

## Is Papua New Guinea viable *without* customary groups?

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### A question of viability

In a recent issue of the *Pacific Economic Bulletin*, focusing on Papua New Guinea, three authors raise the question, 'Is Papua New Guinea viable?' (Gosarevski, Hughes and Windybank 2004). Only, they conclude, if Papua New Guinea abandons the strategies and policies it has been pursuing since independence. Among the policy reforms they see as necessary is the establishment of individual property rights in land. The villain of the piece is said to be communal land ownership. Thus, we read that

- 'communal land ownership means low agricultural productivity and small incomes' (p. 137)
- 'communal ownership has not permitted any country to develop. In Papua New Guinea, where 90 per cent of people live on the land, it is the principal cause of poverty' (p. 137)
- 'communal ownership underlies the struggles over benefits from mineral rights and the depredations of timber exporters' (p. 137).

In place of communal ownership, they say, individual property rights must be established.

- 'Individual property rights are necessary for individual savings and as collateral for credit that is essential for the development of banking. Their absence is the underlying reason for low levels of agricultural lending in Papua New Guinea' (p. 137).
- 'Individual property rights mean that harder working and more ambitious men and women will become wealthier than others. Those with less entrepreneurial interest will ultimately become wage workers, but their incomes will also rise above present levels... Those in genuine need—such as orphans and disabled people—can be given better care as local communities become richer' (p. 138).

If the authors have no doubt about the benefits that will flow from replacing the problems of communal ownership of land with individual property rights, they are more guarded about the process for that replacement. For all the apparent superiority of individual titles, the replacement process must be voluntary.

- 'Individual property rights require land surveys, registration and the organisation and endorsement of individual titles by the traditional landowning communities. These cannot be imposed, but require a

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profound institutional change to unseat 'big men' in favour of the majority and the rule of law' (p. 137).

- 'Complementary development of infrastructure is essential to give greater value to land so as to create a demand for individual property rights' (p. 137).
- 'Appropriate leasehold arrangements may also facilitate the transition to individual property rights' (p. 137–38).

The centrality of land to a country's development and the social and economic wellbeing of its citizens has made customary tenures and the need for their reform a main concern of governments, aid agencies and a wide range of commentators. Customary land tenures, having evolved over countless generations to suit the needs and conditions of a great variety of peoples and their environments, do not lend themselves to easy generalisation. It is even more difficult to understand all the relationships between land tenure and development, and to predict with confidence the impacts, good or bad, which will follow from measures to reform customary land tenures. Given this uncertain state of knowledge and understanding, it is verging on foolhardiness to describe the connections between communal or individual titles on the one hand, and poverty or wealth on the other, in absolute terms.

This paper will take issue with the notion, clearly conveyed by the above quotes, that Papua New Guinea must abandon communal ownership of land in favour of individual property rights, in order to turn from poverty to the path to wealth. Instead of such a dismissal of customary tenures, practical suggestions will be made on how the adaptation of customary tenures to the new demands on land can be facilitated. The author relies on over 30 years of involvement in Papua New Guinea's land tenure issues, as a researcher, adviser to governments and development law consultant.

### **A backward view of customary land tenures**

There is a great deal of misunderstanding about customary land tenures. One of the most common mistakes is to believe that customary tenure involves both the communal ownership and the communal use of land. In its extreme form, this view leads critics to see communal ownership as something like communism, whose fate it should share. On the contrary, communal ownership in countries like Papua New Guinea should be seen as a form of private property rights, albeit that the rights are owned by a group rather than by individuals.

A further aspect of this misunderstanding is the failure to distinguish between land tenure and land use. While it is dangerous to generalise about customary tenures, especially in a country like Papua New Guinea with its hundreds of different ethnic groups, in the author's experience there is a general cultural continuum across Melanesia<sup>1</sup> under which the tenure to land is group based, and individuals have rights to land as a result of their membership by birth into a group, or of some other relationship to the group (for example, marriage to a member, or adoption into the group). Land use, on the other hand, is largely in the hands of individuals—members of the group, their spouses, siblings, children or other close kin.

Land tenure and land use can be seen as a balance between group and individual rights and obligations. It is a traditional balance, but one which can when necessary be shifted in the direction of strengthening the rights of individual group members and relaxing group controls, to allow for the new demands of modern living. How this might be done will be outlined below. For the moment, it is enough to say that abolition of communal ownership, as advocated by the three authors, is not necessary.

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Another major misunderstanding is the belief that customary tenures are static, non-adaptive, uncertain, backward-looking—in short, an obstacle to development. ‘Communal land ownership’, say the three authors, ‘means low productivity and small incomes’ (p. 137). This sweeping statement is contradicted by the facts. The rapid expansion of village cocoa and coffee production in past decades, and of vanilla today, all took place on communally-owned land. Indeed, it is the coffee and cocoa plantation lands under formal titles where production has declined the most, while village production of these crops has increased, in the absence of secure land titles (Mike Bourke, The Australian National University, personal communication).

Next it is asserted, ‘communal ownership has not permitted any country to develop’ (p. 137). This dismissive view of customary tenures is reminiscent of attitudes prevailing in British colonial Africa during the 1950s. The ‘cult of the economic man’, a product of the East Africa Royal Commission, held that customary land tenure systems were not conducive to the effective application of ‘the agents of agricultural production’, and traditional controls had to be replaced by individual freehold titles (United Kingdom 1955:394). Larmour has traced the process by which the African legal model for individualisation of customary tenures was transferred to Melanesia during the 1960s and 1970s (2002:151–61). Research conducted by the present author during the 1970s and 1980s showed how little was achieved in Papua New Guinea under this approach<sup>2</sup> (Fingleton 1980, 1984, 1985), and Larmour concludes that the transfer of the tenure individualisation model ‘seems to have been largely a failure’ (2002:160). Yet it is this failed model which the three authors now advocate for Papua New Guinea.

Over the last decade, better knowledge of the results of converting customary tenures

to individual titles has caused the tide of opinion to turn. The United Nations Food and Agriculture Organization (FAO), in a recent publication on legal trends in agriculture and natural resource management, notes that criticism of the individualisation of customary tenures approach has entered the policy and legal ‘mainstream’ (FAO 2002:222). The following arguments made in favour of customary tenures are noted

- Customary tenure ‘often provides a high sense of security to individual cultivators’.
- ‘Despite the absence of written titles, individuals operating within customary systems frequently have well-defined rights to land and a realistic expectation that those rights will be secure over time’.
- Customary systems ‘can be adaptable, and where conditions have warranted, markets for land rights within such systems have emerged’.
- There is as yet ‘little empirical evidence that individual titling results either in increased productivity or better access to credit’.
- ‘Titling might itself contribute to insecurity of tenure, by raising the spectre of land being lost to outsiders and creditors’.

Larmour, drawing on evidence from Africa analysed by Platteau (1999), adds further reservations about the effectiveness of title registration.

The process of registration created disputes rather than resolving them. Where land was registered, the records were rarely kept up to date. Registration could not grasp complex bundles of rights, and so increased rather than decreased transaction costs. Beyond semi-urban situations, the cost effectiveness of centralised land registers versus decentralised informal mechanisms was doubtful. There was also unwelcome or unexpected effects on distribution, as registration tended to favour the rich, well

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educated, well connected and male (Larmour 2002:154).

Under the weight of this evidence, even the World Bank, hitherto a trenchant opponent of customary tenures as a suitable basis for development, has given ground. Its policy on land titling now recognises that 'communal forms of tenure can be efficient and secure' (Williamson 2001:12), and it is appropriate to give legal recognition to customary tenures and group-based land rights when security is better provided by traditional institutions than by the state itself (World Bank 2003:53, 76). It is surprising, therefore, to see the three authors argue the case so strongly for dismissal of customary tenures, and their full-blown support for individual titles.

### Suggestions for the way forward

In arguing the case against full individualisation of customary tenures, it is not being said that only communal titles should be recognised. This would be to fall into the same trap as the three authors—to believe that it must be one thing or the other. In the brief account of customary land tenures above, emphasis was placed on the need to distinguish between land tenure and land use, and the traditional balance between group-based ownership of land and individual-based use of land. The following suggestions are based on that traditional group-individual balance, and how it might be adapted to meet modern needs.

The FAO publication referred to above, having noted the trend away from individualisation, remarks on the emergence of 'a pragmatic approach' to the issue of land tenure reform—a move away from a 'replacement paradigm'—in which customary tenures are to be replaced by tenure provided by the state—toward an 'adaptation paradigm', focused on creating the appropriate legal and administrative

environment to permit evolutionary change within community-based systems' (2002:223). This is remarkably similar to the guiding philosophy of Papua New Guinea's 1973 Commission of Inquiry into Land Matters, that 'land policy should be an evolution from a customary base, not a sweeping agrarian revolution; collective and individualistic extremes should be avoided' (Papua New Guinea 1973:15). The Commission of Inquiry went on to recommend that customary land registration should only be used where there was a clear demand and real need for it, and that group titles should be registered in the first instance, with groups being able to grant registrable occupation rights to group members and leases to non-members. These subsidiary rights could be transferred, inherited and, with certain restrictions, used as security for loans.

Much work was done during the 1970s in implementing that 'home-grown' report,<sup>3</sup> but reform momentum was lost at the end of that decade, and it has become increasingly difficult to mobilise support for further reform. The last effort, a World Bank initiative in the mid-1990s to bring forward legislation for customary land registration,<sup>4</sup> led to student demonstrations, rioting and four deaths at the hands of the police. This experience seems to have scared off any further attempts at reform in this vital area. It is, in any case, a salutary reminder of the strong passions surrounding proposals for land tenure reform.

In the absence of a suitable land registration law, Papua New Guineans are resorting to 'self-help' measures, to adapt their customary tenures to the new demands on land. During a recent visit to four provinces, the author looked at a range of schemes whereby customary land was being 'mobilised' for large and small-scale cash cropping, and to cater for urban expansion.<sup>5</sup> A common feature of these schemes was the desire to register clan land ownership, as the

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basis upon which further development—under leases from the clans—would take place, a strong endorsement of the registration system recommended by the Commission of Inquiry into Land Matters. This would seem to be a clear indication of what Papua New Guineans want.

As their proponents are finding out, however, these ‘self-help’ schemes can only go so far without the intervention of the state, in providing such essential registration inputs as the independent adjudication of existing rights, accurate identification of land boundaries and the issue of registered titles. Should the state intervene in Papua New Guinea, to provide those inputs in support of a land registration system based on both group and individual titles? There are two main aspects to this question—would such a system be workable? and what benefits would it achieve?

Experience shows that there are three fundamental requirements for the introduction of a workable land registration system

- demand—there must be general support from land owners for the registration process to be introduced
- need—under the existing or proposed land use, there is a genuine need to replace the flexibility of customary tenure with the fixity of registered titles
- administrative capacity—the resources must be available, not only to register titles in the first instance, but to keep them up to date.

A land registration system providing for both group and individual titles would have to satisfy these three requirements, in order to be considered workable. Looking at each—**Demand.** Such a system would reflect the ‘traditional balance’ referred to above, with the land being communally owned but developed by individuals or other land users. It would also have the great advantage of being based on Melanesian culture—

something familiar, not foreign. The evidence shows that it is also what people favour, so it meets a basic requirement of being what the affected population wants. Such a system could be expected to be generally supported. **Need.** Land registration of any kind should not be introduced unless there is a real need to intervene in customary tenures. The sort of circumstances where state intervention can be justified is where major changes in land use (for example, urban expansion, or a major agricultural project) require that land rights and controls must be defined with greater clarity and precision. For the vast majority of Papua New Guinea, no such need to intervene can be demonstrated. All subsistence farming and most cash cropping in the country take place under customary tenures,<sup>6</sup> and the main problems producers face relate to lack of infrastructure (roads, markets, financial services, and so on), not land tenure. The short answer to the ‘need’ test is that land registration should not be introduced unless a genuine need can be demonstrated.

**Administrative capacity.** There is abundant evidence that land registration should only be introduced where the state has the capacity in skills, technology and financial resources, not only to carry out the initial registration of titles fairly and efficiently but also to maintain the land titles register. Many—probably most—of the early land title registers established in Africa have not been kept up to date, seriously compromising their usefulness (Platteau 1996:47–48). Papua New Guinea has a long history of land registration, mainly for titles issued over land alienated from customary tenure. Present problems in maintaining that system must be addressed, before plans are made to extend the system to customary land.

With regard to the question of benefits, a land registration system based on the registration of both group and individual titles would have to provide something extra

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which is not available under customary tenures, and that extra benefit is generally understood to be asset mobilisation.<sup>7</sup> This term refers to the ability to sell, lease, mortgage and otherwise deal with the land, free from the constraints of customary tenure. There are two aspects to the question of benefits

- rights—what rights in the land would the title-holder enjoy?
- powers—what controls would there be over the exercise of those rights?

The answer to these questions is that it all depends on what the registration law provides. To give an example, however, in 1987 the East Sepik Provincial Government passed legislation based on the 1973 Report of the Commission of Inquiry into Land Matters, which sets out the following regime<sup>8</sup>

**Rights.** Individuals could be granted leases in customary land by the land-owning group. These leases can be sold, mortgaged and inherited, subject to the controls outlined below.

**Powers.** The land-owning group has the power, in the first instance, to impose restrictions on dealings at the time of the grant of leases. Subject to any such restrictions, dealings can be entered into for the sale or mortgage of a lease, but checks must first be carried out to ensure that a sale has been approved by the land-owning group, and mortgages can only be entered into with 'prescribed bodies'.

Unfortunately, as a result of the collapse of the World Bank's customary land registration initiative in the mid 1990s (see above), the operation of this law was never tested. Based on this system, however, a project for the settlement of two areas of urban customary land by low-income earners was designed in the early 1990s,<sup>9</sup> and it gained the support of the customary land owners, the settlers and the banks.

There is no doubt that the involvement of groups means less freedom in the use of

land, and much depends on how well land-owning groups are regulated. In the same issue of the *Pacific Economic Bulletin*, an officer of the Department of Petroleum and Energy in Papua New Guinea catalogues the problems encountered in using incorporated land groups as the vehicle for distribution of petroleum royalties and other benefits among customary land owners—leadership struggles, improper distribution of benefits, misuse of funds, lack of representation, accountability and transparency, internal conflicts, bribery, corruption and the failure of business enterprises (Koyama 2004:23–28). It is no coincidence that these are precisely the problems facing the Papua New Guinea state, in its grappling with the new responsibilities of nationhood. The response of the three authors is to query whether the state of Papua New Guinea is viable. A more practical response would look for ways to channel the remarkable ingenuity of Melanesian leaders along more equitable and productive lines. This is a challenge facing the nation at all levels.

Finally, a plea should be made for inclusion in Australia's Enhanced Cooperation Package (ECP) of support for institution-strengthening in the land groups area. The law under which they operate, the Land Groups Incorporation Act, was intended to provide legal recognition to customary groups for purposes of land ownership and decision-making over the use and management of land.<sup>10</sup> The legal powers of incorporated land groups are certainly wide enough to allow them to be made responsible for matters like royalty distribution, but clearly much better provision should be made to control such distributions. Koyama makes some suggestions for improvement, which could readily be implemented (2004:29–30), but the whole area of land group incorporation and administration needs strengthening. At present, more than 10,000 incorporated land groups are super-

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vised by a single officer, who also processes 10–15 applications for new incorporations every day.<sup>11</sup> If Australian companies enjoyed such lax regulation, would their leaders behave any differently?

### Notes

The author is a lawyer-anthropologist, with an extensive background in land tenure and natural resource laws. He has a beef cattle farm and is a freelance development law consultant.

- <sup>1</sup> Melanesia embraces Papua New Guinea, Solomon Islands, Vanuatu (in all of which countries the author has worked on land tenure), New Caledonia and Fiji.
- <sup>2</sup> The results were minimal in terms of quantity and quality. Less than one thousand individual freehold titles were issued in the first 13 years of the law's operation, groups refused to accept that their customary control over the land in question had ceased, and there had been no increase in productivity attributable to the new titles.
- <sup>3</sup> The author was heavily involved in this work, as head of the Policy and Research Branch of the Department of Lands in Port Moresby. See Fingleton (1981) for an account of reforms during this period.
- <sup>4</sup> Again, the author should acknowledge his involvement, having prepared drafting instructions for such a law as a World Bank consultant to Papua New Guinea in 1988. The draft legislation, however, departed from the author's drafting instructions in many fundamental respects.
- <sup>5</sup> The fieldtrip was conducted in the East New Britain, West New Britain, Morobe and Eastern Highlands Provinces during February–March 2004, as part of the Asian Development Bank-funded project preparation for a proposed agriculture and rural development project.
- <sup>6</sup> Oil palm is the exception, but even here all new expansion is taking place on customary land, either as village plantings or under a head lease by incorporated land groups to the state.
- <sup>7</sup> Analysed recently by Hernando de Soto, in his influential book *The Mystery of Capital* (De Soto 2000).
- <sup>8</sup> The author drafted this Provincial land legislation, as a (now) AusAID consultant. It is described in Fingleton (1991:197–218).
- <sup>9</sup> The author prepared the legal documentation for the Urban Settlement Planning Project funded by World Bank.
- <sup>10</sup> The author was heavily involved in the drafting of this law, which arose from recommendations of the Commission of Inquiry into Land Matters (Papua New Guinea 1973). Tony Power, as an adviser to Chevron Niugini, had the idea of involving incorporated land groups as the main bodies for royalty distribution. Chevron Niugini engaged the author in 1992 to prepare a manual for the incorporation of land groups, which has been developed as the standard manual for this purpose.
- <sup>11</sup> Figures provided during an interview by the author and Lorna Brew with the Titles Officer (Incorporated Land Groups) in the Department of Lands and Physical Planning on 11 March 2004.

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