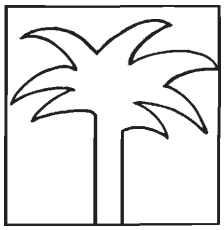

Are there advantages to maintaining customary land tenure in Papua New Guinea?

David Lea

This paper considers the frequently encountered claims made in favour of customary land tenure in Melanesia. These claims often include the assertions that customary tenure ensures that a continuing relationship with the land is maintained; customary tenure makes land plentiful; customary tenure maintains equity and protects against monopolisation by the few; and, finally, customary tenure is creative. In most cases one can demonstrate with greater force that the contrary applies and that most of these assertions lack plausibility. Moreover, the first claim, which may indeed be the most accurate, may well have dubious utility with deleterious effect on trade and commerce.

David Lea is Associate Professor of Philosophy, Department of International Studies at the American University of Sharjah, United Arab Emirates.

This paper focuses on assertions which make strong moral claims in favour of customary communal ownership. Two such claims are distinguished: that the customary system can deliver equitable distribution, and that custom is adaptable to a cash economy and thereby implicitly can continue to effect equitable outcomes. Appeals to economic rationalism arguing for the economic disutility of customary land tenure often fail to resonate with Papua New Guinea audiences or Western intellectuals who support these traditions. This is not due to lack of cogency but rather the fact that there is an emotional attachment to the ideal of the moral primacy of the community.

Normative concerns have gained in importance since the ethical dimension found its way into the theory of globalisation (Higgot 2000). This has meant a genuine recognition of the ethical questions of justice, fairness and inequality. This development and the flagging of the importance of related 'governance issues' by international financial institutions has been, in part, a reaction to the 'economism'

that dominated policy throughout the 1980s and 1990s.

Among other things, the East Asian financial crisis of 1997, which spread to Latin America and Russia in early 1998, together with attempts to abort the third Ministerial Meeting of the WTO in Seattle in 2000, provoked a new international and intellectual policy agenda. Given this climate, any proposals to promote Western forms of ownership over customary community ownership on the grounds of economic efficiency must address issues of social and economic justice. These concerns go beyond a prevailing concern for economic growth that dominated the literature of political economists and policymakers in the 1980s and early 1990s (see Higgot 2000).

As ethical and moral considerations have taken hold in aspects of the global governance agenda in recent years, some have urged a greater sensitivity to 'capacity building' that acknowledges local traditions and sociocultural realities (see Dubsky 2002). With respect to linkages between customary ownership and Melanesian traditions Holzknecht, echoing Crocombe (1974), states

> [w]ith regard to land rights and property rights…It must be remembered that land rights across Melanesia are a subcategory of property rights and the relationships established by property rights should be viewed as a subcategory of social relations generally (Holzknecht 2002:8).

Customary land tenure is thus seen as integral to the ideal of the Melanesian community and thereby an organisational construct that maintains traditions and protects members of the community from the inequalities and exploitation generated by a modern capitalist system based on individual forms of ownership.

This paper argues that the latter set of beliefs are largely ideological myths that fail to reflect the unhappy reality which results from attempts to apply customary land tenure, allegedly based on group rights, in a modern cash economy. Moreover, current PNG legislation (itself a colonial construction) that gives legal recognition to group rather than individual rights with respect to land tenure, only exacerbates rather than obviates the inequities and exploitation. This is particularly evident in the development of resources, especially in forestry and the mining and petroleum sectors.

Recently Sagoff (2000) argued that it is not the case that industrialised economies exploit developing economies by consuming a disproportionate share of natural resources. Sagoff argues that most of the resources consumed in the United States are from domestic sources. Moreover, the share of the raw materials sourced from developing economies for use in industrial economies is at a thirty year low and continues to decline (Sagoff 2000:61).

If Sagoff is correct, how do we account for the lack of wealth in developing economies, if this is not due to exploitation by industrial economies? With respect to the causes of poverty, Sagoff argues that in developing economies people often confront intractable entrenched land tenure systems and lack of infrastructure with little access to markets, education or employment (Sagoff 2000). Sagoff is not alone in seeing the land tenure and property systems as being at the heart of the inability of developing nations to mobilise resources and generate wealth through trade and commerce. There are, however, others who see advantages in traditional customary tenure systems that are not to be found in modern Western forms of property systems.

This paper looks at the claims to the advantages of the customary Melanesian system of land tenure and explores their plausibility. It is the argument of this paper that the central claims are either unfounded or in fact work to the disadvantage, not to mention injustice, of 'landowners.'

The claims for custom land tenure

The continuing relationship with the land

Many claim that life is land for Melanesians and that without their land life is meaningless. More than any other consideration, land is viewed as the central value for the Melanesians. A representative expression of this view is found in the writings of Power (1988), former consultant to Chevron PNG, and a driving force behind the 1980s East Sepik land legislation reform. For example, he asserts that the lynchpin of the Melanesian group—ensuring the continuity of community life and history—is the communal landholding, and claims that it is the locus for the community's cultural activities. Because of this, Power believes, Melanesians cannot fully disassociate themselves from their land. Power concludes that the Melanesian concept of a sale of land is really something like the Western concept of a lease. After the sale of land, Melanesians maintain a proprietary interest in the land by some form of interest in the subsequent use of the land by the new owner.

From such views one can conclude the obvious that, compared with the peripatetic existence in Western society, where it is not uncommon for households to change locations as much as ten times during the lives of its original generation, Melanesian families appear relatively stable and attached to single well circumscribed geographical location. The fact that individuals tend to remain and work in proximity to their place of birth may well engender a strong emotional attachment to their home base. But let us not go too far in attributing a universal validity to this Melanesian tradition of linkage to a particular physical location. It is also true that with the advent of the twentieth and twenty first centuries, thousands of Papua New Guineans have left their traditional lands and migrated to urban centres such as Port Moresby and Lae, or to work in plantations and resource developments in other provinces. Thus before we too readily subscribe to a view of the Melanesian character based on the traditional lives in subsistence rural communities, it must also be recognised that many Melanesians, like other peoples throughout the world, have responded to the introduction of a cash economy and industrialisation by shifting and abandoning original locations to access the benefits of capitalism.

But while many Papua New Guineans now enjoy access to previously inconceivable forms of wealth through capitalism, one might ask whether capitalism enjoys benefits from the Melanesian attachment to traditional localities. Some point out that custom prescribes that transactions over land in the Melanesian context establish a continuing relationship between the parties, whereas in the Western context, transactions occur as impersonal market interactions characterised by an absence of continuing relations between the parties. For example, Power (1988) and Cooter (1991) have argued that these continuing relationships between customary transacting partners have formed the basis of successful productive activities.

Since capitalism in its basic form is about buying and selling, does the sense of continuing relationship enhance access to wealth, especially if the seller continues to maintain an interest in the land and its use after a sale has been made?

In the capitalist system, a sale usually involves the passing of all rights and interests from the seller to the buyer, and the extinguishing of the rights and interests previously located with the seller. It does not take a great deal of imagination to recognise how this system would quickly become inoperative if the buyer could not be sure of full and quiet enjoyment and control of the asset in the future, and moreover, if the authorities were not prepared to defend security of title and freedom from interference. A fairly recent case that amply demonstrates the economic disutilities effected by the

attachment to alleged traditional land after initial alienation, is demonstrated in a case study of the behaviour of the Mogei Agilka Kundump sub-clan of Mt Hagen recorded by Dwyer, et al. (2000).

As the authors describe the events, on 17 September 1999, a sub-clan of the Mogei Agilka Kundump occupied the Holy Trinity Teachers College in Mt Hagen township, forcing a temporary closure. They claimed that they would forcefully repossess the land if the government did not satisfy their demanded compensation for 1.5 million kina. This claim was based on a belief that they had been underpaid by the colonial government at the time of original acquisition of the land. In 1948 the Catholic Church acquired a 99 year lease from the Australian Government. They had received about 209 pounds for their land in 1952.

The clan argued that their forebears would not have been able to foresee the current cash value of the land or their recent population increases. (Doubtless, there are many throughout the world who would like to demand a renegotiation of compensation every time there is a sale of a piece of real estate or bundle of shares whose value unforeseeably appreciates.) Moreover, they claimed to be disadvantaged on three fronts. First, they had lost land that was more productive than that on which they now lived; second, their benefit had been sacrificed for the rest of Papua New Guinea as it served as a location for the training of teachers who benefited all parts of the country; third, they noted that the Department of Lands had given in to similar demands in other parts of the country.

It is hardly worth commenting on any of the above, except perhaps the first. With reference to the first point, the loss of productive land, the Catholic Church pointed out that the colonial government had originally been invited by local leaders to acquire the land in order to create a buffer between two warring Mogei groups and that local leaders had welcomed the arrival of the church. Moreover, one long-standing resident of Papua New Guinea stated that the land was not used by local clan groups who lived above the valley floor because it was swampy and malarial and there was no clear evidence as to which of the local groups had claim to the territory. The land was often subject to overlapping claims and tribal fighting.

The upshot of this dispute saw the Mogei Agilka arranging to fly the Lands Commissioner to Mt Hagen. He heard the case and ordered the state to pay the Mogei Agilka compensation of 700,000 kina on 22 September.

In the Western context it is often stated by judges that it is not the business of the courts to write or rewrite the contract for the parties. This is an eminently sensible principle and precludes the flood of litigation that might occur every time individuals felt they could demand additional remuneration for bad business decisions or unforeseeable and foreseeable events that enhance the value of the holding subsequent to transfer. But in the strange world of Melanesian compensation claims, these sorts of grievances are regularly entertained by the authorities, making every investment and every dealing with land an enterprise to be menaced by the possible future disruption and escalating demands in direct relation to the success of the endeavour. In a country starved for foreign investment, except in mining and other resource extraction—and even here the prospects for future investment are seriously diminishing—uncertainty and the insecurity of legitimate title continue to undermine economic development, and with it, future possibilities for the generation of wealth.

However, the argument that Melanesians must recognise that transfer, sale or conveyance means that the rights and interests of the seller are extinguished and the seller has no further legal or psychological interest in the holding, will continue to be ignored. This is essentially because of the

sentimental attachment that equates the community with a primary moral value and sees the communal land base as being integral to these communitarian values. But a community is ultimately divisible into its membership and the central question one must ask is whether the current legislation that purports to maintain these communitarian values really delivers an equitable distribution of 'community' resources and revenue to the membership.

Ensures that land is plentiful

There exists somewhat of a consensus that customary land in Melanesia is collectively rather than individually owned. It is widely believed that this ensures that land is plentiful because each individual, through the fact of membership in a customary landowning group, such as a clan, is a landowner; that is, he or she has an entitlement to some share in the group's land. Moreover, dealings in land can only proceed according to custom, and there can be no dealings in land between citizens and non-citizens. The law itself goes on to provide that land can only be alienated through either a lease/lease-back situation whereby the government acquires customary land and leases it back to the traditional landowners who then may sublease it to a third party, or by a process called land tenure conversion. Both processes are intolerably long, time consuming bureaucratic exercises that exact significant 'transaction costs'.

As Curtin (2002) has recently pointed out, the result is paradoxically that land may be plentiful, but it is not plentiful where it is required for development purposes. The inability to purchase land for development means that large-scale copra, coffee, and cocoa and oil palm plantations are not prevalent. Moreover, there is a shortage of land for tourist development, evidenced by the fact that there is a near absence of tourist resorts along its tropical shorelines. Moreover, in the urban areas, especially Port Moresby, there has been an explosive population growth. The political authorities and businesses are running out of alienated land necessary to meet the needs of this growing population. The situation may reach crisis proportions in the next ten years (Aldridge 2000).

Moving from issues relating to large investments and urban development, one finds that even smallholder agriculture is restricted by issues relating to the availability of land. Some argue with respect to agricultural production that lack of large holdings is not an impediment and that smallholdings have successfully met the need. But, at the same time, it has been pointed out that the indices of population growth and of output of the main exported cash crops since 1980, show how output of coffee, cocoa and copra oil have fallen behind population growth (Curtin 2002). To be more precise, the reality of customary land tenure creates a situation in which customary practice militates against enlarged holdings that realise those economies of scale that trigger greater productive levels. Ploeg (1999) points out that land is first of all parcelled out in small lots. These would be proximate to the village and linked to the available water supply. New lots could only be then acquired some distance from the existing settlements. This results in scattered holdings, and increased walking time between holdings. Furthermore, claims on unused areas may be disputed. There is therefore an absence of labour saving equipment in agricultural production—something which is common in industrial countries—simply because scattered smallholdings don't justify their presence.

Again, this is an argument based on economic rationalism that may leave many wedded to the primary communitarian value untouched by its arguments, regardless of their cogency.

Ensures equity and protects against monopolisation by the few

The most important view that needs to be addressed is one that holds that customary land tenure ensures conditions of equity and prevents monopolisation by the few (Holzknecht 2001). This is the primary point stressed by those who see systems based on individual ownership as being inappropriate and unsuitable in the Melanesian context. Obviously, customary land tenure maintains a system of entitlement based on mere membership in the landowning group. This means that all individuals have some form of interest in land based on group membership and group entitlement, which superficially seems to promote conditions of equity. Moreover, since land cannot be permanently alienated or forfeited for debt, interests appear to be protected in perpetuity.

Notwithstanding, the system has not ensured equity in terms of the overall distribution of wealth. In Papua New Guinea, as elsewhere in the developing world, one encounters a significant disproportionate distribution of wealth in a comparison of the urban élites with the subsistence agricultural rural population.

Defenders of the current system often fall back on an argument that is really formulated as a counterfactual, that is, that the privatisation and Westernisation of customary land tenure would result in a few principal owners and a mass of landless peasants. Evaluation of such statements is always difficult and never entirely reliable. The best one could do is to refer to similar cases in which there have been movements to individual forms of land tenure, with full rights to purchase and sell. Some often make reference to the act of enclosure in eighteenth century England as an example in which landless peasants were forced off the land and fled to the overcrowded cities. Doubtless this occurred but can we now describe modern England as a society characterised by systems of property in which there is monopolisation of wealth by the few. One might go on to describe efforts in Africa and elsewhere to individualise landownership. Kenya and Uganda, for example, instituted such programs and although neither case was entirely successful, there was no blatant evidence of monopolisation of land (James 1985).

On the other hand, there is ample empirical evidence indicating that group customary tenure, supposedly captured by the incorporated land groups (ILGs) and the landowner companies (LOCs), is failing to secure any form of recognised equity. There is an abundance of evidence from the mining and petroleum sectors, especially with recent events in the Southern Highlands featuring the fracturing of groups and attendant hostilities between competing groups each determined to establish its credentials as the true landowners, that the interests of individuals and groups are being savaged by these legislative attempts to make sense of customary group entitlement. One could hardly claim equitable outcomes obtain in a situation where each competing group alleges that the other's entitlements are the result of fraudulent claims.

The statement that customary tenure ensures equity was made by a researcher who works extensively in the forestry sector, and so the claim is now considered in relation to this sector. The PNG Review Team Reports (5 February 2001–5 March 2001), which consist of audits of forestry projects for compliance with the requirements of policy, the Forestry Act and other regulations and guidelines, are reviewed. These were compiled from areas in 11 provinces across Papua New Guinea: Western Province, Madang Province, West Sepik Province, East Sepik Province, Oro Province, West New Britain Province, Southern Highlands Province, Milne Bay Province, Gulf Province, East New Britain Province, and Central Province. These reports are indicative of the

general failure of custom, operating through the legal mechanism of the ILGs and LOCs, to secure an unambiguous, just, equitable and transparent distribution of benefits.

Each of the reports has a section devoted to landowner issues. Five general types of problems are identified.

- Bogus or flawed ILGs were found in three cases. In one of these cases it was explicitly stated that there was mismatching between the group and landownership.
- Membership lists of ILGs and landowners were said to be flawed, incomplete or missing in three cases.
- Confusion, uncertainty and misrepresentation were evident at the level of interaction between ILGs and LOCs in four cases. (According to legislative intent, the LOC empowers landowners and ILGs and enables them to enter into commercial arrangements by means of this mechanism.) In one case, for example, there was uncertainty as to which ILGs two competing landowner companies represented. In another case in Western Province the holder of the Timber Authority claimed to be a landowner company but was actually a foreign company through 50 per cent foreign ownership.
- A proliferation of family-based ILGs rather than ILGs that reflect the true clan (group) ownership were found in four cases.
- Finally, a miscellaneous set of problems including insufficient care in the formation of the ILGs, unresolved landowner problems, confusion and unrealistic expectations, conflicting aspirations, lack of awareness, and unsatisfactory activities were detected in five cases.

Only one of the 20 case studies exhibited a level of acceptable landowner involvement. Significantly, in Cloudy Bay, Central Province, the auditors found both sufficient landowner awareness and 'adequately documented' ILGs. But this case is merely an exception that deviates from a pattern in which the ILG is simply part and parcel of the problem rather than the solution.

The concept of individual interest is the casualty in the emphasis on group rights expressed through the ILG and the LOC. Repeated references to anomalies such as 'states of confusion', 'lack of awareness', 'uncertainty', 'incomplete' and 'flawed' lists, 'bogus' and 'flawed' groups, 'foreign controlled groups', all bespeak a situation in which events and the organisation of ownership rights are beyond individual control because there exist no primary identifiable individual legal rights. Instead, legal rights are assigned to an amorphous entity which defies specification—the group—thus providing fertile ground for manipulation and intrigue. The legitimation of the group as the principal right-bearing unit, allegedly according to custom, has created a situation which is contrary to the Western emphasis on the individual as the principal locus of rights and property rights. The advantage of the latter is that it clearly empowers the individual *vis-à-vis* the group and ensures that the individual is not at the mercy of group decision-making (de Soto 2000). In contrast, the PNG situation is illustrative of the unhappy developments that overtake us when we fail to regard individual rights as primary. Jones (2000) for example, speaks of the fallacy of conceiving a right-holding group as a single unified entity possessed of the same sort of moral standing as an individual person. In Papua New Guinea the fallacy is a reality with far reaching and disturbing consequences.

But note that some (see Power 1988) may argue that group rights are reflected in Western law when it recognises the corporation as having legal standing, so why can't the same model be used as the legal basis of group customary landowning rights? The difference is that the modern corporation is actually grounded in individual rights. Even

in the case of the modern corporation, individual rights are prior to corporate rights. After all, corporations only come into existence through contracts between individuals—in the end the corporation is actually just a nexus of contracts between individuals (see for example, Donaldson and Dunfee 1999; Maitland 2001).

Custom is creative

The final issue is the claim that traditional land tenure has a built-in flexibility and is always changing to meet the needs of new generations, and by implication generates novel equitable solutions in the modern monetary economic system. For example, Kemeata (2001) stresses that the great diversity of custom allows for creativity in implementing structural changes appropriate to a group's changing needs. Cooter (1991) made a very similar argument in his rejection of Hart's (1961) distinction between custom and law based on the perceived static nature of custom as against the dynamic character of the law. Cooter rejects the basis of Hart's distinction arguing that custom changes and is changeable in its response to an evolving social context. Holzknecht (2002) also argues that custom in any particular context is not static and that it continues to evolve over time. He argues that communities can learn from their past and adapt their time-honoured customary institutions to look to the future. On the other hand, Kemeata (2001) differs in that he does not entirely accept the self-sufficiency of custom and sees a need for a set of legal protections to ensure that entitlements to monetary benefits and so on proceed according to custom.

This leads us to a central issue as to whether custom can address issues associated with the distribution of monetary benefits. The question is not simply whether custom can change in response to a monetary system, but whether there is a sufficient basis within custom to effect fair and just distributions in a relatively newly-introduced cash economy. Do there exist sufficient customary guidelines that can form the basis for an equitable distribution of cash, that is, monetary benefits? In order to answer this question one has to look more closely at traditional Melanesian land tenure and determine whether there exist appropriate customary procedures that can accommodate a monetarised economy.

It is well documented that a major cause of the Bougainville crisis was the failure of named land titleholders to administer and distribute trust monies received from royalties, occupation fees and compensation payments. There was in fact no distribution to the beneficiaries and it has been suggested that this failure was due to the lack of ritual governing the disbursement of cash. Customary guidelines were lacking or confused because inheritance is usually matrilineal, whereas cash crops are thought to belong to the male line (see Filer 1990). Thus, the leaders, rather than operate in conditions of confusion in which the dissemination of benefits would lead to controversy, decided instead simply to keep the benefits for themselves.

References to landowners and self-ascription of landownership are a frequently encountered aspect of discourse in Melanesia. Some suggest that the term landowner is now carrying many of the connotations we associate with citizenship. For example, one of the important distinctions between citizens and non-citizens is that the former are landowners, whereas the latter can never be. But ownership and what it means, may not carry the same denotation in all cases. Honore (1961) identifies eleven incidents, or rights, powers and liabilities we associate with the modern liberal legal concept of ownership. Honore argued that unless the system of property rights enveloped all eleven incidents it could not be recognised as ownership in the modern liberal sense of the term. Not all entitlements must carry all eleven, but all eleven must be recognisably

present in the system of ownership as a whole. In any case, Honore's eleven incidents include *inter alia*: the right to capital, the right to income, the power of transmissibility, and the liability to execution. The right to capital is said to include the rights to alienate, consume, waste, modify or destroy the holding. The right to income includes the rights derived from foregoing personal use and allowing others to use the holding. The power of transmissibility refers to the ability to devise or bequeath the holding. The liability to execution refers to liability to have the holding taken to satisfy a debt.

Many might question whether it would be appropriate to attribute a concept of ownership to any system that falls short of incorporating the entire bundle of rights and liabilities. Nozick (1974), in his extremely influential work on the liberal principles of ownership, for example, defines property in ways that make transfer and alienation the defining character of property. A final consideration is the right to income. Honore (1961) defines ownership through eleven incidents, but a simpler approach has been suggested by Christman (1994). Christman has suggested that ownership should be bifurcated, giving us two separate notions: 'control ownership' and 'income ownership'. The first refers to the power to use and consume something and involves having the ultimate authority over access to the holding. The second refers to the right to exchange the holding with other willing parties and keep the proceeds from such trades. The right to income includes the natural return from alienation, that is, rent, interest and profits. While some hold a similar position but believe that control rights and income rights are incompatible perspectives on ownership, Christman sees them as two different modes of ownership. Nevertheless, the two are separable, he claims, and one mode need not entail the other. Christman asserts that there is both psychological and historical evidence to confirm this view, and that the right

> …to use, possess, consume, destroy and alienate one's property—rights manifesting primary fundamental control (control rights)—can be meaningfully distinguished from the right to transfer title conditional upon receipt of goods in trade and the right to increased welfare and income from doing so (1994:131)

In Melanesia one could claim that the right to income surely exists in inchoate form where, for example, a party might transfer land to a relative and receive certain benefits such as the right to be honoured in feast or gift giving. However, it is clear that Christman has in mind benefits that are of a monetary character and which are determined by market forces, for he says that, unlike control rights, income rights are unequally conditional,

> …for while the right to income from trade or rent of an asset is itself fixed, the content of that right is not and depends upon market factors over which one has no control or presumptive claim (1994:131).

It is clear that the right to income could only exist in a cash-driven economy where relative scarcity and market forces can determine a fluctuating flow of benefits and compensation from the exchange of holdings. Income rights with respect to land could only exist in a non-indigenous customary context. Certainly, customary 'landowners' had access to their lands and authority to control and exclude those who did not, but on the other hand, the right to monetary benefits from rent or exchange of land would have been an unheard-of concept.

Thus, we begin to see the enormity of the problem, when one attempts to rely on 'custom' (that has no anterior existence) to regulate the distribution of monetary income from the use of land. It is not surprising that the conduits of distribution become locked in a form of paralysis in the absence of clear guidelines, as in the case of Bougainville.

Walzer (1983) explains that the character and nature of various social goods are described and interpreted differently from one culture to another, and impacted within the very notions of these different social goods are distinct rules and procedures governing their distribution. In any cultural tradition, the definition of the good life will include reference to various natural and social goods that constitute the elements that concatenate and alloy in various accepted forms of the good life. Walzer's point is that distinct social goods imply distinct principles of distributive justice, whose immanence creates what he calls a distinct 'sphere of justice'. To understand and be familiar with a particular social good is also to be cognisant of the procedures and rules governing its distribution. In contrast to Melanesians, Westerners are familiar with money as a social good, its sphere of operation, and the principles and normal procedures that govern its distribution.

The difficulty of working out a solution to the distribution of a social good for which there is no basis in custom is clearly evidenced in the efforts of people such as Kemeata, who is well aware of the failures and difficulties occurring when monetary benefits were distributed to agents in the form of Trust monies (as in the case of Bougainville or as in Moran, Hides and Gobe in the Southern Highlands where disbursements have been granted to incorporated land groups).[1] In the latter instance, recipients dissolved and split land groups in order to gain more immediate control of the trust monies. In his preferred system for the distribution of income benefits, Kemeata (2001) recommends that overall authority be vested with the patrilineal leader or traditional leader (in the case of distribution in the southern Highlands) who will reject or accept a clan group or individual as a member of the land group. Furthermore, the patrilineal head can determine through custom each listed group's residual classification and their value, status and contribution to the welfare of the clan and land group. These can be used to determine what percentage of the rights and benefits or liabilities each listed member or beneficiary clan group should get or is entitled to. He goes on to say that distribution at the beneficial group level is done by representatives of the beneficial group according to customary norms, while the patrilineal head has no access to the money. This system, of course, is intended to obviate a potential Bougainville scenario, but Kemeata (2001) admits that although it is being implemented in Moran in the Southern Highlands, there is no indication of its success. It is not surprising that there is yet to be evidence of success.

Again, the problem is reliance on custom where there is no custom. It must be remembered that we are talking about remote tribes and clans who have not handled money on any scale and certainly not as a group. To speak of there being customs that can be reliably referred to for determining what each individual or group should receive is simply begging the question. Exactly which customs and traditions could one refer to for the distribution of a 'social good' that has had no existence in tribal cultural traditions.

The problem is further exacerbated by the fact that often in Papua New Guinea, resource developments are established in remote areas, as in the case of Porgera or Ok Tedi, that are usually not cultivated or claimed by specific individuals or families, although the group as a whole may claim the territory. Obviously, in a subsistence agriculture community, entitlement to agricultural produce at the individual and family level is easily susceptible to customary determinations. Family and individual plots are clearly designated; and entitlement to products is made by simple reference to the produce that the individual or group generates from working those plots. Compare this situation with that of a modern resource

development where what is produced is often generated in areas uncultivated by any group, family or individual. Moreover, development of these areas is effected by an external agent, in an area of commonage which no family or individual has bothered to claim, although generally claimed by the wider clan or group. Consider also that the product is not the familiar social good, such as agricultural produce, but cash, an entirely modern social good with no traditional rules or procedures for distribution in traditional Melanesian society. There could be no conceivable set of customary rules of entitlement that could apply to such an extraordinary situation.

Even more dangerous and contentious would be the idea that the patrilineal head might fix distribution through assigning a value to each clan or individual in terms of contribution to the welfare of the land group. Any such attempt would be hampered by the fact that, in general, Melanesian societies unlike Polynesian, had no tradition of hierarchies based on lineage. One could imagine the resentment and altercations that may arise with any attempt to tie benefits and liabilities to a personal evaluation of status and contribution of the sub-group to the welfare of the greater overall landowning group.

Conclusion

It is the contention of this paper that most arguments in favour of customary land tenure fail to convince, especially when one attempts to apply its guidelines or lack of guidelines, to a monetary driven system of trade and commerce. The customary system will continue to thwart attempts to mobilise land for resource development or agricultural and urban development. Legislation that has been enacted to make customary land available for development through lease/lease back arrangements, incorporated landowner groups, and landowner companies, has simply created a bureaucratic tangle embedded with punitive transaction costs, and susceptibilities to corruption and political manipulation. Moreover, custom has been incapable of providing guidance in the difficult area of distribution of monetary benefits. Attempts to devise a mechanism to facilitate a distribution based on customary entitlements have generally failed, whether we speak of the trusteeship arrangement as in Bougainville or distribution based on incorporated land groups as in the Southern Highlands.

Ultimately, confusion devolves from a legal system that only recognises the rights of the landowning group while leaving it up to custom to determine individual rights. This has created a false dichotomy in which the law seems to ascribe moral standing to the group as an entity distinct from the individuals who make it up. This has fostered a conceptual as well as legal confusion. How do we realistically conceive of a group as a discrete entity that exercises consciousness, intentionality, responsibility and so on, not dissimilar from characteristics of the human personality, the primary bearer of rights? Jones (2000) points out that the idea of rights held collectively or jointly is quite capable of making sense of rights that are commonly claimed as group rights, so long as we do not view groups as entities that enjoy a moral status or a distinct reality that is somehow separable from the persons who make it up. Individuals alone possess moral standing and are the primary bearers of rights but in some cases the rights they aspire to are simply traceable to the fact of their membership in a specific group.

The current problem with PNG law is that it ascribes ownership rights to groups without specifying the nature of the interests or rights that individuals possess through membership in the group. This is the fundamental weakness in the current system of land tenure because, when all is said and done, group rights only cash out in terms of

the specific rights we can assign to the particular members of the group. The current situation in Papua New Guinea is analogous to assigning to a group of citizens a right to work without legally specifying the unique individual rights that follow from this group right, for example, the content of the individual right, the mechanisms necessary to assert the right, and the remedies for non-compliance.

This is extremely important because ownership rights become most contentious over issues relating to the 'right' to income. The right to income is a 'positive right' to receive some form of welfare or certain benefits, rather than a 'negative' or 'liberty right' that constrains against violation, injury or trespass. On this point O'Neill (1996:134) has observed that welfare rights are different from liberty rights in that to institutionalise the former is not just to secure the backing of the law and the courts but also to define and allocate obligations to contribute and provide the relevant goods and services and so to fix the very shape of these rights and obligations. The point she is making is that the right to benefits remains basically inchoate and meaningless without the legal institutional setting and an ancillary system of obligations and rights which give meaning. This entails that there must already exist certain customs and traditions together with an institutional framework that enable one to assert and enforce this right. These are elements which were entirely absent in traditional Melanesian culture and the current legal context that allegedly preserves that tradition. As a result, individual interests and rights over those interests, especially with respect to income, lack the necessary definition that could give them meaning.

Thus, while the law enshrines a general group right to ownership, it simply relies on custom to sort out individual rights. This situation is simply preposterous when one reflects that it is supposed to occur in the context of a modern market economy, in which appropriate customs relating to property and monetary distribution have no precedent in Melanesian traditions. Even the Fijian land tenure system, which invests ultimate title in the *mataqali*, or kinship group, under the supervision of the Native Land Trust Board, follows very strict legal guidelines in the distribution of revenues to the individual membership (see Lea 2001). In Papua New Guinea it is therefore not surprising that unspecified individual rights have created a chaos of conflicting claims in which only the most ruthless and opportunistic have flourished.

Note

[1] See, for example, *PNG Independent* 10 May 2001:8, letter to the editor entitled 'Torato is no Gobe Landowner'; A.P. Power, 2001. 'State neglect a major factor', *The National*, 20 March:19.

References

Aldridge, B., 2000. *Current Land Situation Report*, presented to the Special Parliamentary Committee on Urbanisation and Social Development, Port Moresby.

Christman, J., 1994. *The Myth of Property*, Oxford University Press, New York.

Cooter, R., 1991. 'Kin groups and the common law process', in P. Larmour (ed.), *The Governance of Common Property in the Pacific Region*, National Centre for Development Studies, The Australian National University, Canberra:33–46.

Crocombe, R., 1974. 'An approach to the analysis of land tenure systems', in H. Lundsgaarde (ed.), *Land Tenure in Oceania*, University of Hawaii Press, Honolulu:1–24.

Curtin, T., 2002. Scarcity amidst plenty: economics of land in Papua New Guinea, The Australian National University, Canberra (unpublished).

Donaldson, T. and Dunfee, T., 1999. *Ties that Bind: a social contracts approach to business ethics*, Harvard Business School Press, Cambridge, Massachusetts.

de Soto, H., 2000. *The Mystery of Capital: why capitalism triumphs in the west and fails everywhere else*, Random House, Sydney.

Dubsky, R., 2002. 'The formula for public sector reforms: public enterprise reform in Fiji islands and good governance in Oceania', *South Pacific Journal of Philosophy and Culture*, 6:6-22.

Dwyer, D., Dwyer, T., Ellis, G., Ward, M., Fitzpatrick, D., 2000. *A Compensation Claims Procedure for Papua New Guinea: report to the Institute of National Affairs*, Asia Pacific Press, The Australian National University, Canberra:36–40.

Filer, C., 1990. 'The Bougainville rebellion , the mining industry, and the process of social disintegration,' in R.J. May and M. Spriggs (eds.), *The Bougainville Crisis*, Crawford House Press, Bathurst.

Hart, H.L.A., 1961. *The Concept of Law*, Clarendon Press, Oxford.

Higgot, R., 2000. 'Contested globalization: the changing contextual normative challenge', *Review of International Studies*, 26:131–53.

Holzknecht, H., 2001. 'Papua New Guinea customary land issues,' The Australian National University, Canberra (unpublished).

——, 2002. 'Opportunities, Potentials and Problems in Communal Land Tenure (CLT)', in *Forestry-related and other Developments in the South Pacific*, University of the South Pacific, Suva:10–12.

Honore, A.M., 1961. 'Ownership', in A.G. Guest (ed.), *Oxford Essays in Jurisprudence,* Oxford University Press, London:107–47.

James, R.W., 1985. *Land Law and Policy in Papua New Guinea*, PNG Law Reform Commission, Port Moresby.

Jones, P., 2000. 'Individuals, communities and human rights', *Review of International Studies* 26:199–216.

Kemeata, R., 2001. 'Flexibility and creativity in Melanesian land tenure', *Catalyst,* 31(2):177–96.

Lea, D.R., 2001.*Introduction to the Ethics of Business and Development in Contemporary Melanesia*, University of Papua New Guinea Press, Port Moresby.

Maitland, I., 2001. 'Distributive justice in firms: do the rules of corporate governance matter?', *Business Ethics Quarterly*, 11(1):129–45.

Nozick, R., 1974. *Anarchy, State and Utopia*, Basic Books, New York.

O'Neill, O., 1996. *Towards Justice and Virtue: a constructive account of practical reasoning*, Cambridge University Press, Cambridge.

Ploeg, A., 1999. 'Land tenure and the commercialization of agriculture in PNG', in T. van Meijl and F von Benda-Beckmann (eds), *Property Rights and Economic Development: land and natural resources in Southeast Asia and Oceania*, Kegan Paul, London:165–87.

PNG Forestry Review, Team Reports, 5 February 2001–5 March 2001. Individual Project Review Report Numbers 12–32, Port Moresby.

Power, A.P., 1988. 'Resources development in the East Sepik Province', in C. Thirwall and P. Hughes (eds), *Ethics of Development: choices in development planning*, University of Papua New Guinea Press, Port Moresby.

Sagoff, M., 2000. 'Do we consume too much?', in P.H. Werhane and J. Reichart (eds), *Environmental Challenges to Business*, Ruffin Series No 2, Society for Business Ethics, Chicago:53–75.

Walzer, M., 1983. *Spheres of Justice*, Basic Books, New York.