PACIFIC STUDIES

Vol. 15, No. 2 June 1992

GRAUN BILONG MIPELA: LOCAL LAND COURTS AND THE CHANGING CUSTOMARY LAW OF PAPUA NEW GUINEA

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Despite repeated attempts by the colonial administration to change the nature of traditional land tenure, Papua New Guinea attained independence with approximately 97 percent of its land still held by indigenous Papua New Guineans, and the rights to use and transfer that land still governed primarily by customary law.[1] The customary land-tenure rules of each of Papua New Guinea's more than seven hundred language groups are woven from a complex web of traditional norms, kinship relations, and social obligations. Customary norms about the acquisition and use of land have their roots in precolonial Papua New Guinea, but they have changed over time, in part to meet changing economic and social conditions.

The economy of Papua New Guinea was, and is, predominantly agricultural. More than 85 percent of the nation's adult population lives in rural areas. The precolonial subsistence economy was characterized by slash-and-burn cultivation in which plots of arable land were developed as food gardens for a few years and then left fallow for as much as a generation. Even today, those Papua New Guineans who obtain all or most of their subsistence from traditional gardens significantly outnumber those who depend primarily on cash cropping or urban employment. Although cash crops account for 35 percent of gross domestic product and are the primary focus of the government's agricultural research and support services, subsistence gardening on customary land continues to be a mainstay of the economy.[2] The myth that every worker has custom-

ary land to which he or she can at any time return permits the formal sector to pay low wages and the government to offer few social services.

Given the economic dominance of agriculture, it is not surprising that land is, and has always been, centrally important to most Papua New Guinean cultures. But, with changing economic conditions and changing uses of land the cultural meanings ascribed to land and the relations of persons to their land change as well. In traditional Papua New Guinea, the clan and the land are one. *Graun bilong mipela* ("the land is ours") transposes to *mipela bilong graun* ("we are the land's"). The land feeds the people who name it and its features. Many Papua New Guineans believe that land cannot be alienated from the clan. It belongs not only to the living but to their ancestors and descendants as well, and they belong to it. Land is not a commodity that can be bought and sold but a source of clan identity. It is also a source of shelter and subsistence, and, as such, the rights of individuals and households to use clan land can be, and frequently are, redistributed to take account of changing needs for land and changing social or political relationships. In a market economy, land takes on different connotations. It becomes a source of wealth for individuals and households who use it to plant cash crops or for logging, mining, or industry. Like any other product, it can be sold or leased for immediate gain. It loses permanent identification with the clan but gains another kind of permanence in the finality of freehold titles and sales.

Although subsistence gardening continues its central role, everyone in Papua New Guinea has been touched by the market economy. There are few areas of the country where some cash cropping is not going on. Mining and timber companies compete for access to customary land. The meaning of land for the people it supports, and the relationships of individuals to one another and to the land, are growing more complex. Customary law, which was predicated on the premise that land provides subsistence, must deal with situations in which land provides wealth. Customary law was developed to be flexible, to take account of shifting gardens, changing household needs, and shifting sociopolitical alliances; now it must deal with individuals and groups who want the law's decisions to be final so that they can assert permanent control over areas of land. In precolonial times, customary law seldom had to deal with population pressures, absentee landowners, landless workers, the use of prime gardening land for cash crops or other industries, or ecologically disastrous agricultural, mining, or logging practices.

Because customary law is, and always has been, constantly changing to meet new needs and conditions, it probably can change again to resolve the conflicts (both those between disputing claimants to land and those between differing views of what land is and how its uses should be managed) that have arisen as a result of these new pressures on land. However, not everyone agrees that these issues should be left to custom to decide. During the colonial period, a parade of administrators and experts attempted to transform Papua New Guinea into a market economy. They announced that land should be converted into a commodity, that market notions of individualized ownership and control should replace communitarian values, and that interests in land should therefore be removed from the aegis of customary law and governed instead by the statutes and common law that the colonial authorities had imported into Papua New Guinea.[3] Although this view has not been put forward so starkly since 1971, when the colonial authorities' last attempt at wholesale conversion of customary land into individualized freehold ownership was defeated by Papua New Guinea's first elected legislature,[4] many of the people influential in today's government are among those who would benefit if conversion were implemented, and recommendations for the registration of customary land are still being advanced.[5]

Even if customary land is not formally converted to freehold, there are many pressures to mold custom in the direction of individual ownership and a market approach to land, and few powerful voices in opposition. Papua New Guinea's is a pluralist legal culture:[6] customary law, the common law enunciated by the formal courts, the statutes and regulations of national and provincial authorities are all sources of state law (the law formally recognized and enforced by the courts and other state institutions). Customary law itself is not unitary; there are as many different customary law regimes, with different rules and different legal processes, as there are clans and cultures within Papua New Guinea. And, if the law is defined to include all the norms that govern behavior rather than just those applied by the state's formal institutions, then there are additional sources of law in Papua New Guinea. Kinship affiliations, church groups, women's groups, workers' and growers' organizations and other social groupings, formal and informal, long-term or fleeting, also serve as sources of the norms that govern the lives of their members or adherents. Legal pluralist theorists posit that each of these sources of law will influence and change the others.[7] But the impact is likely to be greater when a more powerful source of law attempts to

influence a weaker source, as, for example, when the common law courts, backed by the power of the state, attempt to change customary law.

During the colonial period, the Anglo-Australian legal system was introduced into Papua New Guinea and became, with few exceptions, the law applied in all formal courts. Although the colonial authorities intended that state law replace customary law, custom continued to operate informally in the villages.[8] In fact, since few Papua New Guineans were parties to formal court cases (other than as criminal defendants), customary law continued throughout the colonial period to govern the lives of Papua New Guineans more directly and to a greater extent than did the imported laws. But state law influenced custom and continues to do so.

Often, state law's influence is indirect and unplanned. Sometimes, however, the attempts of the courts to influence custom is overt, although the results of that influence may not be precisely what the courts intended. This article charts the attempts of Papua New Guinea's National Court to change customary land law and the policies underlying that law. The judges of the National Court say, in the written opinions or judgments that accompany and justify their orders, that they are concerned merely that the land courts, which apply customary law, do so correctly. But the law inheres as much in process as it does in substance, and the attempts of the National Court to alter the procedures of the land courts will result in substantive changes to customary law. Moreover, because the procedures recommended are those of state law, acceptance of these procedural rules will move the land courts in the direction of state law. The substantive rules of state law, as well as the procedures of state courts, were developed to support a market economy, so, to the extent that customary land courts adopt state law processes, they are contributing to the redefinition of customary land as a marketable commodity.

However, customary law is not without its own ability to influence Papua New Guinea's legal values and processes. Customary law may not have behind it the unalloyed power of the state apparatus, but it has nevertheless had an impact in shaping the decisions of state courts.[9] And, even where state law has influenced customary rules or procedures, that influence has been refracted through a customary lens, so that state law principles emerge in a customary setting with different meanings and different consequences than they have when applied in state courts.[10]

Customary Land Law in Papua New Guinea

In precolonial times, each of Papua New Guinea's many cultures was an autonomous social and political unit that developed its own norms and customs, so that customary law is as varied as the variegated landscape of this island nation. It is possible to make some generalizations about land law in traditional Papua New Guinean societies, but none that I will make in this brief overview of customary land law is true for every clan or village.[11] Moreover, customary law is by its nature adaptable. In response to changing circumstances, it has changed considerably in the last century, and I make little attempt here to distinguish between immemorial and newer customs.

Custom and state law treat the relation of people to land very differently. Under Anglo-Australian common law, land is property. Land can be owned in freehold, which means that an individual, corporation, or group can have a virtually unfettered right unilaterally to determine who uses the land and for what purposes, together with the right to all profits and products obtained from it, as well as the right to sell or otherwise dispose of any or all of these interests in the land. The notion of land as property did not exist under customary law. It is truer to say that the clan belongs to the land than that the land belongs to the clan. If the right of a clan to its land can be equated to any state law concept, it is more accurate to say that a clan has sovereignty over its territory than to say that it merely owns the land. In most Papua New Guinean societies, the claim of the clan, subclan, lineage, or village to its territory is based upon original settlement, though conquest is another of the recognized means of obtaining territory.

The rights of clan members to use clan land does not derive from purchase but from their putative membership in the clan.[12] The nature and duration of use rights varies according to the uses to which the land can be put. The land for village meetings and feasts is open to everyone in the group, as usually are hunting or foraging lands and thoroughfares. Gardening land and house sites tend to be under the control of the households or individuals who cleared and planted them. Because gardens must lie fallow and land productivity varies from place to place, households tend to have rights to a number of small garden plots scattered throughout the clan's territory. Usually, the household that planted a garden has the exclusive right to its products, but, just as often, someone else may have a claim to some of the coconut palms or other plants in the garden.

Rules of succession to a household's plots vary widely and are capable of much flexibility, In some societies (particularly those on the New Guinea islands), interests in land pass matrilineally; in others (particularly those in the Highlands), patrilineally. But a household is generally free, within the bounds of acceptable behavior, to make different arrangements for its members. Even in patrilineal societies, a son-in-law may choose to live with his wife's family and will probably be given gardening land. If the concept of inheritance connotes (as it does under the common law) that heirs receive their shares in the land upon the death of the testator, then inheritance is not an important concept under customary law. The right of children to a household's plots accrue when children are born. In most societies, a household head will assign garden plots to sons or daughters as they come of age or marry.

As a general rule, an individual's rights to land arise from membership in a kinship group. But rights to land also depend upon being an active and participating member of the group, and thus can be lost by clan members if they move away for too long, or acquired by outsiders if they move in and make themselves useful. A person may move to another clan's territory to take care of an aging relative who has no children, to live near a friend, or to live far away from an enemy. Eventually, if the person contributes to the life of the adopted clan, the gardening land once loaned to him will become his, or his children's. Sometimes a clan will permit the members of a neighboring group, which is land poor or which has been driven from its land in war, to settle on clan land. The land may (or may not) eventually come to be viewed as belonging to the neighboring group.

Customary law processes permit much flexibility in the choice and application of these substantive rules, so that rights to land can change to meet changing conditions and changing needs. The processes by which substantive rules are recognized and applied can best be seen when disputes call the rules into play.[13] In many clans or villages, if the parties cannot settle the dispute themselves, a meeting may be called and big-men or elders may attempt to mediate. The parties to a dispute will call upon the substantive rules to support their claims to the land. Perhaps one is the son or daughter of a deceased landholder and the other cared for the landholder in her old age. There will be much discussion by everyone present of which rule should apply, of the customary practice in cases of this sort, and of the equities of each party's situation Eventually a solution may be reached. The solution may well be a compromise because, in a society where acquiescence is the only means of rule enforcement, there is no solution without the agreement of the

parties. In this process, substantive rules serve a dual function. The rules demonstrate that the parties have a claim to the land, but the existence of mutually contradictory rules permits decisions to be made that serve the needs at the time of the disputants and of the group as a whole.

Of course, customary disputes are not always resolved by mediation, and mediation does not always produce a compromise. Custom varies from place to place, changes from time to time, and is more complex and variegated than the compromise (or any one-dimensional) model suggests. Mediation occurs in many villages, but in other villages a leader may, after listening to the parties, declare a decision. Sometimes one party simply has the better of the argument, either because of superior strength or because customary norms favor that party's position.[14] And, often, customary disputes are not settled at all or are seemingly settled only to arise again. The immediate result of many disputes, particularly those between clans, may not be compromise but heightened conflict, even war.[15]

Land disputes between members of a clan or lineage are relatively amenable to mediated settlement. Disputes between clans are less susceptible to mediation until war or the threat of it has occurred. Fewer crosscutting ties and fewer ongoing relationships exist to impel the disputants (or their supporters) towards resolution. Disputes between clans escalate into warfare more regularly than do intraclan conflicts. Clans resolve their territorial disputes by political, rather than legal, means. Negotiation may take the place of warfare, or it may take place as a result of war.

The resolution of a dispute, whether within or between clans, is seldom a permanent determination of the status of disputed land. It decides merely which party will have which interests in the land for the time being. The dispute may be reopened at any time the circumstances of the parties change or either comes to regret the solution. Moreover, others may develop claims to, or needs for, the same piece of land and may ask for its status to be determined anew. In a Papua New Guinean village, the need for land is constantly changing: old gardens need to lie fallow and new ones planted; family members are born, die, or move away; a daughter, once thought married and no longer needing clan land, returns with her children; members of a neighboring clan, fleeing from a war perhaps, request shelter and use of the clan's lands; a son-in-law decides that he would rather live with his wife's clan than with his own. The choice of one party's claim over that of another is not a decision that the rule invoked by one party is valid and the other not; both rules continue to be available to parties in future disputes.

It has been suggested that customary law cannot meet the challenges posed by Papua New Guinea's developing market economy, that land disputes were more amenable to a negotiated resolution so long as land was plentiful and its uses confined to subsistence. With population increases, the expansion of a market economy that turns land into a money-making commodity, and the loss of gardens to cash crops, conflicts over land may become more difficult to resolve through negotiation, and once settled conflicts may be reopened. When land takes on market value, clans that had long ago permitted another clan to settle on their land revive old claims to it, and individuals remember debts that distant cousins had promised to repay in gardening land. In addition, new circumstances have brought new kinds of transactions in land. Papua New Guinean villagers who live near urban centers have "leased" customary land to migrants from other parts of the country; in the Highlands, some Papua New Guinean coffee growers pay compensation for the use of gardening land.[16] Traditional rules of customary law must be reworked if they are to accommodate new kinds of land dealings.

However, neither the difficulties of achieving a resolution when land has begun to take on market values nor the existence of new uses of land requires that customary laws and processes be supplanted. If anything, customary law may be better able to solve the problems caused by the emerging market economy than is state law. Customary law's insistence that land should be available to those who need it is a necessary counter to the market's tendency to foster divisions between those who become land rich and those who become land poor. And, customary law's recognition that no decision about land is ever final permits the status of land to change as people's needs and circumstances change, a valuable flexibility not available under state law.

Papua New Guinea's Land Courts

Papua New Guinea's special courts to hear disputes over customary land were established in 1975, the year independence was achieved. Three factors contributed to Parliament's decision to create customary land courts and shaped the form those courts would take. First, the move towards independence increased interest in replacing as far as possible the imported common law with customary law, which was seen as home-grown and therefore better suited to the values, needs, and conditions of the new nation.[17] In the exhilaration of independence, the proponents of the land courts did not stop to consider how customary law,

which had been developed when Papua New Guineans lived in small, technologically simple, and essentially egalitarian societies, might be adapted to solve questions of land ownership in a nation-state with a rapidly developing market economy and the beginnings of unequal distribution of resources. Nor did they consider the extent to which the vast socioeconomic changes of the colonial period, as well as the pressures of colonial rule, might already have changed customary law into something very different from its precolonial manifestation. These issues were left for time and the land courts to work out. Custom (whatever it might be) had taken on symbolic importance as an exemplar of independence and self-rule.

A second factor leading to the establishment of the land courts was the perception that tribal fighting seemed to be on the increase. Conflicts over rights to customary land are often cited as among the major causes of tribal warfare, and these conflicts were growing in number as population increases produced land scarcity at the same time that gardening land was in demand for cash cropping. [18] The concern over tribal fighting led to the creation of a Committee of Inquiry into Tribal Fighting in the Highlands, which in its 1973 report agreed that land disputes were a frequent cause of tribal wars. The report recommended new procedures, including mediation, for resolving these disputes, rather than merely "hand[ing] down decisions in a purely judicial manner. People charged with settling land disputes should make a point of actually visiting the land in dispute and then attempt to mediate on the spot and arrive at a decision acceptable to the disputing groups."[19] In effect, the committee was recommending that customary processes replace state law processes in the resolution of land disputes.

Mediation is one of the dispute-management methods associated with custom, whereas adjudication is a hallmark of the common law method. However, mediation is only one among the processes available to customary law and there is no evidence that it leads to lasting resolutions. In presuming that mediation was the principal customary dispute-settlement method even between different clans, and that it usually led to permanent resolution of disputes over land, the committee was partaking of fallacies common at the time. As part of the fervor of independence, customary law had been mythicized. Customary law was portrayed, in contrast to the imported common law, as invariably community-centered, compromise-oriented, and leading inevitably to the restoration of social harmony. [20] The differences in the processes used to resolve intraclan and interclan disputes were ignored. Although mediation and compromise were significant among the methods, goals,

and values of customary law, there were many instances in which mediation was not used, in which compromise was not a goal, in which amicable relations were not restored, and in which fighting was a necessary prelude to or substitute for negotiation.[21]

The third factor leading to the creation of customary land courts was the recognition that no governmental agency existing at the time was able to bring customary land disputes to an end. Over the years the colonial administration had tried various institutional measures, all unsuccessful. Through 1952, responsibility for settling disputes over customary land lay with the courts for native affairs. Most disputes unresolved by the villagers themselves, however, tended to be heard by patrol officers (called, in Papua New Guinea, *kiaps*) on visits to the villages in their far-flung districts.[22] In 1952, the Native Lands Commission was set up to investigate and record customary rights in land, with the ancillary purpose of determining which land was "waste and vacant" (or ownerless).[23] Colonial authorities believed that much land in Papua New Guinea was ownerless, and that, once it had been identified, it could be taken over by the state and sold or leased to expatriates for development as plantations. The commission was also supposed to create a register of all occupied land, a preliminary to making land available for market agriculture, lease, or sale. In its twelve years of operation, though, the commission did not identify any unowned land. Nor did it determine the ownership of much occupied land. It decided only 176 cases and registered no titles to customary land.[24]

In 1963, the Native Lands Commission was replaced by the Land Titles Commission, which was given exclusive jurisdiction to decide rights to customary land. The colonial administration had reluctantly realized that Papua New Guinea's economic future did not lie in plantation agriculture and had decided instead to promote development by convincing indigenous people to grow cash crops. It was a basic tenet of the prevailing ideologies of the time that customary land tenures based on communal rights to land were a barrier to economic progress. So, the decisions of the Land Titles Commission on ownership were intended to permit clans either to record their title to the land in a register of communal titles or to divide up the clan land and convert to individual freehold titles. But, although the Land Titles Commission did resolve a number of land disputes, very few titles, either communal or individual, were ever registered.[25]

Neither of the colonial land commissions had succeeded in settling many land disputes or in stemming the rising tide of conflicts over customary land. There were a number of reasons for their failure. Perhaps

the most important was that the colonial authorities' major purpose in creating them had not been to settle disputes between Papua New Guineans but to establish and register title to customary land so that it could be converted to market uses. Even after the failure of the first of the commissions, colonial authorities continued to believe that rights to most customary land were undisputed. The commissions were therefore structured more to serve the administrative function of ascertaining and recording ownership than to fulfill the adjudicatory function of resolving disputes over ownership.

The failures of these colonial institutions led to the formation shortly after the introduction of self-government in 1973 of a Commission of Inquiry into Land Matters, chaired by a Papua New Guinean. A significant focus of this commission's recommendations was on resolving land disputes. Its report identified certain shortcomings of the Land Titles Commission's dispute-resolution process and suggested, as had the Committee of Inquiry into Tribal Fighting, that top-down adjudication be replaced by a party-centered, mediatory approach, such as was believed to exist in customary law:

> We think that certain principles should be used in developing a dispute settlement structure suitable for Papua New Guinea. People should be involved in the settlement of their own disputes and not be able to avoid this responsibility by referring the matter to the *kiaps*. . . . No dispute settlement process, no matter how wisely conceived and appropriate, can succeed until the disputants themselves are prepared to take some responsibility in the settling of the matter, and, if they cannot settle it, are prepared to abide by a decision of a tribunal set up by the Government.[26]

The Commission of Inquiry into Land Matters was correct in suggesting that land disputes would not be resolved by autocratic or disinterested decision-making in which the parties could take no meaningful part. But, like all the commissions and committees that had preceded it, it was incorrect in presuming that correction of this problem would automatically lead to the final resolution of disputes. In presuming finality, it misunderstood the workings, and the goals, of the customary legal process. Customary dispute management provides for changing circumstances by presuming that any decision is temporary at best, capable of being reopened. A return to customary dispute-management processes provides a number of benefits for Papua New Guinea, but sure and cer-

tain outcomes that the parties will not try to overturn as soon as they grow dissatisfied are not among them.

The reports of the two commissions were influential in the enactment in 1975 of the Land Disputes Settlement Act, which established the land courts and provided that they would apply substantive customary law using customary dispute-settlement methods. The land matters commission had recommended "a three-stage system of mediation, arbitration and appeal."[27] The act provides for local people with knowledge of land matters and customary land law to be appointed as full-time or *ad hoc* mediators, and requires that all disputes be mediated. A dispute may be brought to a local land court for adjudication only if the parties have, in the opinion of the mediator, "made reasonable efforts to reach agreement but have been unable to do so." Each local land court consists of a magistrate of a local court (the local courts are the lowest-level trial courts in Papua New Guinea's hierarchy of common law courts) or a district officer, sitting with up to four mediators. Decisions of the local land courts are by majority vote of the magistrate and mediators. The choice of magistrates from the local courts to adjudicate customary disputes over land runs the risk of removing the land courts from custom, since these magistrates are not necessarily native to the areas where they sit as judges. However, this risk is offset by the presence on the panel of mediators who are from the area; additionally, because by 1975 local courts were already operating throughout Papua New Guinea, the use of their magistrates had the advantage of permitting land courts to be operational quickly throughout the country. The act permits appeals from decisions of the local land courts to provincial land courts, which are constituted by district court magistrates (the district courts are the level immediately above local courts in Papua New Guinea's common law court hierarchy). Provincial land court magistrates may sit with land mediators if they wish, but at this appellate level the mediators act only as advisors to the magistrate and do not have a vote in the decision. The appeal is usually a complete rehearing of the case.[28]

The act highlights in many ways its intent that disputes over customary land should be resolved not only according to the substantive norms of customary law, but in light of the values and beliefs that were believed to underlie customary law as well. Thus, section 1 provides:

> The purpose of this Act is to provide a just, efficient and effective machinery for the settlement of disputes in relation to interests in customary land by--

(a) encouraging self-reliance through the involvement of the people in the settlement of their own disputes; and

(b) the use of the principles underlying traditional dispute settlement processes.

Mediators are reminded that their primary function is "to assist in the attainment of peace and harmony . . . by mediating in, and endeavouring to obtain the just and amicable settlement of, disputes" (section 15). Recognizing that in customary forums the discussion is never limited to the issue that is the immediate cause of the dispute but is allowed to range over all the matters on which the parties disagree, the act provides that the local land court may hear and decide other issues that are "inextricably involved" with the land dispute (section 29). The local land courts are not bound by any of the common law rules of evidence, practice, or procedure; are free to call and examine any witnesses they think appropriate; and may inform themselves on any question before the court in whatever manner they think appropriate.[29]

The act recognizes that customary law favors outcomes that are fair to the parties--taking into account their needs, interests, and relative social positions--over decisions based on the rigid application of rules, and permits the allocation of land to be changed when appropriate. Land courts are directed to apply the customs of the area, in regard both to interests in land that are recognized by custom and to the processes by which these interests are allocated or reallocated. Thus, a land court may order a party with an abundant supply to return land to another party that is short of land, if at some time within the past hundred years the land-short party had an interest in that land. Land court orders may also include provisions dividing the land, ordering it held in common, or requiring the payment of compensation or the giving of a feast. After twelve years from the date of a land court's order, a party may apply for a variation of the order if the party can show that "circumstances have changed so that the enforcement of the order is causing hardship." The act requires magistrates and mediators to visit the land, both before making their decision and, after the decision has been made, to mark the boundaries and "satisfy [themselves] that the parties and the witnesses understand' the scope and nature of the court's decision.[30]

The act differs from customary dispute-settlement processes in that mediation is the only one of the various customary responses to disputes recognized. Moreover, the act presumes that local land courts should

mediate not only disputes involving members of the same clan but also disputes between clans. Although negotiation of disputes between clans was probably little tried, and seldom successful, in precolonial Papua New Guinea, there is no reason to presume that it would not succeed today. In precolonial times, each clan was a separate and sovereign polity. Clans did not share the same leaders, were not subsumed under a common political structure, and were not constrained institutionally from interclan war. Today, however, Papua New Guinea's myriad clan polities have all been subsumed under a single state network, which can provide a common political and legal structure, as well as common leaders, and, thus, holds out the possibility that mediation can occur between clans. To date, a significant proportion of the land courts' cases have involved disputes between clans.

If public acceptance of the land court process and of the decisions of land court mediators and magistrates is an indication, they are working relatively well. By 1979, land courts were operating in every province, 105 permanent and more than a hundred part-time mediators had been appointed, and four regional (supervisory land magistrates) and thirty local land magistrates had been named.[31] There have been occasional problems. In late 1978, the land courts in Enga Province in the Highlands were closed for some months after violence interrupted a number of attempts by land court magistrates to mark boundaries.[32] And there have been some criticisms of the operation of the land courts. Richard James Giddings, one of the best of the provincial land court magistrates, has pointed out that there are too many appeals from local land court decisions--in part because the provincial land courts too often overturn the decisions of the local land courts.[33] In 1979, at a seminar for land court magistrates, some participants expressed the opinion that mediators do not receive sufficient training and that, as a result, many mediators issue orders rather than mediating.[34] However, the courts seem for the most part to be applying customary law, as they know it. But in their attempt to apply customary law in a customary way they have come into conflict with the common law courts.

Customary Law in a Common Law Setting

The land courts were to be separated, as far as possible, from Papua New Guinea's common law courts, largely to prevent the common law courts from imposing their notions of law and legal procedure on the land dispute-settlement process. The act bars lawyers from appearing in

most cases, and decisions may be appealed only to the provincial land courts (sections 60, 72). The act was intended to prohibit all appeals to the Papua New Guinea National Court (the common law court that serves as a trial court for major cases from throughout the country and as an appellate tribunal for the local and district courts), but section 155 of the Papua New Guinea Constitution provides that the National Court has a right to review (by writ of *certiorari*) all lower court decisions. When the National Court wanted to change land courts to make them more like itself, it used this review power to circumvent the act's prohibition on appeals.[35]

Customary law and common law differ not only in the substantive rules that each would apply to determine rights to land but, of equal importance, in the processes that each uses for determining rights, managing disputes, and maintaining order. The typical common law process is an adversary trial of a carefully delineated set of issues between two sets of contestants. The trial is presided over by an unrelated third party, and the intended end is an adjudicated decision under which one contestant wins and the other loses. The paradigmatic customary law process is an informal village moot, in which everyone connected to the contestants and the dispute may have a say and in which all the grievances between them may be aired. The dispute may involve a mediator, but he or she has a relationship to the parties, and the intended end is a mutually agreeable resolution.[36]

Substantive rules are invoked for different purposes and function very differently in these disparate legal processes. In the customary law process the rules may be mutually contradictory and their application to disputes is flexible, whereas the common law demands consistency, predictability, and efficiency in the application of rules. Because the meaning and effect of a substantive rule depends upon the procedural framework in which the rule operates, the integration of a customary rule into a common law framework significantly alters the meaning and effect of the rule.[37]

A survey of the cases in which the Papua New Guinea National Court has reviewed the decisions of customary land courts demonstrates the changes that occur to customary law when a common law court imposes its own standards onto customary courts. In these cases, the National Court disagreed with the land courts about which rules of substantive customary law should apply and disapproved of the land courts' willingness to countenance the simultaneous existence of multiple, sometimes contradictory rules and the informality of land court

procedures. If the land courts were to adopt all the changes ordered by the National Court, they would operate much more like common law courts than in the customary fashion envisioned by the act.

Changing the Substantive Rules

All the land court cases reviewed by the National Court have concerned disputes between clans in which one clan claimed the land on the basis of original occupancy and the other on the grounds of conquest, gift, or undisputed occupation and use. At first, the National Court refused to recognize original occupancy as a basis for clan land claims, preferring instead to support the claims either of clans in possession of the land when the colonial administration first encountered the area or of clans currently inhabiting the territory. But, in more recent cases, the National Court has given some recognition to land claims based upon original occupancy. Its preference for certain customary rules over others and the change in its preferences over time does not arise from a careful study of substantive customary law and an attempt to apply that law, but is instead predicated on the National Court's desire that the land courts adopt and apply a single rule--any single rule, so long as it can be easily applied and will lead to a quick and final end to disputes. If these goals were possible of achievement, then the function of the land courts would be not only, as customary law prescribes, to resolve disputes over land but also, as state law intends, to make permanent determinations about land ownership. Once the ownership of customary land has been determined and once it has been made clear that the determination is not open to change, then an end very like land registration will have been achieved. Customary land will have become property. With title to it clear, it will be amenable to sale or long-term lease.

Acquisition by Conquest. The first National Court decision intended to have an impact on the land courts was actually an appeal not from a land court but from one of the last cases heard by the Land Titles Commission before its authority to adjudicate most customary land disputes was transferred to the land courts. *Kaigo v. Kurondo,* decided in 1976, shortly after the land courts became operational, involved a dispute between the Siku and the Gena, two clans from Chimbu Province. Both claimed the same tract of land, the Siku because their ancestors had been the original settlers and the Gena because their clan had taken the land by conquest and maintained effective occupation thereafter. The National Court did not completely accept the principle of ownership by

conquest, even though "[t]here is ample evidence that the Chimbu custom of recognizing acquisition of land by conquest and effective occupation exists." The court argued that the conquest principle is "repugnant to the general principles of humanity." However, it was willing to recognize claims based on conquest in certain situations. It would, for example, uphold the claim of the Gena even though they had gained their occupation through conquest because they were in effective occupation of the disputed land at the time when the colonial administration established its hegemony over the area. But the court would not recognize the claims of clans who won land through conquest after the onset of colonial control:

> To recognize as owners of native land persons who had acquired that land by conquest after Government control had been established would undoubtedly be repugnant to the general principles of humanity but to recognize as owners of land those who had acquired it by conquest and who were in effective occupation of the land at the time when Government control was established is not repugnant to the general principles of humanity. It is the only practical and sensible basis upon which ownership of land can be recognized. . . . Before the advent of the Administration native customary law had reigned supreme, and it was not only expedient but also right and proper that when it imposed its own control the Administration should have recognized rights of ownership of land acquired by native custom even if native custom meant brute force.[38]

Holding that a change in government can make morally repugnant that which was not repugnant before may be illogical; and it is, of course, morally repugnant to hold that Chimbu land conquests are immoral while ignoring Australia's conquest of Papua New Guinea by brute force. But the ruling supports the aims of the common law, in particular the common law's interest in providing the government, the courts, and the parties to land disputes with a single, easily ascertainable rule for determining interests in customary land. Once it has been established that rights accrue to those who were in occupation when the colonial administration took control of the area, then parties can govern their relations by the rule, and courts can apply it mechanistically.

Adoption of this rule supports other goals of state law as well, in particular the interest of the courts in fostering state authority. When private parties settle their disagreements by forceful means (as in wars over

land) rather than by recourse to the courts, their perceived need for the government's dispute-settlement and enforcement institutions is lessened, and the authority of the state is to that extent undermined. In holding that conquest after colonization should not be recognized as a means for acquiring rights in land, the court is upholding the state's monopoly over the settlement of disputes and the use of force.

Denying the Rule of Original Occupation. Despite its preference for a single, generally applicable rule of land ownership, the National Court did not uphold the principle advanced by the Siku clan that interests in customary land should be allotted on the basis of original occupation, even though that is a recognized principle of customary law. The court refused to base its decision on original occupation because application of that rule would be inefficient and uncertain: "a tribunal would be faced with the impossible task of going back to the mists of time in order to ascertain who are the rightful owners of disputed land."[39] The formulation of clear rules that can be easily applied is a goal of the common law courts, and this court believed that the difficulties of assessing the validity of competing oral histories of precolonial events made the principle of original occupation difficult to apply.

But customary legal practice did not bow immediately to the demands of the common law courts. In 1981, five years after *Kaigo v. Kurondo,* the National Court heard *State v. Giddings,* a case in which the land courts had again attempted to settle a dispute between two clans, one of which claimed the land as original occupants and the other on the grounds of long-term settlement on and improvement of the disputed land. The parties to *State v. Giddings* were two clans from Enga Province, the Pialin, who claimed to be the original occupants of the land, and the Ambai, who had settled on the land after another clan had driven the Pialin from it in a long ago war. The land court had awarded the larger share of the disputed land to the Pialin, primarily because the Pialin were the land's original occupants (in Papua New Guinean pidgin, the land was their *as graun*).

It was evident that, if the Enga land mediators had heard about *Kaigo v. Kurondo,* they had not been swayed by it. In upholding the local land court's decision, the provincial land magistrate, Richard James Giddings, remarked laconically, "mediation policy in the . . . [Enga Province] is to find in favour of the 'as graun' (original owners) of land under dispute." The National Court responded with horror:

> If I may say so, that is a surprising policy; if it has been applied efficiently, it could be responsible for a great deal of the High-

> lands tribal fighting in recent years. Indeed, I believe it is a matter which would bear urgent investigation; for five years, or so, this system has been operating for good or ill, and this application is the first time the system has been opened up to examination by the ordinary courts.[40]

The National Court revealed its prejudices in that remark--not least the assumption that the (imported) common law courts are Papua New Guinea's "ordinary courts," implying that the land court system, founded upon indigenous legal principles, is not ordinary.

The National Court's arguments in opposition to the *as graun* principle were based primarily on a technical and narrow reading of the Land Disputes Settlement Act. Thus, the court argued that it "is highly doubtful whether the adoption of an 'as graun' policy to determine ownership is consistent with carrying out the statutory duty" of sections 36(d) and 67 of the act, which require that land courts "endeavour to do substantial justice." But the court did not explain why the return of land to its original occupants might be inconsistent with doing justice. Instead, the court went on to list even more sections of the act with which "the 'as graun' policy does not appear to be consistent," though the court did not explain the relevance or even describe the content of the other sections it cited.

Almost as an afterthought, the National Court concluded that the policy couldn't possibly be consistent with customary law either: "It may be, of course, that in Enga the Local Land Courts have consistently found, in carrying out their duty under . . . [the act] that the relevant custom is an 'as graun' principle. I doubt that."[41] The court preferred its view of customary law even though the local land courts consist of mediators and magistrates from and working in Enga Province, whereas the National Court sits in Papua New Guinea's capital city, far away from Enga.

The major reason for the National Court's dislike of the *as graun* principle probably lies in the interest of common law courts in bringing disputes to closure and preventing once-settled cases from being reopened. To achieve this aim, the National Court was willing to change substantive customary law, to substitute government-made rules for the rules of customary law. For years, colonial *kiaps* (patrol officers) had settled disputes over customary land by giving the land to whoever was on it when the administration first appeared.[42] The courts feared that if they overturned that *kiap*-made rule in favor of the actual rules of customary law, such as original occupation, they would be flooded with litigation from all those who had once accepted a *kiap's* determination.

Returning to the Rule of Original Occupation. At common law, once a court decides that rights to land do not arise from original occupation, then courts in later cases are not supposed to grant rights on that basis.[43] But in customary law all rules retain their power. A rule that received no support in one dispute can nevertheless be recognized in later disputes. The continuing viability of customary norms is one of the ways in which customary law withstands the attempts of state law to change it.

Thus, in *Application of Nango Pinzi,* a case heard in the National Court in 1986, five years after *State v. Giddings,* and decided in 1989, one of the disputing clans claimed land on the basis of original occupation. And, this time, the National Court was willing to countenance the claim.[44] The case involved two clans from Morobe Province on Papua New Guinea's north coast. The Sio claimed the contested territory as original occupants but the Kulavi had been in sole possession of the land for at least ten years and had planted coconuts and other cash crops on it. The local land court had found that the land belonged to the Sio ("It is [our] unanimous decision that the land known as Kulavi . . . is owned by Sio Clan and [they] can use and do anything with it as they see fit and [it can] later be used by their children and children's children"),[45] had ordered the Sio to pay K 20,000 (approximately US$20,000) in compensation for the trees the Kulavi had planted, permitted the Kulavi to continue to harvest the trees until the first payment was made, and allowed the Kulavi to "continue to harvest and live on the produce of their existing gardens [but] no new gardens [are] to be made."[46] The provincial land court reversed that decision, granting permanent possession to the Kulavi. The Kulavi had been in possession for more than twelve years, the provincial land court found, and therefore came under section 67 of the Land Disputes Settlement Act, which establishes a presumption in favor of the possessory claim of any party that "has exercised an interest over the land . . . for not less than 12 years without the permission, agreement or approval of any other person."

The National Court quashed the reversal, returning the case for a rehearing because the provincial land court had determined only the question of possession under section 67 and "did not deal with the question of ownership of the land."[47] In suggesting that the original occupants might have a claim to the land, the National Court reversed the rule developed in earlier cases (in fact, the court does not even mention the discussion of original occupancy in those cases). By 1989, when *Application of Nango Pinzi* was decided, the court had come to realize that its continuing refusal to accept the original-occupancy rule created problems greater than the evidentiary difficulties of choosing between conflicting oral histories. The 1980s had seen continuing land disputes

between clans, many of which had erupted into violence. Papua New Guineans were not about to agree with a legal regime that denied them access to the land of their ancestors. And, as the court notes in *Application of Nango Pinzi,* economic changes had made people less willing to give up claims. Papua New Guineans were developing new uses for customary land, and new relationships as landholders and lessees, making land more valuable. The court believed that, if land disputes were to be settled, original occupation could not be ignored.

The decision in *Application of Nango Pinzi* seemed to be a victory for customary law. First, the National Court reversed earlier attempts to change the substantive rules of customary law. The court also recognized the necessity, as customary law long since had recognized, of uncovering all the issues, of settling all the areas of conflict between the disputants, and of attending to the needs of both parties if a dispute is to be resolved. The provincial land court magistrate (sitting without assessors versed in local custom) had acted like a common law court, mechanistically applying a statutory provision to produce a narrow determination of possessory rights.[48] And the National Court felt bound to remind the provincial land court that customary law (and the customary land courts) aim "more towards solving the 'dispute' for the future and not just towards disposing of the present 'appeal.' "[49]

The decision, however, also reflects the bias of the common law. First, it presumes (as did the local land court) that, at customary law, there is such a thing as ownership of land--and that, if there is, ownership under customary law would convey the same meaning, the same rights and powers, as ownership under the common law. This misinterpretation has percolated through all the recent discussions of customary land tenure. It may be that common law concepts of ownership have so thoroughly infiltrated customary law that ownership must now be accepted as a customary law concept, as well.[50] But a court's decision about ownership will not necessarily settle a dispute. That is the second common law fallacy in the National Court's decision. The court presumed that a permanent settlement of this dispute was possible, if only the right rules and procedures could be applied, if only "ownership" could be determined. But it is the nature of customary relations to land, and of the customary dispute-settlement process, that no resolution is permanent.

Process, Procedure, and the Resolution of Disputes

In addition to wanting the land courts to change the substantive rules of customary law, the National Court also wanted to change their pro-

cesses and procedures in ways that would make the land courts operate more like the National Court. First, the National Court wanted the land courts to choose a single substantive rule and apply it uniformly to all disputes. Second, it wanted the land courts to obey the technical requirements of the Land Disputes Settlement Act and other state laws precisely and mechanistically, rigidly adhering to the letter of the statutes even at the expense of their spirit. The result of these changes, were the land courts to accede to them, would be to turn a mediatory process, aimed at obtaining the parties' mutual agreement to a resolution of their dispute, into an adjudicatory process, aimed at a determination by a court of interests in land. Once the land courts were in the habit of clarifying title to customary land, registration and sale would be only a step away.

Many Rules or One Rule? The National Court has criticized the land courts not only for applying what it believes to be the wrong rules of customary law, but also for the land courts' willingness to recognize that numerous rules, some of which are in conflict, may simultaneously apply in a case. The National Court wants the land courts to recognize either original occupation or conquest, but not both. The National Court would reduce the rules applicable in any case to one. In *State v. Giddings,* for example, the local land court attempted to end the long-festering controversy between the Ambai and the Pialin by dividing the land and giving the greater share to the Pialin, who were poorer in land but stronger both in fighting power and in their ability to manipulate the political system.[51] The National Court reacted as angrily to these bases for the decision as it had to the land court's acceptance of original occupation, accusing the mediators and the advisers whom the land court had consulted of corruption.

But in allowing its decision to be guided by these aims and interests, the land court was following the dictates both of customary law and of the Land Disputes Settlement Act. In the typical customary dispute-settlement meeting (an informal village moot, for example), rules influence the outcome but do not determine it. The rules sometimes operate as bargaining chips, used by the various parties to support their arguments. Sometimes mediators will refer to one rule or another in an effort to attain the parties' acquiescence in a proposed solution. The rules also set boundaries, separating out those claims to land that might be accepted from those that would not be. As such, the rules are also guides to behavior, maintaining order and preventing further disputes from arising. Just as consensus solutions can involve a compromise

between the parties, such as dividing the property that is the subject of the conflict, they can also involve a compromise among the potentially applicable rules, in effect dividing the rules so that each one is honored a little. For rules to operate in this way, for the process to remain open to different solutions that take into account the relative strength and needs of the contending parties, there must be a multiplicity of rules potentially available to each dispute, and there usually are. In land matters, for example, one clan might argue that the land is theirs because of original occupancy and another that they developed and worked it. Both arguments are predicated on recognized principles of customary law. No outcome arises solely from the operation of a rule, for to do that would be to limit the multiplicity of available rules and consequently to restrict the flexibility of the dispute-management process. The Land Disputes Settlement Act follows customary law in permitting the land courts to take a number of rules, needs, interests, and goals into account in each decision. A land court is permitted to divide disputed land (section 39[5]) or order its return from one party to another if "one of the parties to the dispute is short of land and another party has an abundant supply" (section 40).

At common law, unlike customary law, rules are seen as directly determining the outcome of a dispute. The adjudication process is presumed to consist of the neutral application of rules to facts by a disinterested arbiter, and the winner is the party that the rule favors. The process requires consistency in the choice and application of rules. From the multiplicity of potentially applicable rules, a single rule is chosen and, once chosen, will be applied not only in the present case, but thereafter in all cases in which the facts are similar. For example, were it once decided that rights to land accrue from original occupancy rather than from conquest, need, or power, then the general practice of the courts would be to follow that rule in all future cases. To ensure consistency, judicial opinions are written, becoming available for citation in later cases. The written opinion comes to be regarded as a rule in itself, disguising the choices that were involved in its selection of rules to be applied. The *Application of Nango Pinzi* case is unusual in its inattention to the settled rule.

These different approaches to rules reflect the different purposes of state law and customary law. The purpose of a common law court is to apply substantive law (the rules about how interests in land are acquired) in order to determine which of two competing claimants owns the disputed land. The purpose of a customary land court, however, is to settle the dispute between the claimants--a purpose that may

or may not be best accomplished by deciding that, under the applicable rules, one of them owns the land and the other does not.

Sometimes, common law courts do apply more than one rule to a case, but they organize the rules differently than customary courts do. For example, in *Application of Nango Pinzi,* the National Court criticized the land courts for failing to consider a number of rules in reaching their decisions:

> There should have been an inquiry into the custom regarding an agreement by the land-owning clan to let outsiders "use" the land and the customary terms of such agreements (if any). . . . In order to do justice and to apply this Act correctly, the Magistrate should also have inquired into any possible shortage of land amongst the two parties. . . .[52]

However, the National Court did not expect the land courts to accord equal weight to all these rules. It presumed that the rules could be interpreted so as not to be in conflict. One way to do so would be to decide that certain rules are bases for claims to ownership of land, others are bases for claims to possession, yet others give a clan a right to the products of the land. The court presumed, as common law courts do, that earlier failures to resolve the dispute arose primarily because of an error as to which rules should be applied, or in how the rules had been applied, and that the parties to this dispute (and all potential claimants to the land in the future) would cease their conflict once they perceived that correct rules had now been applied to the question.

The transformation by the National Court of customary rules into rules of the common law reached its height in *Application of Ambra Nii,* a case from the Western Highlands Province. The Gupamp claimed land on the basis of original occupation and the Toisap claimed it on the grounds that it had been given to the Toisap at least twenty-five years earlier by the Wakiam clan, which was in possession of it at the time and also claimed to be its original owners.[53] The Gupamp did not dispute the Toisap's possession until the 1980s, when the Toisap began to earn a substantial income from coffee they had planted. The local land court had divided the land between the Toisap and Gupamp, giving the cultivated portions to the Toisap and the undeveloped portions to the Gupamp. The provincial land court reversed that decision, holding that all the land belonged to the Gupamp. The National Court reinstated the order of the local land court. But, in reinstating that order, the National Court actually changed the order.

The National Court cited with approval the comments of one of the local land mediators, who had noted that "both sides have lived there side by side for too long and have worked and owned the land thereabouts. It would be against natural justice if one party is removed. Neither party has shown it had an exclusive right and ownership of the disputed land."[54] Despite its praise for these sentiments, the National Court would not, as had the land mediators, simply hold that both clans had a continuing right to occupancy, without determining precisely what kinds of ownership and possessory rights each clan had. The National Court misread the order of the local land court to hold that, through their failure over many years to contest the occupation of the land by the Toisap, the Gupamp had lost their ownership rights to the portion of the land that the Toisap had occupied and developed. The local land court had, in effect, left the question of ownership undecided; the National Court interpreted the local land court's writings as if it had decided the matter.

The National Court approved of the land court's decision (or, more precisely, its own restatement of the land court's decision) as based upon "the appropriate principles to consider in any investigation of customary land ownership." The National Court found these principles in "an Institute of National Affairs publication being a report by Professor D. Cooter titled Issues in Customary Land Law." (The Institute of National Affairs is a research and lobbying organization, set up by companies and businesses in Papua New Guinea.) The court did not say how Professor Cooter conducted his study of customary land law--whether he consulted ethnographies, interviewed informants, attended land court hearings or read National Court cases. The court did report that the study yielded Professor Cooter a set of eight principles or rules --ranging from "adverse possession" ("A group who resides upon or improves land for a sufficient time without the permission or active opposition from others thereby owns it") to "preponderance of the evidence" ("In customary land disputes, the party shall prevail whose case is supported by the preponderance of the evidence") to "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").[55]

There are a number of problems with Professor Cooter's principles, aside from their doubtful provenance. First, as the three cited above demonstrate, they are an odd and illogical mixture of substantive law

(adverse possession), procedure (preponderance of the evidence), and statements that are not about law but about expected behavior (resisting attempts to return). Second, some are so foreign to customary law as to call all the rest into question. The concept of preponderance of the evidence, for example, is a procedural guideline for common law courts; it does not exist in custom. Third, all the rules favor the retention of title by current users and occupiers of the land, particularly by those who are putting the land to economic uses, in opposition to clans who base their claims on original occupation. For example, Professor Cooter's principles, in addition to adverse possession, include "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"), "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"), and "no unqualified right of return" ("Once a group has abandoned its ancestral [land] . . . 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").[56] These may well be operative principles of customary law. However, the list ignores the conflicting principles, all of which are also operative. And, the list is so remarkably a reflection of common law principles, so patently in the interests of the business community, as to raise suspicions about its authenticity.

Finally, the very notion that customary law can be codified, can be reduced to a set of internally consistent principles, has long been derided by legal anthropologists. In legal anthropology's earliest days, anthropologists in Africa did attempt to make collections of the rules of customary law. But, the wrongheadedness of this task was quickly recognized. The rules of customary law are too various, too flexible, too capable of infinite change and variety, to be captured in a code. The very act of codification relieves them of their capacity for constant change. By removing customary rules from the customary process, codification subverts their meaning and purpose. Professor Cooter's list does not reflect custom--in creating a set of rules that are consistent and that will be applied uniformly, it does reflect state law.

Court Procedure and the Aims of the Legal Process. Although there are major differences in the substantive rules of customary and common law, the more significant difference is in the processes by which these rules are applied to disputes and the very different results that these pro-

cesses are intended to achieve. Customary dispute-management processes often result in a division of the land between the disputants, or some other compromise, and it is a common, though not always accurate, assumption that in criticizing customary processes the National Court is criticizing compromise. Yet, in cases involving land disputes between clans the National Court has sometimes approved and sometimes disapproved of land court decisions that divide the land.

For example, although in *State v. Giddings* the National Court criticized the land court for dividing the disputed land,[57] in *State v. District Land Court, Ex Parte Caspar Nuli,* which was decided in the same year, it praised the local land court's decision as "a compromise giving some rights to each side."[58] But, in the *Caspar Nuli,* case, the National Court overturned a provincial land court decision that was itself as much a compromise as had been the local land court decision that the National Court reinstated. The case involved the Wasikuru and the Ruka, two Tolai clans from East New Britain Province. The Wasikuru, original occupants of the land, had permitted some Ruka to settle on their land but had not expected them to move in permanently or to plant coconuts and other long-term cash crops. The local land court had upheld the Wasikuru's claim to ownership but ordered that the Ruka could continue to harvest their crops for five years, so long as they did not plant new trees and so long as they paid an annual rental to the Wasikuru. At the end of the five-year lease, the Wasikuru were to compensate the Ruka for trees that were still in existence. The provincial land court, on the other hand, had ordered a permanent division of the land between the disputing clans, giving some to each clan.

In its seemingly inconsistent reactions to attempts by the customary land courts to effect a compromise, the National Court is pursuing a consistent principle. It is less concerned with stamping out compromise decisions than with convincing the land courts to forgo the flexibility of the customary law process in favor of technically formal procedures, similar to those used by the National Court. In the *Capar Nuli* case, for example, the grounds for the National Court's dislike of the appellate decision did not lie in its perception that the provincial land court had failed to order a compromise, but in that court's failure to follow the technical rules of appellate procedure as laid down in the Land Disputes Settlement Act. The act provides that a provincial land court may affirm an order of the local land court, may quash the order and make a different order, or may quash the order and remit the case to the local land court (section 60). In the *Caspar Nuli* case, the provincial land court magistrate affirmed the order with, he said, "slight variations."

The National Court overturned his decision: "He has no power to do that and has erred in law. If he affirms the order he must simply affirm it; he cannot add variations." Besides, the National Court pointed out, "the 'slight alterations' or 'slight variations' which the magistrate has purported to add to the Local Land Court's decision are by no means slight." Nor would the National Court interpret the provincial land court magistrate's decision as quashing the order and replacing it with another; to do that, the provincial land court would have had to state expressly "that one of the grounds of appeal of s[ection] 59 [of the act] had succeeded," and it had not mouthed these magic words.[59] Technically, the National Court might have been correct; the magistrate's order did not precisely track the statutory requirements. However, was this minor procedural inefficacy adequate grounds for overturning the judgment? Perhaps the magistrate had not wanted to offend the local land court by stating outright that he disagreed with its order. Perhaps he had not yet learned the talismanic importance to the common law process of magic words and phrases that replicate the statutory language. Perhaps he had been seduced by the Land Disputes Settlement Act, which seems to reject procedural niceties in favor of resolutions that will solve disputes.

Similarly, in *State v. Giddings* the National Court's disagreement with the local land court was not directed primarily at the attempt to fashion a compromise but at the failure of the land court, in the course of fashioning that compromise, to act like a common law court. The National Court had a number of criticisms of the local land court's procedure: it failed to limit itself to admissible evidence, the court was incorrectly constituted, members of the court allowed themselves to be swayed by their relationships to the parties, the court did not hear all the witnesses or allow them to confront one another, the marking of the land boundaries did not proceed in the presence of the parties as mandated by the act.[60] In common law jurisprudence, these criticisms go to weightier considerations than did the criticisms made in the *Caspar Nuli* case. The National Court has, in effect, accused the land court of ignoring the major procedural requirements of the adjudicatory process. If adjudication is to be effective, it is necessary that judges appear to be acting fairly, that they give both sides a full opportunity to be heard, both by the court and by one another, and that the judge appear to have no interest in the outcome. These requirements are necessary to the common law because it is the function of common law courts to make rulings. Parties are expected to abide by a court's ruling whether or not they agree with it, whether or not it is in their favor. Parties,

especially losing parties, will be more likely to accept a court's ruling if they believe that the court acted rightly and made its ruling fairly.

But the land courts do not need to emphasize these indicia of procedural fairness in their proceedings, because the outcome of those proceedings is not supposed to be the issuance of a ruling. Instead, the land courts are supposed to use mediation to reach a result to which both parties can accede. The land courts therefore do not need to find in procedural fairness a justification for why the parties should accept their decisions. In the customary legal process, which land courts are supposed to follow, the perception of justice inheres in the outcomes, not in the process.[61]

Procedural rigidity, the close attention by a court to the mechanics of its decision-making process, is intended to produce results that will not be reopened, and the National Court probably hopes that, if the land courts adopt these procedures, they will be able to bring land disputes to a close. But, for years, Papua New Guineans have refused to close land disputes or to accept the determination of any tribunal as final, no matter what its procedure. The continual resurrection of disputes has been an ongoing source of considerable grievance to, and misunderstanding by, state officials. In the colonial era *kiaps* complained that village people often asked them to settle land disputes that had been decided on previous patrols; they took to writing their decisions in village record books so the next *kiap* would not innocently be drawn into rehearing the same dispute.[62] Few of the disputes that now reach the land courts are new. The land dispute that was the subject of *Kaigo v. Kurondo* had been going on for years, with the clans trying every tribunal then available--*kiaps*, district officers, the Native Lands Commission, the Supreme Court, the Land Titles Commission, the Supreme Court again--and, in the interim, fighting with one another. The dispute that underlay *State v. Giddings* was also long-standing, having involved two local land court hearings, two appeals to the provincial land court, and numerous tribal battles during which people had lost their lives.

The customary process, which is often called "dispute settlement," might be better termed "dispute management." In customary proceedings, such as mediation, the parties reach a settlement for the time being, but it is not intended to be a decision that can never be reopened. Such a decision would entail the grant to one or the other of the parties of permanent rights to the land--a determination that would likely not be acceptable to both parties and thus would not obtain their mutual agreement. The customary process presumes that no dispute is ever per-

manently resolved and that rights to land are never permanently determined. It therefore leaves room for reopening decisions as changing circumstances require.

If the National Court believes that procedural rigidity can guarantee that parties will not attempt to reopen the decisions of the land courts, the National Court is mistaken. The very National Court decisions that were intended to stem the flow of litigation and to convince litigants that a fair and therefore final disposition of their case has been reached have had the opposite effect. Litigants, supported by the customary law notion that no case need ever be final until there is no one left with an unfilled need or a grievance, view the common law court's procedural wrangling as evidence that nothing is final in the common law courts either--and pursue their cases endlessly.[63]

Customary law permits land disputes to be reopened whereas the common law courts expect to achieve finality because the purposes served by the two legal systems and the environments in which they operate differ. Land, in a customary environment, is primarily a source of shelter and subsistence, and one function of the customary dispute-settlement system is to ensure access to land of all who need it, a function best performed if decisions can be changed as circumstances change. The common law operates in a market environment in which land is a commodity; a primary function of the common law is to make sure that determinations about interests in land are final so that purchasers can be confident that what they have paid for will not be taken from them whenever a disgruntled claimant wishes to reopen the case.

Occasionally, however, the imposition by the National Court of procedural requirements on a lower court, even on a customary law court, can have a salutary effect. For example, in *Application of Nango Pinzi,* the National Court used procedural errors committed by the provincial land court as the grounds for overturning the lesser court's allocation of the land. The National Court believed that the provincial land court had been mistaken in granting the land to the Kulavi when the Sio seemed able to prove original ownership, and mistaken as well in not recognizing that these customary landholders could make arrangements with each other about the use of the land. But common law courts cannot overturn the decisions of lesser courts just because they disagree with them. So, the National Court phrased its disagreement with the provincial land court in procedural terms: it held that the provincial land court had made "sufficient [procedural] errors to amount to a substantial miscarriage of justice." First, the magistrate had allowed an appeal from the local land court's decision "merely because he disagreed

with the lower court's decision" and not, as the Land Disputes Settlement Act requires (section 59), because he was not satisfied "in the circumstances of the case that no court doing justice could have reached the decision appealed against." The act's standard for review, which is similar to the common law standard, is intended to discourage a pattern of constant appeals by permitting a decision of a local land court to stand unless it is significantly wrong. Second, the magistrate based his decision partly upon letters written by *kiaps* to one another during the colonial period, letters that were derogatory towards Papua New Guineans and that he did not discuss with the parties. The act permits a land court to "inform itself on any question before it in such manner as it thinks proper," but requires the court, when it does so, to make the information available to the parties (section 50[3]). And, by the way, the "magistrate failed to determine questions of custom regarding ownership, usage and possession."[64]

The National Court's decision in *Application of Nango Pinzi* crystallizes the ambiguities in common law procedural requirements. As this case demonstrates, the existence of procedural requirements gives a higher court an excuse for overturning the ruling of a lesser court even though the higher court might not be able directly to attack the lesser court's holding on substantive grounds. In the *Nango Pinzi* case, the National Court criticized the lower court for failing to follow proper procedures, not because procedure is an end in itself but because the provincial land court's decision violated the goals of the Land Disputes Settlement Act. Because the National Court is a common law court, to overturn the lesser court's decision it had to argue that the lesser court had used procedures improper under common and statutory law.

Custom, the Common Law, and Economic Development

It briefly seemed, as Papua New Guinea was nearing independence, that the new nation would opt for planned development and economic equality.[65] More than fifteen years after independence, however, the country's urban economy is essentially a market system. The National Court's uncritical acceptance of common law principles has been a contributing factor in the gradual erosion of the social and economic ideals of the independence period, because the substantive rules and, even more, the procedural requirements of the common law have as their primary goal the support and maintenance of a market economy.

The role of government and its courts in a market economy is severely circumscribed. According to market economy theorists, economic de-

velopment occurs naturally, without government planning or interference, because individuals and companies in search of expanding profits develop new industries, which, by producing more marketable goods and employing more workers, create the opportunity for yet more industries to develop.[66] Government in a market economy is not supposed to take a central role in planning and promoting development but merely provide infrastructure, enforce market rules and agreements, and occasionally alleviate the harsher effects of the system. The major role of the courts is to support marketplace dealings by providing a set of rules upon whose predictability entrepreneurs can rely, by applying and enforcing the rules consistently and by providing a forum in which disputes about the rules can be quickly and permanently resolved. When a common law court decides a dispute by applying substantive laws to the facts of the dispute, it accomplishes two goals, It ends that dispute between those parties, and it lets future marketplace actors know what rules will be applied should a similar dispute arise between them, thus shaping their behavior.

But the market economy does not produce greater wealth for everyone. Access to goods, services, and the means of production is unevenly distributed. Even with the continuing availability of the rural village as a place where workers and their families may be housed and fed, poverty occurs and increases. So a secondary role of the common law is remedial. Common law courts support the continuation of the market economy by correcting some of its excesses. Where courts are not alert to the social and economic implications of their decisions, their tendency is to utilize common law rules in most cases and to turn to customary rules only in those circumstances when they wish to counter the undue harshness of the market. Generally, the only purpose of the introduction of a substantive rule of customary law into a common law court's decision is to alleviate what would otherwise be the harsh results of a common law rule.

In the land court cases, the tendency of the National Court has been, with few exceptions, to presume the superiority of the common law procedural model and to treat substantive rules of customary law as if they were common law rules. Thus, the National Court requires rules about customary land rights to be applied as consistently, as predictably, and as efficiently as if they were common law rules. The land courts may produce compromise decisions, but they must do so in a way that is procedurally correct and that results in closure, both of the dispute and of the issues that gave rise to the dispute. Moreover, the land courts must settle on certain substantive rules, and apply them, to the exclusion of

all others. If the National Court has its way--if the land courts become like the common law courts, if a system of rules is developed for adjudicating land claims and determining ownership--then the stage will again be set for the registration of titles to customary land. Once land ownership is clearer and unchallengeable, land can be bought and sold.

The common law courts wish to bring land disputes to a close, to turn land into a marketable commodity. But the imposition of alien procedural forms is not the way to do it. Nor is it clear that closure should be a goal of the courts. In Papua New Guinea today, the meaning and uses of land are rapidly changing. Clans once rich in land find themselves, as a result of population increases or changing land uses, land poor. Papua New Guineans are experimenting with new kinds of transactions in customary land. Perhaps, in this fluid situation, claims to land should be permitted to remain fluid as well.

If Papua New Guineans want their land to escape cornmodification they should support customary law. Customary law was developed for economic systems that are more egalitarian than those maintained by the common law, probably smaller in scale as well, in which the production and distribution of goods are accomplished by reciprocity or redistribution rather than by buying and selling. By permitting contradictory rules to exist simultaneously, by eschewing finality, by focusing on interests in and needs for land rather than on ownership and other rights, customary law permits land cases to be reopened whenever the need arises. By keeping to customary law, Papua New Guineans stand a chance of keeping their land from being totally in the thrall of the market.

NOTES

Thanks are owed to many people who have helped me to refine the ideas in this article, but I will leave these friends and colleagues unnamed for now in order to express my special gratitude to R. J. Giddings for his contributions to Papua New Guinea's land courts (and to this article).

1. R. W. James, " 'Unalienated' Land Policies," *Melanesian Law Journal* 11 (1983): 34; Michael J. Trebilcock, "Customary Land Law Reform in Papua New Guinea: Law, Economics, and Property Rights in a Traditional Culture," *Adelaide Law Review* 9 (1983): 194.

2. Donald Denoon, "Introduction," in *A Time to Plant and a Time to Uproot*, ed. Donald Denoon and Catherine Snowden (Port Moresby: Institute of Papua New Guinea Studies, undated), 1-2, 10; Trebilcock, "Customary Land Law Reform," 191.

3. Peter Fitzpatrick, "The Knowledge and Politics of Land Law," *Melanesian Law Journal* 11 (1983): 17; James, " 'Unalienated' Land Policies," 34-38; Robin Hide, *The Land Titles Commission in Chimbu*, New Guinea Research Bulletin no. 50 (Port Moresby and Canberra: New Guinea Research Unit, 1973), 13-14; Alan Ward, "Customary Land, Land Registration, and Social Equality," in Denoon and Snowden, *A Time to Plant*, 249-250.

4. Alan Ward, "Agrarian Revolution: Handle with Care," *New Guinea* 6 (1972); Ward, "Customary Land," 249-250; S. Rowton Simpson, R. L. Hide, A. M. Healy, and J. K. Kinyanjui, *Land Tenure and Economic Development: Problems and Policies in New Guinea and Kenya*, New Guinea Research Bulletin no. 40 (Port Moresby and Canberra: Australian National University, 1973).

5. Those who advocate customary land registration as a vehicle for transforming the nature of land tenure and thus the ownership of Papua New Guinea's natural resources include Trebilcock, "Customary Land Law Reform." Those who believe that through registration, customary tenure, clan ownership and Papua New Guinean land ownership can be maintained include James, " 'Unalienated' Land Policies"; J. Fingleton, "Customary Land Registration as an Instrument of Socio-Economic Change," paper presented at the 1981 Waigani Seminar (University of Papua New Guinea, Port Moresby, mimeo, 1981); and Papua New Guinea Government, Commission of Inquiry into Land Tenure (Port Moresby: Papua New Guinea Government Printer, 1983).

6. For definitions of legal pluralism, see John Griffiths, "What Is Legal Pluralism?" *Journal of Legal Pluralism* 24 (1986); Sally Merry, "Legal Pluralism" *Law & Society Review* 22 (1988); Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

7. Sally Falk Moore, *Social Facts and Fabrications: "Customary" Law on Kilimanjaro* (Cambridge: Cambridge University Press, 1986).

8. Marilyn Strathern, *Official and Unofficial Courts: Legal Assumptions and Expectations in a Highlands Community*, New Guinea Research Bulletin no. 47 (Canberra: Australian National University, 1972).

9. For a discussion of the interplay of customary law and common law in the Papua New Guinea common law courts, see Jean G. Zorn, "Making Law in Papua New Guinea," *Pacific Studies* 14, no. 4 (1991): 1-34.

10. Robert Gordon and Mervyn Meggitt, *Law and Order in the New Guinea Highlands: Encounters with Enga* (Hanover, N.H.: University Press of New England, 1985).

11. The discussions of customary land law in this and other sections of this article are drawn from a number of sources, including Ron Crocombe and Robin Hide, "New Guinea: Unity in Diversity," in *Land Tenure in the Pacific*, ed. Ron Crocombe, 3d ed. (Suva: University of the South Pacific, 1987), 324-354; D. J. Colquhoun-Kerr and Andrew A. L. Lakau, "Land Tenure and Land Dispute Settlement in Enga," *Melanesian Law Journal* 11 (1983): 62-67; Andrew Strathern, "Melpa Land Tenure: Rules and Processes," in *Land Tenure in Oceania*, ed. Henry P. Lundsgaarde (Honolulu: University Press of Hawaii. 1974), 18-38; Peter Eaton, "Customary Land Dispute Settlement:

Should Lawyers Be Kept Out?" *Melanesian Law Journal* 11 (1983): 47-50; Ian Hogbin, "Land Tenure in Wogeo," in Ian Hogbin and Peter Lawrence, *Studies in New Guinea Land Tenure* (Sydney: Sydney University Press, 1967), 3-44.

12. In some Papua New Guinean societies the corporate landholding body is the clan, in others the subclan, lineage, village, or extended family. For brevity's sake, I talk here about "clan land" but mean by that "clan, subclan, lineage, village, or extended family land" as appropriate.

13. K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).

14. For example, Andrew Strathern describes five land disputes among individual Melpa. One was settled (so to speak) when a disputant stole the produce from the garden in question; another was won by the party with more "personal assertiveness"; in a third, clansmen determined new boundaries; in the fourth, the parties' arguments caused so much trouble that clansmen forbade either of them to use the disputed garden; finally, in one case, the disputed land was divided. Strathern, "Melpa Land Tenure," 36-37.

15. Mervyn Meggitt, *Blood Is Their Argument: Warfare among the Mae Enga Tribesmen of the New Guinea Highlands* (Palo Alto, Calif.: Mayfield, 1977).

16. Ward, "Customary Land," 255-258.

17. See, for example, the articles collected in *Problem of Choice: Land in Papua New Guinea's Future,* ed. Peter G. Sack (Canberra: Australian National University Press, 1974); and in *Lo Bilong Ol Manmeri: Crime, Compensation, and Village Courts,* ed. Jean Zorn and Peter Bayne (Port Moresby: University of Papua New Guinea Press, 1975). For a provocative discussion of the ways in which new nations recreate the story of their past to support the ideologies of the present, see Roger M. Keesing, "Creating the Past: Custom and Identity in the Contemporary Pacific," *The Contemporary Pacific* 1, nos. 1 & 2 (1989).

18. Colquhoun-Kerr and Lakau, "Land Tenure," 59; Meggitt, *Blood Is Their Argument.*

19. Government of Papua New Guinea, Committee of Inquiry into Tribal Fighting in the Highlands, *Report* (Port Moresby: Papua New Guinea Government Printer, 1973), 14.

20. For the anthropological bases of this approach, see Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (Glencoe, Ill.: The Free Press, 1955); Philip H. Gulliver, *Social Control in an African Society* (London: Routledge & Kegan Paul, 1963); Paul Bohannan, *ed., Law and Warfare* (Austin: University of Texas Press, 1967); Lucy Mair, *Primitive Government,* 2d ed. (Bloomington: Indiana University Press, 1978); A. L. Epstein, ed., *Contention and Dispute: Aspects of Law and Social Control in Melanesia* (Canberra: Australian National University Press, 1974).

21. The Land Disputes Settlement Act (ch. 45) sections 17 to 20 supports the assumption that mediation and compromise are central to customary law, in providing that local land courts should attempt to settle disputes using mediation; a number of the commentators on the act have presumed that mediation inevitably entails compromise. Colquhoun-Kerr and Lakau, "Land Tenure," 72-76, criticize the local land courts in Enga Province because they decided, rather than mediated, disputes. But land court magistrates and others have pointed out that mediation was never part of the traditional dispute manage-

ment process of every group. R. Giddings, "Beyond the Land Courts: Dispute Settlement or Land Distribution," in Institute of National Affairs Public Seminar, *Land Policy and Economic Development in Papua New Guinea* (Port Moresby: Institute of National Affairs, 1981), 37-42; Steven Zuckerman, "Vengeance and Mediation: The Incorporation of Village Courts into Kamano Society," *Journal of Anthropology* 6, no. 2 (1987): 1-33.

22. Hide, *The Land Titles Commission,* 13-14.

23. Native Lands Registration Ordinance 1952.

24. Crocombe and Hide, "New Guinea," 348-349; Colquhoun-Kerr and Lakau, "Land Tenure," 70.

25. Government of Papua New Guinea, Commission of Inquiry into Land Matters, *Report* (Port Moresby: Papua New Guinea Government Printer, 1973), ch. 8; Colquhoun-Kerr and Lakau, "Land Tenure," 70-71; James, " 'Unalienated' Land Policies," 36-37; Crocombe and Hide, "New Guinea," 349-350; Hide, *The Land Titles Commission,* 13-14; Jean Zorn, "The Land Titles Commission and Customary Land Law: Settling Disputes between Papua New Guineans," *Melanesian Law Journal* 2 (1974).

26. Commission of Inquiry into Land Matters, *Report,* 113.

27. Ibid., 114.

28. Land Disputes Settlement Act (ch. 45) sections 11, 15, and 27; 27(1)(c) (quotation); 22 and 23; 46, 47, 50, and 51.

29. Ibid., section 35.

30. Ibid., sections 39(1), 40, 39(5), 44 (quotation), 42 (quotation).

31. Government of Papua New Guinea, Land Court Secretariat, "First Regional Land Magistrates Seminar 1979: Report" (Port Moresby, mimeo, July 1980), 25-35.

32. Colquhoun-Kerr and Lakau, "Land Tenure," 79-81.

33. R. Giddings, "Land Dispute Settlement in Enga: Where to from Here?" (Enga Integrated Rural Development Project, Wabag, mimeo, 1980).

34. Government of Papua New Guinea, Land Court Secretariat, "Annual Report 7/79 to 7/80" (Port Moresby, mimeo, October 1980); Eaton, "Customary Land Dispute Settlement," 53.

35. *Augustine Olei v. The Provincial Land Court at Port Moresby, Kwalimu Lofena, Edward Iorive and Bue Goroga* [1984] PNGLR 295, 298; *The State v. Giddings, Ex Parte Tiangan Koam* [1981] PNGLR 423, 424; *The State v. District Lund Court Ex Parte Caspar Nuli* [1981] PNGLR 192, 193. The opinions of the Papua New Guinea National Court are collected annually in *Papua New Guinea Law Reports* (PNGLR) and are available in many major law libraries in Australia and the United States. Citations to National Court cases discussed in this article are to the name, date, PNGLR volume, and page number of the case. Local and provincial land court opinions are not published and are available only from the land court involved or, occasionally, from the Papua New Guinea government's Land Court Secretariat.

36. For analyses of the customary dispute-settlement process, see Philip H. Gulliver, *Social Control in an African Society* (London: Routledge & Kegan Paul, 1963); Philip H. Gul-

liver, *Disputes and Negotiations* (New York: Academic Press, 1979); Laura Nader, "Styles of Court Procedure: To Make the Balance," in *Law in Culture and Society*, ed. Laura Nader (Chicago: Aldine, 1969), 69-91.

37. Zorn, "Making Law," 23-25.

38. *Wena Kaigo v. Siwi Kurondo and Others* [1976] PNGLR 34, 37-38.

39. Ibid., 38.

40. *State v. Giddings* [1981] PNGLR 423, 429.

41. Ibid., 429-430.

42. Hide, *The Land Titles Commission,* 14.

43. And usually won't, citing the principle of *stare decisis,* which binds the court to apply the currently effective rule. Courts can, and occasionally do, decide to forgo precedent, to adopt a different rule, but seldom before changing conditions have made the accepted rule totally inoperative. More often, rules change subtly and gradually, through changing court interpretations and applications.

44. *The Application of Nango Pinzi on Behalf of Certain Sio People,* unreported National Court judgment no. N770 (mimeo, 1989). But, interestingly, though the court in *Application of Nango Pinzi* discusses *State v. Giddings* and even praises its logic, the court does not mention that its view of the viability of the rule of original occupancy and that of *State v. Giddings* are opposite.

45. *The Application of Nango Pinzi on Behalf of Certain Sio People,* unreported National Court judgment no. N770 (1989), 4. Although the local land court states that the land is "owned" by the Sio, the decision's definition of "ownership" is closer to a customary law view of the relation of a clan to land (the current generation can do with the land as it likes but may not transfer it away from future generations of the clan) than it is to a common law definition of freehold ownership (under which current owners have the right to sell or otherwise transfer ownership of the land).

46. Ibid., 5.

47. Ibid., 8.

48. And, by the way, applying that provision wrongly. Under section 67 of the Land Disputes Settlement Act, a party establishes rights to land only if it has held the land without the permission of the party claiming to own the land. Here, the provincial land court seems to have stopped when it found that the Kulavi had been in possession for more than twelve years, and did not inquire whether its possession was adverse to the Sio or arose from a grant by the Sio of possessory rights.

49. *The Application of Nango Pinzi on Behalf of Certain Sio People,* unreported National Court judgment no. N770 (1989), 19.

50. This new interpretation of customary law has already produced problems. Customary "owners" of land demand large payments before development projects can proceed (and renew their demands at intervals). This not only slows development (or brings it to a halt, as in the case of the landholders revolt in Bougainville Province) but also means that, through the accident of being on the land where a project occurs, some Papua New Guineans will get much richer than others.

51. *State v. Giddings* [1981] PNGLR 423, 426-427.

52. *The Application of Nango Pinzi on Behalf of Certain Sio People,* unreported National Court judgment no. N770 (1989), 12.

53. *The Application of Ambra Nii on Behalf of Himself and Other Members of the Toisap Clan,* unreported National Court decision no. N1007 (1991).

54. Ibid., 5.

55. Ibid., 8-9.

56. Ibid.

57. *The State v. Giddings* [1981] PNGLR 423, 429-431.

58. *State v. District Lund Court, Ex Parte Caspar Nuli* [1981] PNGLR 192, 196.

59. Ibid., 196-197.

60. *State v. Giddings* [1981] PNGLR 423, 428-429, 431.

61. In *State v. Giddings,* it is also probable that the land court's unusual procedure (which included meeting in secret, hearing few witnesses, not permitting witnesses from opposing clans to confront one another, and marking the boundaries with neither clan present) were occasioned by the violence that had been attending Enga land court hearings and attempts to mark the boundaries of disputed land, violence that had led to the closing of the land courts for several months in 1978 to 1979.

62. Hide, *The Land Titles Commission,* 13-14.

63. Gordon and Meggitt, *Law and Order.*

64. *The Application of Nango Pinzi on Behalf of Certain Sio People,* unpublished National Court opinion no. N770 (1989), 19.

65. See, for example, the articles collected in Jean Zorn and Peter Bayne, eds., *Foreign Investment, International Law, and National Development* (Sydney: Butterworths, 1975). The National Goals and Directive Principles reflect these ideas, as well. *Constitution,* Preamble: National Goals and Directive Principles 1-5.

66. W. W. Rostow, *The Process of Economic Growth* (New York: Norton, 1962); W. W. Rostow, *The Stages of Economic Growth* (Cambridge: Cambridge University Press, 1971); Mark Galanter, "The Modernization of Law," in *Modernization,* ed. M. Weiner (New York: Hill and Wang, 1976), 153. For critiques of market theory, see James D. Cockcroft, Andre Gunder Frank, and Dale L. Johnson, *Dependence and Underdevelopment: Latin America's Political Economy* (Garden City, N.Y.: Doubleday, 1972); Francis Snyder, "Law and Development in the Light of Dependency Theory," *Law & Society Review* 14 (1980).