# LAND TENURE AND LAND DISPUTE SETTLEMENT IN ENGA*

By

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## I. INTRODUCTION

LAND in Papua New Guinea is held under either customary or alienated tenure. Customary land is land owned or possessed by the indigenous inhabitants, the rights to which are regulated by traditional custom. Alienated land, on the other hand, is land which has been severed from the traditional sector either by compulsory or voluntary processes.

In Enga Province all but a very small proportion of land remains under customary tenure. Because little land has been alienated for commercial purposes, it is probable that more than 97% (the national average) of all land remains unalienated in Enga. Land use has remained a constant and central factor in the Engan way of life and disputes concerning land are frequently cited as the principal cause of tribal fighting in the province.

Against this background we undertook this study to meet four specific objectives:

(i) to record the principal elements of Engan customary land tenure;

(ii) to examine the the recurring contention that land disputes concerning customary land are the main causes of the frequent outbreaks of inter-clan fighting in the province;

(iii) to describe and evaluate the processes which led to the breakdown and ultimately the suspension of the Land Court system in the province; and

(iv) to evaluate the likelihood of successfully reintroducing a similar system of land dispute resolution and to recommend the appropriate form it should take.

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## II. THE SETTING

### 1. The People and their Province

The population of Enga is slightly in excess of 166,000 living within 12,198 square kilometres in the central highlands of Papua New Guinea. Much of Enga is extremely rugged and the greatest part of this population is concentrated in the inter-mountain areas of the Lai, Lagaip and Ambun rivers, the Tsak valley and the high Sirunki and Kandep basins. These areas all lie between altitudes of 1,400 and 2,600 metres. Smaller concentrations occur in the vicinity of Kompiam, Maramuni, Porgera, Yengis, the Tarua headwaters, Upper Sau and in some high vallleys west of Kandep at altitudes over 2,600 metres. Beyond these areas settlement is very sparse. The crude population density for the province is 13.1 persons per square kilometre.

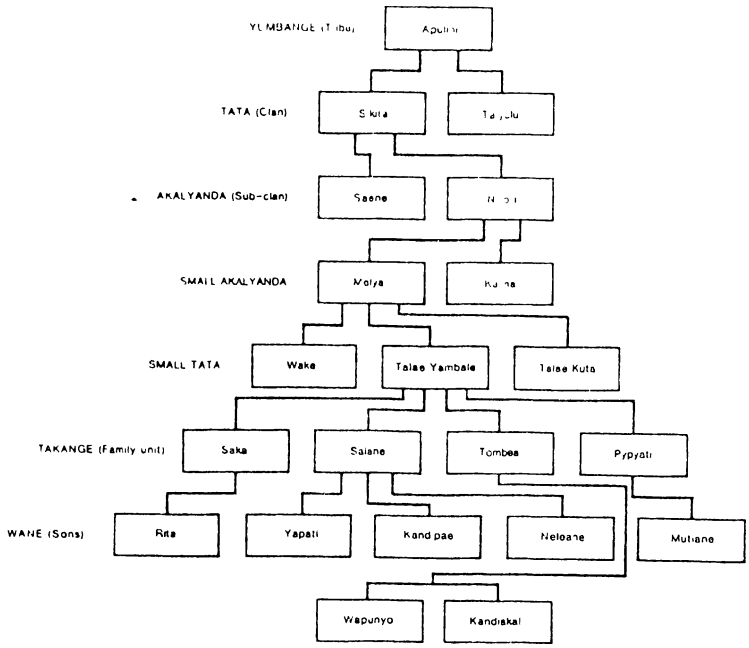
Over 95% of the population lives outside the few small townships. There has been some minor introduction of cash cropping (principally coffee, grown on the lower Lai river basin and pyrethrum, grown in higher altitude regions), but the majority of people remain entirely traditional subsistence farmers. The 'modern' economic sector is small and largely restricted to the operation of passenger transport services and trade stores. The only major investment project currently planned for Enga is the development of the Porgera gold mine although the Enga Provincial Development Programme 1982-1985, **(Enga Yaaka Lasemana)**, is now undertaking investigations into the viability of other rural development projects.

### 2. Settlement Patterns and Social Structure

Engans do not live in villages or settlements but in dispersed family households. A family traditionally occupies two dwellings, one of which is the womens' house **(enda-anda)** in which the women, children and pigs will sleep. The womens' house is also the meeting place for all the family and the place where food is cooked and eaten. Close to this dwelling, but separate from it, is the mens' house **(akali-anda)** which is occupied by the men and all male children over six years of age. Entrance to the mens' house is forbidden to the women. In several parts of Enga, however, the traditional separation of the sexes has begun to lose its significance and mixed housing **(nai-anda)** is replacing the older forms of dwelling for the family group.

Houses are constructed with a windproof cladding of bark, pandanus leaves and grass thatch. They are built close to the ground without chimneys to better conserve heat at night.

The outstanding feature which binds together traditional Engan communities is the hierarchy of descent relationships from tribe to individual. These relationships are illustrated below.




An example of social groupings in Enga from the Layapo Enga area near Kepelam[1]

An Engan's prime concern is for his relationship to the group to which he belongs. Rules governing that relationship impose important reciprocal obligations. Group membership provides a framework of support and security for most Engans which has been little affected by the central government.

Because Engans lack any hereditary leadership they traditionally developed an energetic and highly organised socio-political system building upon inter- and intra-clan alliances. Inter-clan alliances were integrally related to the **tee** or **moga** exchange, a delayed credit accumulation and repayment system whereby pigs, cassowaries, stone axes, salt, tree oil, pearl shells and bird of paradise plumes were traded between exchange partners in a process extending throughout Enga. The sophistication of the exchange system and the complex inter-clan political relationships are partly accounted for by the fact that, unique in Papua New Guinea, almost all Engans speak the same language. Some 98% of the total Enga population understands the main Enga language.[2]

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1. From K.K. Talyaga, 'The Enga Yesterday and Today: A Personal Account' in B. Carrad, D. Lea, K. Talyaga (eds.) **Enga: Foundations for Development** (Armidale, 1982) 61.
2. P. Brennan, 'Communication' in Carrad et al. **op.cit.**, 200,201.

## III. THE CUSTOMARY LAND TENURE SYSTEM

The people of Enga define their socio-political organisation, their relationship with each other and their own existence and needs largely in terms of the land.

Engan legends record that the first ancestor, a snake, arose from the soil and that it is to the soil that one must return. The spirit world is enclosed within an infinity of soil. Earthquakes are the spirits at war and thunderstorms the voice of God communicating with the spirit world.

The identification of Engans with the land is illustrated by their practice of giving of specific names to each mountain, knoll, rock, river and garden. Land and man are interactive. Ancestors settling on land identified the land by naming it and, by the same naming, identified themselves with it.

Our research, conducted through numerous interviews in the regions of largest population coupled with a review of the available literature, supports the conclusion that there is substantial uniformity in the principles which apply to land tenure throughout Enga. We have accordingly expressed our findings as being universally applicable but caution that in some isolated areas of Enga different principles could exist.

### 1. Forms of ownership and land use

Within Enga tribes **(yumbange)** and clans **(tata)** occupy distinct local territories. Land within each such territory is in turn progressively divided into smaller units belonging to sub-clans **(akalyanda)**, small **akalyanda**, small **tatas** and **takange** (family units). Within the **takange** power of control is exercised by the male head of the family who will generally allot to each of his sons rights to garden and otherwise utilize specific parts of the land.

Although distinct clan lands exist, the clan or sub-clan exercises little, if any direct control over the use of their land. As Talyaga notes, effective control over most land is vested in the **takange. Takange** literally means 'father' and the male head of household has complete power over all questions of land use affecting his family's land.[3] However, in practice this power is limited because it must be exercised against a background of community norms. Land is not generally perceived as a saleable commodity and to fail in one's duty to provide adequately for one's descendants would provoke responses of contempt or even violence. Engans in general are clearly conscious of a responsibility to transmit to their children the land they received from their fathers.

Land falls into two categories. It is either homestead land **(andakam yu)** or bushland **(kaktae). Kaktae** can in turn be subdivided between land used for seasonal gardening **(ima)** and land used only for hunting and collection of wild fruits **(anga yu).**

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3. Talyaga, **op.cit.,** 65.

## 2. Private and Public Land

Apart from **takange** controlled land there are two other forms of land holding: communal land and public land.

### (a) Takange land

**Takange** land may conveniently, if at some risk of inaccuracy, be thought of as being 'owned' by the male (the head of the family) who has exclusive or proprietary rights over it. Such land is used for domestic purposes. Practically all the **andakam yu** is divided into parcels controlled by a **takange.**

### (b) Communal land

Communal land is land used by the clan as a whole. It can be of two types, the first of which occurs when the community acquires usage rights over parts of otherwise individually controlled **takange** land. Often this involves the use of fragments of land 'owned' by two or more **takange.** Examples of these kinds of communal land are ceremonial grounds, pig foraging grounds, sing-sing places and burial grounds. If a family wishes to reconvert its land to private use (for example to make gardens on its land used by the community for pig foraging) the **takange** must obtain the permission of all other members of his clan who are affected.

The second kind of communal land is land actually controlled by the clan as a whole and not 'owned' by a **takange.** Such land includes ancient sing-sing or ceremonial grounds over which all individual **takange** rights have been forgotten and lands reserved for spiritual and magical purposes. Most such land, however, generally comprises unproductive land such as rocky mountain slopes and swamps. Those clan members closest to such unproductive communal land often range their pigs upon it but this use does not confer proprietary rights upon them. Thus if such land is purchased by the government, the whole of the clan will share in the distribution of the payment for it.

Bushland **(anga yu)** is also communally owned and exploited by the whole clan with the exception of all pandanus trees that are individually owned. If population pressure causes migration into the virgin bush, ownership of ground for the first generation is not firm. Land only becomes accepted as having been reduced into the possession of a **takange** if it is cleared and worked for one or two generations.

### (c) Public land

Creeks, rivers, lakes, salt springs and major walking paths ordinarily can be freely used by all Engans.

## 3. Land Fragmentation and Boundaries

**Takange** land is usually held in the form of many small plots. As Talyaga notes:[4]

4. Talyaga, **op.cit.,** 65.

> 'Households or family units have access to scattered plots of both good and bad land varying from low river terraces to steep mountain slopes up to wooded mountain crests where game and pandanus trees are found.'

A single family unit may own up to twenty pieces of land distributed over an area as large as three square kilometres. The combined area of these fragments may be as little as half a hectare in the more densely populated regions. Within this land the **takange** owns all the resources above and below the ground **(yu pip katapae og endakali menden).** Hunting of wild game by other clan members is, however, generally permitted, but not the setting of traps.

The borders of clan and **takange** lands are usually distinctly marked. Boundaries of **takange** lands are indicated either by natural features such as creeks or large rocks or by the planting of lines of **tangets** (a wide-leafed bush) or trees. Gardens and houses are usually specially fenced or protected by deep trenches **(barrets).** These **barrets** and fences are intended to prevent the incursion of pigs and other animals upon cultivated land and also to establish the land's boundaries.

On the larger scale, clan and sub-clan borders are also usually marked by some natural landform such as mountain ridges, walking tracks or streams. When there are no such natural features to distinguish the land of one clan from that of another a deep **barret** is often dug. Occasionally **tangets** will be planted to mark inter-clan boundaries. Only in rare cases will the boundary not be physically marked.

Unless there is hostility between clans the existence of a boundary will not prevent some cross-border utilisation of land. Pigs are permitted to forage beyond clan boundaries (pig knows no boundary) and if inter-clan relationships are untroubled members of one clan may be permitted to garden on the other clan's **kaktae** ground. In some cases where good relationships and intermarriage have extended over several generations the resultant land exchanges and intermingling can result in there being no clear boundary.

## IV. THE AQUISITION OF LAND RIGHTS

### 1. Primary Aquisition

Primary aquisition of land was traditionally effected by the settlement and cultivation of vacant land by a settler **(yumbange).** Land so acquired was then transmitted to the descendants of the **yumbange** unless lost because of warfare or otherwise alienated. Primary acquisition of land became increasingly rare as the stock of vacant, unclaimed, inhabitable land dwindled. It is doubtful that any such land exists today.

### 2. Secondary Acquisition

Secondary acquisition of land can take a number of forms. At the macro level **tatas** (clans) could, by custom, acquire additional land by conquest, exchange, gift, compensation or by the occupation of

land which had become vacant due to the death or departure of its previous owners. Such abandoned land could be reduced into possession after many years of uncontested occupation and use.

Until recent times direct sale of land as a commodity was unknown, but exchange, gift and compensation dealings involving the transfer of land were relatively common. For example, the killing of a neighbouring clansman might be compensated for by a gift of land to the deceased's **tata**, or allies might be permitted to settle on land as a reward for their assistance in warfare.

Although land could be won by conquest, it was unusual for land gained by that means to be wholly retained by the victors. Usually at least part of the conquered land would be relinquished to the defeated clan in return for payment of tribute and compensation.

Warfare as a means of procuring land has been aggressively discouraged since the imposition of central government control and the acquisition of land by conquest is now practically unknown.

### 3. Inheritance

Inheritance is patrilineal. By custom all sons share equally in their father's estate, the eldest son commonly retaining his father's last house site in recognition of his greater status. An Engan male child acquires an interest in his father's land at birth. That interest is of necessity a conditional one, shrinking, for example, if further male children are born[5] or if part of his father's land is given as compensation to another clan. This conditional estate become's vested on the death of the father.

Land acquired by partrilineal inheritance is held securely. Even if the son absents himself for long periods, acquires land rights elsewhere or conducts himself in ways repugnant to his clan, his land will not be taken from him (although he may face one or more forms of traditional punishment). While an heir is absent from his land he will normally appoint a close relative as a trustee to watch over his land. Trustees acquire temporary rights to garden and build residences on the land. When the heir returns, the trustee must relinquish the land to him although he can retain his established gardens until they return to fallow and the use of a house until it becomes unfit for habitation. Although an absent first generation heir cannot lose his right to return to his father's land, his children may face difficulty in reclaiming it. If the children have not regularly visited the land during their father's lifetime, they would be required to obtain approval from their father's brothers to return. To obtain this approval they would normally be required to pay some compensation to their father's brothers and/or to permit the trustee who had been maintaining the land to retain a house or garden site permanently.

If an Engan male dies leaving only daughters, the eldest daughter will inherit his land. She and her husband may then settle on the land and her male children will inherit. However, if she dies leaving either no children or female children only, ownership of the

5. Prospective male heirs to **takange** land are known as **tuig.**

land then reverts to her father's brothers. But if a man dies leaving no living issue, his land passes in equal shares to his brothers and, if he has no brothers, to his next of kin.

### 4. Resettlement and Acquisition of Land Rights

A young man with many brothers growing up in a densely populated area might wish to resettle where fertile land is more plentiful. Engan land tenure rules are generally sufficiently flexible to allow this. One form of resettlement is to move to the land of an uncle if the uncle has few or no children of his own. Alternatively, he may be permitted to settle on land from either his mother's clan or from his wife's clan. Acquisition of land through marriage is relatively common.

A married Engan, having paid bride price for his wife, is entitled to request his father-in-law or his brothers-in-law to permit him to settle on their **takange** land. Assuming his wife's family has abundant land, they would have a customary duty to set aside some land for the couple to occupy. A man acquiring land rights through marriage is known as a **wanakali.** However, if a man obtains permission to settle from his mother's family, he is known as a **wane.**

Neither **wane** nor **wanakali** settlers immediately acquire proprietary rights over their land. Initially they are regarded as tenants at will whose tenure is dependent upon establishing and maintaining good relations with their kinsmen, paying traditional clan dues **(wane lait sig** and **wane kig sig)** and taking part in all normal clan ceremonies and activities. Only by the third generation are such settlers regarded as ordinary landowning members of the clan.

### 5. Land Acquisition through Customary Adoption

If a family adopts a distant blood relative he will be permitted to use some part of the **takange** land. His claim to land ownership, however, will be as or more tenuous than that of a **wane** or **wanakali.** Only after three or four generations will his descendents acquire permanent land rights and status as members of the clan.

A special kind of adoption principle applies should a widow or divorcee return to her original family group. They are re-adopted into their family's clan and their young children, if any, have the choice of inheriting land rights from either their father or mother. Older children generally stay with their father's clan and grow up as members of his clan.

### 6. Temporary and Subsidiary Rights to Land

Although the **takange** exercises extensive rights over land which are analogous to western notions of ownership, these rights will, by custom or modern usage, be subject to a complex network of temporary and subsidiary rights held by others; the equivalent of easements and licences in English land law.

Such rights can arise from commercial transactions (the renting of land to another clan member for a garden or house site), from customary religious obligations (permitting relatives of a deceased

clan member to visit a grave site on the land) or from customary social obligations (permitting another to harvest the fruit of a pandanus tree which his father had planted).

Other common subsidiary rights to land include hunting rights (common to all) and access rights. No-one has the right to close a major established walking track and a proprietor of land must permit other clan members free access to any spring or creek.

A **takange** will also often permit others to exercise temporary usage or occupation rights over part of its land. **Wane, wanakali** and adoptive interests fall into this category because they are revocable during the first and sometimes the second generation. Interests of a similar kind (initially revocable but ultimately permanent) will frequently be granted to members of allied clans in recognition of their assistance in past disputes.

Temporary usage rights are also given to clan members who have lost their gardens and houses because of natural disasters or tribal fighting.

### 7. An Overview of Land Tenure

The Engan system of land tenure is both flexible and complex and we were surprised to find the system as yet little affected by the impact of central government control and the cash economy. However, some stresses are now becoming evident. For example, as there is now less need for allies since the imposition of central government control, few young clan members see why they should permit the descendents of former allies to remain on 'their' land. The descendents, however, also regard the land as their home and claim the right to stay. Such disputes would have been unlikely to arise in former times, but several such incidents were reported to us in the course of our research in the province. Doubtless other stresses and pressures on the traditional land tenure system will emerge in the future as the cash economy becomes of more significance in Enga.

Finally, we note that even without such added stress the traditional land tenure system provides many potential points of friction, particularly between the holders of temporary or subsidiary interests and the **takange** 'owners'. Uncertain and disputed interand intra-clan boundaries also provide a recurring source of tension.

## V. LAND AND FIGHTING

### 1. The Relationship between Land and Fighting

Meggitt has hypothesised that a correlation exists between the frequency of fighting and population pressure and that land shortages and disputes over land are the dominant causes of fighting in Enga.[6]

Both hypotheses are important, for if correct, the first would

6. M. Meggitt, **Blood is Their Argument: Warfare Among the Mae Enga Tribesmen of the New Guinea Highlands** (Mayfield, Los Angeles, 1977).

point to certain policy responses (resettlement, population control etc.) whilst the second would emphasise the need to develop efficient land dispute settlement processes.

Allen and Giddings have recently published statistical evidence which supports Meggitt's first hypothesis. They report:[7]

> 'When the number of fights reported from each census division... is regressed against the number of people per area of 'usable' land in each division a significant positive association is seen to exist. A similar, though less significant association exists between the number of fights per 10,000 people and the population density on 'usable' land, an approach which reduces the cogency of the argument that the most fights just occur where there are more people.'

Meggitt's second hypothesis has also been researched by Allen and Giddings resulting in their publication of data from an analysis of 189 reported inter-clan fights occurring between 1961 and 1980. Of these fights 48% were reported as having been caused by a land dispute. Other causes reported in descending order of importance were pig thefts (8.0%), homicide (5.9%), exchange (**tee**) disputes (5.3%), alcohol (5.3%), women (4.8%), pandanus (3.2%), elections (1.1%) and motor vehicle accidents (0.5%).[8]

Allen and Giddings, however, express three reservations as to the reliability of this data. First, they say, the ostensible and reported causes of disputes may not accurately reflect the true underlying causes. Second, Enga warfare as a strategy inevitably involves attacks on the enemy's houses, gardens and lands irrespective of the originating cause of the dispute. Third, the system of data collection itself imposes inevitable distortions.

In subsequent oral discussion with the authors Giddings suggested an added reason for caution. He pointed out that through the period from 1960 to the mid 1970s some disputes may have been explained to the expatriate Kiaps in terms of quarrels over land because such officers could better understand and respond to such disputes. Our own research, whilst not directly confirming this hypothesis, found indirect support for it. For example, Patrol Reports for the Middle Lai Division 1944-5 to 1966-7 now held at the District Office, Wapenamanda, clearly illustrate that the administration, as a matter of policy, refused to arbitrate or assist in the settlement of disputes arising out of **moga** or **tee** (ceremonial exchange) ceremonies. In such cases a clan (or individual) which wished to obtain assistance from the Kiap might be tempted to falsely formulate its claim in terms of a dispute over land.

One further reason to doubt the reliability of the data was independently suggested to us by Kai[9] and Wormsley.[10] They noted

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7. B.J. Allen & R.J. Giddings, 'Land Disputes and Violence in Enga: The "Komanda" Case' in Carrad et al. **op.cit.**, 181.
8. Allen & Giddings, **op.cit.**, 181,184.
9. Yal Kai, Secretary to the Provincial Government Executive Council; personal communication with Colquhoun-Kerr.
10. Dr. William Wormsley, Anthropologist and Director of the Law and Order Project **Enga Yaaka Lasemana**; personal communication with authors.

that, in order to obtain clan and allied support to commence or continue warfare, an issue must be perceived as important enough to warrant the costs entailed. A dispute about, say women or bride price may not provide this immediate justification. However, it may have given rise to an enmity between two men so bitter that each resolves to incite his people to warfare, explaining the reasons to his clansmen and allies in terms of an issue he knows to be important enough for them to fight for: that of land.

However, even after having taken all these reservations into account, the Allen and Giddings data remains powerful evidence that land is the single most important cause of violent disputes in Enga.

## 2. Fighting in Perspective

Until the arrival of the first colonial administrators little more than forty years ago, warfare had, of necessity, provided both the ultimate means of dispute resolution and a crude but effective mechanism for land redistribution. Fighting may have been spurred on by the fact that pre-colonial Enga was an unstable and changing society and was undergoing significant structural modification. Lacey's study of Engan pre-contact oral traditions noted:[11]

> 'These traditions told about rises in population, increases in agricultural productivity and exchange and the growth in competition and conflict over land and other resources, as clans spread through Enga valleys.'

The imposition of central government control brought with it the policy of stamping out warfare as a means of self-help dispute resolution. Yet, perhaps not surprisingly, given the marginal nature of early penetration and the short time span of its control, inter-clan violence and warfare has persisted in Enga at fluctuating levels of intensity and frequency to the present.

Serious though it is, the social costs of inter-clan fighting should not be exaggerated. In the period 1973-80 inter-clan fighting accounted for an average of 20 reported fatalities per annum.[12] It was also responsible for important indirect adverse effects on the delivery of general health services to the province.[13] While these costs are significant, it should be kept in mind that inter-clan fighting generally has only a localised impact. At any one time the overwhelming majority of Engans remain unaffected by fighting. Even for the warriors engaged in a battle, the risk of disabling injury or death is surprisingly low. It is likely that, with increasing access to motor vehicles, road accidents will soon be a more common cause of injury and loss of life.

Fighting tends also to have only marginal impact upon the subsistence economy and there has been no evidence of famine following inter-clan violence.[14]

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11. R. Lacey, 'History' in Carrad et al. **op.cit.**, 8,9.
12. Allen & Giddings, **op.cit.**, 180.
13. B. Carrad & W. Davidson, 'Health' in Carrad et al. **op.cit.**, 268.
14. P. Wohlt, Nutritionist and Consultant **Enga Yaaka Lasemana**; personal communication with authors.

In years to come, fighting may begin to impose a more substantial cost by retarding the development of cash cropping and in reducing the incentive for infrastructure investment in the province,[15] but in some senses it is still true that tribal fighting is more significant for what it represents - the failure of the authority of the State - than for its intrinsic human or economic costs.

## VI. THE GOVERNMENT RESPONSE: EVOLUTION AND BREAKDOWN

Government penetration of Enga did not begin until 1938/9 (Taylor/Black patrol) and full control of the province was not established for some years thereafter. The history of government response to land disputes in Enga is therefore short.

Patrol records of the early contact period reveal frequent instances of Kiaps arbitrating land disputes either informally or in the exercise of the authority of the Court of Native Affairs.

In 1952, however, the jurisdiction of the Courts of Native Affairs to hear and determine claims involving disputed customary land was removed when the **Native Land Registration Act** 1952 came into operation. That Act was later repealed[16] and succeeded by the **Land Titles Commission Act** 1962 which commenced on the 23rd May 1963. Both the **Native Land Registration Act** and the **Land Titles Commission Act** were primarily intended to facilitate the systematic registration of all customary land in Papua New Guinea. In this large task both Acts proved to have been over-ambitious and no registrations were recorded under either piece of legislation. Although primarily designed to facilitate land registration, the **Land Titles Commission Act** was also intended to make possible sporadic dispute resolution. A sympathetic but searching analysis of the reasons for the failure of this too cumbersome machinery can be found in Chapter 8 of the **Report of the Commission of Inquiry into Land Matters** 1973.

In Enga the filling of the vacuum left by this failure was largely left to the Kiaps and to the 'demarcation committees'. These committees were established in 1956 by the Chief Commissioner of the Lands Titles Commission who divided the whole of Papua New Guinea into 500 adjudication areas and appointed a demarcation committee for each such area. These committees were intended to make recommendations upon which registration decisions could, ultimately, be based.[17] However, as Knetsch and Trebilcock note, their functions:

> '...were never clearly defined; many never actively operated at all, others attempted to resolve disputes and rationalize the varied claims to scattered parcels by different groups - a process that often prompted further conflict...'

Perhaps the demarcation committees were more successful in Enga (albeit at a task for which they were not designed) than in many parts of the country because, for much of the period of their opera-

15. B. Carrad, 'The Economy' in Carrad et al. **op.cit.**, 177.
16. **Native Land Registration (Repeal) Act** 1963.
17. J. Knetsch & M. Trebilcock, **Land Policy and Economic Development in Papua New Guinea**, Discussion Paper No.6 (Institute of National Affairs, Boroko, 1981) 10.

tion, violent land disputes occurred relatively infrequently.[18]

Following the failure of these systematic land registration schemes a new approach to land policy in Papua New Guinea was urgently needed. In February 1983 the Government appointed a Commission of Inquiry into Land Matters (the CILM) under the chairmanship of Mr Sinaka Goava. The Commission reported in October of the same year. Chapter 7 of its report dealt with the matter of dispute resolution. It concluded:[19]

> 'We think that certain principles should be used in developing a dispute settlement structure suitable for Papua New Guinea. People should be involved in the settlement of their own disputes and not be able to avoid this responsibility by referring the matter to the Kiaps ... No dispute settling process no matter how wisely conceived and appropriate can succeed until the disputants themselves are prepared to take some responsibility in the settling of the matter, and, if they cannot settle it, are prepared to abide by a decision of a tribunal set up by the Government ... But the people must be given good reason for accepting the new land settlement structure ... It must give fair and just decisions after full examination of the facts and the relevant law. It must be backed up by the power of the Government where necessary.'

The Committee proposed that these aims be translated into reality by the creation of a decentralised three-tier system of dispute resolution. The first stage would be mediation, the second stage, only available after the failure of mediation, would involve hearing and determination of the issue by Local Land Courts and the final stage, to be available only in limited circumstances, would be by way of appeals to a District Land Court. There would be no appeal from a decision of the District Land Court.[20]

These recommendations were adopted and implemented by the **Land Disputes Settlement Act** which was enacted in 1975. This Act has functioned effectively in all provinces except Enga.

### 2. The Land Disputes Settlement Act in Enga

Nothing in the introduction of the Land Court system in Enga in 1975 appears to have foreshadowed the trouble to come. Yet within

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18. Allen and Giddings conclude that 'following the imposition of colonial control fighting all but ceased until the late 1960s' (Allen and Giddings, **op.cit.**, 179). This view is shared by most commentators but perhaps should be contrasted with that of the Officer in Charge of the Wapenamanda Patrol Post who, in a letter to the Assistant District Officer dated 31 July 1963, reported: 'Attached is a list of land disputes which the groups concerned wish to have decided by the Land Titles Commission. I feel this is far from a complete list [the O.I.C. is referring to a list of 81 disputes] ... To the best of my knowledge fighting has taken place at one time or another as a result of all the disputes although in some cases the history of violence precedes the advent of the administration'. (File 34.1.1 Wapenamanda).
19. **Report of Commission of Inquiry into Land Matters** (Department of Lands, Surveys and Environment, Port Moresby. 1973) 113.
20. **Report of Commission of Inquiry into Land Matters, op.cit.**, 120.

five years the system had collapsed under the pressure of increasing violence and lack of respect. What went wrong? We examine this question by looking at three factors: the declining efficacy of mediation, the breakdown in the courts and the responses of Engans to these factors.

**(a) Declining Efficacy of Mediation**

The intended central role of mediation is illustrated by the response of the Secretary of the Land Court Secretariat (Mr S. Goava, the former Chairman of the CILM) to a letter he received from a Reserve Magistrate complaining that mediators in his Engan sub-district lacked understanding of their responsibilities.[21] On 11 November 1976 Goava wrote in reply:

> 'It might be true to say that many of these ad hoc mediators are responsible men with good knowledge and experience of their customs and land history ... but have found it hard to understand the given explanations of their role and duties ... If this is the case then assist them and explain their duties ... It **is to be hoped that most of our land disputes on customary land be settled by mediation. So that only few (sic) difficult cases can be taken up to the Local Land Court.**'(our emphasis)

To a considerable extent mediation appears to have fulfilled that central objective even in the areas of greatest unrest. Giddings observed:[22]

> 'In Lagaip District, which is one of the nation's disaster areas as far as land court litigation is concerned, mediation appears to have been remarkably successful. During the period January 1978 to March 1980 a total of 197 disputes were recorded in the Land Dispute Register at Laiagam. According to that register the mediators were able to settle 143 (73%) of those disputes which is as good a rate as any in the highlands region. Above all else this indicates that, whilst employed strictly in a mediatory role, most Laigaip mediators enjoy credibility amongst their people.'

In Table 1, however, a different picture emerges from an analysis of the Form 7 Record of Mediation Returns held at the Laiagam District Office.

**Table 1: Registered Mediations Recorded**

| Year | No. |
|---|---|
| 1976 | 16 |
| 1977 | 14 |
| 1978 | 7 |
| 1979 | 2 |

21. File 8.1.1. Wabag.

22. R.J. Giddings, **Land Dispute Settlement in Enga: Where to From Here,** unpublished typescript Submission to the Enga Integrated Rural Development Project (1980) 9.

Table 1 suggests that mediation met with some declining acceptance between 1976 and 1980. The discrepancy between this conclusion and the results referred to by Giddings probably reflect little more than the unreliable nature of record-keeping in Enga. However, our impression formed after extensive interviews with informants in the Laiagam area is that, although the mediators continued to play an important role at all times throughout the period, they had lost much respect and effectiveness by 1980. We set out below some factors which appear to us to have influenced this decline in their effectiveness.

**(i) Lack of understanding of the role of mediation.** As part of our research we met with all the available former land mediators in the Laiagam area.[23] Most former mediators were impressive men of obvious character and authority, but not one had an accurate conception of what the role of a mediator involved. A typical description of what passed as a 'mediation' was given by one of the most experienced mediators, Wato Kambilo. He recounts:[24]

> 'When a dispute arises we tell the District Manager who appoints up to five mediators. He gives us access to a vehicle and if the dispute is far away he gives us a policeman to accompany and help us. When we arrive at the scene of the dispute both groups gather. We place one party on each side and we assemble in the middle. We then ask both sides for their stories. We try to find out who is the rightful owner. To find that out we spend at least 5 days hearing stories. We always meet in the common ground with both parties present at all times. When we hear the stories both sides will try to claim some land marks and we go and inspect the land to see if that is so. If one party has a more distinct border it helps indicate who is the rightful owner. When there are vague symbols and doubts as to who is the rightful owner we split the land in half. Before announcing our decision we always try to find and speak with an old man who is not associated with the disputing parties to confirm our opinion. We then ask the disputing parties to come to the District Office and in the presence of the District Manager and the police we announce our decision.'

When we enquired if disputes were ever settled by common agreement before they gave their decision we were told bluntly that even if a side knew it was in the wrong it would always wait for the mediators to give a decision.

No matter how successful the above approach proved (and we query what criteria of success was applied by the District Manager in recording that such a 'mediation' had been successful), it was not mediation - the process of assisting disputing parties to reach their own self-imposed compromises. This would make little difference if mediation was intended to operate merely as a legal prerequisite to a court case. But this is not the purpose of mediation and to so proceed risks inflaming rather than healing disagreements.

Discussing traditional forms of dispute settlement Adams, citing

23. We conferred with eleven former mediators.

24. The translation has been condensed and the grammar corrected.

Beirsack,[25] has argued:[26]

> '... a dispute in Enga has two stages: first, a period of anger, irrationality and selfishness, during which the disputants are incapable of dialogue. Hostility towards, and intimidation of, the other side serves the therapeutic purpose of 'ending the anger'. Only after the anger has thus been vented is each capable of listening to reason, of making the psychological effort of healing the severed relationship through ground-yielding compromises. The coming together is made possible by the presence of a third party who 'translates' between two extremes the mediator. According to Biersack, the goal of mediation, is to discover the point at which the error on either side can be eliminated and agreement made possible. However though the mediator provides the channel of communication, the sequence of compromises through which the point of error on each side is discovered is undertaken by the disputants alone, for agreement consists in their mutual recognition of the justice of the compromise.'

In terms of this model the Laiagam mediators' approach would be liable to coincide with the first stage of settlement when both sides are incapable of true dialogue. Mediators should appreciate that their task is to assist both sides to evolve their own solutions and should therefore allow time for that process to occur. As Giddings noted in a letter, dated 1 June 1979, to the Senior Magistrate, Wapenamanda:[27]

> 'I have discussed mediation techniques with the Enga D.O.I.C.s and have stressed that mediation must, in deeply entrenched cases, be a long term process. It may take months or years to mediate settlement of a land dispute not days or weeks ... A dispute hurried through mediation and pushed into the Land Court is bound to fail there.'

**(ii) Lack of Training.** The mediators' failure to understand their intended role can only be explained in terms of lack of satisfactory training. Of the eleven mediators with whom we had discussions, only two claimed to have received any training. Unfortunately the training they referred to was a six week training class held in Madang in 1967 which they had attended after having been appointed to positions in the then operational demarcation committee system. It had never been adequately explained to them that their functions under the new **Land Disputes Settlement Act** differed from those that they had formerly undertaken. The other nine mediators had received no formal instruction and had picked up much of their knowledge from the two 'trained' mediators.

**(iii) Lack of on-the-job experience.** Although the Laigam mediators misconceived their role at least several of their number had, over time, acquired considerable experience (impressing us with their competence and sensitivity) in handling land disputes. However, this

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25. Aletta Beirsack, **Enga Disputes and their Settlement.** A report on research findings prepared for Government officials of the Enga Province (April 1978).
26. R. Adams, **A Report on the Operation of the Land Disputes Settlement Act (1975) in the Highlands** (typescript, La Trobe, 1979) 19,20.
27. File 8.1.1. Wabag.

was not the norm, particularly in the Wabag and Kompiam areas where District Officers had permitted disputants to nominate mediators of their choosing. How infrequently such mediators were able to gain adequate experience is illustrated by an analysis of pay claim sheets for the two year period 1979-1980 for Wabag-based mediators shown in Table 2.[28]

**Table 2: Frequency of dispute mediation per mediator**

| No. of Mediators | No. of Disputes |
|---|---|
| 0 | 4 or more |
| 2 | 3 |
| 4 | 2 |
| 22 | 1 only |

Table 2 reveals that the great majority of mediators undertook only one mediation over the two year period. Even the two most active mediators were used only three times. Mediation, as with any practical skill, benefits not only from training but also from experience and practice. Little opportunity for building up practical experience is suggested by the above analysis.

The Wabag pay claim sheets are of interest for two other reasons. First, they confirm that mediation efforts tended to be shortlived. The average length of time spent in mediating a dispute was 9.5 days, with no mediation extending over a period longer than 24 days. Second, the pay sheets confirm that mediation was cheap. The average cost per mediator per dispute was K17.33. Even where three or more mediators were used jointly the cost of mediation can be considered as small.

**(iv) Perceptions of Corruption.** Mediators have dual roles under the **Land Disputes Settlement Act.** The first is that of mediation, the second is to form a component of the Local Land Court.[29] In both capacities, although principally in the latter, mediators in Enga have often been perceived to be corrupt. Typical of this criticism is a claim by the member of the National Parliament for Lagaip-Porgera, Mr M. Ipuia that land mediators commonly accepted bribes.[30]

The Lagaip mediators to whom we spoke certainly were aware of such allegations and acknowledged that bribes had been offered. They maintained, however, that with one exception 'who brought shame on all us mediators' no mediator had accepted a bribe.

The mediators claimed that most accusations against them came

28. **Ibid.**

29. Section 23(1) of the **Land Disputes Settlement Act** provides: A Local Land Court shall be constituted by a Local Land Magistrate who shall be Chairman, and ... an even number of Land Mediators (not being more than four) ...

30. Personal communication with authors.

from losers who had refused to accept their decisions. Probably most, and possibly all, such allegations were so motivated and reflected 'less the corruptability of mediators but more that terrible distrust/anxiety syndrome so endemic in parts of Enga'.[31] Nonetheless this perception, no matter how little justified, can only have contributed to the difficulty of providing an effective system of dispute settlement in the province.

**(b) Breakdown in the Courts**

Some rough measure of the success and acceptability of a court system can be measured by observing the frequency and rate of success of appeals. As Adams notes:[32]

> 'It might be assumed that the spectacle and confusion of District Land Court magistrates quashing the judgments of their Local Land Court colleagues undermines confidence in the capacity of legal machinery to help settle land disputes.'

In May of 1980 Giddings published data showing that, for Enga as a whole, there was a 74% chance that an appeal from a Local Land Court would be successful. A more complete analysis can be obtained from Table 3.

Table 3 highlights the breakdown in the Land Court system. The high proportion of successful appeals allows only three possible explanations: lower court incompetence, appellate court over-activism or a combination of both these factors.

**Table 3: Appeals from Local Land Courts to Provincial Land Courts**

| District | Nunber of Cases Determined | Number of Cases Appealed | Percentage Appealed | Appeal Successful (and percentage) | Overall Success Rate of Local Land Courts* |
|---|---|---|---|---|---|
| Wabag | 13 | 3 | 23% | 1 (33.3%) | 92% |
| Laiagam | 23 | 13 | 57% | 9 (70%) | 61% |
| Wapenamanda | 9 | 7 | 78% | 7 (100%) | 22% |

**Source:** R.J Giddings, 'Land Dispute Settlement in Enga: Where to From Here' (Unpublished typescript; submission to the Enga Integrated Rural Development Project) 9.

* Success rate calculated by dividing the aggregate of decisions not appealed and those upheld after appeal by the total of all decisions expressed as a percentage.

31. Giddings, **op.cit.**, 5.
32. Adams, **op.cit.**, 34.

Giddings has stated:[33]

'There are two main reasons why so many Local Land Court decisions fail in appeal. These are:

(A) Poor decisions are made on the weight of evidence. They often lack that spirit of compromise so essential in establishing balance and stable relationships between competing groups which have calims of fairly equal weight to the disputed lands;

(B) Incorrect procedures are followed. This includes confusion and ambiguity in the wording of decisions and failure to place boundaries decided on the ground.'

An illustrative and readily accessible account of the appellate court's methodology and practice can be found in Allen and Giddings' analysis of the 'Komanda' case.[34]

We have also closely read a large number of other relevant appeal court decisions. Whilst we are certain that the predominant factor contributing to the high rate of successful appeals has been lower court error, our impression is that the ready willingness of the appeal court to substitute its own findings of fact and attitudes to matters of policy has been a secondary, but not insignificant, factor.

To the extent that this secondary factor has contributed it would appear to be inconsistent with s. 58 of the **Land Disputes Settlement Act** which prohibits appeals except on the grounds:

(a) that the Local Land Court exceeded or refused to exercise its jurisdiction; or

(b) that the Local Land Court conducted its hearing in a manner contrary to natural justice; or

(c) that in the circumstances of the case no court doing justice between the parties would have made the decision appealed against.

In our opinion these provisions impose a strict threshold test, one to which, occasionally, the appellate court has given insufficient weight.

Magistrate error is, however, the principal cause of unsuccessful decision making and the blame for this must attach to the lack of adequate training for and the failure to develop a specialised group of, Land Court magistrates. Magistrates were given little or no training before hearing their first court case to enable them to confront 'the reality of dispute settlement in the field - the common pitfalls into which the land courts often stumble'.[35] Nor were

33. File 8.1.1 Wabag: Report on the Activities of the Land Court in the Highlands Region January-May 1980: A Statistical Analysis p. iv.

34. Allen & Giddings, **op.cit.**, 186-94.

35. Quoted from Regional Land Magistrate R. Giddings' correspondence with the Chief Magistrate dated 8 December 1980; File 8.1.1 Wabag.

administrative arrangements made to facilitate the development of a cadre of full time specialists. Instead, ordinary magistrates had to undertake this as a part-time task, a role for which they were ill-equipped.

### (c) The Engan Response: Upsurge of Litigiousness and Violence

Perhaps in a less aggressive and competitive social milieu the weaknesses of the dispute settlement structure might have had fewer dramatic costs. However, in Enga the disputants jostled for the opportunity to take advantage, fair or foul, of these weaknesses.

Giddings captures some of this mood in the opening words of one of his judgments:[36]

> 'I believe that this is yet another case in the genre '**traim tasol**' (pid. have a go). The Local Land Court has handed down its decision; the appellant sub-clan is aware that there is an avenue of appeal available to them so they decide 'to have a go' at an appeal. The most they are likely to lose for pursuing such a course of action is ... the amount of their deposit. The most they can gain is total possession (of the land) plus the prestige of an outright win against their adversaries.'

This **'traim tasol'** phenomenon was prevalent at each level of the land dispute settlement process as, for example, original **takange** land holders took advantage of the situation to seek court orders authorising the removal of established multigenerational settlers.

Adding to the problems caused by the increasing number of claims came attempts to obtain improper advantages; to **'stil kot'** (pid. win unfairly). Offers of bribes to, and persistent attempts to confer 'privately' with, magistrates became all too common.

This bleak picture was further aggravated by another form of dishonesty - lying in court. Local Land Court Magistrate, R.A. Cherake, highlighted the problem that lying presented to the court as follows:[37]

> 'During inspection of the land both parties indicated and claimed equally for every mark on trees, holes in the ground, creeks, karuka palms and in fact every inch of ground.'

Other commentators reported that lying in the Land Courts had become such a problem at the Courts were forced to accept it as normal.[38]

Finally, with the credibility of the system undermined, violence coupled with refusal to accept decisions became increasingly common. Inter-clan fighting escalated and even the courts found themselves subject to abuse and physical intimidation. As the crisis deepened Giddings wrote of his frustration to the Secretary, Land Court Secretariat, in eloquent language:[39]

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36. Kandep Local Court, No 1 of 1976.
37. **Ibid.**
38. Allen & Giddings, **op.cit.**, 193.
39. Letter dated 23 July 1979; File 8.1.1 Wabag.

'I am tired of trudging through swamps and breaking my way through thick bush to the accompaniment of screams and shouts of opposition from the disputants ... together with the constant threat of harassment only averted by shotgun-wielding police.'

## VII. THE SUSPENSION OF THE LAND COURTS

### 1. The Wapenamanda Trigger

The process of breakdown described above did not extend evenly throughout Enga. Porgera and large parts of the Kandep and Kompiam districts were little affected. The main focus of trouble was the Laiagam/Wabag/Wapenamanda axis. On the 21 November 1978 matters in Wapenamanda came to a head.

On that day, Local Land Court Magistrate Bato Kawa had been scheduled to deliver a judgment in a case involving disputed land known as 'Wanepokos'. As was by then the usual practice, Kawa requested the police riot squad to stand by. Unfortunately a communication breakdown resulted in the police not receiving this message. Despite the absence of police the Court assembled and Kawa began reading the Court's decision. Before he finished, a fight broke out behind the bench. Bottles and stones were thrown at the Court. Kawa was hit a glancing blow by a bottle but was not injured. He recalls that the demonstrators were finally dispersed only because of the quick-thinking action of the then District Manager who obtained a rifle and fired shots over the crowd.[40]

Official responses were swift. On 22 November 1978 the Senior Local Magistrate for Wapenamanda, Mr R. Saronduo, wrote to the Senior Provincial Magistrate telling him of the incident and informing him that 'my fellow magistrate Mr Kawa and I [have] decided to temporarily stop all land court work both mediation and court hearings'.[41] On 27 November 1978 the Senior Provincial Magistrate, Mr M.M. Pitpit, instructed the Wapenamanda magistrates 'not to handle or hear any Land Disputes unless the people show some respect for the Law and its officers'.[42] Finally, on 8 December 1978, the Chief Magistrate for Papua New Guinea, Mr H.B. Mina, wrote to the Administrative Secretary of the Department of Enga to confirm:[43]

'...that the Senior Provincial Magistrate issued the instruction on my express orders. For some time now I have been uneasy about the unchecked unruly behaviour which accompanies land court hearings in the Wapenamanda are and I am not going to allow a situation to continue where magistrates are threatened and the dignity of the courts is degraded.'

### 2. The Suspension Becomes General

Although the suspension of the Land Courts at Wapenamanda was intended to be only a temporary measure, the failure of the Wapena-

40. Bato Kawa; personal communication with Colquhoun-Kerr.
41. File 37.2.11 Wapenamanda.
42. **Ibid.**
43. File 8.1.1. Wabag.

manda leadership to give adequate assurances for the safety and dignity of the Land Courts stalled all attempts to lift it during the months that followed. Meanwhile, matters in Wabag and Laiagam continued to deteriorate. Only in a minority of narrowly focussed disputes involving the claims of individuals rather than groups were court processes effectively functioning. The end finally came on 7 August 1980 when Chief Magistrate J.F. Aisa issued Circular 84:[44]

> 'It has been of some concern that there is a continuous tribal fighting [sic] taking place in the Enga Province. Some of these fights result from land disputes by clans. The Courts are often hindered from carrying out their work by clans not accepting their decisions or offer threats when decisions were not in their favour.
>
> It is ordered that as from the date of this circular all tribal or clan land disputes would not be handled by Courts throughout Enga Province ...'

This suspension notionally left the processes of mediation, and land court hearings for the resolution of disputes between individuals, unaffected. From the inception, however, it was generally applied as if all land court activity was suspended. Finally in May of 1981 the Chief Magistrate issued a further memorandum, Circular 111, to clarify the issue:[45]

> 'This is to confirm the decision given on the 6th May 1981 that all land dispute dealings in the Enga province whether by mediation or by the Courts and whether between individuals or between clans are suspended as from 6th May for an indefinite period.'

This suspension has remained in effect throughout Enga to the present.

### 3. The Legal Basis for the Suspension

Perhaps because of the general acceptance of the necessity for drastic action the decision of the Chief Magistrate met with little critical reaction. That it has remained immune from legal criticism is, however, surprising. The Chief Magistrate appears to lack any statutory right to take this action and, in our opinion, there would be considerable difficulty in arguing that he possesses an inherent or implicit authority. Even if, for the purpose of argument, one conceded to him the right to instruct all members of the magistracy not to undertake duty when their safety and dignity could not be protected adequately, it is difficult to see how that would justify the banning of land court proceedings in Porgera, which has always had a peaceful record, or the banning of the work of mediators who have little to do with the magistrates after their initial formal appointment.

In our opinion, an application to the National Court for an order in the nature of mandamus to compel Land Court magistrates to appoint mediators and to resume hearing cases in Enga would be success-

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44. **Ibid.**
45. **Ibid.**

ful.[46] Nothing sustains or justifies the suspension except tacit acceptance and lack of challenge.

## VIII. POST-SUSPENSION ADAPTATION: FILLING THE VACUUM

With mediation and the Land Courts informally suspended, new approaches were soon developed to fill the vacuum and to respond to the unrest. Some of the measures developed were lawful, others, unfortunately, were plainly illegal.

### (a) Legal Measures

**(i) Preventative Orders.** The **Village Courts Act** was never intended to be used to decide disputes involving questions of land tenure. Section 20(1), in fact, expressly provides that village courts are to have no general powers of jurisdiction in matters involving the ownership of land. Section 20(2), however, makes an exception to this rule. That sub-section allows Village Courts, in cases affecting customary land, to make orders, pending a decision by other tribunals,

> ... authorizing the use or occupation of the land by one of the parties to the dispute ... and ... prohibiting the use or occupation of the land ... and restraining the other party from interfering with the authorized use or occupation.

However, we have found that only occasionally have Village Courts exercised the power granted to them by s. 20(2).

Frequent use is, on the other hand, made of another provision of the **Village Court Act**, s. 15. That section authorises the making of 'preventative orders'. It provides:

> Where it appears to a Village Magistrate that a dispute or threatened dispute may cause a breach of the peace the Magistrate ... (b) for the mean time order the parties ...to desist from ... any act ... that might aggravate the dispute or cause a breach of the peace.

Preventative orders have been frequently issued, usually in terms which prohibit both sides to a dispute from entering upon or using any of the land which is the subject of the dispute. Such preventative orders are designed to keep the contestants separated rather than to judge the merits of the contending claims.

This use of s. 15 preventative orders (also often referred to as 'Form 4' orders) has received official encouragement. An example is the general directive issued by the Assistant Secretary, Department of Enga, on 1 July 1983 to all District Managers:[47]

'All fresh customary land disputes ... must be registered in the

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46. See also s. 58 of the **Land Disputes Settlement Act** which provides that refusal of the Local Land Court to exercise its jurisdiction may be the subject of an appeal.

47. File 41.1.4. Wapenamanda.

dispute register and ensure that Village Court magistrates in the disputing area issue preventative order to both parties to prevent trouble while the ban is on.'

(ii) **Operation Mekim Save: Stage 1.** Operation Mekim Save (O.M.S.) is a two stage programme. The first, the lawful stage, operates under the umbrella of the **Village Courts Act.** The second stage, referred to in detail later in this paper, employs illegal methods to enforce orders made by O.M.S. magistrates during Stage 1. Launched in late 1981, Operation Mekim Save involved the selection, in each of five provincial districts, of an elite cadre of the most experienced and influential Village Court magistrates. The Village Court magistrates so selected were formed into O.M.S. teams, each of which was entitled to exercise all the powers of a normal village court. These O.M.S. teams were given the responsibility of interceding to restore order in the most troublesome disputes in their districts.

In this role they appear to have had considerable success. Many Engans praise the O.M.S. teams for providing an impartial, rapid and common-sense response. We also observed, and were impressed by, the work of the Lagaip O.M.S. team in controlling and defusing a serious fight which had erupted in the Tomolo area in the Sirunki census division. The parties in that case had had a complex history of enmity and were currently in dispute over the ownership of a piece of land. The O.M.S. team travelled by four-wheel-drive vehicle to the scene of the fighting, listened to speakers from each side and then made a temporary preventative order prohibiting both sides from using the land.[48] In enunciating this decision the O.M.S. team adopted a quite formal process culminating in a short symbolic ceremony during which three senior representatives of each disputing clan were brought face to face to shake hands and break arrows to mark the end of the warfare.

**(b) Quasi-legal remedies**

Notwithstanding the suspension of the land court system, provincial records continue to reveal occasional instances of the **Land Disputes Settlement Act** being used.

In Laiagam there is evidence that a temporary order was made under the **Land Disputes Settlement Act** in 1983.[49] In the Porgera Land Dispute Register there is evidence that mediators have been appointed since the issue of the Senior Magistrate's Circular 111. In Kandep the Land Disputes Register (unfortunately not maintained after February 1982) records several instances of mediators having been appointed after the issue of Circular 111. It also records six instances of temporary orders under s. 30 of the **Land Disputes Settlement Act** having been made by Local Land Court magistrates during the period of the suspension.

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48. The preventative order was deliberately made to apply only for a short period because the O.M.S. team was unsure if the ownership of land had been previously considered or decided by an earlier court hearing. Not wishing to contradict a prior court determination the O.M.S. team intended to research this question and then to return to make an appropriate permanent order.

49. File 7.3.1. Laiagam.

Because post-suspension record-keeping has been abandoned in many districts, it was impossible to obtain an accurate total of the number of like instances which had occurred in Enga.

**(c) Illegal Responses: Operation Mekim Save Stage II**

Enga Premier Danley Tindiwi bluntly described the second stage of O.M.S. as 'intended to destroy anything that can assist in tribal fighting: houses, gardens, bows and arrows'.[50]

Stage two of O.M.S. is openly acknowledged to be illegal but is justified by those who support it as a necessary evil, a shock measure and a last resort if continued fighting continues in contempt of the orders of an O.M.S. Stage I team. O.M.S. Stage II involves the total destruction by the police of all property possessed by both sides to a dispute. The underlying rationale for this is that such destruction will compel the parties to give attention to their immediate survival and thus distract them from fighting. It is claimed also to provide a fearful example to others of what might happen if they ignore the O.M.S. magistrates.

O.M.S. Stage II operations have been unleashed once in each of the Laiagam, Wabag and Wapenamanda areas in order to provide an 'example' in each part of the province where fighting was most common.

Assessments of the effectiveness of this controversial programme are difficult to make. Premier Tindiwi gives Operation Mekim Save credit for the recent decline in the level of inter-clan fighting in Enga. Giddings, in his report to the Chief Magistrate dated the 1 March 1982, was more sceptical. He commented:[51]

> 'However, the use of violence in this way appears ... to have the opposite effect in some cases. As Ronald Rimbao [a senior Engan magistrate] told me, and what he said makes sense, once O.M.S. destroys their houses, plantations and herds it merely frees the people from the burden of property and this freedom allows them to pursue their warfare with increased vigour ...'

Comparing these assessments our impression is that Tindiwi is correct in claiming that O.M.S. played a role, as a shock measure, in halting the epidemic of fighting in Enga. We also formed the impression that the fear of this sanction still has some effect in promoting compliance with the O.M.S. magistrates' decisions.

These benefits, however, have been obtained only at a cost. They involve a step towards the loss of human rights by the citizens of Papua New Guinea. They also have contributed to the appalling gulf between ordinary villagers and the police. Gordon and Kipalan have previously drawn attention to what they referred to as the 'deteriorating ties between the police and the local communities'.[52] Amongst many of the ordinary villagers we found fear of the police to

50. Personal communication with with Colquhoun-Kerr.

51. File 8.1.1. Wabag.

52. R. Gordon & A. Kipalan, 'Law and Order' in Carrad et al. **op.cit.**, 332.

be very real. A District Manager explained, for example, that he could no longer request police to accompany him or O.M.S. magistrates to a rural area because the villagers would simply run away and hide. Our impression is that O.M.S. Stage II unfortunately exacerbated the already difficult relations between the villagers and police.

### 2. The Present Position

We found no-one contending that tribal fighting had not declined since the suspension of the land courts. This may be coincidence, but many Engans appear to share the views expressed by Albert Kipalan, a former senior provincial magistrate and now an Engan member of the National Parliament. Kipalan believes that the suspension provided a cooling down period putting an end to the upsurge of largely spurious claims that had distorted the system.

Others, like Bato Kawa, attribute the decline in tribal fighting to the use of preventative orders by O.M.S. magistrates; yet others such as Premier Tindiwi suggest that O.M.S. Stage II played a major part.

Our assessment is that all of these factors have played a part in contributing to the decline. But we are of the opinion that the present position is unstable. Lack of stability is inherent in each contributing factor discussed above. The suspension is vulnerable at any time to a legal challenge, the use of preventative orders cannot indefinitely continue to withdraw large sections of fertile land from economic use and the provincial government cannot continue to use massive violence against its own people without internal crisis and, one presumes, National Government reaction.

## IX. FORMULATING A NEW DIRECTION

Etzione has identified three factors underpinning the acceptance of authority. He claims these to be: coercive power, resting on the application of sanctions; remunerative power, based on the allocation of material costs and benefits; and normative power resting on symbolic rewards, social cohesion and idealistic commitment.[53]

In Enga, the State has only a limited ability to exercise coercive power. Gordon and Kipalan have persuasively illustrated the factors which limit the administration's ability to dictate to the largely capitalistic Engan communities.[54] Secondly, although remunerative considerations could promote compliance, provided Engans could be persuaded that disputes might be settled by mediation or in the courts with less social and economic cost than if left to be resolved by informal mechanisms - including the use of violence such remunerative values would probably provide an unstable base for a land dispute settlement system. This is because simple calculative responses would also motivate practices such as the making of false **traim tasol** claims. The consequence would be the rapid undermining of the credibility of the system. Therefore, in our opinion, any land d[illegible]e resolution process in Enga must ultimately rest on a

53. A. Etzione, **Comparative Analysis of Complex Organization** (Glencoe, 1961).
54. Gordon & Kipalan, **op.cit.**, 332-34.

foundation of normative acceptance. That foundation appears to have been largely undermined because of the factors described previously. Reintroduction of a dispute resolution system is therefore unlikely to be successful unless Engans can be persuaded to have new-found respect for it. Therefore, the system will need to be perceived as understandable, impartial and incapable of manipulation if this respect is to be achieved. Finally, in formulating a new response, special attention needs to be given to the enforcement of court rulings. A system whose decisions can be flouted with impunity is unlikely to command respect in Enga.

### 1. Law, Equity and Social Policy

A threshold question is whether the new dispute settlement process should be only concerned with adjudicating rival claims or whether it should, in addition, be concerned with wider land policy issues. Specifically, should the Courts accept responsibility for redistributing land, taking 'needs' as well as 'rights' into account?

Giddings has previously highlighted this issue and has expressed views tentatively favouring taking such needs and capacity to use land into account,[55] but we would argue that to do so would be counter-productive. We suggest that if Courts are required to balance 'needs' against 'rights' their decisions are likely to become controversial and less well accepted. We also suggest that it would make the system unduly cumbersome and complex. As Allen and Giddings' study of the Komanda dispute illustrates, even an experienced and senior magistrate cannot make accurate evaluations of land needs without the aid of expensive resources not commonly available to the Courts.[56]

We are, however, entirely in agreement with Giddings' conclusion that Enga must move to develop its own land policy. At the provincial government level there is need for attention to be given to the vital questions of land distribution and population growth. Because of the restraints imposed by the **Constitution**[57] it is likely to be difficult and expensive to effect a radical provincial land reform policy,[58] but there is nothing standing in the way of commencing a campaign promoting smaller families and birth control nor of government programmes giving modest assistance to internal migration, including inducements to those holding excess land to permit land-short migrants to settle upon it.

## X. RECOMMENDATIONS

### 1. A Provincial Land Code

Because similar principles of land tenure apply throughout most, if not all, of the province,[59] it presents a rare opportunity for the

55. Giddings, **op.cit.**, 15.
56. Allen & Giddings, **op.cit.**, 194-96.
57. Section 53 **Constitution of the Independent State of Papua New Guinea.**
58. R.W. James, **Land Tenure in Papua New Guinea** (Port Moresby, 1978) 130-140.
59. See above at pp. 61,62.

development of a workable provincial land code. Knetsch and Trebilcock have observed that:[60]

> '... it seems quite unrealistic for ... governments to place the entire burden of resolving land disputes on the Land Courts without any framework of legislative principles to guide their decisions.'

Giddings states:[61]

> 'Changed circumstances make it imperative that ... [the courts] know what is accepted as being custom. So often they accept custom as being what the most aggressive party to a dispute says it is. In these circumstances natural justice runs the risk of being overlooked by the courts in their search for expediency and acceptability in the sight of powerful and prestigious community groups.'

We agree with Giddings' observation and suggest that immediate attention be given to enacting a provincial customary land code. The codification of rules of custom by the provincial legislature would free the courts from the burden of having to make intractable choices of the kind illustrated by Giddings[62] and Knetsch and Trebilcock,[63] leaving them free to undertake the less complex, yet crucial, task of adjudication.

Section 68(4) of the **Land Dispute Settlement Act** already allows customary land tenure codes to be enacted by local government councils but this provision has never been used. It would be possible for this mechanism to be used to implement our recommendation. However, given the moribund condition of local government in Enga, it would be more practical to allow the initiative to come from the Provincial Government which would, as a result, also acquire an interest in maintaining the integrity and credibility of the land court system.[64]

We therefore advocate that s. 68 of the **Land Dispute Settlement Act** be amended to allow judicial notice to be taken of customary land tenure codes enacted by provincial governments.

Finally, because the complete codification of Enga's land tenure rules is unlikely to be quickly completed, initial attention should be directed towards selectively codifying those aspects of most importance to the Land Courts. To achieve this, former Local and Provincial Land Court magistrates should be invited to identify the issues they consider to be most important. Priority can then be given to codifying the customs attaching to those matters.

### 2. Overhauling Mediation

The CILM observed that no dispute-settling process can succeed

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60. Knetsch & Trebilcock, **op.cit.**, 58.
61. Giddings, **op.cit.**, 14.
62. Giddings, **op.cit.**, 14-19.
63. Knetsch & Trebilcock, **op.cit.**, 56-60.
64. **Ibid.**, 58.

unless the disputants are prepared to take some responsibility for its success.[65] Mediation by promoting in disputants a sense of direct responsibility for decision-making and by encouraging the making of self-enforced decisions, facilitates this important objective.

Our earlier analysis has, however, shown that this will not be achieved by appointing untrained and unsupervised mediators. If mediation is seriously intended to succeed in resolving the majority of disputes, leaving only a few intractable matters to be decided by the courts, then adequate resources must be allocated to enable that goal to be met.

This would start with the careful selection of mediators and would be followed by their receiving suitable training. Training should be directed both to their developing mediation techniques[66] and to instructing them about the nature of the legal framework in which they will be operating. Such training cannot be left to a busy District Manager. It must be professionally conducted. Ideally this should be the task of a Regional Training Officer who would also have ongoing responsibility for both supervising the work of the mediators and culling from their ranks any mediators who fail to meet the standards expected of them.

Secondly, fewer rather than more mediators should be appointed to allow all of them to develop their practical competence through repeated experience. Finally, mediators should be treated with at least a minimum of respect for the important role they carry out. Mediation ought to remain inexpensive, but little can justify mediators' present low level of remuneration[67] and nothing the delay of up to two years which frequently precedes their receipt of it.

### 3. Rebuilding the Local Land Court

The arguments for training and repeated practice of skills which we have advanced above in respect of mediators apply with equal cogency to Local Land Court magistrates. It is they who will bear the responsibility of controlling the proceedings of a court, often in an atmosphere of tension and controversy, designed to resolve issues found intractable through mediation. In this task there ought to be no room for avoidable inexperience or incompetence. In our opinion these two hazards could be largely overcome were one senior Local Land Court magistrate to be allocated the task of hearing all land dispute cases in Enga. That magistrate could then acquire, in a relatively short time, most of the skills and knowledge essential to allow the system to work. Giddings confirms that it would be possible to appoint a single full time Local Land Court magistrate to hear most, if not all, cases arising in Enga.[68]

We also see much merit in Knetsch and Trebilcock's proposal that, at the national level, a formal training programme be established in

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65. **Report of the Commission of Inquiry into Land Matters, op.cit.,** 113.
66. For further discussion of this issue see Gordon and Kipalan, **op.cit.,** 331.
67. K1.75 per day plus a small extra allowance if required to stay overnight away from home etc.
68. Personal communication with Colquhoun-Kerr.

order to develop a cadre of full time specialist Land Court magistrates.[69]

Finally, we would recommend three significant changes in the judicial methodology previously employed by Local Land Courts. First, we suggest that there are good reasons to encourage the development of a more inquisitorial style. To rely wholly or even primarily on choosing between evidence adduced by adversaries is, given the propensity for interested parties to lie, unlikely to result in sound decision-making. We would therefore encourage the Local Land Court, whenever possible, to actively search out on its own initiative, neutral testimony and objective historical records. No amendment to the **Land Disputes Settlement Act** would be required because ss. 35 and 37 already contain all the necessary powers, including the authority to issue subpoenas on its own motion, for the Court to so act. Safeguards for the litigants are provided for by s. 35(2) which requires that all information obtained by such means be made available to both parties and their submissions invited.

Second, we would advocate that the Local Land Courts should not hesitate to exercise its power under s. 28(2) of the **Land Disputes Settlement Act** to adjourn a hearing 'if it appears that by doing so an agreement may be arrived at between the parties'. If the Local Land Court suspects that a case has been rushed through mediation and that a consensual agreement might yet be achieved by that process, it should decline to proceed until further attempts at mediation are made. In our opinion Engans are more likely to accept the legitimacy of the Local Land Court if it is not immediately available for minor disputes. Going to court was intended by the CILM to be a last resort after mediation had clearly failed and a case should not be heard otherwise. The courts should ensure that this policy is adhered to.

Third, we commend Giddings' practical suggestion[70] that the Local Land Court should at all times strive to narrow the focus of a dispute to as confined an area of land and to as small a group of individuals as is possible. By narrowing the focus the Court gives attention to the root cause of the dispute, rather than to its secondary manifestations, and is more likely to make sound and acceptable decisions.

### 4. Appellate Court Restraint

The legitimacy of the Local Land Court will again be undermined unless, when the suspension is lifted, the great majority of its decisions can be accepted as final. However, unlike Knetsch and Trebilcock[71] we see no requirement to amend the law to further restrict appeals. We are of the opinion that, properly interpreted, and applied with restraint, the existing appeal provisions set our in s. 58 of the **Land Disputes Settlement Act** are quite adequate to screen out unmeritorious appeals.

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69. Knetsch & Trebilcock, **op.cit.**, 59.

70. Conversation with Colquhoun-Kerr; see also Regional Land Court Circular No 5 'Limiting Jurisdiction in Local Land Court Cases' (File 28.7.1 Goroka).

71. Knetsch & Trebilcock, **op.cit.**, 59.

In addition to appeals under that Act, s. 155 of the **Constitution** confers jurisdiction upon the National Court to review any exercise of judicial authority by a lower court even if the legislature has purported to remove all rights of appeal. The National Court has already twice exercised this inherent power to quash a decision of the Provincial Land Court in **The State v. Giddings**[72] and **The State v. District Land Court, Ex Parte Caspar Nuli.**[73] The grant of such relief is, however, always a discretionary matter and in our opinion there are sound reasons for the National Court to exercise its discretion with some caution in order to avoid **traim tasol** litigation, the wasting of National Court time and the undermining of the authority of the lower courts.

### 5. Enforcement

The **Land Disputes Settlement Act** gives Local Land Courts wide powers to hear and determine questions of land ownership and use, but Courts can only make judgments and issue orders. By themselves, Courts can neither settle disputes nor enforce their own decisions. Voluntary settlement of a dispute requires the good-will of the parties, whilst enforcement of court orders requires the exercise of the executive powers of the State.

In the past it has not been uncommon for litigants who have failed in the Court subsequently to attempt to obtain a **de facto** reversal of the decision by dispossessing the rightful claimants with the use of violence or intimidation.

If the Land Court System is not to decline rapidly into impotence, the State must act to punish such law breakers and to protect the interests of the legitimate land occupiers. We suggest that there will be a need to develop a non-provocative but firm provincial policing strategy after close consultation between the police, Local Land Court personnel and the Provincial Land Disputes Committee.

In our opinion, however,it would be unwise to regard the Land Court as an institution whose decisions must always be strictly enforced come what may. If, for example, as has occasionally happened, rival clans choose to ignore the Local Land Court decision but make peaceful alternative arrangements following further negotiations, there is neither cause for concern nor justification for enforcing what was plainly an unacceptable determination.

## XI. CONCLUSION

In September 1982 the Enga Provincial Land Disputes Committee resolved to canvass opinion throughout the province before forwarding to the Chief Magistrate its recommendation as to whether or not the suspension of the Land Courts should be lifted.[74]

The Committee subsequently received reports that the people of Wabag, Kompiam, Porgera and Wapenamanda were generally in favour of

72. [1981] P.N.G.L.R. 423.
73. [1981] P.N.G.L.R. 192.
74. File 8.1.1 Wabag.

lifting the ban but the people of Kandep and Laiagam were opposed. A vote taken subsequently at a public meeting in Wabag, attended by the Committee, revealed 30 in favour of and 26 against the suspension.[75]

Although opinion in Enga is obviously sharply divided on this issue we are of the opinion that eventually, some form of land dispute settlement process will have to be reintroduced. However, we think it is less important to decide a time for its reintroduction than to begin readying for that event, whenever it may occur. If time is not taken now, before the suspension is lifted, to rectify the problems that previously led to the system's disintegration, history is likely to repeat itself.

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75. **Ibid.**