Kin Groups and the Common Law Process

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MONOGRAPH 29

CUSTOMARY LAND TENURE:
REGISTRATION AND DECENTRALISATION
IN PAPUA NEW GUINEA

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IASER
Papua New Guinea
Institute of Applied Social and Economic Research
KIN GROUPS AND THE COMMON LAW PROCESS

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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 defence 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 (Narokobi 1986). Perceiving the gap in received law has proved easier than filling it. The Papua New Guinean 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 20(1) of the Papua New Guinean Constitution recognises that received law is an imperfect expression of the Melanesian way of life and calls upon Parliament to declare the underlying law (Goldring 1978: 149-172). 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

1. I would like to thank Peter Larmour for suggesting how to distil this chapter from several of my essays written for the Institute of National Affairs. A.P. Power and Chris Turtle corrected errors in earlier drafts. My research was sponsored by the Institute of National Affairs and financed by the Asia Foundation.

2. This is perhaps a source of inspiration for the well-known quotation from the report of the Constitutional Planning Committee: 'We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundations of our ancestral land (Papua New Guinea 1974a: Ch. 2 para. 98).
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.

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. My observations suggest that the common law process in the land courts can provide a better solution to problems of land mobilisation and development than Parliament is likely to offer through fresh legislation. My reasons for this conclusion are set forth in this brief contribution.

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. This chapter describes the practices that were observed and which are consistent with the prescriptions of the Act.

Land disputes are first brought before a mediator or a panel of mediators, who are appointed in principle by the Provincial Land Disputes Committees, 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, the 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 either settled by mediation or decided by trial.

At trial, a magistrate presides, but he sits with two or more mediators and any decision is by majority vote. The land court hears disputes referred to it de novo, as if mediation had not occurred. Mediators are not ordinarily called upon 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.
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Appeal from decisions of provincial land courts to the National Court is limited, and there are not many published cases. 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. 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.

How active are the land courts? This question demands a statistical report on their activity level. The Land Courts Secretariat collects returns from local officials on their annual activities. Between 1976 and 1987 there were, according to official statistics, an average of 63 disputes decided per year by local land courts. The annual numbers varied from 31 to 101, with no apparent trend. During the same time period, provincial land courts, which hear appeals from local land courts, decided an average of 13 cases per year, varying from a high of 28 to a low of two. Although observations suggest that this data is not very accurate, there is ample evidence to conclude that cases are being decided with sufficient frequency to support the common law process. Land disputes reach court with sufficient frequency to drive the evolution of court-made property law.

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. 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

6. 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.

7. 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.

8. 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 Komonota between Ningalimb No. 2 and Iahita No. 3 clans (O.S.No. 24, 1987)

9. If there is a trend in this data, which is uncertain, then the trend is downward, unfortunately.
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:10

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.

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 the tenant originally obtained permission to occupy and use the land by fraud.11

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 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

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10. See case of Danga Mondo and Korugl Goi, dispute over land known as Par, Kundiawa District Land Court, 27 November 1987, presiding magistrate R.J. Giddings.

11. 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 Iarutul and Allan Marat versus Asael ToMimi, dispute over land named Pupunabubu, Provincial Land Court at Rabaul, decided 10 November 1979, presiding magistrate Theo Bredeneyer.
move from time to time and often serve in districts far from their own homes. A magistrate who, say, comes from Madang, may find himself presiding over a property court in Chimbu. This system of assigning magistrates to districts would not work if customary law were a heterogeneous collection of particular rules. 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 Dickson, 'there are as many nuances of customary title as there are languages' (1987: 6). This is true, but there are also shared principles of grammar. 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 behaviour is negligent which falls short of the community’s standard of reasonable care. Thus the negligence principle is general, but the standard of behaviour 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 improvements leaves 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 behaviour, a living body of law encompasses principles for its own development. The occasion for the development of law is presented by new and unforeseen choices.

Only recently there was an example of a change in custom that was recognised by the local land court in Rabaul. Before 1953, Telai custom permitted the leader of a clan to decide whether or not to sell its land. As

12. 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 Is Bore Maria, concerning the land called Rakakava of Tavuiliu, local land court at Rabaul, 1982.
population pressed upon the land, and as cash cropping increased, 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.

Legal philosophers have a helpful distinction to explain why some people think of custom as static and unresponsive. Legal rules can be distinguished into primary rules for regulating behaviour and secondary rules for extending and modifying the primary rules. Secondary rules prescribe how to create, alter, interpret, and extinguish primary rules. An example of a secondary rule is the requirement that a bill must receive at least a majority vote in Parliament before becoming law. Custom, according to an eminent philosopher, has no explicit rules for its creation and modification. This lack of secondary rules allegedly makes it static and inflexible (Hart 1961: 89-96). This is the conception of custom, not as living law, but as a list of regulations.

Customs for regulating land arise in Papua New Guinea from practical interactions of kinsmen. A kinship group, in 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 organisation 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. We ought to think of customary law as living law, with the power to adapt, not as a static list of regulations.

Mobilising Customary Land

Since independence, a consistent theme on the part of Papua New Guinean 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 clouds from the title to land that inhibit dealings needed for economic development. These two objectives -- customary authority and development -- often seem opposed to each other. This appearance, however, is an illusion based upon the mistaken belief that custom is static.

13. Hart (1961) 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.

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. If custom was static and unresponsive, it would be unable to adjust to these changes in circumstances. One possible remedy is to scrap customary law as quickly as possible and replace it with freehold ownership 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 (Papua New Guinea 1984d: 7).

The Land Tenure Conversion Act provides a mechanism for converting land from customary ownership to freehold. The Land Titles Commission receives applications for conversion and follows a lengthy procedure designed to protect the interests of affected parties. 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 steady pressure towards conversion, although the total amount of converted land remains relatively small.

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.

When 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 individual or group might reduce transaction 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 for economic development.

15. 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 Title Commission officer makes a decision whether or not to convert the property; (v) affected parties have 90 days to appeal the decision.

16. N.P. Oliver, Commissioner, Land Titles Commission, supplied the table on land conversions in Appendix 1, at my request.
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 paralysed.

Market and Relational Property

A contrast between two types of ownership will clarify why wholesale conversion of customary ownership to freehold title can disrupt production. 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. 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 of America, 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 alongside 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 the United States of America, it has a feature in common with some important business relationships. Some business relationships are long run in the sense that they last a long time. Some examples are the relationships between financiers

17. 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.
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. Economists conceptualise 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 non-cooperation, 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 specialised 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.

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 photocopier 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, the contrast is between market property and relational property.

Registration Versus Law

The Task Force on Customary Land Issues proposed formal registration of customary lands (Papua New Guinea 1983). The proposed registration process is quite detailed, with many procedural safeguards spelled out in the Report. The 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 proposed 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.

What is the significance of land registration for property law? 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. 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 the purposes of farming.

Registration of land has no necessary connection with the concentration of ownership rights. Thus the registration of customary boundaries under East Sepik Province's recent 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 the purposes of applying customary law.

My 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 paralyse traditional methods of production and distribution.

Direct Dealings in Customary Land?

Section 73 of the Land Act prohibits sale, lease, or disposal of land except to Nationals in accordance with customary law. There is general agreement in
the legal profession in Papua New Guinea that this provision forbids dealings in customary land among private persons. This ban on direct dealings is retained in East Sepik Province's Customary Land Registration Act, which establishes a government committee responsible for vetting all deals in customary law.

The lease or sale of land, like any market transaction, is potentially beneficial to both parties. If this prohibition was the end of the matter, the benefits of exchange would be lost. The Land Act, however, tried to capture some of these benefits by allowing indirect dealings. Section 73 is partially undone by Section 15 which permits government to purchase or lease land from customary owners. 'Lease-and-lease-back' is an arrangement whereby government leases land from customary owners, only to lease it back to them and thus bring the land out from under the constraints of Section 73. Section 15 has been used to defeat Section 73.

This legal device could, in principle, result in widespread leasing of customary land, but its use in fact has been obstructed by a backlog of applications, estimated at between 8,000 and 10,000 applications in 1983, for lease-and-lease-back arrangements that are stalled in the Department of Lands (Papua New Guinea 1983: 26). The lease-lease-back procedure is clumsy, time consuming, and requires costly legal advice. There is evidence that the ban on direct dealing is widely violated. All over Papua New Guinea, customary owners are leasing land without going through the government. Unwieldy government controls are having their predictable effect — creation of a vigorous black market or grey market in land. Indeed, most land transactions in Papua New Guinea are deals between customary owners that are never subjected to official scrutiny and probably would not be enforceable in the land courts. The absence of legal sanction impedes commerce by undermining contracts.

There may be, however, a legal device for circumventing this problem. Perhaps Section 73 could be construed, not as forbidding direct dealing as such, but rather forbidding direct dealing that violates customary law. In so far 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. 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 authorisation for sale or lease of the type demanded by contemporary conditions. But in so far as we think of custom as living law, it contains within itself the capacity to develop in order to encompass market exchange.

The ostensible reason for 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.

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 another means for direct dealing without any change in existing law. The officials responsible for vetting land deals in East Sepik Province should issue preliminary approval of all transactions that use standard forms. Instead of having civil servants scrutinise 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.

Evolutionary Pressures

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).

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 Province's
legislation envision clans forming incorporated land groups, with traditional
leaders serving as a board of directors and making business decisions. 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 rationalisation of
land administration by a customary group is provided by Gerard Natera. His
report on efforts to help the Agriculture Bank establish clan enterprise in his
village concludes:

My efforts in my own village situation were 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 (Natera 1987: 12).

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

Individual versus clan enterprise is, it seems, 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 organisation
best suited to their needs and preferences. The land courts should assist them in
getting what they want, not telling 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 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 other's 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.

The land courts do not need fresh legislation or additional powers to proceed with their task. They need small improvements in administration and modest increases in resources. Here are 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 analyse 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 rationalising the system of mediation. In practice, the kiaps who are employed by the Department of Provincial Affairs appoint mediators, but mediators are paid by the Justice Department. This fact 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. It seems that local land courts should be given the option of treating the recommendations of mediators as decisions by a lower court. If this proposal was 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 have 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 was 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.

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 also play a significant role in the redistribution of wealth. Beggars are a common sight on the streets of the United States of America 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. Furthermore, 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 also strengthen traditional authority as required to combat crime.

To become such a positive force, the common law process must take hold in the land courts. 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 regularising 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 of America have failed to create a body of law that recognises 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 and government should foster the development of the intellectual community needed to make this vision into a reality.
APPENDIX 1

Table 1
Land Tenure Conversion Activity

<table>
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<tr>
<th>Year</th>
<th>No. of Applic. Received</th>
<th>L.T.C.A. s.7 Applic.</th>
<th>L.T.C. s.15 Applic.</th>
<th>No. of Hearings</th>
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<td>1987</td>
<td>166</td>
<td>160</td>
<td>6</td>
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In terms of hectares converted, there are no current statistics, but in 1979 Commissioner Oliver, in reply to a request from 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. (Letter from N.F. Oliver to The Secretary, Department of Lands Survey and Environment, 30 May 1979.) I am grateful to Mr. Oliver for discussing the issue of conversion with me.