with the Act and any relevant custom S. 50(2)(e).

As I have said above, this is an application for judicial review. It is not a Land Court and it is not the Land Titles Commission. This court has a very limited role. The review can succeed on one of three matters: (1) excess of jurisdiction (2) contrary to natural justice, and (3) error of law on the face of the record. I have listened to Mr. Jerewai's arguments that BAPO has no authority to give back the land of the two appellant villages. I say that the Local Land Court and the District Land Court made no mistakes of law (save for the one I have mentioned - about acquiring land by conquest - which does not help the appellant). I consider that the District Land Court, and for that matter the Local Land Court, made no errors of law and I dismiss the application for review.

Lawyer for the applicants: Alois W. Jerewai

Analysis of the case:

The highest court of appeal for most disputes over customary land is the provincial land court. In special circumstances, however, the National Court will accept appeals from provincial land courts. The following case is a good example because the judge is very careful to explain why he has accepted the appeal. Notice that Justice Bredmeyer refuses to re-open issues of fact. He accepts the facts as decided by the lower court, and asks whether the right rules and principles were combined with the facts to reach a decision.

Notice that Justice Bredmeyer explicitly lists some considerations for determining customary ownership that were recognized by the National Court in a previous case. You should compare these considerations to some principles invoked in the cases discussed above. Here are some questions to assist you.

What is the relationship between Bredmeyer's first consideration ("Who was there when the government came?) and the number of years required to establish ownership under adverse possession? Is this consideration more likely to complement or conflict with this principle? How does Bredmeyer's first consideration relate to the principle of first possession?

What is the relationship between Bredmeyer's second considerations ("Use and occupation") and the acts by which ownership is established under the principle of adverse possession?

What is the relationship between Bredmeyer's fourth consideration ("intimate knowledge of the land") and the principle of first possession?

What is the relationship between Bredmeyer's fifth consideration ("need") and the historical pattern of land redistribution in Papua New Guinea?

Case of Relvi IaUtul and Allan Marat, versus Asael ToMimi

Court: Provincial Land Court at Rabaul, East New Britain
Presiding magistrate: Theo Bredmeyer
Parties: Relvi IaUtul and Allan Marat, versus Asael ToMimi
Interest: land named Pupunabubu
Date of decision: 10 Nov 1979
Case in brief: Facts: A trespasser who improved land was given a life-interest in half of it by the local land court, whose decision was appealed.
Decision: Decision of lower court upheld.

Edited transcript of the case:

"...The Local Land Court found that the land known as Pupunabubu at Tavai No 1. belongs to Relvi TaUtul and her son Allan Marat. The court found that the coconuts and cocoa trees on it were planted by Asael Tomimi. The court divided the land in half and gave Tomimi a life interest in half of it. The court gave written reasons for its decision (undated) and at my request gave further reasons...

In this appeal Mr. Ronald ToVue, a former magistrate and District Commissioner, represented ToMimi and the appellant, and Mr. Allan Marat, who is a barrister and solicitor, represented his mother and himself...

I deal now with the grounds of appeal...

...

7. No court doing justice to both the parties would have made such an order.

This is, I think, the most important ground of appeal and the one that is most difficult for me to decide. It does not allow me simply to substitute what I think would be a good decision for the one given. To allow the appeal I have to find that no court would have come to the decision. If I were to find no evidence in favour of the decision or no credible evidence in favour of it, then I should quash the decision.; On the other hand, if I find credible evidence in favour of the decision, I must uphold it.

...

There is credible evidence both ways. There is evidence to support the Local Land Court's decision that Ereman took over as caretaker. I cannot say that no court would believe it. I must uphold the main finding that the land is owned by IaUtul and Allan Marat, and I so find.

I now turn to the minor findings giving ToMimi a life interest in the eastern half of the land. The Local Land Court has published its reasons dated 8.10.1979 as to why it did that. The Court clearly considered an alternative result of making IaUtul and Allan Marat pay for the trees on the land.

The first three reasons as I understand them boil down to this. ToMimi and his line have been wrongly on the land, and knowingly so, for many years. Therefore he should not get compensation for the trees. On the contrary, IaUtul and Marat are to get the trees free as compensation for having been deprived of possession for so long – but out of sympathy for ToMimi, an old man with no other resource of income, he

will be allowed to get the produce and income from half of the land for the remaining years of his life.

...

To win the appeal the appellant has to show me that in the circumstances of the case no court doing justice between the parties would have made such a decision. The appellant has not shown that. I dismiss the appeal and affirm the decision of the Local Land Court

...

Analysis of the case:

The Land Dispute Settlement Act does not ordinarily allow the parties to be represented in court by lawyers. Yet, in this case, Mr. Ronald ToVue was represented by ToMimi, a lawyer. Why was ToVue allowed to be represented by a lawyer? What are some of the advantages and disadvantages of allowing the parties in customary land disputes to be represented by lawyers?

Compare and contrast magistrate Bredmeyer's decision in this appeal to the District Court with Justice Bredmeyer's decision in the previous case involving an appeal to the National Court (Case of Ningalimbi No.2 and Ilahita No.3 Clans, versus Mamlimbi Clan). Is there any difference in the scope of issues considered in the two cases? Does the Land Dispute Settlement Act impose different standards of appeal to the District Court and the National Court?

The case of Relvi Utul and Allan Marat was apparently decided upon the basis of the following principle:

trespasser not compensated: Owner may evict a trespasser without paying compensation for improvements made to the land.

Do you think that Magistrate Bredmeyer agrees with this principle? Is there any difference between the application of the principle in the case of Relvi Utul and Allan Marat versus Asael ToMimi as decided by Magistrate Bredmeyer and the case of Relvi Utul and Allan Marat decided by Peter Sapeke?

Footnotes

1. Sometimes one party cheats another and the exchange does not create a surplus. For example, it would be cheating for me to induce you to buy the truck by promising that its engine is in good shape when I knew that the engine was in terrible shape. There may be no surplus from transactions like this one. If most business transactions had this character, people would stop engaging in them. The fact that people persist in buying and selling from each other proves that they enjoy a surplus from most transactions.
2. This is one formulation of the "Coase Theorem". The theorem was originally developed by Ronald Coase in his famous article, "The Problem of Social Cost", 3 J. Law and Economics 1 (1960). There are many expositions of it. See, for example, Robert Cooter and Thomas Ulen, Law and Economics (1988).
3. In British common law, the strength of the claim to own a disputed right is unaffected by its assignment or subrogation.
4. The most prominent advocate of this position in Anglo-American jurisprudence is Ronald Dworkin.
5. The transcript faithfully reports Magistrate Giddings' words, but their order has been altered to make it more readable. Specifically, Magistrate Giddings gave his decision as it pertained to each party at the end of the case. Instead, the case as reported above puts the magistrate's order to each group at the end of the discussion of the facts pertaining to each group.
6. R. J. Giddings, Kumbo and Kumdi Clans, District Land Court, Mt. Hagen case number 8 of 1978.
7. Emagave v. Sokaufa (Ufeto), Goroka Local Land Court in Eastern Highlands Province, decided by Magistrate J. Singomat, 29 May 1987.
8. The City of San Jose, California, passed a rental control ordinance which was challenged in court because it instructed the rent board to take account of the renter's ability to pay when adjusting rents. The U.S. Supreme Court recently upheld the constitutionality of the ordinance. This is one of the rare instances of an American statute explicitly recognizing that need for property can create an interest in it. I know of no such principle in British common law.
9. Case of Alivia Vaninara and Tunait Tomage, Local Land Court at Rabaul, presiding magistrate P. Tirese, parties Alivia Vaninara and Tunait Tomage, interest in land called Gamkaravitan, 20 July 1987.
10. See the case of Tobernat Tokunar and Ia Bore Maria, Local Land Court at Rabaul, presiding magistrate John Gesling, parties to dispute Tobernat Tokunar and Ia Bore Maria, interest in land called Rakakava of Tavuiliu, 1982.

11. In contract law the victim of breach can ordinarily recover his "reliance damages", which includes opportunity costs. The seminal article making this point is Fuller and Perdue, "The Reliance Interest in Contract Damages", 46 Yale Law Review 52 (1936). The concept of opportunity cost has been developed extensively in the economic analysis of law. See, for example, Cooter and Ulen, Law and Economics (Scott Foresman, 1988).
12. Decided by G. C. Lapthorne, Provincial Land Court at Kundiawa, 15 February 1982.
13. The principle can extend to use as well as ownership, as follows: "A group that uses land for a sufficiently long period of time without the permission of active opposition from others, but does not possess it, thereby acquires a use right in it."
14. In the British tradition, adverse possession is a statutory principle, not a common law principle. the number of years stipulated in various statutes varies from jurisdiction to jurisdiction, e.g. from as short as 5 years to as long as 25 years.
15. Possession is culturally determined and in Papua New Guinea it tends to include such acts as gardening, grazing or burning vegetation, making permanent improvements upon the land, and defending it. There is, however, a conflict in the concept of possession between peoples with different modes of life, e.g. hunters and gatherers do not believe that gardening and improving the land is necessary for ownership of it.
16. This principle is proposed by Cooter in his analysis of the case of Munua Imbo and Dambayagi Endemongo, concerning the land called Taramugl, decided by the District Land Court at Kundiawa, 15 February 1982.
17. R. J. Giddings in Pinji-Yupegu of Kaigu clan on behalf of Komogamp GP, and Wagama GP, District Land Court at Tambul, 18 October 1978.
18. R. J. Giddings. Koi-Traepi for Talia-Isa Clan and Kape-Ruipi for Talia-Manda Clan, District Land Court of Baiyer River, 26 May 1981.
19. R. J. Giddings, "Regional Land Court Circular Number 11", (2.79).