# THE LAND TITLES COMMISSION AND CUSTOMARY LAND LAW: SETTLING DISPUTES BETWEEN PAPUA NEW GUINEANS

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The Land Titles Commission has "exclusive jurisdiction to hear and determine all disputes concerning and claims to the ownership by native custom of, or the right by native custom to use, any land, water or reef..."[1] Thus, when disputes arise between groups of Papua New Guineans as to who owns land in customary tenure, and if the parties wish a legally enforceable decision of the dispute, they must bring a claim to the Land Titles Commission.[2] However, as this paper will attempt to show, the Commission's method for solving disputes over customary land is not satisfactory. The Commission, following principles laid down by the Supreme Court, views these disputes as evidentiary problems, to be solved by arriving at an accurate statement of the facts. It fails to recognize that there are legal issues involved as well, and that a dispute over customary land tenure cannot be solved until the applicable customary law has been ascertained and applied. By failing to find the proper law, the Commission has failed to settle disputes in a way that would be understandable and acceptable to Papua New Guineans.

## I. *Background to Land Disputes*

In every district in Papua New Guinea, numerous disputes have arisen between families or extended families, and between

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1 *Land Titles Commission Act 1962-1971*, s.15(1). The Act uses the term "native land" in referring to land owned by Papua New Guineans under customary law. I shall use "customary land" instead, except where paraphrasing or quoting the Act.

2 Local and district courts are expressly denied jurisdiction over land disputes.

But the *Land Titles Commission Act 1962-1971*, s.15A, permits local courts to give temporary relief.

sub-clans, clans or villages over boundaries and the ownership of tracts of land.[3] Many reasons have been offered for the frequency of land disputes. Because slash-and-burn agriculture forces groups to move periodically, people may forget the precise bounds of earlier settlements and the same area may be owned or occupied by different groups at different times.[4] When land is held by clans or communities, many individuals may have concurrent interests in a single block of

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3 "Land disputes will be the greatest problem a Papua New Guinean government will have to face in the future. ...our first government will be landed with this trouble..." A.M. Kiki, *Kiki: Ten Thousand Years in a Lifetime* (1968) 144.

4 The concept of ownership is very difficult to define precisely in a discussion of customary land tenure. The English legal system has given very precise meanings to "ownership." For example, in the context of the *Real Property (Papua) Act 1953-1969*, ownership means legal possession of a registered certificate of title to land. At common law, ownership, as seisin, consisted of possession and title. None of these culturally derived meanings are applicable to Papua New Guinea societies. As a result, many commentators - and too many courts - have decided that ownership of land does not exist in traditional societies. See *Millirpum* v *Nabalco* (1971) 17 FLR 141. Papua New Guinea law has adopted the attitude that Papua New Guineans have, by "native custom," certain group or personal rights over land which are equal to "ownership." Neither lawyers nor anthropologists agree on precisely what these rights are. Hogbin has suggested that the only way to end the confusion is to dismiss the term "ownership" altogether from our vocabularies. See I. Hogbin & P. Lawrence, *Studies in New Guinea Land Tenure* (1967) 33. However, if we are to discuss an Act that concerns "ownership by native custom," we cannot do without the term. I intend, however, to avoid the responsibility of defining customary ownership, and thus will be unpardonably vague in my use of the term. For the purposes of this paper, "ownership" will mean any rights or interests which Papua New Guineans, individually or in groups, can assert over their land by virtue of customary law.

land.[5] When written records are not kept, time and the weather can change old boundaries or the natural features by which one's land was recognized. In some areas, wars frequently resulted in changes of ownership, before the *Pax Australiania* artificially stabilized the situation.[6] All of these reasons for frequent disagreements over rights to land can be included in the general observation that land is the most important element in the traditional Papua New Guinean economy. Disputes in any society cluster around those areas that are important to the members of the society: the incidence of land disputes among Papua New Guineans is probably no higher than the incidence of disputes over contracts or hire-purchase agreements among members of Western societies.

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5 It is common in traditional societies for many people to hold rights to land concurrently. For example, a large tract of land may be owned by the group (a clan or a village) as a whole, while various segments of the group simultaneously hold particular rights over blocks of land within the tract. On Wogeo Island, each village owns its land as a unit, but heads of families within the village have the right to administer, use and inherit defined blocks of residential and garden land. Hogbin and Lawrence, *Studies in New Guinea Land Tenure*, *supra*. Rights to land may be apportioned by use, with one individual owning the right to garden on a tract of land and another individual owning the right to hunt there. B. Malinowski, *Coral Gardens and Their Magic*, Vol.I (1935). Among the Chimbu, lands owned by the clan are divided so that each sub-clan has access to residential and hunting grounds and to garden plots of varying quality. H.C. Brookfield and P. Brown, *Struggle for Land* (1963).

6 In the Highlands, where land ownership depended greatly on power and the outcome of tribal wars, the Land Titles Commission has generally not followed the procedure for determining ownership outlined in this article. Instead, it has tended to award land to the claimant who was in possession at the time that the Australian administration established control over the area. This policy has had mixed results. On the one hand, faced with demands for stability in what had been a fluid and constantly changing situation, the Commission felt it necessary to declare a single principle on which to ground decisions. And the date of Administration control does mark the end of the era when land ownership could be determined by war. However, this rule overlooks the possibility that claimants may have been ousted from land which, by other principles of customary law, they owned and which, had the coming of the administration not intervened, they could have retaken.

In recent years, potential causes of land disputes have increased. Cash cropping, urbanisation, leases and sales to government and industry have made land more valuable. Many land disputes between Papua New Guineans occur when one group hears that another is claiming or about to be compensated for alienated land.[7] At the same time, economic and social changes have undermined traditional values and rules, making people less sure about ownership and their customary rights over land, and occasionally making customary dispute settlement agencies ineffective.[8] Finally, population growth and the more intensive use of land required by permanent tree crops have created contests for land where once there was enough for all.

The multitude of land disputes and the tendency of disputes in some areas to erupt into violence prompted the administration to set up, first, the Native Lands Commission and then in 1962, the Land Titles Commission. It was hoped that a quasi-judicial body, devoted solely to adjudicating boundaries and settling disputes over land, would be able rapidly to settle all outstanding claims and controversies.[9]

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7 For example, *Gaya Nomgui* v *Admin.*,Full Ct. (1972) No.36 and the Newtown case, *In re Era Taora*,Full Ct. (1971) No.18.

8 A.L. Epstein describes several examples in *Matupit: Land, Politics and Change among the Tolai of New Britain* (1969) 138-200.

9 The Preamble to the *Land Titles Commission Act 1963-1971* provides:

"Whereas it is universally recognized that the expeditious and final determination of disputes as to rights in land and the registration of guaranteed rights to land are of basic importance to the well-being and development of all countries and especially of developing countries such as the Territory of Papua New Guinea:

And whereas it is also universally recognized that these matters can best be dealt with by judicial authorities independent of control by the Government of the day, doing justice to all parties in accordance with the law..."

The Land Titles Commission has not experienced overwhelming success in carrying out this mandate. Early attempts to establish demarcation committees, which would mark the boundaries to all land within prescribed adjudication areas, were all but abandoned when it became apparent that the committees stirred up more disputes than they solved and the commission did not have the manpower or time to act promptly on their findings.[10] For most of its history, cases between Papua New Guineans and expatriates over rights to alienated land, particularly in the context of the *Land Titles Restoration Act*, have captured much of the Commission's time and most of the headlines.[11]

Of the thousands of disputes between groups of Papua New Guineans, most are never brought to the Land Titles Commission.[12] And those that are do not get speedily settled.[13] Months may pass before a hearing is scheduled, and then the

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10 R.L. Hide, "The Land Titles Commission in Chimbu," New Guinea Research Bulletin No.50 (1973) 96-101.

11/12 *Ibid.*, at 29-32.

13 For example, a fight between two clans in the Highlands recently attracted national attention. The land dispute, which caused the current fight, first came to official attention in 1960 when it was heard by the Native Lands Commission. It reached the Supreme Court in 1970, which remitted it to the Land Titles Commission after deciding a procedural point. *Re Application by Endugwa Group*, Sup. Ct. (1970) No.604.

Commission may take years to hear a case.[14] After the hearing, the process of appeal winds its way from a review by a panel of three commissioners, [14A] followed by appeal to the Supreme Court and Full Court, followed perhaps by a remand for re-hearing by the Commission, whence the process can begin again.[15] The fault does not lie entirely with the Commissioners, and the substitution of a new agency to decide land disputes, as envisioned by the Commission of Enquiry into Land Matters,[16] would not make the mills of justice grind faster. There

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14 "... two... applications, both dated 22nd September 1966, had been made to the Land Titles Commission in respect of the subject land, application No.62 ... and application No.63 ... These applications were heard by Mr. Acting Commissioner Jones on 29th and 30th September 1966 and 11th October 1966 ... However, the hearing appears to be inconclusive for no order was made. Applications Nos.62 and 63 were next brought on before another Commissioner, Mr. Commissioner Smith, on 29th August 1967... The hearing was then adjourned to a time and place to be specified. Mr. Commissioner Smith appears not to have taken any further part in the proceedings. The two applications, Nos.62 and 63, ...then came on for hearing on 19th March 1968 before Mr. Senior Commissioner Kimmorley... At the end of this hearing the Commissioner adjourned the proceedings to a date to be fixed. In fact the hearing did not resume until 1st September 1970. ...It is unfortunate that the original proceedings should have been spread over a period of more than four years..." *Madaha Resena v Morea Mabi, In re Idumava Land*, Sup. Ct. (1972) No.705.

14A The review by a panel of three commissioners may be skipped. *Land Titles Commission Act 1962-1971*, s.34 and s.38.

15 For example, in the *Idumava* case, the Commission hearings, which lasted from 1966 to 1970, were followed by a review in 1971, a decision by the Supreme Court in 1972, and an appeal to the Full Court which ordered in 1973 that the case be remitted to the review panel.

16 Commission of Enquiry into Land Matters, *Final Report* (1973).

would still be too few adjudicators for too many disputes, too protracted an appeal process, and too much willingness to prolong every case to the limits of the appellate machinery and beyond. The only way to catch up to land disputes and to settle each dispute when it arises would be to saturate the country with land courts. Only if courts were available in almost every village could disputes be brought for settlement before the enmity between the claimants had attained insoluble proportions. This could best be achieved by giving village courts jurisdiction over claims arising out of interests in customary land.

There are further reasons for allowing village courts to settle land disputes. Frequently, disagreements over boundaries or land use arise as part of a broader argument, which may include the failure of one party to pay bride price or compensation for injuries, the unwillingness of one party to work on a common road, or a sequence of similar slights, misunderstandings and defaults. It is to be expected that an attempt to resolve the land dispute will fail if the other grievances and issues connected with the argument are not considered simultaneously. Land courts, such as the Land Titles Commission, must confine themselves to one issue, but the village courts would be able to view the circumstances as a whole.

Further, village courts may be the best forum for settling disputes over customary land because they will have the most knowledge of local customary law. They can be relied upon to understand not only the substance of customary law but also its procedure: they will usually know which circumstances call for strict application of the rules and which require compromise among the rules or the parties. From its inception, the Land Titles Commission has failed adequately and accurately to apply customary law in land disputes between Papua New Guineans. This paper will attempt to analyze the reasons for that failure.

## II. *Judicial Settlement of Land Disputes*

*The Land Titles Commission Act* envisions that disputes between Papua New Guineans over the ownership or occupancy of customary land will be solved by applying customary laws to the dispute. But, customary law is contained in traditions passed orally from generation to generation. Unwritten, it resides in the memories and opinions of the members of a community. The record of land ownership exists not in a certificate of title, deposited with a registrar, but in the stories that fathers tell their sons about past wanderings and wars.

Recognizing the need to admit oral traditions into evidence, the act frees the Commission from the duty to adhere to the technical rules of procedure and evidence applicable to most judicial bodies:

> In the investigation, hearing and determination of any matter before the Commission, the Commission is not bound to observe strict legal procedure or apply technical rules of evidence, but shall admit and consider such information as is available.[17]

But the extent of the Commission's freedom from the procedural rules binding other courts is open to question. Before 1965, section 29(1) explicitly permitted the Commission to admit hearsay into evidence.[18] Does the amendment, which drops all reference to hearsay and substitutes the phrase "such evidence as is available," imply that hearsay will not be admissible?[19] Further, it is clear that section 29(1) permits the Commission to eschew common law rules of evidence and procedure, but does it free the Commission from statutory demands? For example, must the Commission adhere to the requirement of the *Native Customs Recognition Act* that "questions of the existence and nature of native custom in relation to a matter, and its application in or relevance to any particular circumstances, shall be ascertained as though they were matters of fact"?[20] The Supreme Court has begun to formulate answers to these questions. It has determined, for example, that a Commissioner may visit the disputed site,[21] and it has rein-

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17 *Land Titles Commission Act 1962-1971*, s.29(1). The Act also provides, in s.10C, for the appointment of assessors to advise the Commission on customary law.

18 Amended by Bill No.43 of 1965.

19 The legislative debates and drafting instructions offer no enlightenment on the question.

20 *Native Customs Recognition Act*, s.5(1).

21 *Uriva v Maika* (1969-70) PNGLR 234 at 241. However, this holding was rendered irrelevant by the passage of s.29A (No.22 of 1972) which makes a visit to the site by the Commissioner mandatory.

stated "strict legal procedure" insofar as it has required that parties before the Commission be given the opportunity to see and reply to any information that a Commissioner uses in reaching his decision.[22] If the Land Titles Commission survives, the limits of its power to ignore strict procedure and rules of evidence will gradually take shape through the Supreme Court's responses to cases broaching the issues.[23]

The *Land Titles Commission Act* gives the Commission much freedom to pursue its inquiries into customary land law, but - perhaps wisely - it gives but little direction. An inquiry into customary land law must begin by defining the appropriate parties and subject matter, and for this it is necessary to refer to other statutes. The *Ordinances Interpretation Ordinance* defines "native" as

> ... an aboriginal inhabitant of the Territory and includes a person who follows, adheres to, or adopts the customs, or who lives after

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22 *Re Volupai* (1969-70) PNGLR 303; *In re Idumava*, Sup.Ct. (1972) No.705, 7.

23 The Commission finds itself, in regards to this issue, in a predicament common to quasi-judicial bodies. These agencies are usually created with the expectation that they will combine the impartiality of a court with the freedom from procedural restraints available to administrative investigations. However, because they are, in part, judicial bodies, appellate courts hold them to standards of natural justice, which results in rules of procedure and evidence being applied to their deliberations. Moreover, because these administrators are not judges, appellate courts tend to subject their findings to greater scrutiny than they would those of trial courts, which are protected by the notion that a trial judge should be permitted considerable leeway within the limits of judicial discretion. For an example of this process, see *Osineru Dickson and ors.* v *Luka Okere and ors., Goilanai No.2*, Sup. Ct. (1969) No.621.

> the manner of the aboriginal inhabitants of the Territory.[24]

The same act defines "native land:"

> ... land which is owned or possessed by a native or a native community by virtue of rights of a proprietary or possessory kind which belongs to that native or native community and arise from and are regulated by native custom.[25]

Aside from the general problems of interpretation posed by these provisions,[26] the definition of "native land" could create difficulties in deciding cases between Papua New Guinean claimants. The provision limits native land to that over which a native or native community has established rights, but disputes before the Land Titles Commission arise precisely because the ownership of the land is in question.

The *Land Titles Commission Act* makes only one attempt to establish substantive standards for the Commission:

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24 *Ordinances Interpretation Ordinance 1949-1964*, s.5. See also the complementary definitions in ss.49(2) and 55(2). For a discussion of the difficulties inherent in attempts to interpret and apply this definition, see Kassam, "Laws of Succession in Papua New Guinea," (1974) 2 *Melanesian L.J.* 5, at 17-21. Does the definition include only those "aboriginal inhabitants" of Papua New Guinea who follow traditional custom, or does it embrace both "aboriginal inhabitants" and anyone else who adopts traditional customs? To come under the definition, must a person live completely under traditional custom or could he be selective in his choice of customs? For example, could a person buy land under "native custom" and bring a claim concerning that land before the Land Titles Commission, while continuing to live, in other areas of his life, as an expatriate? None of these questions have yet been considered or decided by the Commission.

25 *Ordinances Interpretation Ordinance*, s.6(1). *The Native Customs Recognition Act*, s.4, defines "native custom." *The Land Act 1962-1973*, s.7(1) and ss.81-86, provide various restrictions on transfers of native land.

26 See footnote 24, *supra*.

> ... without otherwise limiting the discretion of the Commission to inquire into and determine the existence of native custom relating to land, where a native exercises a customary right to exclude others from land and that right is recognized and not disputed by other natives, that fact is prima facie evidence that the land is native land owned by that first-named native.[27]

As the Supreme Court has noted, this is an admirable starting point for an investigation into the ownership of customary land:

> ... it follows from section 42(1)(c) that where a native exercises a customary right to exclude others from land and that right has, in fact been recognized and not disputed by other natives, for the purposes of the Commission that fact is a test of ownership...[28]

In effect, the provision equates occupancy - or, more precisely, "effective occupancy," which includes not only living on or using the land, but also being able to keep others from doing so - with ownership.[28A] In its willingness to use "effective occupancy" as a test of ownership, the court has demonstrated its ability to modify the common law to reflect local conditions.

Though this provision may be useful in establishing the right of Papua New Guinean groups to sue for their land, it is only a first step in solving a dispute between Papua New Guineans. For the very fact that a case has arisen demonstrates that the "right to exclude others from land" is not recognized and is "disputed by other natives." Thus, in solving a case between Papua New Guineans, the Commission must look beyond its establishing act for guidance on the crucial questions of a standard to adopt in deciding between

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27 *Land Titles Commission Act 1962-1972*, s.42(1)(c).

28 *Uriva* v *Maika*, *In re Veakabu-Vanapa* (1968-69) PNGLR 234, at 242.

28A *Ibid.* See also *Geita Sebea* v *Territory of Papua* (1941) 67 CLR 544.

competing claimants to customary land.[29] The Supreme Court has suggested that the Commission look for guidance from the Privy Council, and, in particular, the judgment of Lord Denning in *Adjeibi Kojo II* v *Bonsie*.[30]

The case arose among the Ashanti on the Gold Coast and involved a dispute between two sub-chiefs of the same clan over a tract of land near the Supong River. The defendant's people worked the land, and had for some time, but the plaintiff claimed that the defendant merely held the land as security for a debt contracted by their grandfathers. Each sub-chief claimed that the land had been given to his ancestor by the clan's head chief as a reward for services in the war against Abrimoro, which took place approximately 200 years ago. It is useful to review the foundations for their claims in some detail. First, the plaintiff:

> ... the Atwimahene (Head Chief of Atwima) now laid claim to the land. He lived many miles away at Kumasi, but he said that piece of land at Bonkwaso was given to his ancestor as a reward for his services in the war against Abrimoro some 200 years ago. The Atwimahene gave evidence by way of traditional history about the war, identifying himself with his ancestors and speaking as though he himself were present in person. He told how the Bantamahene appointed him with other chiefs to chase Abrimoro and he got as far as Bonkwaso when he was stricken by smallpox and got no farther. He was given that land at Bonkwaso as a reward for his services in that campaign. Three other chiefs ... supported his evidence, describing the campaign as if they themselves were there and and it only happened yesterday.[31]

And, the defendant:

> ... the defendants said that the land never

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29 Nor are other acts useful. Although, as noted above at footnote 25, they contain general definitions of native land and restrictions on dealings in native land, they do not provide standards for choosing between conflicting Papua New Guinean claimants to land.

30 *Adjeibi Kojo II* v *Bonsie*, [1957] 1 WLR 1223.

31 *Ibid.*, at 1224.

> belonged to the plaintiff but was given to the Odikro of Nerebehi at the end of the Abrimoro war. The Odikro of Nerebehi gave evidence by way of traditional history, saying that he did not go with the first contingent ... to chase Abrimoro, but that he was sent later to search for the first contingent. He met them on the Supong stream as they were returning victorious. Afterwards, he was given the land up to the Supong stream, which included the land at Bonkwaso now in dispute. The Bantamahene (the head clan chief of both the contestants) supported the traditional history of the Odikro of Nerebehi.[32]

The case was heard by a trial court, which was similar in structure and jurisdiction to Papua New Guinea village courts, and three appellate courts before reaching the Privy Council. The trial court found in favour of the defendants. The first appellate court reversed that decision, but at the next two levels, the appellate courts upheld the decision of the trial court on the grounds that judges in the original forum are in the best position to estimate the credibility of witnesses.

While the Privy Council also found in favour of the defendants, who were the parties currently in possession of the land, it said that the credibility and demeanor of witnesses is not relevant in cases where customary law, as revealed by traditional history, is at issue:

> ... there was no dispute as to the primary facts, that is, the facts which the witnesses actually observed with their own eyes or knew of their own knowledge in their own lifetime. The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognized that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever ...Where there is a conflict of traditional history, one side

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32 *Ibid.*, at 1225.

> or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth.[33]

In *Adejeibi Kojo* v *Bonsie*, competing claims for the ownership of land under customary law resolved themselves into a dispute over historical events. In Rashomon fashion, each party presented a different view of the same story, the war against Abrimoro. If the war had gone as the Atwimahene described it, then the land was his. If, on the other hand, the war had occurred as the Odikro of Nerebehi told it, then the land was his. When two witnesses describe the same event differently, it is usually assumed that one party is either lying or mistaken. In the absence of external evidence supporting one or the other, it is possible to determine which story accurately depicts the event by contrasting the demeanour and credibility of the two parties. This test is, however, of little use when neither party himself witnessed the event, and when each is merely relating what he has been told. To establish the credibility of the parties ensures merely that we believe them to be relating honestly what they have heard; it in no way ensures that the story, as they heard it, represents the events as they actually happened.

In such a case, where determining ownership of land under customary law depends upon choosing between conflicting oral histories, credibility tests are irrelevant. Instead, the Privy Council suggested, "The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable."[34] Applying this test, the Privy Council awarded the land to the defendant on the evidence that his people had been using the land undisturbed for many years and that he had in 1919 successfully prosecuted a trespassing claim to land on the Supong River, which rendered his version of the traditional history more probable.

The Papua New Guinea Supreme Court first applied the test devised by the Privy Council in *Uriva* v *Maika*.[35] Six groups each claimed to own all or part of a 3,500 acre tract

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33 *Ibid.*, at 1226.

34 *Ibid.*, at 1227.

35 *Uriva* v *Maika, In re Veakabu-Vanapa* (1969-70) PNGLR 234.

of land in the Central District between the Vanapa River and the Brown River Road.[36] The representative of each group substantiated the group's claim to the land by reciting the history of its contact with and use of the disputed area:

> Haino [Maika, who won before the Land Titles Commission] ...said that his group formerly lived in the village of Gubini, but some mountain Hoari fought them, so they came to a second village. Here the well was poisoned by the Koitabu people, half his people died, so that they then shifted to their present village Veakabu, which is adjacent to the subject land, on the western side of the road. His father and grandfather did not live on the land, but both used to hunt upon it. His sister had lived on the land since about 1951 and he has lived there for about seven years.[37]

Each of the appellants related a long history of attachment to the land. Bue, representing the Koabata, said that his grandfather had lived on Veakabu-Vanapa. Gorogo Jack, representing the Varu, claimed only part of the land, saying that his mother had obtained rights to it from her father, that his mother and he had lived on it more than forty years before when he was a child, and that an Administration official had paid him for timber cut from the land. Finally, Edward Uriva represented three groups of Konere people:

> His claim was that, historically, his group's ancestors lived in the area, including the subject land, and they had contact first with Sir William McGregor about 1895 to 1900 when on his first patrol. The people were then living in villages, but they did not live on but around the subject land. From 1890 on, the villages were shifted to higher ground on account of malaria. Their foot track runs through the land.[38]

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36 Three of the groups were represented by the appellant Edward Uriva.

37 *Uriva* v *Maika*, *op.cit.*, at 236.

38 *Ibid.*, at 237.

"At the hearing, each of the groups claimed a prior traditional right,"[39] and based its current interest in the land on that right, attempting to support it by evidence of present occupation. The Commissioner awarded the land to Haino Maika's group, seemingly on the grounds that his evidence was the most probable,[40] and Uriva and Gorogo Jack appealed.[41]

The appeal was brought on numerous grounds, but the court accepted only the ground that the decision was based upon insufficient evidence. Frost J. reasoned that a decision as to which group owns the land is, in effect, a decision as to which group has effective occupancy of the land, and he pointed out that each group's claim to effective occupancy was based upon traditional history. The court then quoted at length from *Adjeibi Kojo* v *Bonsie*, concluding, "I consider that this statement of the law applies to the present case and provides valuable guidance."[42]

Thus, the court reviewed the evidence available to the Commission to determine which party had proved the probable truth of his version of the traditional history by evidence of current use and occupation. The court was unable to find sufficiently explicit evidence of current occupation on which to base a judgement for any party:

> ... it appears that there were people living on the land, that there were gardens on the land... But when one turns to the transcript, there is no precise evidence as to which people or group were using the gardens or of the people living on the various parts of the land.[43]

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39 *Ibid.*, at 243.

40 See *Ibid.*, at 239, for the text of the Commissioner's reasons for his decision. Frost J. notes that the reasons "are indeed meagre" but that "it can be inferred that the learned Chief Commissioner accepted Haino [Maika]'s evidence and rejected the evidence of Edward [Uriva] and Gorogo Jack." *Ibid.*, at 240. Later, however, Frost J. suggests that the Commission may have been following the *Adjeibi Kojo* test. *Ibid.*, at 245.

41 Gorogo Jack died before the appeal was heard, and his group was represented by Ao Aubo.

42 *Ibid.*, at 245.

43 *Ibid.*, at 246.

The court allowed the appeal and remitted the case to the Commission for rehearing, on the ground that "there was no critical examination of the respective claims based on traditional history" by reference to current occupation.[44]

While the African case and the Papua New Guinean case are similar in that both involve claims to land ownership derived from recitals of a history that has been orally transmitted, there are important differences that distinguish the two cases. In *Adjeibi Kojo* v *Bonsie*, both claimants referred to the same historical event, but told the story differently. If the plaintiff's version of the tale were accurate, then the defendant's version must be false. Similarly, if the defendant's story were true, then the plaintiff, however innocently, was relating a lie. Their claims to the land depended upon which version of the story was accepted. The Privy Council's test was devised to make it possible to choose between the two histories.

In *Uriva* v *Maika*, on the other hand, four claimants told four separate stories. The events they described occurred at different times, sometimes concerning different parts of the land; but, even where the events overlapped in time, it is possible that every story was true. Proof that Uriva's people did meet Sir William McGregor, for example, would not undercut Gorogo Jack's claim to have received payment from the administration. Gorogo Jack's family could have been occupying the land at the same time that Maika's people hunted there. The Privy Council's test, designed to choose between competing histories, is inadequate for deciding ownership when the histories do not conflict.

Papua New Guinean societies recognize numerous different kinds of rights over land. One group may have the right to hunt over a block of land, while rights to garden there may be held by another group. Thus, in *Uriva* v *Maika*, if the court were able to establish that Haino Maika's group, for example, had hunting rights to the land, it could not proceed from this to the proposition that other groups were thereby denied access to the land for other uses. Where rights to land can be apportioned according to the different uses of the land, effective occupancy may be an invalid standard.

The *Adjeibi Kojo* v *Bonsie* test was next applied in the *Idumava* land case, where the traditional histories recited by

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44 *Ibid.*, at 245.

the two claimants were in direct conflict.[45] Idumava is a point of land stretching into Port Moresby Harbour, and has long been the subject of a dispute between the people of a Motuan village on Tatana Island and a Koita clan who live in Roku village near Idler's Bay. The respondents supported their claim both by traditional history and by evidence of present use:

> The traditional history of the [Koita] people was that they originally came from the Vanapa River ...and later settled on the northern shore of Fairfax Harbour at certain villages, including Tanomotu... From Tanomotu the clan saw smoke arising from Naba Naba on or close to the subject land, and went there to investigate. There is nothing to suggest that it was not possible to make the journey overland by following a course around the western side of Fairfax Harbour. They became friendly with other Koita clans who apparently had settled at this place and who owned the subject land, and acquired it from them. They then moved ... to Roku, situated on the shores of Idlers Bay, where they finally settled. However, while shifting their villages they continued to make gardens on various parts of the land ...[46]

The Motuan claimants also presented both a traditional history and evidence of present use:

> [The Motuans claimed the land] as ancestral

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45 *Madaha Resena and ors.* v *Morea Mabi, In re Idumava*, Sup.Ct. (1962) No.705. This judgment is of doubtful value as a precedent, since the case was appealled to the Full Court, which remitted it for rehearing by the Land Titles Commission review panel, on the grounds that the review panel might have given the impression that it was being discriminatory when it refused to admit new evidence. However, since the Full Court decided to remit the case on these procedural grounds, it did not find it necessary to reach the substantive issues which Frost J. discusses in his Supreme Court opinion. *Bobby Gaigo Rahonamo* v *Morea Mabi, In re Idumava Land*, Full Ct.(1973) No.46.

46 *Madaha Resena* v *Morea Mabi, supra* 15-16.

> clan land inherited from their forefathers. The claim was supported ...by use of the land for gardens by the ancestors and in more recent times at two places on Idumava Point, but the people lived in the villages on Tatana. They erected only stone shelters near the gardens. The Tatana people claimed that there were no villages on the land at least as far back as the time of Captain Moresby's visit in 1873. They also claimed that the [Koita] people had "no villages, no gardens, no houses" on the land.[47]

The Idumava case resembled *Adjeibi Kojo* v *Bonsie* in that the traditional histories were in conflict. Each party claimed that his ancestors were the only people to use the land, and "neither side was ready to concede that the other gardened in the same vicinity."[48] At the hearing, the Land Titles Commissioner adopted an approach similar to that recommended by Lord Denning in *Adjeibi Kojo*.[49] He inspected the site himself, and found old village ruins. He also found "that the ground was very rocky and stony and could not therefore be used for gardening."[50] Since this evidence made the history of the Koita people, who had described old villages, more probable than that of the Motu, who had claimed to use the land for gardening, the Commissioner awarded the land to the Koita.[51] His decision was upheld by Frost J. on appeal:

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47 *Ibid.*, at 4.

48 *Ibid.*, at 16.

49 There are many other issues involved in the appeal - the use of anthropologist's accounts by the Commissioner, the conduct of the review by three commissioners, the possibility that the Koita abandoned the land - but this paper focuses on one issue, the test for choosing between conflicting histories.

50 *Madaha Resena* v *Morea Mabi*, *supra*, at 18.

51 "The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is the more probable."
*Adjeibi Kojo II v Bonsie*, *Supra*, at 1227.

> ... the Commission's decision, both at the original hearing and on review, should not be disturbed because on the evidence the claim of the respondent based upon his traditional history ... that they were owners of the land is to be preferred, and ... this claim is supported by sufficient evidence of occupation.[52]

Using the Adjeibi test has propelled the Commission and the court into a confusion between occupation and ownership. Admittedly, in a society without written records, it is difficult to find a more compelling test of ownership than occupation of the land in question. The *Land Titles Commission Act* supports the emphasis on occupation by providing that effective occupation will be "*prima facie* evidence" of ownership.[53] But *prima facie* evidence is subject to rebuttal, and the act recognizes that the customary law of some Papua New Guinean societies may distinguish between occupation and ownership.[54] It was a major step in legal thinking to grant that effective occupation alone could equal ownership, because it permitted the courts to recognize the rights of the indiginous people in colonies and protectorates to their land. But when the courts follow the *Adjeibi Kojo* test to the point that occupation becomes the only criterion for ownership, then the courts risk replacing the customary law of the parties with a court-made law.

The customary law of a Papua New Guinean clan may provide that the clan owns land that it does not occupy, or

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52 *Mahada Resena* v *Morea Mabi*, *supra*, at 20.

53 *Land Titles Commission Act*, s.42(1)(c).

54 Thus, in s.42(1)(c), the *Land Titles Commission Act* provides that effective occupancy is "*prima facie* evidence" that the land is owned by the occupant. But, it modifies this by providing, in s.42(1)(c) that this does not limit "the discretion of the Commission to inquire into and detérmine the existence of native custom relating to land," and, in s.42(2), by providing that "Nothing in the last preceding subsection contained shall operate or be taken to operate so as to defeat any rights by native custom which exist or may come into existence in favour of any person."

that it uses only for certain purposes. In some societies, land lost through war is still considered the property of the losers, even though they are denied access to it.[55] *Uriva* v *Maika* is an example of the multiple uses to which land can be put; different groups may simultaneously possess various usufructary rights over a single piece of land. In the *Idumava* case, the Commission and the court may have been correct in finding that the Koita effectively occupied the land to the exclusion of the Motu. However, one cannot jump from that finding of fact to a statement of the law without an intermediate step. It is necessary to ascertain the rule that Koita and Motu customary law would apply in such a case: do their laws provide that effective occupation equals ownership, or, for example, might Motuan law hold that a Motuan village retains its ownership rights to land occupied by Koita?

The Motu and Koita are separate societies, each with its own legal system or complex of customary laws and procedures. In the *Adjeibi Kojo* case, both parties represented sub-clans within a single clan, so it was possible for the courts to assume that both parties followed the same customs. In such a situation, the court merely needs to ascertain what the law is, and apply it to the facts as it finds them. There was no dispute over the law in *Adjeibi Kojo*. Both parties accepted that the clan's head chief allocates land to sub-chiefs, and the court's problem was merely to decide which sub-chief had in fact received the land. The situation in the *Idumava* case was quite different. The parties were not members of the same society. Their rules about land allocation may differ radically, and a Koita would not consider himself bound by Motuan land law any more than a Motuan would accept Koita jurisdiction. In the *Idumava* case, it is possible that the Koita did own the land - under Koita customary law - and that the Motu simultaneously owned the land - under Motuan law. The Commission and the court treated the case as a conflict over the facts alone, and looked for evidence to resolve the conflict over the facts.[56] Perhaps, the case

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55 Reay, "Land Tenure as a System of Political Change," paper presented to the Third Waigani Seminar (1969) 8.

56 Papua New Guinea cases and statutes reflect a tendency to differentiate between law (the rules that have been imported or enacted) and custom (the traditional rules that most Papua New Guineans live by). For example, the *Native Customs Recognition Act*, s.5, provides that "questions of the existence and nature of native custom in relation to a matter, and its application in or relevance to any particular circumstances shall be ascertained as though they were matters of fact."

ought to be viewed as a conflict of laws case, which would involve the court in a very different exercise, requiring it to ascertain the relevant laws and to use conflict of laws principles in determining which party's laws to apply. Disputes between different societies cannot be settled on the same principles as disputes between parties within a single clan.

In the *Idumava* case, the Commission and the court agreed that effective occupation will be an operative principle of customary law; in the *Lilumpat* case, the Land Titles Commissioner attempted to award the land on the basis of which claimant had occupied it earliest.[57] The land under dispute comprised Piawai, Pig (or Tab) and Masas Islands near Madang. The claimants represented land owning groups and clans who lived on nearby islands (the Lilumpat and others on Siar Island and the Ianu and Sausau on Kranket Island) and used the disputed area for fishing and fruit trees. The parties' traditional histories were in conflict. The court summarized the evidence of the claimants from Kranket Island first:

> The first witness for the [Ianu and Sausau] clans was Gardip-Jas. According to him, his forefathers lived on Yomba Island which broke up. Berma and his wife Globa survived and swam to Tab Island, one of the islands the subject of this proceeding. They found it not large enough to support them so they swam to Pejawai (Piawai) Island, another island the ownership of which is in dispute in this proceeding. From there they went on to Kranket Island, which is not involved in this proceeding. He went on to relate how Berma and Globa had six children who intermarried.[58]

The claimants from Siar also presented an historical account of their arrival on the islands:

> [Their witness] claimed that the three islands belonged to the Siar people ... He stated that his forefathers who lived at Saisawan owned the three islands. Before the white man came to

57 Lilumpat and ors. of *Siar* v *Ianu and Sausau of Kranket*, Sup. Ct. (1972) No.668.

58 *Ibid.*, at 4.

> Madang his forefathers owned the three islands and were still using them up to the time when the Germans came to the area. They used them for fishing and harvested the breadfruit and mango trees planted by his "forefather's forefathers." He claimed that they still used the islands when the Germans left and the English came and that the German government had ruled that the islands belonged to the Siar people. After the arrival of the English, an "English Masta Mak" had ruled that the three islands belonged to the Siar people.[59]

There was no dispute over current use of the islands, both parties agreeing that the Siar people alone used them for fishing and for gathering nuts and fruit. However, there was disagreement over the basis of the Siar people's right to use the islands. Witnesses from Kranket stated that the Siar clans used the islands with the permission of the Kranket owners:

> [Gardip-Jas] further stated that his forefathers, whilst fishing, met people from the Lilung clan [of Siar] and gave them permission to fish around the three islands ...[60]

The Siar people denied having requested or received permission to fish about the islands, and added that the Kranket had always denied ownership of the area:

> ... the Australian government, which was looking for an area to establish a leprosarium, approached the luluai of Kranket and asked who owned Tab and Pejawai ... Islands. The luluai replied that the islands belonged to the Siar people.[61]

The Land Titles Commissioner ruled in favour of the Kranket Island clans:

> ... I find that in the distant past these

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59 *Ibid.*, at 5.

60 *Ibid.*, at 4-5.

61 *Ibid.*, at 6.

> three islands were owned by the Ianu and Sausau clans of Kranket ... The people of Siar have been given permission to fish from the three islands but the Ianu and Sausau people can withdraw that permission if they wish.[62]

The Siar people appealed to the Supreme Court, where Williams J. decided that the Commissioner had erred in awarding the land on the basis of which group he believed had arrived on the islands first. Since the Commissioner was presented with a conflict in the traditional history of the use and occupation of the islands, he ought to have applied the *Adjeibi Kojo* test. In doing so, he would first have assessed the relative probability of the traditional histories and would then have weighed the evidence of recent use of the islands.[63] The court then reviewed the traditional histories, and decided that the respondents' story did not demonstrate an intention on the part of respondent's ancestors to own the islands:

> ... in the account given by Gardip-Jas there was no evidence as to the use to which Tab and Pejawai ... Islands may have been put by Berma, Globa and their children. A strong inference, which I think may be drawn from Gardip-Jas' evidence is that the stay of Berma and Globa on Tab and Pejawai ... Islands was a somewhat transient one before moving on to Kranket Island, where they finally settled and founded the Kranket clan.[64]

However, the court considered the evidence of recent use and occupation, which the Commissioner seems to have ignored, to be more important:

> ... it appears that [the Chief Commissioner]

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62 *Ibid.*, at 2-3.

63 *Ibid.*, at 11.

64 *Ibid.*, at 8. Neither the Commissioner nor the court seems to have recognised, in the story of Berma and Globa and their intermarrying offspring, an origin myth. The convention of a couple (often brother and sister) who are the founders of the society, and their children (often related to animals or natural forces) who found the clans within the society, is worldwide. Berma and Globa, whether or not they existed in fact, are the Kranket people's Adam and Eve, and the report of their "somewhat transient" stay on various islands is the people's attempt to express through myth their ownership of the islands.

> attached no weight to the evidence concerning the recent use of the three islands ... Faced as he was with a conflict in the traditional history of the islands, this was a matter to which, on the authority of Adjeibi Kojo's case, considerable weight should have been given.[65]

Reviewing the evidence of recent use, the court found that the appellant Siar people had enjoyed exclusive use of the islands for many years. The court further found that this use did not depend upon the permission of the Kranket people, because they claimed to have offered the Siar fishing privileges whereas the Siar had both fished and gathered fruit and nuts without complaint from the Kranket.[66]

It is not possible to estimate from a single judgment precisely how much weight the court intends to give in future cases to evidence of recent use and occupation. As formulated by Lord Denning, the *Adjeibi Kojo* test uses "the facts in recent years" as a touchstone for estimating the truth and accuracy of the traditional history.[66A] Thus, whichever party is currently in occupation will have an advantage, and in three of the four cases discussed here, the current occupants were ultimately successful. But, in the *Lilumpat* case, the court seems to have made recent occupation an even stronger sign of ownership than Denning intended. In *Lilumpat*, the court has separated the test into two parts - first, weighing the history on its own merits and, then, looking separately at current use. This creates the possibility that current occupation will become a test of such importance as to be conclusive, except where it can be shown that the current possessor illegally ousted his predecessor.[67] In effect, the

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65 *Ibid.*, at 11.

66 The Court also listed other "matters of significance" overlooked by the Commissioner - "the apparent failure by the respondent group to assert ownership on occasions when opportunities to do so presented themselves. *Ibid.*, at 11.

66A *Adjeibi Kojo II* v *Bonsie*, *supra*, at 1227.

67 However, this argument does not seem to be used in the Highlands, where the land is often given to the claimant who was occupying it at the date that Australians assumed control of the area, without inquiring how he got the land.

court has created a new customary rule; it has determined that, in customary law, current occupation equals ownership.

In the *Lilumpat* case, the Commission and the court each imposed its notion of the customary law on the claimants. The Commission believed the customary law to be that land is owned by the first arrivals. This may well be the customary law of many societies in Papua New Guinea, and should be applied whenever members of those societies contest a land case. The court, on the other hand, considered the proper rule to be that land is owned by those most recently using it. Again, this may be the law of many Papua New Guinean groups, and could be applied whenever members of those groups contest land ownership.

## III. Conclusion

In the cases reviewed in this paper, the Commission and court have misconstrued their function in disputes between Papua New Guineans. They have assumed that there is a single customary law of land ownership applicable to all Papua New Guineans, and that its provisions are plain. Thus, they have viewed the role of the Commission or courts to be primarily an investigation into the evidence presented by the claimants, a problem of selecting facts from that evidence and giving the land to the party whose story turns out to be true. The Commission is charged with settling all "claims to the ownership by native custom" of land in Papua New Guinea.[68] It has abrogated this duty, and instead chosen the easier task of determining merely who happens to be occupying or using land at a convenient date. This procedure omits half the judicial function. Having found the facts, the Commission must apply the law to those facts. In this case, it must apply customary land law, and to do so, it must discover what the rules of that legal system are. Frequently, as in the *Idumava* case, the Commission will find that there are two (or more) systems of law potentially applicable, because the parties come from different clans or societies. In that situation, it will have to evolve principles adequate to deal with internal conflicts of laws cases.

It must be remembered, too, that the many legal systems of Papua New Guinea possess not only their own rules, but a process of adjudication and settlement appropriate to those

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68 *Land Titles Commission Act*, s.15(1).

rules.[69] Traditionally, most disputes over land did not end in war; instead, official or unofficial arbiters and arbitrators achieved settlements that restored social harmony. Normally, because of the felt need to reassert communal values and group solidarity, land disputes involved compromises. Disputants shared the land, or the winner rewarded the loser with gifts and feasts. The Land Titles Commission has not demonstrated an ability to formulate solutions that restore community harmony or to award compromise settlements.[70] The village courts, however, are expected to use compromise and other traditional legal procedures, and could do so most effectively were land disputes included in their jurisdiction, thus permitting the village court magistrates to consider simultaneously all the grounds of a dispute between parties. While it would be necessary to make special provision for land disputes that crossed village or tribal lines, as it is necessary to do for other kinds of disputes involving more than one village, such problems do not outweigh the benefits to be derived from returning land disputes to courts of general jurisdiction.

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69 L. Pospisil, "The Attributes of Law" in P. Bohannan (ed) *Law and Warfare* (1967) 25-42.

70 The *Land Titles Commission Act*, s.25A, permits the Commission to mediate between the parties "in order to affect a settlement of any matter under dispute." The provision has not been often used.