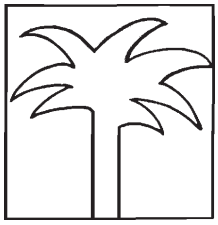

Incorporated land groups: part of the problem or part of the solution?

David Lea

This article argues that land group incorporation is a flawed mechanism because it does not provide for the simultaneous registration of the land that is supposed to belong to the group, and invests title in groups rather than individuals. The continued use of this mechanism will ensure that property interests are subject to political expediency, and that individual interests will be savaged by the political leadership. The same situation was equally true in the West until property interests were ascribed to individuals whose rights were given strong protection in the law and constitutionally entrenched.

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R.W. James, in *Land Law and Policy in Papua New Guinea,* argues that the colonial policy of the 1960s, which sought to institute and register individual forms of land tenure, was reversed by subsequent legislation and the constitution, which redirected the thinking of policymakers (James 1985:49). Significantly, the Land Groups Incorporation Act 1974 provided for the legal recognition of traditional groups and their incorporation for the purposes of acquiring, holding, disposing and managing land (Land Groups Incorporation Act 1974, Ch. 147, S1e). This legislation gave legal substance to the view that in Papua New Guinea the primary owners of land are groups of one form or another. James stated that the land group corporation represents an emphasis on lineage as the basic land owning entity, but lineage clothed with legal personality in the nature of a land group corporation.

> In this way many of the elements of the traditional system were sought to be retained, for example, collective ownership, mass participation in the decision making processes, traditional disputes settlement philosophy and a distribution system based on one's interest in the land (James 1985:50).

With respect to the PNG Constitution, the principle that development should be achieved primarily through the use of Papua

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New Guinean forms of social, political and economic organisation was adopted as a national goal. It holds that villages and communities should remain as viable units of society and includes, among other things, a guideline that 'land policy should be an evolution from a customary base and not a sweeping agrarian revolution or total transformation of society' (James 1985:50).

The idea is therefore that the Land Groups Incorporation Act represents an effort by the legislature in conformity with the spirit of the constitution to preserve customary collective land tenure through the modern legal personality of the corporation. Has it worked? In other words, has the Act provided 'mass participation in the decision making processes, traditional disputes settlement philosophy and a distribution system based on one's interest in the land'. The *Post Courier* (one of two national newspapers) published the following letter under the ominous title 'Con men, spivs in control' (*Post Courier*, 18 April 2001:10). It states

> I would like to thank the government for bringing to some of us in PNG con men and spivs, both from within our community and outside.
>
> We kept them under control before but now because of the new developments brought to us by our government, the con men and spivs control us.
>
> I am also talking about the development of incorporated land groups. Before we never heard of these things. Now in areas that have the development, there are hundreds of them, many such groups only having one or two people. Because of the development our government has brought us we now have brothers fighting against brothers, sisters fighting against sisters.
>
> If you doubt that I am speaking the truth, you haven't been reading my favourite newspaper much. The advertisements of one land group fighting another over millions in oil royalties, the blowup of incorporated land groups that the government seems to register and deregister one flip flop after another every time the big man (PM) goes overseas or looks the other way.
>
> J. Franklin Kabai, Boroko, NCD

The letter appeared after a long series of advertisements paid for by rival incorporated land groups, others paid for by the Minister of Petroleum and Energy, letters and scholarly articles, all concerned with landowner disputes in the Southern Highlands over the Kutubu oil and gas project. Indeed, on the page opposite the letter, the *Post Courier* ran a long article by Rodney Kameata, senior research officer in social and environmental affairs at the National Research Institute, on incorporated land groups entitled, 'Using land groups in resource development' (*Post Courier*, 18 April 2001:11). In this article, Kameata considers the use of the incorporated land group within the forestry, agricultural and oil and gas sectors. He goes on to recommend that the state play a greater role in organising people in the agricultural sector and go beyond social mapping and landowner identification studies to the creation of monitoring mechanism to cater for splinter groups within the oil and gas sector.

This was not the first article to highlight the state's mismanagement of incorporated land groups. A few weeks earlier Power ('State neglect a major factor', *National*, 19 March 2001:15, 20 March 2001:19), who had been a major force behind the drafting of East Sepik legislation on land tenure, defended the Land Groups Incorporation Act and the mechanism of the incorporated land groups in the face of ongoing conflicts in the Southern Highlands. He argued that conflicts were arising, not because of flaws in the legal mechanism of group incorporation, but because of want of proper administration. Although Power admitted that

> …the very Act that was designed to empower landowners has been used

> by manipulators to disenfranchise individual landowners and land groups (*National*, 20 March 2001:19)

Power reached the conclusion that these misadventures were the result of the state negligently implementing the Land Groups Incorporation Act. Indeed he (1999) had recently re-published his book, *Land Group Incorporation* in three volumes, under the auspices of AusAID, giving detailed instructions on the incorporation of land groups, replete with proscriptions and prescriptions drawn from experience and a careful reading of the Act. It would appear therefore that the Australian government, through its donor arm, had also given its continued blessing to incorporated land groups.

This article considers the fundamental problem with incorporated land groups and the legislation which gives them validity. The use of incorporated land groups (ILGs) is increasing in the gas, petroleum and forestry sectors, in which activities are driven by outside developers. It may be argued that the original intent of the Act was not to use incorporated land groups as vehicles for the disbursement of benefits, but to create a mechanism by which indigenous 'land-owners' could manage their customary land, given the restrictions on dealings in customary land. Thus, one might be accused of offering a form of strawman argumentation in attacking the legislation, when the fundamental problem is that the legislation is being applied contrary to its intended purpose. Indeed, this may well be the case. Power (n.d.), for example, sees the ILG system as one which has the ability to distribute cash benefits fairly and as a mechanism to manage the physical, social and economic impact of the resource development. Weiner, however, writing of the Foi in the Kutubu area, noted that

> …having worked with the Foi both before and since the Oil Project, there seems no doubt in either my mind or theirs; the ILG is perceived solely as a petroleum benefit-receiving body, and all of the uses to which it has been put by the Foi (and other people within the petroleum project area) have been exclusively related to this function. It has not yet been put to use to attend to matters that pertain to ownership of land *per se*, as it was originally designed (2000:9).

Nevertheless, the view of this paper is that the ILG is an inappropriate vehicle both for managing and titling land, and for disbursing benefits from external resource developers (extractors). Whether or not groups are alleged to be the primary owners of land, it still remains that Melanesians, as individuals, have interests in this group-held land, and these interests are not being protected or promoted by incorporated land groups.

Land registration

The first and most obvious point, which Power mentions and underlines in his book, is that the registration of an ILG does not entail or mean that any piece of land or territory is thereby registered (Power states this reality directly but doesn't seem to recognise it as a major drawback). Or, as Kameata elaborates, the Act does not require confirmation that the ILG is the proper owner of the land for which it purports to speak, nor does it require disclosure of any disputes about the ownership of the land *(Post Courier*, 18 April 2001:11). It is perhaps assumed that every PNG citizen by definition has an interest in some particular piece of land and therefore, given all land is owned by the group rather than the individual, one registers the owners because there is no mechanism for the registration of customary land (registration of customary land is a hot issue and has been vehemently resisted throughout the years).

But this legal state of affairs leads to a scenario in which the state first registers the landowners and then has to look around for the particular piece of land to which they

belong. This is fine where there is plenty of land around for everyone and all is of more or less equal value. But matters are drastically different when you have a number of incorporated groups all laying claim to the same piece of valuable territory which is awaiting development from an immensely wealthy international conglomerate seeking to reward the true claimants with royalties, infrastructure development, generous leasing arrangements, equity arrangements, and employment opportunities. Then, the government may well find itself enmeshed in real conflict control rather than quietly admiring 'traditional dispute resolution'.

Not surprisingly, the conflict control scenario is now being played out among landowners in the Southern Highlands associated with the Kutubu Oil and Gas project. One obvious solution would be to register the land with the true owners well ahead of development. In other words, it seems to defy common sense to register a group as a land-owning group without specifying the estate to which their rights are attached. The current legal reality can only be grasped in light of the relatively recent tangled history of aborted initiatives and defeated proposals for the registration of customary land in Papua New Guinea.

A system of formal registration was attempted in 1952 when the Native Land Commission was established to inquire into the ownership of each tract of unalienated land and record the rights of the traditional owners. The program was pursued for ten years with little practical result (James 1985:42). In the 1960s, the 'transformation policy' adopted by the Australian Administration involved the substitution of individual registered titles (freehold) for traditional communal forms of landholding and the replacement of customary law by English real property law (James 1985:45). The legislation intended to implement the plan more efficiently was, however, ultimately defeated by the PNG members of the House of Assembly in 1971 (James 1985:46). Larmour (2001:10) records that the event which galvanised opposition to the proposed legislation was a paper circulated by visiting academic at the University of Papua New Guinea, Alan Ward, 'Agricultural Revolution, Handle with Care'. One of the more recent noteworthy attempts to register land occurred in 1995 and was defeated by a concert of university students and the military who saw land registration as synonymous with eventual dispossession, or alternatively, a subversive plot hatched by the World Bank and the IMF. Even more recently, events in July 2001 saw four people, including two students, killed in demonstrations against privatisation and a perceived government intent to register customary land.

This dismal history is indicative of the paralysing forces of distrust, uncertainty, innuendo and even misinformation which saddled the state with a half baked mechanism for registering 'owners' without registration of the land which is supposed to be owned. Larmour (2001) argues for the non-effects of registration as found in African research and in the late colonial period in the Solomon Islands. He points out that in sub-Saharan Africa, titling had no discernable impact on investment behaviour; lack of opportunities deterred investment rather than lack of credit; transaction costs for outsiders might be decreased but they are increased for insiders.

Taking all this into consideration, it must also be said that many of the registration schemes Larmour is looking at were never fully realised. He states that where land was registered, records were rarely kept up to date. This gives us an obvious reason why these schemes would fail—up-to-date records would be a necessary condition for success.

Individuating title

Moreover, the point is not simply to register groups and their land but to register individuals and their land. The second crucial problem with the Incorporated Land Groups Act is that it provides for the registration of groups rather than individuals as owners. Hernando de Soto (2000), the Peruvian economist, gives an illuminating analysis of what modern Western property rights mean and how they work. He does not say directly that Western forms of property imply individual freehold, but he makes the telling statement that the evolution of Western property shifted the legitimacy of the rights of owners from the politicised context of local communities to the impersonal context of law. This, he says, created individuals from masses by transforming people with property interests into accountable individuals. This is the important point—that property rights can only be moved out of the politicised context by ascribing them to individuals rather than groups.

To grasp this point, one needs to understand the difference between the concept of entitlement as understood within the Western and Melanesian traditions. It has been pointed out that in Melanesia it is not through the application of hard and fast rules that land disputes are resolved; rather those involved in the disputes arrive at solutions that are likely to receive broad consensus. Ultimately, recognition of a claim derives from negotiated consensus over a general observance of norms and principles in the dispute process rather than the rigorous application of norms in the form of a code (Ballard 1997). The point is that, if rights to land are ultimately held by the group, any particular interest or claim can only be validated through a negotiated group consensus. In other words, individual rights may always be subject to the tyranny of local politics and political intrigue.

Cooter, a US legal academic consultant to the Institute of National Affairs, extolled the virtues of customary land as being 'relational' rather than 'market oriented' (1991). He stressed the cooperative nature of the customary system and stated that it is the group who parcels out land to individuals. As an illustration, Cooter mentions a general practice among coastal groups that requires a family to acquire approval from the group before erecting a family house on land they use for gardening. Clearly the politics and negotiations necessary to acquire group approval might sometimes prove to be insurmountable. This is what de Soto is referring to when he talks about removing property from the local politicised context.

Successful legislation on ownership desperately needs to move property rights out of the political context and endow them with a life which is to a certain degree independent of the vicissitudes of political manoeuvring whether on the local, regional or national levels. Instead, incorporated land groups preserve a reality in which these rights are always subject to political intrigue and shifting political power.

If we were to characterise the situation, we could say that the incorporated land group represents an attempt to deal with the reality of capitalist relations of production through what the legislators have conceived to be the traditional form of property, the collective land tenure. That it does not and cannot work is obvious in light of such disastrous events as those associated with the Foi landowners and their incorporated groups in the Kutubu region. De Soto (2000) has argued forcefully that successful wealth generation and successful integration into the system of global capitalism can only be achieved through property relations that share the essential characteristics of modern Western systems—a system of property in which specifically defined rights give strong protections to individual interests.

But a prevailing view exists that customary group ownership, contrary to modern systems of ownership, is wedded to group interests and fundamentally anti-thetical to any form of individual interests in land beyond commonly held usufructuary privileges. Crocombe, in his study of land tenure in Papua New Guinea, states that

> …the major land rights were held by ongoing groups within which individual usufruct and control was a consequence of group membership through birth, adoption or refuge; land was not subject to inheritance in the European sense of the term (1987:339).

Similarly, Power (1988) asserts that, in Melanesia, land was held through generations by force of arms and social groupings. The fundamental constant, he remarks, was that the group owned, and individuals used, the land.

> Individual land usage rights did not remove the reality that the group was the basis for ownership and the basis for the defence of these rights (1988:272).

Land group incorporation, he believes, is intended to preserve this reality through the legal mechanism of the corporation.

Even the assumption that property rights are traditionally held by collectives and the corresponding assumption that the ILG simply strives to give legal status to this reality, are problematic. For example, Weiner states

> …the LGIA is based on a quite erroneous assumption of the communal nature of land-holding and transmission within the Melanesian 'clan', and of its essentially 'collective' interest (2000:6).

Similarly, Evans-Pritchard,describing the Nuer in 1940 wrote

> [a] tribe very rarely engages in corporate activities, and, furthermore, the tribal value determines behaviour in a definite and restricted field of social relations and is only one of a series of political values, some of which are in conflict with it (1940:149).

Moreover, although Ward (1997) upholds the concept of group ownership, he observes significantly that customary land does not necessarily entail common land. As he states,

> …within the land of one clan, members may not have equal rights…because specific individuals or families…may hold residual and relatively exclusive rights (Ward 1997:23).

Indeed, there is ample evidence throughout Papua New Guinea that control or effective ownership tends to be exercised at the family or individual level.[1]

Although it is true that the group or tribe may collectively protect its territory by force of arms, this does not entail collective ownership, as Power believes. Indeed, it is surely a truism that most communities, political entitles and nation states, will pool resources and coordinate their military capacity to protect territory, but this hardly supports a corollary that property within the territory is subject to collective ownership. Indeed, it may now be appropriate to revise the belief that land in Melanesia is communally owned by groups rather than individuals. It is true that the group must confirm an individual or family's exclusive use and occupation of land, but this is not fundamentally different from the reality in a Western nation state, which legitimates and confirms one's exclusive rights to the use and control (ownership) of property. For example, think of the procedures such as registration and issues of mental competence, which must be satisfied before title is granted. This is all to say that, in the West, it is also the society or greater organisation represented by the state, township or municipality that legitimates individual title.

Matters are not substantively different from the Melanesian reality in which the group is said to grant control, management and use of land to individuals, families and extended families. As Weiner (2000) and Evans-Pritchard (1940) point out, the group,

be it tribe or clan, does not manage land on a corporate basis; instead management occurs at the family or individual levels; exclusive rights that entail the right to exclude are parcelled out to individuals and families. Thus we are essentially speaking of levels of individuation. It is true that the Western legal reality gives a greater degree of emphasis to individual rather than family ownership. Until the Married Women's Property Act 1882, however, UK law recognised the husband as the ultimate owner and controller of family property; only after the passing of this law could women retain individual property interests within the family unit. This does not differ substantively from the situation of the patrilineal Foi in the Southern Highlands where effective ownership, that is control of access, is always exercised by specific individuals or at most a set of full male siblings and their father (see Weiner 1986, 1988).

Having argued for the similarities between Western and Melanesian ownership, it is necessary to point out that the fundamental difference is that, once registered and formalised, property within the Western system gains its independence from the vicissitudes of local politics by endowing the individual with legally protected rights that ensure 'security of title'. In contrast, there is always an element of uncertainty and fluidity to property rights in Melanesian society because they are unformalised. Thus, they lack certain protections and may at some stage become subject to the internal politics of the group.

ILGs and the protection of individual interests

Trebilcock and Knetch in the 1980s and Cooter in 1991, as consultants employed by the Institute of National Affairs, recommended retention of collective ownership, arguing that the importance of individualisation of land tenure to support enhanced economic productivity is easily exaggerated.

> Even in developed economies, most major economic resources are owned by groups, whether corporations, cooperatives, insurance companies, pension funds, mutual funds, etc (Trebilcock and Knetch 1981:105).

From the start, the right which the ILG preserves for the individual is supposedly a usufruct subject to group control. Consider in contrast, the protections accorded to property in the Western system, to promote both individual accountability and individual control, and moreover, to secure the individual's rights within the group. Individuals who have an interest in collective property like an incorporated body have an interest which is well defined and clearly specified.

For example, if I own several shares in an incorporated company, I have a clear and distinct idea of my rights, powers and liabilities. If my share of the company is greater than 50 per cent, I know that I have a controlling interest in the company and can determine its future. I can also calculate accurately my share of future revenues and I can accurately know the current value of my interest by consulting the share market. Furthermore, I am at liberty to exchange that interest for an interest in another company.

In contrast, an individual with an interest in customary land is caught behind a veil of ignorance. He cannot state with any certainty his degree of control, the value of his interest, or his share of future revenues from this collectively held property. Moreover, he cannot exchange his interest for an 'equivalent' interest in the property of another ILG, nor can he legally exchange his interest for monetary compensation. Ultimately, the individual's interest cannot be assigned a value, because his interest is tied up with a particular group in which all the above issues need to be worked out through the local politics of the group.

The great advantage of modern property rights is that they are designed to enhance individual autonomy and decision making by making property rights independent of local and non-local politics and parochial arrangements. If you have an interest in some form of property, the law tells you exactly the extent of your rights, liberties and liabilities. Moreover, this information is recorded in an integrated system accessible well beyond the local level. The law thus acts to constrain others and the local group to respect and honour the rights and liberties associated with your property interest. To use Nozick's (1974) terminology, modern property creates 'side constraints' which place limitations and boundaries on political decision making and public policy.

Custom versus legally defined rights

But of course the framers of Papua New Guinea's legislation assumed that individual rights, liberties and liabilities within the incorporated land group would be worked out through custom and customary arrangements. To define and prescribe the above would be to interfere with custom. But, whatever one says about custom, it is apparent that PNG custom is incapable of controlling local politics or regulating these ongoing struggles for economic advantage to protect individual interests in a modern capitalist context. Custom cannot substitute for legal principles which state the extent of each person's interest and the rights and liabilities attaching to that interest and constrain external and internal politics of groups.

Examples of this point are legion. On matters of adjudication, for example, Brian Aldridge (2000:17,18), in a paper presented to a Special Parliamentary Committee on Urbanization and Social Development in 2000, offered a daunting list of obstacles which confront those who seek to develop customary land in the National Capital District. With the population projected to grow from 531,000 to 675,000 by the year 2015, there is a desperate need to develop land within the National Capital District. To accommodate this increase, according to Aldridge, an additional 6700 hectares of land are needed. Of this area, the government could provide 44.6 per cent of alienated land and the balance of 55.4 per cent would have to be derived from customary land. Aldridge distinguished the difficulties into six categories. Among the problems, he lists the fact that the land claimants themselves are often suspicious, litigious and often allow cash to corrupt custom, so that what should have been decided by custom is referred for adjudication in the courts.

Aldridge demonstrates this point with numerous references, among them the dispute which is frustrating the development of the Napa Napa Oil Refinery within the National Capital District. Aldridge's consultancy company, AKT, was commissioned to report on the tenure status of the Napa Napa road, which links the refinery to the urban centre of Port Moresby. They determined that the road traverses land known as Idumava, containing 240 hectares and the subject of a long-standing dispute between the Tanumotu clan of Roku, and the clans of Tatana Island. The initial decision on the dispute was taken by the Land Titles Commission in 1970 in favour of the Tanumotu clan of Roku. The matter was then appealed four times within five years prior to independence and three times after independence. The dispute still awaits resolution. It is currently in the Supreme Court awaiting judicial review. Similar disputes are occurring across the country.

If custom were a self consistent system with a functional adjudicating mechanism, these cases would not end up in the court. The fact that disputes inevitably end up there is indicative that this mechanism is absent. An additional peculiarity, Aldridge underlines, is the penchant of Local Land

Courts to revisit previous decisions of the Native Land Commission and/or the Land Titles Commission, which clearly frustrates dispute resolution. This was clearly the case in the Idumava case in which the Local Land Court overturned the decisions of the Land Titles Commission that had sparked the chain of appeals. The latter observation should alert observers to a major difference between custom and the application of law in the Western sense of the term. The fact that the PNG courts exhibit a tendency to overturn and reverse decisions by other courts and tribunals, as in the Idumava case, indicates that custom continues to exert a powerful and not necessarily positive influence on the application of property law. Specifically, there is much evidence to indicate that custom works by 'negotiated consensus' rather than through the careful application of general rules to specific cases. This means that courts, which regard themselves as guided by custom, will often treat each dispute with fresh eyes and disregard earlier court decisions and their reasoning as they look for some new consensus to fit the current context (in most disputes the courts may not find this 'consensus' and may simply search for the most politically acceptable solution).

Clearly this tendency may have been appropriate in the past to maintain and harmonise relations within a relatively small local group, but it is fatal for an enduring 'security of title' and the 'absence of term'. These are two of the eleven essential incidents that Honore (1961) holds, define the modern liberal institution of ownership. The 'right to security' ensures immunity from expropriation and 'the absence of term' refers to the characteristic by which the temporal length of one's ownership continues for an indeterminate period. Reliance on ownership claims that are dependent on consensus and local arrangements and thereby lack clear security of title, can only undermine development, commerce and trade, not to mention the interests of the individual.

The ongoing publicity of misadventures and battles between the Foi land groups in the Southern Highland dominated the news in early 2001. Published reports and announcements emanating from this area indicated that traditional custom was incapable of providing acceptable dispute resolution or benefit distributions that met with elementary notions of justice or fairness. On 8 March, the *Post Courier* published an advertisement from 109 Foi landowners thanking the government for releasing their equity payments while at the same time demanding an immediate investigation of payment of 600,000 kina to deregistered incorporated land groups associated with the Kutubu Oil and Gas Project.[2] Chris Haiveta, Minister for Petroleum and Energy, attacked the Kutubu landowners, stating that 'a handful of greedy and power hungry landowners were on the verge of destroying Papua New Guinea's petroleum industry' (*National*, 9 March 2002:2).[3] In April 2001, the *National* reported that payoffs had been made by Foi leaders to influence politicians to recognise particular groups as genuine landowning groups from among the disputing Foi landowners (*National*, 12 April 2001). The same article reported police suggestions that the 'Foi Future Generations Fund' was being recklessly spent by the leadership through hire car, hotel accommodation, aircraft leasing and payoffs to politicians.

With respect to the Foi landowners, Power identifies the problem as one in which ILGs have been split and recreated from existing ILGs, while earlier ILGs have been de-registered. He states that

> …more than thirty land groups were de-registered without due process… New land groups were then registered without due process. These amounted to a reconfiguration of the same people into non-customary entities like family groups but with new officials. There were no new people' (*National*, 20 March 2001:19).

Family ILGs, he argues are contrary to customary groupings and are purely intended to maximise shares to the families.

The same happened in the Gulf Province, where many of the Kerewo ILGs broke up and formed family ILGs in similar manner to maximise returns contrary to custom. He goes on to admit that many allegedly criminal acts of fraud have been perpetrated on the landowners' funds, ranging from the drawdown of the Foi Future Generations fund to wrongful payments to the then non-existent Kutubu Development Authority

Power (*National*, 19 March 2001:15, 20 March 2001:19) denounces the gerrymandering that fractures custom to capture maximum wealth for certain families. What he fails to recognise, however, is that it is a mistake to attempt to base legal entities on a diversity of local customs. The assumption that custom can function as law to delineate entitlements is misplaced. Indeed it is rational that many within the groups might attempt to organise into smaller discrete groups—that is, families—and register them to maximise the flow of benefits. Custom may well be no more than a loose arrangement which tends to group families into clans, but so long as group membership is not tied to some independent variable like a registered section of land then it is natural that families and individuals will attempt to define the 'group' in a way that is most favourable to their own interests.

Power decries the fact that the state has been negligent in implementing the Land Groups Incorporation Act correctly, citing the lack of capacity of the Department of Lands and Physical Planning to implement the Act. The Department of Justice has allowed the Land Court Secretariat to run down so that there is no cadre of well-trained magistrates versed in customary land tenure to manage the Land Disputes Settlement Act independently and objectively. (The Land Disputes Settlement Act states that, subject to Section 40, it shall endeavour to do substantial justice between all persons interested, in accordance with the Act and relevant custom. Section 68 enables both a local land court and a Provincial Land Court to determine and apply relevant customs).

The fundamental deficiency in the Act (LGIA), however, is the failure to register the land group as the owner of a particular piece of land. If a registered land group were already designated as the legal owners of a discrete piece of the earth's surface, it would be far more difficult to cavil as to whether that group conformed to a customary land owning group, even given that concept made some sense anterior to the Incorporated Land Group Act.

The most famous case in which custom failed to control the distribution of benefits from collectively held property occurred during the Bougainville crisis. In this case, individual titleholders were entrusted with the fiduciary duty to use money received from royalties, occupation fees and compensation payments, for the benefit and general welfare of the landowners. But in the ensuing events the titleholders never distributed benefits or money. Some have theorised that the failure to disburse benefits was attributable to a lack of ritual governing the disbursement of cash.[4] Whatever is the true answer, it is evident that traditional custom was incapable of controlling a situation created from capitalist relations of production. The Land Group Incorporation Act is little more than an effort to prescribe legislatively a form of social structure that is assumed appropriate to subsistence agriculture—and even here it may be misconceived (see Weiner 2000; Evans-Pritchard 1940)—to capitalist relations of production, where it proves to be inappropriate. Moreover, the fact that property is conceived to be held by the group, rather than the individual, has consistently put the interests of the individual at the mercy of the political manoeuvring of other individuals within the group. There is ample evidence from all of the above that custom

has failed to control these manoeuverings and power plays and protect the interests of the individual.

Conclusion

Land group incorporation is a flawed mechanism because it does not provide for the simultaneous registration of the land which is supposed to belong to the group, and invests title in groups rather than individuals. The continued use of this mechanism will ensure that property interests are subject to political expediency, and that individual interests will be savaged by the political leadership. The latter observation is not meant to be an unfavourable pronouncement on Melanesian leadership. The same situation was equally true in the West until the property interests of individuals were legally protected, and these rights were constitutionally entrenched.

Notes

[1] For example, the Megier tribe in the Madang (see Yabon 2001) area clearly exhibit this pattern of tenure and much anecdotal evidence suggests this is also the case in Central Province. Indeed, it is also worth noting that although the East Sepik provincial government in the 1980s passed legislation to facilitate the incorporation of landowning groups in order to develop their land, the program was largely unsuccessful. This failure adds evidence to the conclusion that Melanesians generally do not actually manage land on a corporate basis, although they may act in concert to protect territory. Although the greater part of this paper is preoccupied with the shortcomings of the ILG in the disbursement of petroleum benefits in the Kutubu area of the Southern Highlands, the failure of the East Sepik legislation also highlights the inappropriateness of the ILG in fulfilling the supposed purpose of the Act, the management of land.

[2] Power (*National,* 20 March 2001:19) attempts to explain the situation, arguing that Chevron had originally incorporated landowner groups because the Department of Lands and Physical Planning (DLPP) was incapable of implementing the Act. Nevertheless, he says that after extensive consultation with landowner elders the job was fairly well done. Subsequently, he says, landowner leaders began to manipulate the Act. DLPP officers were then, he says, forced to register nonsense land groups without any adequate credentials and without going through due process, and more extraordinarily to de-register land groups against their wishes and without due process. He goes on to mention that a similar problem occurred in the Gulf province in which many of the Kerewo ILGs sought, in a manner contrary to custom, to maximise benefits by forming family ILGs. I believe his examples illustrate my point rather than his conclusion. Group rights are always more susceptible to individual opportunism whereas individual rights afford much greater protection. Second, custom is insufficient protection for individual rights in a situation in which capitalist relations of production apply, and rights are primarily applied to groups rather than individuals. The conclusion should not be that the government has to take on a greater supervisory role in the 'identification and distribution of landowner and local level government benefits', which, in the case of the PNG government, would be simply wishful thinking. The conclusion should be that the state needs to abandon a policy which emphasises incorporated groups rather than individuals, and which only benefits and recognises groups, rather than individuals.

[3] Power's viewpoint is that these remarks relate to an act of desperation by the original Foi incorporated land groups which led them to shut down the Mubi Vale station in an attempt to stand up for their rights. This group, he contends, has been frustrated by the lack of success of their court actions in the face of recent payouts by the DPE and MRDC and the drawdown of the Foi Future Generations Fund.

[4] Colin Filer originally raises this issue. See also Lea (1997:35) for further discussion.

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