PACIFIC STUDIES

Vol. 14, No. 4 December 1991

MAKING LAW IN PAPUA NEW GUINEA: THE INFLUENCE OF CUSTOMARY LAW ON THE COMMON LAW

Jean G. Zorn
CUNY Law School at Queens College,
City University of New York

This is the story of a court case in Papua New Guinea. The case, *png Ready Mixed v. The State*,[1] involved the Papua New Guinea government, a concrete manufacturer (which called itself "png Ready Mixed Concrete Pty. Limited"), and the residents of a squatter settlement near the town of Lae in a dispute over possession of the land on which the settlement stood. This is also the story of the ways in which customary law is infiltrating and changing the introduced common law of Papua New Guinea.[2] The case demonstrates that common law judges in Papua New Guinea are deeply influenced by the principles and processes of customary law, even when they do not know or do not admit that they are. It also suggests the limits of that influence, however, and the ways in which customary law changes when it becomes a part of a formalistic common law system.

The judge in the *Ready Mixed* case never doubted that common and statutory law, not customary law, applied to a conflict involving industrial expansion and land owned by the government, and he decided the case by referring to common law rules and principles. But customary law crept into his opinion as well. There is a metaphorical nicety to the mixture of the common law (which was introduced into Papua New Guinea from Australia during colonial times) and customary law (which, though changed over time, still represents the indigenous, precolonial social order) in a case called *Ready Mixed*, a case in which the parties are also a mixture—expatriates versus Papua New Guineans, a

company versus villagers, the interests of industry versus the need for shelter. The residents of the squatter settlement, migrants from Papua New Guinea's rural villages, are themselves mixed, partaking simultaneously of the old order and the new, recreating a traditional village in an urban setting, engaging both in subsistence gardening and in wage employment, subject both to custom and the common law.

Ready Mixed: The Company, the Government, and the Villagers

The residents of the squatter settlement in the *Ready Mixed* case are part of the ever-growing stream of people moving from Papua New Guinea's traditional rural villages into its towns. Papua New Guinea is like other Third World countries in the intensity of its urban migration pattern. And Papua New Guinea resembles other Third World countries, as well, in that its towns are not particularly welcoming to rural immigrants. Jobs are scarce, wages for unskilled work low, and inexpensive housing virtually nonexistent. Many of the migrants must begin urban life on patches of unused land in or near the towns, building makeshift shelters from whatever materials they can find. Newcomers tend to settle near people they know, people from home or those with whom their village has had traditional trading relationships, in *ad hoc* communities that Papua New Guineans now routinely call squatter settlements, although some of the settlers rent from traditional landowners and are not, technically, squatters.[3] Within the settlements, order tends to be maintained and disputes managed in customary fashion, although customary rules and procedures change to meet the new conditions of urban life.[4] In recent years, as crime in Papua New Guinea's towns has grown, it has become fashionable to view the squatter settlements as sources of crime, disease, and disorder.

In the mid-1960s, a sizeable group of migrants, primarily from the Sepik, took up residence in a village on the east bank of the Bumbu River near the town of Lae.[5] The village was the home of the members of the Ahi Association whose ancestors, the original bearers of the name Lae, had settled the area in precolonial times. Relations between the migrants and the Ahi Association people were cordial at first, but as village land became scarce, tensions developed; and in 1968, about twenty Sepik people decided they would have to move to the uninhabited marshlands on the west bank of the river. Over the years, the population of the new settlement grew, until by 1981 there were over five hundred residents (mostly from the Sepik but some from the Highlands and other areas as well) occupying about seventy houses. The settlement's

semiofficial name is SPT2, but it is often referred to as Biwat, after the home village of many of the settlers. By 1981, many of the original makeshift shelters had given way to substantial, permanent dwellings. Gardens and trees had been planted and much of the swamp drained. Children had been born, grew, attended Lae schools. Many of the residents went to work each day in Lae.

At first, the residents were uncertain whether the land on which Biwat stood was customary land, still owned by the Ahi Association, or government land. Some residents had seen government maps and documents that included the land in the approximately 12,000-acre parcel that makes up the Town of Lae, title to which had been registered as belonging to the colonial administration in 1942. The Ahi Association still claimed the land, however, and some of the residents paid rent to the association until 1979, when the association gave up its claim to the land in exchange for compensation from the government.[6] The government did little to help the migrants develop their village; however, officials were aware of the village's existence at least as early as 1976 and did nothing to hinder its growth either. Up to 1981, no evictions were attempted, nor did government officials suggest to the villagers that anyone might someday object to their continuing presence on the land. Like most squatter settlements, the village was not provided with electricity, water or garbage collection, but government health inspectors, welfare officers and census takers made routine visits, and the inhabitants voted in town and national elections.

But, in 1979, at about the time that negotiations between the Ahi Association and the government were concluding, a company that styled itself "png Ready Mixed Concrete Pty. Ltd." applied to the Papua New Guinea Department of Lands to lease all of the land on which the village stood.[7] The company was owned by expatriates but incorporated under the Papua New Guinea Companies Act (PNG Revised Laws, ch. 146). Its offices and concrete-mixing facilities were located near the village, and it wished additional land for the bulk storage of cement and to expand operations. The government might at that point have conferred with village representatives, but it did not. Instead, it advertised the land for tender in the government gazette, in radio announcements, and on the notice board of the Lae Town Council offices. As prescribed by statute, the Land Board held a public meeting in February 1980 to consider the tenders it had received. In February 1981, the board announced that a ninety-nine-year lease of the village land had been granted to the company. Shortly before this announcement, the company had contacted the Department of Lands about

ejecting the villagers. The government agreed that it might have some responsibility for carrying out evictions but suggested that the company contact its own solicitors about mounting a private ejectment action. After the award of the lease, the company brought suit against the government in the Papua New Guinea National Court, asking for immediate vacant possession of the leased land.[8]

The villagers did not go quietly. They learned in 1980, some time after the meeting of the Land Board, that their land was up for tender. Between November 1980 and May 1981, they held a number of meetings to protest the possibility of eviction. One speaker at their meetings was Utula Samana, the premier of Morobe Province, who argued that the villagers should be allowed to remain on their land until the national government provided an alternative village site. The government refused either to do this or to permit the village to remain permanently at its present location. The company reacted to the villagers' distress by including Samana as a respondent in its lawsuit, asking for a declaration that he had acted unlawfully in advising the residents not to leave the land.[9] The only interested parties not initially included in the lawsuit were the villagers themselves. They had to beg the court's permission to be included.

The National Court resolved the dispute in a way that gave something to the company and something to the villagers. The court found that the company did indeed have legal title (or, at any rate, would have it once the Department of Lands, an agency notorious for administrative slowness, got around to issuing the promised lease) and that the company was therefore entitled to possession of the land. But the court also found that the villagers had established a possessory interest that, in the court's judgment, entitled them to remain on the land for another six months to a year.

The Courts, the Common Law, and Custom

Although the National Court presumed, as Papua New Guinea courts tend to do, that the common law imported from England, rather than the customary law of Papua New Guinea, should apply to the case, the court's decision in *Ready Mixed* was novel in a number of ways. The court based its decision upon a rule that was new even to the English common law and then applied this rule in a new way, unlike the way it had been applied in England. The court's decision was also influenced by customary law principles and concepts. But none of the novelty is acknowledged in the court's opinion, nor does the court mention its use

of custom. Instead, for the most part, the judge writes as if he is merely finding and applying settled common law doctrines. The reason for the judge's reticence on these subjects lies in the tensions inherent in the judicial process in a pluralistic society.

Like most of the new nations of the Pacific, Papua New Guinea chose at independence to retain the common law, which had been imported during the colonial period, as part of its legal system. And, like courts in other nations that have continued to recognize the common law, the Papua New Guinea courts find themselves in a continual conflict between the common law's impetus towards certainty and continuity in the law (an impetus that finds its expression in the presumption, deeply engrained in common law jurisprudence, that every case can and should be decided by applying the rules found in prior cases) and the country's need for changes to that law, changes that will make the imported law better suited to the circumstances of Papua New Guinea and its people. To some extent, the tension between the impetus towards certainty and the need for change so the law will better reflect changing social and economic conditions exists in every common law jurisdiction.[10] But it is particularly marked in countries such as Papua New Guinea where the common law is a foreign implant (in Papua New Guinea's case, out of England by way of Australia), characterized by a set of substantive rules as well as by a dispute-resolution ethos and procedure that bear little relation to the norms, values, and processes of the customary legal systems indigenous to the country.

The Papua New Guinea Constitution attempts to resolve the tension by providing that the substantive rules of Papua New Guinea's underlying law (a phrase chosen to distinguish Papua New Guinean law from the English common law) should be an amalgam drawn both from custom and from the common law of England. In fact, the Constitution suggests that, in choosing which principle of law to apply to a case, the courts should look first to custom and fall back upon an English rule only when no customary norm is applicable.[11] However, the Papua New Guinea courts seem to have had a great deal of difficulty in weaning themselves from English law. They continue to cite almost exclusively to English precedents or Papua New Guinea cases that applied Australian or English rules and seldom discuss whether the common law rule is appropriate to the circumstances of Papua New Guinea. Custom is seldom mentioned in cases decided by Papua New Guinea's National and Supreme courts. When it is mentioned, it is usually dismissed as irrelevant.

As a result, many people have gotten the impression that the common

law of Papua New Guinea remains resolutely English, that the courts are not adapting the law to the special circumstances of Papua New Guinea (circumstances, needless to say, very different from those that have ever prevailed in England), and that custom is not influencing the development of Papua New Guinea's law.[12] But this impression is not entirely correct. The law of Papua New Guinea is diverging from that of England, is becoming more Papua New Guinean with every case that the judges of the National Court or Supreme Court decide, and customary law has been influential in shaping the course of change. However, the changes that courts are making to the common law go unremarked (even, I suspect, by the judges themselves) because, in their opinions (the documents that judges write to explain and justify their decisions), the judges seldom mention that they have changed the law or that they have used principles of customary law in doing so.

The reasons for the unwillingness or inability of Papua New Guinea's judges to admit the reality of legal change or the influence of custom lie in the narrowly formalistic brand of common law jurisprudence that was bequeathed to Papua New Guinea by its colonial courts. The jurisprudential paradigm developed in nineteenth-century England and Australia (the paradigm that was introduced into Papua New Guinea and taught to the people who are today its judges and lawyers) is positivist.[13] Positivism is both a philosophical system, which attempts to explain the sources and purposes of law, and a set of instructions for judges, telling them how to decide cases. As a philosophical system, positivism preaches that the law is found only in statutes or cases, that is, in the pronouncements of legislatures and courts, the agents of the sovereign or state.[14] As a methodology, positivism instructs judges to decide new cases by combing prior cases to find an applicable common law rule. In the positivist universe, a judge ought not to look to custom or social conditions for the principles on which to decide a case, because neither custom nor social conditions are sources of law. If the rule of an earlier case is not suited to the social and political circumstances in which the new case arises, it is not the business of the judge to change the rule or to search for a new one.[15]

It is probably not mere coincidence that positivism became predominant in common law jurisprudence during the colonial period. Positivism's insistence on a single source of law enabled the colonizers to apply their own law wherever they went and reinforced their claims that their role was legitimate. Positivism plays a similar role for the new government of a new and pluralist nation. The government's claim to authority and legitimacy is supported by its claim to be the sole source of law

and its ability to apply the same law, with relative uniformity, to the disparate groups and regions under its sway.

But positivism depends upon two untenable propositions. First, it presumes that the common law contains a rule to fit every case that will come before any court. Second, it presumes that the facts of widely disparate cases will be so similar that judges can perform their rule-finding function mechanistically and that considerations of the purpose or effects of the rule need not impinge on the judicial process. In sending judges back to old cases and old rules, in limiting their authority to the mechanical task of picking out the appropriate rule and slapping it down on a new set of facts, positivism is, in the conflict between continuity and legal change, squarely on the side of continuity. But, even in England where the common law was born, judges have discovered time and again that there are many cases in which the questions and issues cannot be resolved by simple application of preexisting rules. Thus, even in its English home territory, the common law has changed over time—sometimes dramatically, more often by gradual evolution as judges reinterpret and reshape old rules to meet changing circumstances. It is therefore not surprising that judges in Papua New Guinea, a country very different from the one in which the common law was originally developed, frequently find that the available common law rules do not solve the problems that cases pose. So they, too, change the rules, often using principles and norms drawn from customary law to do so. Their positivist training, however, deters them from admitting in their opinions that they are doing this. Decisions of the Papua New Guinea courts that markedly alter the common law as it would operate in England continue to be written as if the judge had simply found the applicable English rule and stuck it on the case.

The National Court and the Common Law

In the *Ready Mixed* case, for example, the court made some radical changes to Papua New Guinea land law. But the opinion is written as if the court has merely found, and is applying, preexisting rules. Prior to the *Ready Mixed* decision, villagers in the respondents' position would most probably have been subject to immediate eviction; the law of trespass would have governed their situation. As trespassers—a category that includes anyone who enters land owned by another, however innocently they do so—they would have had no right to remain on the land, even for a moment.[16] The company and the government presumed that the law of trespass would govern this case:

> [The villagers] came onto the land as trespassers. . . . [T]heir status should not be recognized as having changed because they knew that the land belonged to the government and they never took any steps to notify the authorities of their presence, nor to request permission to put up their structures nor to do anything to put the State in a position where it could make an informed decision as to what to do.[17]

As trespassers, the company and the government argued, the villagers should be promptly ejected.

The court, however, accepted the residents' argument that they were protected from immediate eviction by the English principle of proprietary estoppel, which had been described by Lord Denning in an English case, *Crabb v. Arun District Council*.[18] Lord Denning's description of the rule is quoted in the *Ready Mixed* opinion: "Short of an actual promise, if [a landowner], by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights—knowing or intending that the other will act on that belief—and he does so act, that again will raise an equity in favour of the other."[19] Applying this rule, the Papua New Guinea court found that the government, the putative owner of the land, had effectively conveyed to the villagers a license to possess the land by its conduct in not evicting the villagers, or even warning them that they might be subject to eviction, throughout the years that the temporary settlement was growing into an established village. The government had led the villagers to believe that it would not insist on its legal rights, with knowledge that the villagers would act on that belief by further investing in the development of the land. In leading the villagers to rely to their detriment on this belief, the government had created a license on their behalf against it and the company, which took the lease knowing of the situation; and both were estopped for a period from contesting the villagers' continuing possession.

This change in the common law was a large step for the court to take. The doctrine of proprietary estoppel was new not only to land law in Papua New Guinea but to land law in England as well. The doctrine had been developing for some time in the English courts but was not fully adopted in England until *Crabb v. Arun District Council*, which was decided 23 July 1975, less then two months before Papua New Guinea obtained its independence. The Papua New Guinea Constitution, at Schedule 2, limits the reception of English law by the courts of Papua New Guinea to those principles that were in effect at the date of independence. Thus, a two-month delay by the English court in render-

ing its decision in *Crabb v. Arun* might have left the Biwat villagers without a remedy.

It was by no means a simple or obvious step, however, from the reception of the doctrine to the conclusion that it protected the residents of Biwat. In taking the step, the court was again creating new law, going even further than the English courts had gone. In reaching its decision that the government and the company had created a situation in which the villagers might claim the protection of the proprietary estoppel doctrine, the court did not rely upon what the government and the company had done or said but upon what they had failed to do or say. A number of English cases are cited in the *Ready Mixed* opinion;[20] but in each of them, unlike the situation in *Ready Mixed*, the landowner had overtly said or done something to confirm the occupants' belief that they had been granted an interest in the land. In *Inwards v. Baker* and *Jones v. Jones*, a father had bought land and asked his son to occupy it.[21] In *Pascoe v. Turner*, a middle-aged philanderer told his rejected mistress that the house they had shared was now hers.[22] In *Ives v. High* and *Crabb v. Arun*, the parties had expressly agreed to rights-of-way across the landowners' property.[23] In each of these cases, the occupants had then acted to their detriment in reliance on these express promises or agreements and the landowners had then stood by, acquiescing in these actions.[24] The problem for the occupants (and for the courts) in the English cases was that the landowners' promises or agreements were unenforceable at law because the parties had neglected to write up or register their agreements. In the *Ready Mixed* case, however, no government official had ever expressly promised the residents that they could stay, nor had the government even implied such by any action (such as by providing building materials or garden seed). All the government ever did was to do nothing, to issue no warning that all could be taken away as houses were built, gardens were planted, and money was spent.

Courts everywhere find it much easier to find liability where there is misfeasance, where a person has actually committed a wrong, than where there is merely nonfeasance, a failure to do right. But, urged on by counsel for the villagers, the National Court was willing to take this leap and to hold that the government by its nonaction, by its failure to speak or act, had implanted in the settlers the belief that it would not contest their residence:

> Once a significant number of persons had taken up residence on the land, built dwelling houses on it, planted trees and the like,

> it was up to the State if it wished to protect its right to possession of the land to issue some sort of a warning or statement that persons who came on to the land to take up residence and build and plant crops there did so at their own risk. Yet no such warning issued at any time. The result is that those who came, took up residence, built houses, planted crops and the like . . . may be regarded as having sufficient interest in the land as to give rise by early 1981 to an equity entitling them to remain on the land despite the State's legal right to possession.[25]

Unlike the government, the company had attempted to procure the settlers' eviction but not, the court found, in a timely fashion and, even then, not strenuously. After putting in its bid for the lease in 1979, the company waited until 1981 to ask the Department of Lands whether the government might evict the settlers. Informed that the government would prefer not to take action, the company did not insist that the state give it vacant possession but waited until after its lease had been approved to move against the settlers. "The company was in my view taking a calculated chance that sooner or later, though preferably sooner, the occupants would be ejected. In the meantime it refrained from insisting on vacant possession because such insistence may well have resulted in the State withdrawing its offer to grant the lease to the company."[26] Because the company knew of the situation and did so little, the court found that its lease was subject to the residents' license against the government.

By recognizing the doctrine of proprietary estoppel, a doctrine only recently developed by the English courts, and by applying it in these circumstances, the court was making new law for Papua New Guinea. And this new law can have far-reaching implications. At the least, it might prompt the government, which had hoped that if it ignored squatter settlements assiduously enough they would simply go away, to reconsider its alternatives in relation to the settlements that have grown up in all of Papua New Guinea's towns. At best, it provides squatters with a legal weapon that will help them avoid or delay eviction. But positivist courts do not like to be seen as lawmakers. Legislators, they insist, make new laws while courts merely apply the law as they find it.

It was, therefore, to be expected that the court would not announce this as a new doctrine. Indeed, the court said that it had found the rule in existing English law. Although admitting the doctrine was found in a case "decided on 23rd July 1975, a date about as close to the date of Papua New Guinean Independence as one needs to go," the court

referred to *Crabb v. Arun* not as creating the doctrine but, merely, as discussing it.[27] The court invented a history for *Crabb v. Arun*, placing it in a line of cases named but not described, partly (I expect) because descriptions would reveal that the doctrine had not always existed but was gradually developed over a series of cases, and partly because the naming was sufficient to establish, in incantatory fashion, that *Ready Mixed* was not new but was part of a tradition. To give the doctrine a local pedigree, the court cited a preindependence Papua New Guinea case. That case referred to (though it did not adopt) the holding of one of *Crabb v. Arun*'s predecessors; but, the court now opined, the earlier case would have adopted the doctrine, or something like it, if only the facts of the earlier case had been different.[28]

The common law is made up of two sets of norms—the rules of law and the principles of equity—either of which, depending upon the circumstances and the courts' inclinations, can be applied to a particular case. The law gives money damages to those who have been injured by a breach of the rules; equity gives various remedies, when fairness or the parties' justified expectations are at stake, even though a rule might not have been breached. Proprietary estoppel is a doctrine of equity, allowing certain occupants of land to retain possession even though a strict construction of the rules of law would not permit them to do so. Equity is more flexible than law, but even equity is hedged about with procedural requirements and limited by the innate conservatism of the common law, so the relative flexibility of equity does not entirely explain the *Ready Mixed* decision. For that, one must look to customary law.

The National Court and Customary Law

Despite its conclusion that the doctrine of proprietary estoppel gave the villagers an equitable interest in the land, the court did not confirm them in permanent possession. Instead, it tried to strike a balance between the interests of the company and the needs of the villagers by permitting the villagers to remain on the land for six months to a year, after which the company would be free to bring ejectment proceedings again.[29] Nothing in the English doctrine of proprietary estoppel, nothing in English or Papua New Guinean principles of common law and equity, mandated this decision. The court found this remedy in customary law.

In striking a balance between the company and the villagers, the court was technically within the general guidelines laid down by Lord Denning in *Crabb v. Arun:* "it is for a court of equity to say in what

way the equity may be satisfied."[30] But this maxim is not intended to permit a judge to fashion a remedy from thin air. In each of the English cases cited in the *Ready Mixed* opinion, the courts created a remedy that matched, as nearly as possible, what the occupants had been promised by the landowners.[31] In other words, the English courts used their equitable powers to enforce the expectations that the landowners' promises had created.

But, in granting to the villagers possession for a limited time, the Papua New Guinea court gave none of the parties what it had requested. Indeed, none of the parties had suggested the remedy that the court adopted. The court discussed the remedies that the parties had wanted it to exact and gave reasons, based primarily upon the principles of common law and equity, for refusing each of these remedies.

The company and the government had wanted the villagers removed immediately, arguing that the residents could not seek equitable relief when, by being in unlawful trespass, they had violated the basic maxim that "he who comes to equity must come with clean hands."[32] Although the court found "some merit in this submission," it granted an equitable remedy nonetheless, seemingly on the grounds that the hands of the government and the company weren't entirely clean either. The court pointed out that, in the manner in which the land was advertised for tender, the government had acted within the letter of the relevant statutes but perhaps not within the spirit that expects a government to look after the people's welfare:

> The advertisement or a summary of it was placed on the town notice board and there were even announcements over Radio Morobe. But as Mr. Morey, the Provincial Lands Officer, fairly and properly conceded in evidence, there was no way in which from a practical point of view the occupants, who were so vitally interested, could have been expected to know that tenders were being called for or that the Land Board was meeting or what was going on generally.[33]

The court took pains to exonerate "the departmental officers who carried out their duty according to the statutory requirements, and probably more" and the Land Board ("There is no doubt that the Land Board came to a proper conclusion on the material before it that the public interest justified the granting of the lease to the company for the purpose of extending its industrial activities"). Nevertheless, the court concluded, there is blame to be placed somewhere, even if only upon "the

system," because "if the occupants had been given some proper notification and afforded a real opportunity to object to the company's application and to put their case to the Land Board, other considerations as to competing land use might have prevailed and the lease might never have been granted."[34]

The residents, too, had hoped for more than the court granted them. They argued for either lifetime possession or an alternative village site. Their argument for lifetime possession was based on common law precedent, most immediately upon *Inwards v. Baker*, one of the English cases that the court cites in its opinion in support for its statement that proprietary estoppel is an established rule. In that case, an English court had granted a son lifetime possession of a house that the son had built on land owned by his father.[35] The *Ready Mixed* opinion declared that case distinguishable, although it did not say why. Perhaps, the court had in mind the absence in the *Ready Mixed* situation of a familial relationship (although the villagers did point out that the government is "the father of the nation").[36] But in *Inwards*, the court did not base its decision on the duties that fathers owe to sons. It permitted the defendant lifetime possession not because he was a son of the landowner but because he had given up opportunities to purchase other house sites, relying on the landowner's promise that the house "was to be his home for his life or, at all events, for so long as he wished it to remain his home."[37] In fact, not only in *Inwards v. Baker* but in all of the English cases on which the *Ready Mixed* court relied, the courts gave lifetime or permanent possession to the holder of the equitable license. When counsel for the villagers in *Ready Mixed* argued that the equitable license should result in a grant to them of lifetime or permanent possession, she was closer to the mainstream of English jurisprudence than was the National Court in granting them only temporary occupancy.

The residents' argument for an alternative village site was based upon an amalgam of customary concepts: "Mr. Poli [a spokesperson for the villagers] says that if the National Government as the father of the nation does not carry out its responsibility of finding some land for him, he will stay on the subject land until he is pushed into the sea, that he regards the land (or part of it surely) as his and available for him to pass on to his children."[38] The court rejected this argument on two grounds. Neither of the court's responses was drawn directly either from common law or from customary precedents, but both reflect the premises on which the common law operates in a market economy. The court first pointed out that no statute requires the government to provide alternative sites for people who are being forcibly evicted and, in the absence

of statutory authority, "it would not be just and equitable [for the court] to order the State to provide alternative residential sites unless it could be shown that suitable land was available, and that has not been done.' "[39] In a market economy, government and the courts play a limited role. Housing, like the distribution of other goods, is a matter for the private sector, to be decided by the bargains that individuals make. Government does not provide goods and services, nor generally even require their provision; and the courts will intercede to require government action only in the presence of a statute expressly requiring that action.

The court's second response reflected a misuse of custom that is widespread in Papua New Guinean government and business circles: "Mr. Poli (and possibly some of the other occupants) has his own land elsewhere which he holds under customary tenure near Angoram in the East Sepik Province; he understandably prefers to live in Lae where he has his immediate family and his employment."[40] The court did not ascertain how many of the residents had customary land available to them in the Sepik, but, even if most of them did and even if their villages could support them, it was callous to assume that going home to the village was an acceptable alternative for people who had chosen to make a life in the town of Lae. Papua New Guinea's economic growth is predicated, in large part, on the myth of the village, the presumption that the village can support every urban worker, so that neither government nor corporate employers need make large expenditures for housing, health insurance, or other forms of social security.

The court referred to common law principles and premises to help it reject the remedies suggested by the parties but was remarkably reticent as to the principles underlying the remedy that it chose to order. The opinion is written as if that remedy springs necessarily from the doctrine of proprietary estoppel, but it does not. Once the court had decided that the residents had an enforceable equitable interest, that interest could have been enforced in a number of ways. The court could have ordered that the Land Board hearing be reconvened, giving the villagers an opportunity to present their position and the board the opportunity to make a decision taking into account both the country's need for industrial development and its need for urban housing. By differently interpreting the English cases, the court could have ordered that the villagers had lifetime possession or even a freehold. Or, by placing the burden of proof as to the availability of alternative accommodations on the government instead of on the residents, the court could have permitted the residents to remain in possession until another village site was found.

The court chose instead to give the villagers possession for a limited time. This choice may be broadly consonant with the principles of common law and equity, but it was not dictated by those principles.

In deciding that equity gave to these villagers a license to remain on the land for six months or a year, the court was formulating a new principle of the common law and equity of Papua New Guinea. Although the court did not express its debt to customary law for this new formulation, customary norms informed the decision. Customary law seeped into the opinion in ways that the court neither credited nor, perhaps, recognized. The influence of customary law is evident, first, in the court's recognition that the villagers' residence on the land and their work in developing it gave them some rights in the land; second, in the court's decision that it must balance the interests in the land of the company and the villagers; and, finally, in its manner of honoring that balance by granting possession to the villagers for a limited time.

In granting an interest to the villagers based upon their residence and development the court was adopting customary law notions.[41] Under customary law, clan and kinship are the basis of land rights, but interests in land may also be acquired through residence, contributions to the land-holding group, and participation in the development of the land. In most Papua New Guinean societies, ultimate territorial rights are held by the group as a whole; and most clans have stories describing the original settlement of the land and the naming of its features by the clan's founder, a putative ancestor of the current residents. This story, supported by legends in which clan totems spring from the land, links the group and its land in perpetuity. The land exists because the people found it and named its features, and the people exist as a group only in relation to the land. In the customary law of most Papua New Guinean societies, it is generally believed that the land cannot be permanently alienated from the clan, because to do so would be to alienate the identity of the people as well. But customary law does recognize other means by which clans may alienate or acquire land. Land may, for example, be lost to one clan and acquired by another by conquest. Land won in battle eventually belongs to the conquerors, if they cement their right to it by residing on it, planting gardens, and using it.

Within the clan territory subclans, family units, and individuals have rights to land, including rights to build houses or plant gardens on defined areas, to plant coconut or other trees, to hunt or fish, to use footpaths or gather wild fruits. A map of clan territory would be a variegated pattern. A family's needs require a variety of land types, so most families hold widely scattered plots for different purposes. Moreover,

some land uses are overlapping. The same plot of land in which one family holds gardening rights may provide coconuts or access routes for others. None of these rights can be described as belonging in perpetuity to an individual. Each individual exercises his or her land rights on behalf of the family and clan. Land is not individually owned, although individuals may nurture and preserve the land for this and later generations. Acquisition of these interests in land depends primarily on membership in the clan, on kinship; but a clan member who moves away, who does not participate in village affairs, may gradually lose land rights. Similarly, persons who were not originally members of the clan may acquire rights within its territory. They have potential claims to the land of their affines, to land owned by other kin, or even to the land of hereditary trading partners. They can actualize these rights by moving onto the land and taking part in the affairs of that group. As their land rights are gradually recognized, however, they come to be viewed as members of the clan, preserving by this genial fiction the general rule that clan land cannot be alienated from clan ownership.

A time chart of land rights within a clan would show a pattern that is simultaneously stable and shifting. The land rights of a son in a patrilineal society (or of a daughter in a matrilineal society) are acquired at birth, but whether these rights will mature into actual use of the land, and how much of it, will depend on how many other children are born, whether he or she stays in the village, is adopted into another family or moves onto a spouse's land, and whether other persons establish interests in the land that coexist with or contradict these land rights. At any moment in the life cycle, a person may have a secure hold on certain land rights, be in the process of gaining others, and be losing yet others. In recognizing that the residents of Biwat had established a claim to the land through their development and cultivation of it, as well as their participation in the life of the village, the court was borrowing from customary law the notion that interests can be acquired in land in this way.[42]

The court was also indebted to customary law for the notion that it should seek a compromise that balanced the interests of the company and the villagers. Under common law, a verdict that effects a compromise between the parties is unusual. Even at equity, which professes to be (and occasionally is) more attuned to justice and fairness than is the common law, the winner-take-all principle usually holds. The English cases cited in *Ready Mixed* may have stated that equity permits a court to fashion whatever remedy best redresses the injury,[43] but courts of common law and equity seldom take equity at its word in quite the way

that *Ready Mixed* did. Equity sometimes finds doctrines (such as proprietary estoppel) that allow it to appoint a different winner than would the common law; but having found a different winner, equity is no more likely than is the common law to give that winner only some of the pie. In the English proprietary estoppel cases that *Ready Mixed* cites, for example, the courts did not balance the interests of the occupants and the legal owners. In each case, the court gave the occupant all that he or she had requested.

Customary law, on the other hand, has a 10,000-year history of striking a balance, of attempting to settle disputes by giving something to each party and less than all to any, with the intention that everyone will come away from dispute-settlement negotiations with some satisfaction (or, at least, that no one will leave entirely dissatisfied). This was a sensible goal for the societies that developed Papua New Guinean customary law. Precolonial societies had methods, but not institutions, of norm enforcement. With no police to enforce the judgments of adjudicators, with only the power of opinion to ensure obedience to social norms, the primary methods for dispute resolution and norm enforcement were compromise, in which both parties, feeling satisfied with the outcome, would relinquish the dispute, or war, in which one party, not necessarily the one with the better claim, would prevail. Disputes occurring within a clan or village could more easily be resolved by reminders of mutual interest. In a village, everyone must go on interacting after the dispute has been resolved. Ongoing social relations will proceed with the least friction if everyone can take some degree of satisfaction in the outcome of the dispute-settlement process. Those occurring between clans and villages were less amenable to compromise, more likely to erupt into violence if a workable solution was not found; but it was possible, through mediation and compromise, to procure the mutual agreement of two clans based upon each clan's perception that its interests had been served.

The dispute between the villagers and the company, two entities with very different interests and worldviews, is more like a dispute between clans, neither of whom has much incentive for settling with the other, than like an intravillage dispute. And, as the court realized, striking a balance can be a sensible goal for a court operating in a large, diversified, and disunited society, as well as for a mediator attempting to avert interclan hostilities. The court was faced with competing demands, coming from different socioeconomic classes, each buttressed by contrary notions of what the public interest requires. The parties to this dispute, the villagers and the company directors, shared neither a common

culture nor a common vision of land use. To the villagers, land was shelter; to the company, it was capital. A judgment in favor of the company would uphold economic development but at the expense of the working poor. A judgment in favor of the villagers would support the notion that government's first commitment should be the distribution of the benefits of development to the mass of the people but at some risk that income-producing businesses would be alienated. Like a mediator in a traditional forum, the court recognized that the feeling on both sides was at such a pitch, the competing values so firmly entrenched, that a winner-take-all solution, no matter how strongly supported by legal rules, would not end the dispute. In a politically tense situation, to come down entirely on either side was to ensure that the other would continue to pursue avenues of redress, both within the courts and without. The court chose, as customary law might have, a compromise position that gave some support, however symbolic, to both points of view.

The court's resolution of the controversy was to recognize the company's right to ultimate possession while permitting the villagers to continue in possession for a limited time. The court cited no prior English or Papua New Guinean common law cases that had adopted this remedy. Probably there are none. It is a resolution more familiar to customary law than to common law or equity. It is not unusual in customary law to find instances where disputes over land have been settled by recognizing the ultimate rights in the land of one party while permitting the other to remain in possession for a limited period. Under the conditions of traditional agriculture, where land is gardened only for as long as the soil is productive and then left fallow for a number of years, the length of a party's possession can be bounded by the time when the crops ripen or the garden has returned to fallow or the thatched house has become unfit for habitation.[44]

However, where land has been converted to permanent cash crops such as copra or coffee, or where houses have been built of fiberboard or concrete, the courts must develop other yardsticks to determine the length of possession. There are Papua New Guinean cases that have awarded temporary possession to land, but they are cases heard in the local land courts, which apply customary law to disputes over customary land. The court in the *Ready Mixed* case did not cite them, though it was probably familiar with them. A local land court in East New Britain Province, for example, settled a dispute between two clans by determining that one owned the disputed territory but the other could harvest existing cash crops for five years. The court also required the occupying clan to pay an annual rental of K100 (approximately

US$100) to the landowners and the landowners to pay compensation for trees still producing when they regained possession.[45]

In permitting the Biwat villagers to remain temporarily in possession of their settlement, the National Court decision was consonant with customary law. But it was not a perfect mirror of customary law, either as traditionally practiced or as developed by local land courts. The remedy that the National Court devised for the village residents was considerably less generous than the settlement offered by the local land court in East New Britain to the occupying clan. The *Ready Mixed* decision permitted the residents to remain on the land for only six months to a year, and the court did not order that they be compensated for the homes and gardens they would leave behind.[46] In utilizing customary law, the *Ready Mixed* court altered it to suit the aims of the common law in an industrializing society.

The rules and processes of the common law were developed to meet the needs of a market economy. An axiom of classical liberal theories of the common law is that the law best serves the market by leaving it free to order itself through the self-interested bargaining of the actors in the marketplace. In this view the proper role of the state, its courts, and its common law is not to govern the market, to own or manage industry, but to support entrepreneurs by enforcing the bargains they make. In this century, the excesses and abuses of the market economy have demonstrated the limits of that classical liberal approach. The common law has found an additional role in mitigating the market's abuses, particularly through equitable doctrines such as proprietary estoppel. But equity does not do away with the predominance of the market, nor does it significantly alter the common law's function as a supporter of the market economy. In effect, by softening the market's harsher impacts, equity helps the market to preserve itself. By adopting into equity a customary law principle, the court in *Ready Mixed* was changing the common law, but it was changing customary law as well, making custom serve the ultimate aims of a market economy.

A Commentary and Some Conclusions

The Papua New Guinea Constitution is not a positivist document. It presumes that custom, public policy, and the circumstances of the country are as much sources of law as are statutes and the decisions of common law courts. It recognizes that there may not be a preexisting rule or principle of the common law available for every case that a court must decide (or that the preexisting rule or principle, having been developed

in and for a very different society, may not be appropriate to the needs and conditions of Papua New Guinea) and that judges therefore have a responsibility not only to find law but to make it.[47]

As the *Ready Mixed* opinion demonstrates, however, the Papua New Guinea courts are resolutely positivist. They do not believe that law inheres in the norms and values by which people order their mutual existence and society meets its goals, whatever the sources of those rules. They believe that all the law is found in statute books and court reports, and that the proper role of the courts is to apply existing statutory and common law rules, not to create new common law principles out of the shared experience and common values of the people. Positivist judges thus tend to act as if they are finding the law even when, of necessity, they are making it. For example, the *Ready Mixed* case created new law, using customary norms to do so, but the opinion was written as if the court were merely finding and applying existing law. As a result, the process by which customary law became part of Papua New Guinea's common law, and the changes that the court made both to custom and to the common law, remained covert. The court did not discuss its assumptions about the nature of the customary principles that it was adopting, the policies that its new rules would further, or the relation of the new rules to the circumstances of Papua New Guinea.

We might wish to argue with the outcome of the case. We might, perhaps, have struck a balance differently, have given more time to the villagers and less to the company, have ordered the government to redo the process by which it allocated the land or to find an alternate site either for the company or for the village. Part of the reason for the positivist style of opinion writing is to forestall arguments of this kind. A judicial opinion is written as if it is merely an explanation of the grounds for the court's decision, but it is also a justification of that decision. By writing the opinion as if it were not making choices based upon policy, circumstance, or values but merely finding the applicable, already existing rule and mechanically applying it to the dispute, the court precludes (or hopes that it precludes) further argument on any basis other than whether it correctly applied the proper rule.

If the *Ready Mixed* opinion demonstrates the dominance in Papua New Guinea of positivist ideology, it also demonstrates the inability of that paradigm to encompass everything that judges, even positivist judges, routinely do. The court in the *Ready Mixed* case did create new rules for Papua New Guinea's common law, despite its positivist orientation. It recognized, albeit implicitly, that the existing rules and principles of the common law, either as previously applied in Papua New

Guinea or as recently developed in England, did not adequately solve the problems raised by the case. In order to balance the conflicting interests of the company and the villagers, of capitalist industrial expansion and the need to afford some protection to the victims of that expansion, new rules and remedies were needed. The court turned to custom to supply those new rules and remedies, perhaps out of the intuition that custom best embodies the policies, circumstances, and common understandings of Papua New Guinea.

In raising issues that demanded the construction of new rules and remedies, the *Ready Mixed* decision is not unique. Most cases require the court to consider new facts and issues and make new rules. The ultimate fallacy of the positivist position is its presumption that the facts of each new case can be mechanistically fitted under the rubric of a preexisting rule. But each new case differs, in one respect or another, from the cases that have gone before it. The facts of the dispute and the circumstances in which the parties find themselves are never precisely the same. The social policies that the rules are meant to effect change over time. No prior rule or principle precisely applies to the new facts, circumstances, and policies. The judge's act of reinterpreting a rule so it will apply to new and different facts itself changes the rule and makes it into something new. In finding and applying the law, the judge of necessity is making law. For many cases, although no rule fits the new facts precisely, more than one prior rule could be applied, depending upon how each is interpreted. In order to choose among competing rules, the court cannot use the rules themselves, because either would be equally applicable. In such a situation, "the process of judicial decision is, as a matter of fact, determined consciously or unconsciously by the judges' views of fair play, public policy, and the general nature and fitness of things."[48] Despite the claim of positivist judges that their role is merely to find the law, all judges, most of the time, are making law.[49]

The *Ready Mixed* case contains several examples of precedent's lack of definitiveness. At least two common law doctrines—trespass or proprietary estoppel—could have governed the case, and the court had to choose between them. The court chose to apply the doctrine of proprietary estoppel. Although the court gives no reason for its choice (the better to look as if no choice were involved), the choice did not rest within the rules themselves. Nothing in the elements of either doctrine definitely established it as more suitable to the situation. Most probably, then, the court's choice arose from an inchoate sense that proprietary estoppel better fulfilled the valid claims of the parties, as well as better serving the social policies that the court believed should be advanced.

Under the doctrine of trespass, the villagers would have been subject to immediate eviction, an outcome that the court obviously believed to be unfair. Using proprietary estoppel, the court could give the villagers a reprieve from the burden of ejectment.

But the doctrine of proprietary estoppel did not perfectly fit the circumstances of the parties, so, in adopting the rule, the court had to change it. In England, the doctrine had been used to protect a spurned and aging mistress, a son whose stepmother was overreaching, homeowners who found the paths from their land to the highway suddenly cut off. In each of these cases, a promise had been made and then taken back. Extending the doctrine to cover a squatter settlement in Papua New Guinea, settled by people with no assurances from the landowner that they had a right to settle, itself changes the meaning and effect of the rule. Finally, for its construction of the appropriate remedy, the court could find no common law principle or rule that seemed appropriate to the situation and had to invent one. In doing so, it looked to custom, probably because custom captured the court's sense of fair play, of public policy, and of the nature and fitness of things.

There are many layers of irony and ambiguity in the unacknowledged use of custom by the court in the *Ready Mixed* case—most particularly in its use of the people's law to give the people a very limited remedy. But, then, there are layers of irony and ambiguity generally in any attempt to integrate custom into a common law framework. Not the least of the problems is the difficulty that courts have in defining what custom is. Used to dealing with statutes and cases, with the law in written form, the courts have not evolved a method for finding laws that inhere in tradition, in unwritten (sometimes unspoken) norms, and in informal dispute-settlement processes.[50] The Papua New Guinea Constitution admonishes the courts to ground the law in custom but without a clear definition of custom, of whether it consists of norms and shared beliefs or whether it is a tally of common behavior patterns.[51] When the courts speak of custom, they seem to be referring to it sometimes as one, sometimes as the other.[52] Nor are the courts certain, despite the statement in the Constitution that custom need not have "existed from time immemorial,"[53] whether the norms, values, or behavior patterns of Papua New Guineans today can properly be called custom. To an anthropologist, it is axiomatic that the customary law of Papua New Guinea's precolonial villages did not, could not survive intact into the present, as if one hundred years of colonialism and economic change had no impact. And a number of lawyers have noted that many of the norms that village people now believe to be of ancient origin were probably developed relatively recently, by or as responses to

colonial authorities and policies.[54] But to a positivist court, accustomed to think of the common law as essentially unchanging (even in the face of evidence that it changes constantly), the notion of relying upon an ever-changing body of norms is unthinkable.

There is also a question whose custom to apply in a country in which each tribal group or village has its own customary law system. When forced to deal with the question directly, the courts have responded by refusing to apply customary law unless both parties to the dispute were governed by the same custom.[55] Implicit in that response is the presumption that customary law can apply only to cases in which both parties are native-born Papua New Guineans, since expatriates or naturalized citizens tend not to be members of customary communities and not to have a Papua New Guinean customary law that extends to them. Nowhere has the court imposed similar limitations on the coverage of the English common law, even though that could with equal justification be viewed merely as the customary law of one of Papua New Guinea's many groups of people. Papua New Guinean customary law, which is the indigenous law of the country, is treated by the courts as the personal law of certain peoples, applicable only to them; whereas the common law, which was imported, is treated as the residual and general category, potentially applicable to everyone.

The *Ready Mixed* decision demonstrates a remarkably apt way out of all the problems that the courts have created for themselves in dealing with custom. The *Ready Mixed* court treats custom not as a rule to be found and applied but, like public policy or a general principle of the common law, as a source of the law that the court is constructing. The customs that the court used to formulate its remedies were certainly not the personal law of the expatriate owners of the cement company. They may or may not have been the law of the Biwat villagers; the court never inquired. But they were representative of general trends in Papua New Guinean experience and values, of current social and economic conditions, as well as of a uniquely Papua New Guinean approach to solving the problems occasioned by these social and economic conditions. Whether the parties would have felt themselves ruled by these norms, in all their particularity, is irrelevant; what counted was that the parties—and later parties for whom the rule in this case now stands as a precedent—would recognize that the values and policies embodied in these norms express the values and policies of their society. The court used custom to guide it in developing a common law that is suited to the circumstances and needs of Papua New Guinea. In effect, it was relying upon (and formulating) general principles of customary law.[56]

But, even in a case that uses customary law as fluently as does the

Ready Mixed case, the changes that customary law undergoes when transmuted into a general principle of customary (or common) law are apparent. Law inheres both in substantive norms and in the processes by which those norms are realized in action. When common law courts adopt a substantive rule of customary law, they remove it from the customary process, thereby altering the operation of the rule and, because substance and process interact, changing the meaning of the rule as well. Because the aims of the common law process are different from the aims of the customary law process, the way in which substantive rules function in each is different as well. In the customary setting, the aims are to settle disputes, if at all possible, and, in doing so, to restore, for a time, amicable relations and to fulfill as much as possible the needs and expectations of all the parties at that time. No dispute is presumed permanently solved; the changing nature of village land needs, populations, and power relations mandate that no solution can be final, no rule impregnable. A decision that fulfilled the needs of a village at one time may not fulfill its needs at another time. To meet these aims, substantive norms must be flexible, fluid, capable of being used in different ways at different times. A rule firmly applied at one time may be later ignored in a situation that would seem similar to a mind trained in the common law.

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, for settled matters to be capable of being reopened when needs and social relations change, there must be a multiplicity of substantive rules potentially available to each dispute, with none carrying more weight than the others. For example, a village can hold simultaneously to the norm that land is inherited by stipulated kin and to the potentially contrary norm that land belongs to those who work it. The fact that one of these norms is followed at one time, the other at another, both in varying proportions at yet other times, does not mean that the norms do not exist, but that social needs at the time of each dispute in which they are relevant will determine their application.

Under common law, on the other hand, it is presumed that rules directly determine the outcome of each dispute and that the adjudication process results in a solution that will resolve the dispute permanently. These presumptions are embodied in the positivist notions that there is only one rule that fits each dispute, and that similar disputes will be governed by the same rules. Once it has been decided, for example, that long-term residence and the development of a village site cre-

ates an equitable interest, this rule will be applied in later cases, to the exclusion of other rules that might also have been applicable. To ensure this consistency, judicial opinions are written and become available for citation in later cases. The written opinion comes to be regarded as the embodiment of the rule, disguising the choices that were involved in its writing.

The consistent application of uniform rules by common law courts performs a number of functions useful to a market society. First, consistency and uniformity lend the appearance of legitimacy to the state and the economy. In an economically diverse society in which some groups and individuals have better access to land, goods, and services than do others, the fact that the same set of rules ostensibly applies to all suggests fairness and justice, interposing a mask of legal equality over the realities of economic inequality. Second, consistency fosters predictability and the orderly functioning of the market. Predictable rules provide actors in the marketplace with guideposts by which to pattern their dealings. Knowing the relative security of registered title to land, a seller may seek a higher price for land that has been registered. Knowing that the existence on that land of a squatter settlement may tie it up for six months or a year, a buyer may offer a lower price but not so low as if no settled rule determined the outcome. Finally, the consistent application of rules helps the courts to bring disputes to closure, to achieve finality, by convincing both parties, even the loser, that the only possible outcome has been attained. The state's success at ending disputes adds to its legitimacy, as well as providing orderly social conditions in which the market can operate. Customary law, operating in societies in which the option of force is available to everyone, is more chary of outcomes that, by denominating winners and losers, lead to further dispute. But the state's ability to threaten imminent use of its agencies of force is not the only reason that the decisions of common law courts are obeyed. Because of the ideology surrounding the common law, the power of the rules themselves promotes acquiescence by the parties to judicial decisions. Even the loser is impressed by the ritual of the courtroom drama, the seeming consistency of rule application, and the irrefutable congruence of facts and rules.

The common law that was imported into Papua New Guinea from England is gradually changing, gradually becoming less English and more Papua New Guinean. One important force in this change is the influence of customary law on judicial thought. As in the *Ready Mixed* case, judges use custom to reinterpret common law rules and to make them better fit the circumstances of Papua New Guinea, even when

they do not acknowledge (or do not recognize) that they are doing so. In this process, however, customary law changes. Gradually, as Papua New Guinea's common law develops, it will become an amalgam of something that is not quite the law of England, nor will it replicate precisely the customary law of Papua New Guinea. It will be (and will be always in the process of becoming) itself.

Epilogue

Readers who have come this far will want to know how the story ended, what happened to the cement company and the Biwat villagers. Six months after the National Court handed down its decision in the *Ready Mixed* case, a second *Ready Mixed* case began. The company instituted another action against the villagers, this time in the Lae District Court, a lesser court that has jurisdiction to order summary evictions under Section 6 of the Papua New Guinea Summary Ejectment Act (PNG Revised Laws, ch. 202). The company argued that it had waited the six-month period prescribed by the National Court and should now have possession of its land. The district court refused to order the eviction of the villagers, however, noting that, in order to bring an action under Section 6, one must have legal title to the property. In this case, legal title required that a lease be in existence; and, although all the technical formalities for granting a lease to the company had been complied with, the Department of Lands had still not gotten around to signing and issuing the lease document. Nor did the earlier decision of the National Court vest title in the company. That opinion had quite explicitly stated that the issues would be considered as if the company had legal title but that, until the company actually received the lease, it did not have legal title. The company appealed to the National Court, where a judge different from the one who had heard the first *Ready Mixed* case held that the company did have legal title and could therefore eject the villagers.[57] The villagers appealed this decision to the Supreme Court, which heard the case in 1984. All three members of the Supreme Court panel agreed with the district court that the company had not obtained title as a result of the *Ready Mixed* decision and was therefore unable in 1982 to bring summary eviction proceedings.[58]

As it turned out, however, the Supreme Court's decision had little direct impact on the dispute between the villagers and the company. At the Supreme Court hearing, company counsel informed the court (and the villagers) that its lease had at last been issued. The company was therefore in a position to commence summary ejectment proceedings,

however the Supreme Court ruled on the company's 1982 attempt to evict the villagers. To date, the company has not pursued its ejectment option. Perhaps it was worn down by the villagers' perseverance. Perhaps it feared that demolishing the settlement would demolish its public image and its sales figures as well. Whatever the reason, as this article was being written, Biwat still existed, and its population had grown to approximately one thousand.[59] In the last few months, however, the Lae Town Council has been demolishing squatter settlements, claiming that they harbor disease and crime.[60] So, by the time this article is read, Biwat may have disappeared.

NOTES

An earlier version of this article was presented at the 1989 Annual Meeting of the American Anthropological Association in a session entitled "Law in Papua New Guinea: Ideal and Practice." I am grateful to the panelists and the audience for a lively and informed discussion that helped me to clarify and illuminate many of the points made here. There are, in addition, many people whom I need to thank for their contributions to this work. Linda Bartlett, Ellen James, Josepha Kanawi, Nancy Mikelsons, Bruce Ottley, Christine Stewart, and Stephen Zorn read successive drafts and made helpful suggestions along the way. Kendall Johnson and Patty Buchanan were invaluable research assistants. Sharlene Rohter's editing was thorough and thoughtful. Counsel for the Biwat villagers (now a judge of Papua New Guinea's Supreme Court) T. A. Doherty shared her extensive knowledge of the case. Most importantly, I must thank the Biwat villagers, whose determination proved (yet again) that no court decision is final so long as people continue to find the strength and community to work for what is theirs. Research in Papua New Guinea for this article was supported by a grant from the City University of New York Research Foundation.

1. *png Ready Mixed Concrete Pty. Limited v. The Independent State of Papua New Guinea, Utula Samana and Samson Kiamba (representative of a class of 511 persons)* [1981] PNGLR 396 (National Court). The written decisions of Papua New Guinea's National Court and Supreme Court are collected in bound volumes *(Papua New Guinea Law Reports)*, which are published annually in Sydney by the Law Book Company. They are available in many American law libraries. In this article, quotations from the words of the court in the *Ready Mixed* case, and descriptions of the court's reasoning, are taken from the court's written decision, as published in *Papua New Guinea Law Reports*, Volume 1981, pp. 396ff.

2. I use phrases such as "customary law" or "custom" in this article, although their validity is questionable and their connotations uncertain. The use of "law" in reference to the norms and dispute-management processes of stateless societies imposes a Western category on something that may have very different aims and effects. On the other hand, to call it "custom" alone is to suggest that, unlike what is done in the formal courts of Papua New Guinea, it is "not law." Some term, however, is needed to denote the norms and processes by which Papua New Guineans manage their disputes and maintain order outside the for-

mal court system; these have the virtue of widespread use, as well as being the terms that the formal courts themselves use.

3. For descriptions of squatter settlements in Papua New Guinea and of the reactions to them of other urban dwellers and the government, see Hugh Norwood, *Port Moresby Urban Villages and Squatter Areas* (Port Moresby: University of Papua New Guinea Press, 1984); Nigel Oram, *Port Moresby: Colonial Town to Melanesian City* (Canberra: Australian National University Press, 1976); Nigel Oram, "Urban Expansion and Customary Land," in *Problem of Choice: Land in Papua New Guinea's Future*, ed. Peter Sack (Canberra: Australian National University Press, 1974), 170–180.

4. The residents of squatter settlements are nominally subject to the laws and ordinances of the town in which the settlements are located, but custom is also an important source of law within urban settlements. Many settlements are built on land belonging to traditional trading partners or kin of the settlers, with the settlers' rights to use the land governed by customary law. In this situation, the migrants may compensate their hosts for use of the land. Settlement residents often form committees, composed of the leaders of the various clans or rural villages represented in the community, to settle disputes and keep order. Norwood, *Port Moresby Urban Villages*, 83. Where a community consists of people from various parts of Papua New Guinea, it is likely that the committee will be applying a new version of "customary law" in settling disputes, much as urban village courts do when deciding disputes between parties originally from different areas of the country. Even when residents of an urban settlement are all from the same area, the new problems and situations of urban life will require that new law be made.

5. Descriptions of the Biwat settlement and its history are taken primarily from *png Ready Mixed Concrete Pty. Ltd. v. The State*, [1981] PNGLR 396, and from a letter, dated 29 December 1989, from T. A. Doherty.

6. For a discussion of the so-called Lae town purchase, see Ian Willis, "Lae's Land Grabbers: White Man's Justice—But Who Can Afford It?" *New Guinea* 6 (1972): 4. According to Willis, most of the land now comprising the town of Lae, including the land on which the Biwat settlement was established, was seized by the German Neu Guinea Compagnie in 1900 to 1910. "The Lae were never paid for their land because it was [considered by the Germans to be] ownerless," although evidence exists that the Lae considered it theirs and used it for gardens. Willis, at 11. In 1927, the Australian colonial administration, which had succeeded the Germans in control of New Guinea during World War I, took title to the land, but did not register its title until 1965. The Australian colonial administration believed for many years that the Germans had paid for the land. The Lae brought suit in 1971 for damages for the wrongful taking of their land. This was at a time when numerous clans throughout Papua New Guinea were starting to bring claims against the administration, asking for damages or for the return of their lands. The Lae won their suit in the trial court (although they were awarded only A$7,200 in damages, the value of the land in 1927), but lost in the highest appellate court, on the grounds that contemporaneous German documents showing the land to be ownerless in 1900 are more to be trusted than oral histories. *Gaya Nomgui v. The Administration* [1971–1972] PNGLR 430, 448. To those versed in the common law, with its assumption that a case once decided cannot be reopened, the Lae's defeat on their final appeal should have ended the matter, but the Papua New Guinean view of disputes is more open-ended. The Lae persevered outside of the court system until in 1979 they reached a settlement under which the government awarded them compensation for their land.

7. Descriptions of the company and the genesis of the lawsuit are taken from *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396. It is noteworthy that, in its opinion, the court described Biwat at some length and very favorably (the court never, for example, used the term "squatter settlement"), but accorded the company less than a paragraph, and then only to comment on the oddity of its lowercase name and the lack of citizenship of its shareholders.

8. *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396. The National Court is Papua New Guinea's major court of original jurisdiction. It is also the first appellate tribunal for the local and district courts, both of which are trial courts with limited jurisdiction. Appeals from the National Court are heard by the Supreme Court. The National Court consists of ten judges, all of whom must be qualified lawyers. National Court judges sit as appellate justices in the Supreme Court.

9. The court refused to uphold the company's claims against Samana. *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 410.

10. William Twining notes the existence of this tension in the common-law process in courts in the United States, in his *Karl Llewellyn and the Realist Movement* (Norman: University of Oklahoma Press, 1985), 3–9.

11. The Papua New Guinea Constitution can be found in Brian Brunton and Duncan Colquhoun-Kerr, *The Annotated Constitution of Papua New Guinea* (Port Moresby: University of Papua New Guinea Press, 1984); and in Pacific Law Unit and Institute of Pacific Studies, *Pacific Constitutions*, vol. 2, *The Independent States of Melanesia and Micronesia* (Suva: University of the South Pacific, n.d.). The Papua New Guinea Constitution provides, at Schedule 2.1, that the rules of substantive customary law are part of the underlying law, except those that are inconsistent with the Constitution or a statute or "repugnant to the general principles of humanity." Schedule 2.2 provides that the common law of England in effect at the date of Papua New Guinea's independence (16 September 1975) is also part of the underlying law, except provisions inconsistent with the Constitution, a statute, or customary law, or "inapplicable or inappropriate to the circumstances of the country from time to time." Schedule 2.3 provides, "If in any particular matter before a court there appears to be no rule of [customary or English] law that is applicable [to the case] and appropriate to the circumstances of the country, it is the duty of the . . . Supreme Court and the National Court to formulate an appropriate rule as part of the underlying law."

12. A few of the many writers who have argued that customary law should be given a larger place in the common law scheme than the Papua New Guinea courts have afforded it include Brian Brunton and Derek Roebuck, "Editorial—Customary Law and Statute Law in the Pacific: A Policy Framework," *Melanesian Law Journal* 10 (1982): 6–13; David Weisbrot, "Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict," in *Law and Social Change in Papua New Guinea*, ed. David Weisbrot, Abdul Paliwala, and Akilagpa Sawyerr (Sydney: Butterworths, 1982), 59–103; Bernard Narakobi, "The Adaptation of Western Law in Papua New Guinea," *Melanesian Law Journal* 5 (1977): 52; S. D. Ross, "A Review of the Judiciary in Papua New Guinea," *Melanesian Law Journal* 5 (1977): 5; Law Reform Commission, *Declaration and Development of the Underlying Law*, Working Paper no. 4 (Port Moresby: Government of Papua New Guinea, 1976); Richard Scaglion, "The Role of Custom in Law Reform," in *Essays on the Constitution of Papua New Guinea*, ed. Ross DeVere, Duncan Colquhoun-Kerr,

and John Kaburise (Port Moresby: Government of Papua New Guinea, Tenth Independence Anniversary Advisory Committee, 1985), 31–38. Roebuck has argued that the courts have begun to give custom a more prominent place in their decisions, in his "Custom, Common Law, and Constructive Judicial Lawmaking," in *Essays on the Constitution*, ed. DeVere, Colquhoun-Kerr, and Kaburise, 127–145. The judges themselves believe that they are paying more attention to custom. See Papua New Guinea Supreme Court, "Appendix C: The Judiciary and the Development of the Underlying Law," *Annual Report by the Judges 1987* (Port Moresby: Government Printing Office, 1988). In all these articles—both those that lament the absence of customary law from the opinions of the court and those that argue it has begun to be included—the authors presume that customary law has been considered or adopted only where the court, in its opinion, overtly discusses the applicability of custom. These writers would therefore classify the *Ready Mixed* case (and other cases like it), in which the court bases its decision on custom but does not acknowledge doing so, as a case in which custom was not adopted.

13. Positivism was introduced into English jurisprudence in the early nineteenth century. John Austin and Jeremy Bentham are among those given credit for originating it. A number of excellent works of legal theory or legal history trace the origins and development of the positivist school in England and the United States. See, for example, Brian Simpson, "The Common Law and Legal Theory," in *Legal Theory and Common Law*, ed. William Twining (London: Blackwell, 1986), 8–25; David Sugarman, "Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition," in *Legal Theory and Common Law*, ed. Twining, 26–61; W. Friedmann, *Legal Theory* (New York: Columbia University Press, 1967), 253–311.

14. This is contrary to legal pluralism, which recognizes that law exists in every social grouping, institution, community, or social field within society that makes rules to which its members adhere. See Sally Falk Moore, *Social Facts and Fabrications: "Customary" Law on Kilimanjaro 1880–1980* (Cambridge: Cambridge University Press, 1986); Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978); John Griffiths, "What is Legal Pluralism," *Journal of Legal Pluralism* 24 (1986): 1; Sally Merry, "Legal Pluralism," *Law & Society Review* 22 (1988): 869; M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975).

15. Although positivism still dictates the way in which cases should be decided for most judges in Australia and Papua New Guinea, it has been replaced in the United States (and, to some extent, in England) by realism, a theory of judicial decision making that admits the inevitability of legal change and leads judges to make that change overt, along with the policies and values guiding the change, by grounding their decisions not only in prior rules but also in the circumstances of the parties and the social policies that the rules are intended to effect. For discussions of realism, see Twining, *Karl Llewellyn and the Realist Movement;* Karl N. Llewellyn, *The Case Law System in America* (Chicago: University of Chicago Press, 1989).

16. See, for example, *John Jivetuo v. Independent State of Papua New Guinea, Madang Provincial Government and Commissioner of Police, Royal Papua New Guinea Constabulary* [1984] PNGLR 174.

17. *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, at 407.

18. *Crabb v. Arun District Council* [1975] 3 All E.R. 865, 868.

19. *Crabb v. Arun District Council* [1975] 3 All E.R. 865, 871, cited at *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 404.

20. Cases cited in the opinion include some decided prior to *Crabb v. Arun* that were gradually developing the doctrine that it would enunciate. These were *Inwards v. Baker* [1965] 2 Q.B. 29, 2 W.L.R. 212, 1 All E.R. 446; *E. R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379. The *png Ready Mixed* opinion also cites two cases decided after *Crabb v. Arun*, which rely on it. These are *Jones v. Jones* [1977] 1 W.L.R. 438; *Pascoe v. Turner* [1979] 1 W.L.R. 431.

21. *Inwards v. Baker* [1965] 2 Q.B. 29, 35; *Jones v. Jones* [1977] 1 W.L.R. 438, 440.

22. *Pascoe v. Turner* [1979] 1 W.L.R. 431, 434–435.

23. *Ives v. High* [1966] 2 Q.B. 379, 392; *Crabb v. Arun* [1975] 3 All E.R. 865, 869.

24. In *Inwards v. Baker, Jones v. Jones*, and *Pascoe v. Turner*, the occupants gave up other dwelling places, or built or improved the house, believing it to be theirs. In *Ives*, the landowners acquiesced in and encouraged the defendant's building a garage accessible only if he crossed their property to reach it. In *Crabb v. Arun*, the landowner built a fence with gates at the places where the parties had agreed plaintiff's right-of-way would begin.

25. *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 405.

26. Ibid.

27. Ibid., at 404.

28. *The Administration v. Blasius Tirupia; Re Vunapaladig and Japalik Land* [1971–72] PNGLR 229; discussed in *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 404.

29. In determining the length of time that residents could remain on the land, the court divided the residents between those who had arrived prior to 1976 (five years before the company commenced its action for possession) and those who had arrived in 1976 and afterwards. Those who had arrived before 1976 could continue in undisturbed possession for one year from the date of the court's order and those who had arrived later could continue for six months. The court seems to have chosen 1976 as a watershed year for two reasons. First, government officials, asked at the hearing about their awareness of the village's existence, admitted to knowledge dating from that year, which is the year that the officials took up their postings in the area. Second, from the conflicting evidence of aerial maps and memories, the court concluded that there may have been no more than sixty residents in the village by 1976 and that its major population expansion probably occurred thereafter. It is not clear, however, if anyone during the National Court hearing was aware that the court's order would differentiate in this way. Counsel for the residents did not attempt to locate government officials who knew of the village prior to 1976 and did not establish the date at which each resident had settled in the village. Of the village's 511 inhabitants, only Samson Kiamba and Andrew Poli, both of whom had moved to the village before 1976, testified at the hearing, and, because no other residents were in court to be asked about their length of residence, only Kiamba and Poli and their families were given the one-year entitlement. *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 407.

30. *Crabb v. Arun District Council* [1975] 3 All E.R. 865, 871; quoted in *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 404.

31. In *Inwards v. Baker* and *Jones v. Jones*, for example, where the courts found that the landowner had promised lifelong possession of the house, the court granted that. In *Pascoe v. Turner*, where the court found that the landowner had promised to give the house to defendant, the court granted that. In *Ives v. High* and *Crabb v. Arun*, where the courts found that there had been (unenforceable) contracts for permanent rights-of-way, the courts granted permanent rights-of-way.

32. *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 407.

33. Ibid.

34. Ibid.

35. *Inwards v. Baker* [1965] 2 Q.B. 29.

36. *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 406.

37. *Inwards v. Baker* [1965] 2 Q.B. 29, 37.

38. *png Ready Mixed Concrete Pty. Ltd. v. The State* [1981] PNGLR 396, 406.

39. Ibid.

40. Ibid.

41. The descriptions in this article of Papua New Guinean customary land tenure are taken from a number of sources, including D. J. Colquhoun-Kerr and Andrew A. L. Lakau, "Land Tenure and Land Dispute Settlement in Enga," *Melanesian Law Journal* 11 (1983): 59–90; Peter Eaton, "Customary Land Dispute Settlement: Should Lawyers Be Kept Out?" *Melanesian Law Journal* 11 (1983): 47–58; Oram, "Urban Expansion and Customary Land," 170–180; 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; Ron Crocombe, Robin Hide, and Peter Eaton, "Papua New Guinea: Unity in Diversity," in *Land Tenure in the Pacific*, ed. Ron Crocombe, 3d ed. (Suva: University of the South Pacific, 1987), 324–367. Although the descriptions in this article are generally true of many Papua New Guinean societies, groups vary considerably, and every aspect of the descriptions will not hold true for every group.

42. One might ask why, given this set of facts, the court did not simply apply customary law and hold that residence on and development of land confers rights in the land, regardless of what the owner of the land promised or did not promise. Here, however, the court might have felt itself constrained by the common law. The common law also recognizes multiple interests in land, but it bundles all those interests and grants them to the individual freeholder. Only he or she can unwrap the bundle, and all choices as to the use of the land are the freeholder's. If the freeholder wishes he or she may lease the land to another's use, may grant easements permitting others limited use of the land, may sell all or part of the land or give it away, may determine who inherits rights in the land, may use it productively or allow it to sit unused. Once a freeholder has voluntarily parted with any of these interests, the courts will hold him or her to the terms of that agreement, but the initial bargain is the freeholder's to make. Even the doctrine of proprietary estoppel, though interfering with the legal rights of a freeholder, pays deference to the common law model of individual ownership. Under that doctrine, courts do not simply declare that an occupant

has acquired rights to land through living on it or developing it; they phrase it as an acquisition that was actually or impliedly agreed to by the freeholder.

43. See, for example, *Crabb v. Arun* [1975] 3 All E.R. 865, at 871, 880.

44. Colquhoun-Kerr and Lakau, "Land Tenure and Land Dispute Settlement in Enga," 65; R. Hide, *The Land Titles Commission in Chimbu*, New Guinea Research Bulletin no. 50 (Port Moresby and Canberra: New Guinea Research Unit, Australian National University, 1973), 12–13.

45. *The State v. District Land Court [Kimbe] Ex Parte Caspar Nuli* [1981] PNGLR 192, at 194. The National Court upheld the original decision of the local land court and reversed the appellate decision of the provincial land court, which had held that the land should be spatially rather than temporally divided. At 196.

46. The court never discussed compensation, so one cannot know its reasons for failing to award it. Possibly, the villagers never asked for compensation in their pleadings. Possibly, the court was constrained by common law and statutory concepts. In common law, temporary occupants (lessees, for example) are entitled, when their occupation ends, to remove personal possessions from the land but not to remove fixtures (which include houses, trees, and anything permanently attached to the house or the land) or receive compensation for the fixtures they leave behind, unless statutes expressly permit compensation for improvements. For example, Papua New Guinea's Revised Land Act provides, at Section 48(3), that upon the expiration of the term of a government lease of land on which improvements have been constructed, the outgoing lessee is entitled to be paid the value of the improvements, but the act does not permit the lessee to remove the improvements. See *Fletcher Morobe Construction Pty. Ltd. v. Minister for Lands*, Unreported Supreme Court SC366 (1988).

47. For the relevant constitutional provisions, see note 11 above.

48. Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* (London: Transaction Books, 1982; originally published 1933), 123.

49. For much better descriptions of the judicial process than I have here given, concluding as I have that every case requires that a judge in some sense make new law, see Morris R. Cohen, "The Process of Judicial Legislation," in ibid., 112–147; Karl N. Llewellyn, *The Common Law Tradition—Deciding Appeals* (Boston: Little, Brown, 1960).

50. As a result, the Papua New Guinea courts often write as if their failure to ground their decisions in custom more often and more overtly is primarily a matter of the administrative and procedural difficulties in doing so. See, for example, Papua New Guinea Supreme Court, "Appendix C: The Judiciary and the Development of the Underlying Law," *Annual Report by the Judges 1987* (Port Moresby: Government Printing Office, 1988). Since a number of writers, such as David Weisbrot, "Papua New Guinea's Indigenous Jurisprudence and the Legacy of Colonialism," *University of Hawaii Law Review* 10 (1988): 1-45, have listed these difficulties, I need not repeat them here, particularly since I contend that these procedural problems, while real, seem insuperable only because the courts' positivist orientation causes the courts to focus on them.

51. Schedule 1.2(1) of the Constitution defines custom as "the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time

when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial."

52. For example, in assault or murder cases, the colonial courts were prone to give Papua New Guineans light sentences on the grounds that, since it was the "custom" of traditional villages to fly off the handle at the slightest provocation, it would be unfair to impose stiffer penalties. In these cases, the courts were, in their patronizing way, confusing custom with common behavioral patterns. Sometimes, too, the colonial courts gave lighter sentences to Papua New Guineans when the murder was required by customary payback rules. Here, the courts were defining custom as a normative system.

53. See note 51 above.

54. For discussions of whether the "customary law" of today even deserves to be viewed as custom, given the changes wrought by the forces of colonialism, see Peter Fitzpatrick, "Traditionalism and Traditional Law," *Journal of African Law* 28 (1984): 20; Francis Snyder, "Customary Law and the Economy," *Journal of African Law* 28 (1984): 34.

55. See, for example, *Supreme Court Constitutional Reference No. 4 of 1980: Re Petition of M. T. Somare and Sir Julius Chan* [1981] PNGLR 265.

56. I am grateful to Andrew Strathern for this felicitous phrase.

57. *png Ready Mixed Concrete Pty. Ltd. v. Herman Gawi* (Unreported, 1983).

58. *Herman Gawi (as representative of a class of persons) v. png Ready Mixed Concrete Pty. Ltd.* [1984] PNGLR 74 (Supreme Court).

59. Letter, dated 29 December 1989, from T. A. Doherty.

60. For reports of recent provincial and local government moves against urban settlements, see the Port Moresby *Post-Courier*, issues of July and August 1991.