

A COMPARATIVE ANALYSIS OF LAND TENURE LAW REFORM IN UGANDA AND PAPUA NEW GUINEA*

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INTRODUCTION

In 1953 the British Colonial Government established a Royal Commission to investigate and recommend ways for the promotion of economic development in Britain's east African colonies. After more than two years of investigation, the Commission in its report identified customary land tenure as one of the major constraints on economic development in the region.¹ It recommended a gradual replacement of customary land tenure by individual ownership of land. Since then, debate has moved backwards and forwards in Africa and the South Pacific nations (and other developing nations) as to whether customary land tenure is indeed one of the principle obstacles to agricultural or economic advancement and whether individual titles to land was the way forward.² To a certain extent, it may be said that this is a tired debate, yet it has refused to go away. Literature and reports by eminent economists, political scientists, social-anthropologists and experts from other disciplines point in different directions. The World Bank, which for decades had been urging developing nations to reform customary land tenure, in its 2003 report concedes that customary land tenure does not necessarily impede economic development and that it is possible to achieve economic development under customary land tenure. The report, however, does not completely exonerate customary land tenure in this regard.³

The controversy as to whether customary land tenure impedes economic development demonstrates the complexity of land tenure. The issues involved are mainly for the economists and other social scientists. For lawyers, our main task is to highlight and evaluate the laws adopted or proposed to implement the policy. This, of course, does not necessarily mean that the other issues are outside our domain. In this paper we compare and contrast the historical and current attempts to reform customary land tenure law with a view to promoting economic development in Papua New Guinea and Uganda. Our original object was to compare reforms in Melanesia with African countries. We abandoned that objective when it became clear that this would entail too much generalisation. Moreover, getting access to current data from various nations was extremely difficult. There is no specific reason for selecting Uganda and PNG other than the fact that the author is very familiar with the land law and policy of both countries, and wishes to capitalise on that knowledge and experience to highlight the similarities and differences and the future trends. More importantly, in recent years the issue of

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¹ East African Royal Commission, 1953-1955: Report, Cmd. 9475 (EARC Report).

² See for example, Irving Gershenberg, 'Customary Land Tenure as a Constraint on Agricultural Development: A Re-evaluation' (1971) *East African Journal of Rural Development* 51.

³ Klaus Deininger, *Land Policies for Growth and Poverty Reduction* (2003).

customary land tenure reform has been at the fore in both countries. It is hoped the paper will give readers an insight into what is happening in two countries almost at the opposite ends of the globe.

HISTORICAL PERSPECTIVE

When the British (Australians) colonised the territory of Papua (1884), they recognised the indigenous peoples' land rights. Commodore Erskine solemnly assured the indigenes that 'your lands will be secured to you [and] no land, whatsoever or howsoever acquired within the Protectorate hereby established will be recognised by Her Majesty's Government.'⁴ Successive administrations adopted specific laws and policies to implement this pledge. Similarly, when the Germans declared their Protectorate over New Guinea they recognised existing native land rights, a policy which the Australian administration maintained under its League of Nations mandate.⁵ The *Land Act 1962* put to rest any lingering doubts with regard to the ownership of customary land. Section 7 of the Act declared that 'all land in Papua New Guinea *other than customary land* is the property of the Crown subject to any estates, rights, titles in force under any law in force.' The only land claimed by the administration was 'waste and vacant land' (ownerless land) and land purchased from the customary landowners. Because of this policy, to date approximately 97% of land in Papua New Guinea is held under customary tenure. The remainder is state land, of which most is alienated in freehold or leasehold.

Britain's land tenure policy in her colonies in eastern Africa was different. There, recognition of customary land rights was the exception rather than the rule. For example, in Uganda,⁶ the British protectorate administration declared most land in the territory Crown land by virtue of the protectorate. Customary land tenure was recognized but within limits. Under the *Crown Lands Ordinance 1903*, indigenous Ugandans had a right to occupy any land (outside the Buganda kingdom and urban areas) not granted in freehold or leasehold without prior license or consent in accordance with their customary law.⁷ However, the Governor had the power to sell or lease such land to any other person without reference to the customary occupants of the land. Compensation was payable to the displaced occupants at the discretion of the Governor. The only right the customary occupants had was to remain in occupation of the land until arrangements, approved in writing by the Governor, were made to re-locate them to other land.⁸

There is no credible legal basis to justify Britain's recognition of customary land rights in Papua New Guinea but not in Uganda or other African colonies such as Kenya.⁹ The popular legal argument that Britain did not recognise native land rights in territories

⁴ Quoted in *Administration of Papua New Guinea v Daera Guba* (1973) 130 CLR 353 at 381-382 per Barwick CJ. See also Amankwah, Mugambwa and Muroa, *Land Law in Papua New Guinea* (2001) 74.

⁵ Amankwah et al, above n 4, 74.

⁶ Part of what now is Uganda became a British protectorate in 1894, the rest in 1897.

⁷ Section 24(4), *Crown Lands Ordinance 1903* (repealed).

⁸ Ibid s 33. See also John Mugambwa, *Principles of Land Law in Uganda* (2001) 4.

⁹ Much of what is now Kenya became a British protectorate in 1895.

inhabited by “primitive” people is unreliable.¹⁰ Whatever primitive meant it was most unlikely that the inhabitants of the African territories were considered by the British to be less sophisticated than their counterparts in the South Pacific. If it was a policy decision, it is not clear why they chose to recognise customary land tenure in the Pacific island colonies, but not in their eastern African colonies. We leave the matter for the historians.

REFORM OF CUSTOMARY LAND TENURE IN UGANDA

In East Africa, until the Second World War, the colonial administration did nothing to change the nature and status of customary land tenure. The publication of the East African Royal Commission (EARC) Report in 1955 was the catalyst for the reform of customary land tenure in Britain’s eastern African territories and, as we shall see, played an influential role in Papua New Guinea and other colonies. The EARC reported that customary land tenure was based on the needs of a simple subsistence economy and the social relationships that were associated with land use in such an economy. Its main argument against customary land tenure was that it was of communal nature. Consequently, there was no incentive for individuals to invest in the land to increase its productivity or make long-term improvement in the land. Individuals were also discouraged from investing in the land they occupied because the tenure system did not provide individuals with sufficient assurance that their long-term land rights were secure. Moreover, customary landowners could not use their land as collateral for agricultural loans because financial institutions did not recognise customary titles. The EARC Report was also critical of the fact that under customary land tenure, land was not treated as a commodity that could be sold, leased, mortgaged or otherwise dealt with commercially. Hence, it had no commercial value.

The EARC felt that the only way forward was to reform customary land tenure. Accordingly, it recommended that the administration adopt land policies aimed at the individualisation of land ownership and the mobility of land transfer. The Commission urged the administration not to leave customary land tenure to evolve under the impact of modern influence.¹¹ Rather, the administration had to be proactive in meeting the requirements of the progressive elements in the society. However, the EARC urged the administration to proceed with caution when reforming customary land tenure. The reforms had to be introduced gradually, mindful of the local political and economic circumstances.¹²

The publication of the EARC report caused a political stir in Uganda. Most districts overwhelmingly rejected its recommendations. The timing of the report was unfortunate as it coincided with the land rights uprising in Kenya (“the Mau Mau uprising”). The

¹⁰ According to Dr Peter Sack, by the time Papua and New Guinea were colonised in the 1880s the legal theory that in a colony inhabited by “primitive” people all land upon colonisation automatically became the property of the colonising sovereign ‘had fallen into disfavour.’ (Peter Sack, ‘The Triumph of Colonialism’ in Peter Sack (ed), *Problem of Choice – Land in Papua New Guinea’s Future* (1974) 200, 204. This argument is not quite true in relation to Britain’s African colonies such as Uganda and Kenya, both of which were colonised ten years after the colonisation of Papua and New Guinea.

¹¹ EARC Report, above n 1.

¹² *Ibid.*

people suspected that its purpose was a pretext by the colonial administration to appropriate their land and give it to foreigner investors as had happened in neighbouring Kenya.¹³ Some saw it as a last minute attempt by the colonial government to undermine the African way of life and culture.

In spite of the protests, the Ugandan administration embraced the EARC's recommendations. Eventually, it convinced three districts (Kigezi, Ankole and Bugisu) that demarcation and registration of individual titles would give customary landowners secure titles and would eliminate disputes over ownership and land boundaries. These districts were the most highly populated districts in the country and they happened to have the most land disputes.¹⁴ Pilot schemes were set up in the three districts to adjudicate individual ownership of parcels of land in accordance with customary law. Once the land was surveyed and the boundaries appropriately marked, the adjudicated owner could then apply to the Director of Lands and Survey to be registered as proprietor of an estate in freehold in respect of the land, and would be entitled to be issued a certificate of title under the *Registration of Titles Act* (Torrens system).¹⁵ Legally, customary land law ceased to apply to the land, instead statutory and common law applied just like any other freehold land.

After Uganda became an independent state from Britain (1962), the policy advocated by the EARC almost came to a standstill. The pilot scheme was completed in the three districts but was not extended to other districts. There were several reasons for this. African intellectuals and politicians dismissed the EARC report as based on a misunderstanding of customary land tenure.¹⁶ They argued that, although African customary land tenure was communal, it recognised individual land rights over the land they occupied. They dismissed the report's claim that customary tenure was insecure as a Eurocentric misconception of customary land tenure.¹⁷ Critics of the report asserted that in reality in most customary land tenure systems individuals' rights over a specific piece of land and improvements were secure and virtually permanent. The rights were inheritable and, in some cases, alienable to other group members. Others praised the attributes of customary land tenure as the very foundation of African culture. They warned that changing the land tenure to individual freehold would destroy the very fibres that held the society together.

Some critics also charged that the recommendations were capitalist propaganda. In the mid-sixties, Uganda was in the grips of an ideological political change. The government announced strategies to move the country towards socialism. Changing customary land tenure to individual title was an anathema to its newly found ideology. Obol-Ochola, one of the proponents of socialism, wrote that since the country was committed to socialism, the government should avoid establishing a tenure system that would 'foster and

¹³ S Okec, 'Pilot Schemes for the Registration of Land Titles in Uganda' in James Obol-Ochola (ed), *Land Law Reform in East Africa* (1969) 255, 257.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ See S Obol-Ochola, *Customary Land Tenure and the Economic Development of Uganda* (LLM dissertation, University of Dar es Salaam, 1970).

¹⁷ For a comprehensive criticism of the report see Obol-Ochola, *ibid.*

perpetuate exploitation, social and economic injustice and disparity'.¹⁸ Besides, the feedback from the pilot scheme was not very encouraging. There was no evidence of any significant increased production or investment in the land under the pilot scheme.¹⁹ Moreover, most landowners who had had their land surveyed and demarcated did not bother to complete the process by registering their title under the Torrens system legislation. It seemed their only concern was to have their boundaries marked for all to see to ward off encroachers. This indicated that their fear was not insecurity of tenure but rather encroachment by neighbours.²⁰ Even registered titles soon ceased to reflect the actual state of affairs, especially because of subsequent unregistered transfers due to subdivision of the land amongst the proprietor's relatives under customary succession law.²¹ The process of keeping a register seemed to be a waste of funds.

Although the post-colonial government rejected the recommendations of the EARC, it did not formulate any formal alternative policy to promote customary land tenure. What was formally Crown land after independence was renamed public land. From a legal point of view, the status of customary land tenure remained the same. Although under the *Public Land Act 1962*, indigenous Ugandans had a right to occupy any unalienated public land without prior consent, s 22(1) of this Act provided that the relevant government body 'shall not be prevented from making a grant in freehold or leasehold of public land ... merely by reason of the fact that such land or any part thereof is occupied by persons holding under customary tenure.' As under the colonial legislation, customary tenants had a right to remain on the land until arrangements were made and carried out for them to be settled on another area equally suitable for their occupation and or compensated for the improvements.²² However, subsequently, the legal status of customary landowners received a boost following the enactment of the *Public Land Act* [Cap 21]. Under this Act, the government was prohibited to grant in freehold or leasehold any public land that was lawfully occupied under customary tenure without the consent of the customary occupants.²³ Applicants for land occupied by customary tenants had to furnish the government with evidence that the occupants consented to the application and the compensation payable to them. Failure to provide such evidence, or to pay the customary occupants compensation approved by the Minister, was a ground for revocation of the grants.

Perhaps, ironically, considering the political rhetoric at the time, the same Act gave customary occupants of land a right to apply for a lease over the land they occupied.²⁴ All leases of public land were granted subject to standard development conditions, breach of

¹⁸ *Ibid.*

¹⁹ Judy Adoko and Simon Levine, 'A Land Market for Poverty Eradication? A Case Study of the Impact of Uganda's Land Acts on Policy Hopes for Development and Poverty Eradication' http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/lemu_land_market_for_poverty_eradication.rtf (Accessed June 2005).

²⁰ *Ibid.*

²¹ Every succession resulted in further fragmentation of holdings. See Okec above 13, 263-4.

²² Section 22(1), *Public Lands Act 1962* (repealed).

²³ *Ibid* section 24(2).

²⁴ Section 25, *Public Lands Act 1969*.

which could result in forfeiture of the land.²⁵ It has been suggested that the object of the provision was to facilitate “progressive farmers” who wished to use their land more productively or use it as security for a loan, convert their customary title to leasehold. The inference being that they could not do so under customary tenure.²⁶ If this was the objective, it demonstrates that the independent government, like the colonial administration, felt that economic development was not achievable under customary land tenure. The only difference between the two governments was that the independent government did not take any active steps to promote the conversion of customary tenure to leaseholds. It was much left to individual landowners to decide whether or not to convert their titles. In the event, early in 1970, Dictator Idi Amin overthrew the elected government and imposed his own regime. With the country in political turmoil everything was at a standstill.

Amin’s “reform” measures

In 1975, Idi Amin, out of the blue enacted the *Land Reform Decree 1975*, which essentially sought to overhaul the country’s land tenure system. Under the Decree all land in Uganda was declared to be public land. Land owned in freehold was converted to leases held from the government subject to development conditions. With respect to customary land tenure, the Decree removed the protection customary landowners had previously enjoyed under the *Public Lands Act 1969*. The Decree empowered the government to lease any land occupied by customary tenants to any person (including the occupants) without the consent of the occupants. The government’s only legal obligation was to pay compensation for the improvements. The Decree also abolished the right hitherto enjoyed by indigenous Ugandans to occupy in accordance with their customary law any unalienated public land (outside urban areas) without prior permission.²⁷ The Decree made occupation of any public land without consent a criminal offence. If anyone was in doubt as to the status of customary tenure, section 3(2) of the Decree expressly declared that: ‘For the avoidance of doubt, a customary occupation of public land shall be only at sufferance²⁸ and a lease of any such land may be granted to any person, including the holder of such a tenure, in accordance with this Decree.’ Customary landowners retained a right to sell or donate their land, provided the transfer did not vest title in the transferee except over improvements over the land. Any agreement purporting to transfer customary tenure as if it were an actual title was void and constituted a criminal offence punishable by up to two years imprisonment.²⁹

The object of the Decree was to make security of land tenure dependent upon land use, which, supposedly, would promote agricultural development. This, however, put customary landowners in a difficult dilemma. On one hand, if they wanted security of tenure over their land they had to apply to the government to convert their tenancy to

²⁵ See sections 22 and 23, *Public Lands Act 1969*.

²⁶ Judy Adoko and Simon Levine, above n 19.

²⁷ Section 3(1) of the Decree (this is the effect of repealing s24 (2) of the *Public Lands Act 1969*).

²⁸ The term “tenant at sufferance” refers to a person who initially entered in possession with the consent of the landowner, and remains in possession, after the period for which the consent was given expires, without the consent or dissent of the landowner (*Butterworths Australian Property Law Dictionary* (1997)).

²⁹ Section 4, *Land Reform Decree*.

leasehold with a risk of forfeiting the land if they failed to comply with the statutory development conditions. On the other hand, if they did not apply for a lease they risked the government alienating the land to others who could demonstrate to the government the capacity to develop it. Reportedly, some customary landowners took advantage of the legislation to convert their titles to statutory leases. However, they were not “progressive farmers” but relatively wealthy business people whose motive was for ‘prestige, land hoarding or for collateral for loans for their other business.’³⁰

Several economists dismissed the policy underlying the Decree as simplistic and unlikely to stimulate agricultural development. Part of the reason for this was the difficulty of identifying on a national or even regional level appropriate development conditions to suit all manner of land and circumstances. For example, it was impossible to specify the percentage of land that had to be cultivated in a particular period or crops to be planted because there were many variables such as the ecology of the land, weather patterns, and value of the land. Moreover, the cost of enforcing the conditions was likely to be disproportionate to the benefit.³¹ The other main criticism of the Decree was that it rendered the status of customary tenants vulnerable.³² Indeed, the Decree caused panic throughout the country, with landowners fearing losing their land to the rich and well-connected people. In the event, the Decree remained largely unimplemented partly because it was politically unpalatable, even for dictator Idi Amin’s regime, and partly because for ten years the country was in political turmoil. During the period, government activities were almost at a standstill. As we shall presently see, it was not until the mid-1980s when relative peace was reinstated that reform of customary land tenure once again came to the fore. Indeed, the government declared land tenure reform one of its major policy initiatives.

PAPUA NEW GUINEA

Before we discuss the reform measures in PNG, we should briefly refer to land tenure reforms in Kenya as they had some impact on PNG. The British colonial administration in Kenya, like its counterpart in Uganda, accepted the general recommendations of the EARC. In a statement issued in 1956, the administration declared that it was its policy ‘to encourage the emergence of individual land tenure amongst Africans, where conditions are ripe for it, and, in due course, to institute a system of registration of negotiable title.’³³ The administration’s policy in this regard was also highlighted in a statement by Swynnerton, then Assistant Director of Agriculture:

³⁰ Judy Adoko and Simon Levine, above n 19, 14.

³¹ *Report on Land Tenure and Agricultural Development in Uganda* (Makerere University Institute of Social Research and Land Tenure Centre, University of Wisconsin-Madison, 1989).

³² Judy Adoko and Simon Levine, above n 19.

³³ H Magala and A. K. Magugu, ‘Recent Reforms in Kenya’ in James Obol-Ochola (ed), *Land Law Reform in East Africa* (1969) 240. The East African Royal Commission Report gave support to policies that had already been undertaken in the colony, including the Swynnerton Plan to Intensify African Agriculture in Kenya (1955) to intensify the development of African agriculture, see Patrick McAuslan, ‘Control of Land & Agriculture in Kenya and Tanzania’ in A Sawyer (ed), *East African Law and Social Change* (1967) 172, 173.

Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmers a unit of land and system of farming whose production will support a family at a level, taking into account perquisites derived from the farm, comparable with other occupations. He must be provided some security of tenure, through an indefeasible title, as will encourage him to invest his labour and profits in the development of his farm, and as will enable him to offer it as security against such financial credit as he may wish to secure from such sources as may be open to him.³⁴

The administration pursued this policy in earnest. The process involved adjudicating customary land rights in accordance with the relevant customary law, surveying the land and recording individual titles. After the lapse of a prescribed period, which allowed time for inspection and objection, if any, the titles were registered under a system similar to the Torrens system.³⁵ After Kenya attained independence (1963), the independent government, with the assistance of the British government, maintained the policy with renewed vigour. Appropriate legislation was enacted to facilitate the process. The individualisation of land ownership was also facilitated by the fact that Kenya, unlike its neighbouring countries (Uganda and Tanzanian), maintained a predominantly “free market” economic policy. Consequently, there was no perception of ideological conflict.³⁶

Whether Kenya’s individualisation and registration of titles has resulted in a significant increase in investment in land is beyond the scope of this paper. It suffices to say that some cite Kenya as a success story and a clear vindication of the EARC recommendations. Others are sceptical.³⁷

With respect to PNG, the Australian colonial administration (like the British in Africa), maintained what Professor James called the “status quo” policy, which meant preserving existing landownership under customary land tenure.³⁸ Its policy was to acquire land from customary landowners and give it to expatriates for plantation farming with the

³⁴ R J M Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya* (1955) 9 (cited in Rowton Simpson, ‘Land Problems in Papua New Guinea’ in Rowton Simpson, R. L. Hide, A.M. Healy and J. K. Kinyanjui, (eds), *Land Tenure and Economic Development* (New Guinea Research Bulletin No. 40, 1971) 3, 5

³⁵ See generally Kinyanjui, ‘Land Reform in Kenya’ in Rowton Simpson, R. L. Hide, A.M. Healy and J. K. Kinyanjui, (eds), *Land Tenure and Economic Development* (New Guinea Research Bulletin No. 40, 1971) 127 – 135.

³⁶ Another important factor that might have contributed to Kenya’s land tenure reform was that, as Kenya moved towards independence, the government bought back vast areas of land from white farmers in what was known as “White Highlands”. The land was subdivided into small units and distributed amongst landless or unemployed indigenous Kenyans. See Kinyanjui, *ibid* 134.

³⁷ See generally: M. P. K. Sorrenson, *Land Reform in the Kikuyu Country* (1967) 201 – 252; McAuslan, above n 33, 205 – 227.

³⁸ R. W. James, *Land Law and Policy in Papua New Guinea* (Law Reform Commission Monograph No 5, 1985) 42. In 1952, the administration made its first attempt to record customary land. The *Native Land Ordinance 1952* made provision for the investigation and recording of customary land for a period of five years. After the period expired, the title would become absolute. The legislation proved difficult to implement and was repealed in 1963 without any land being recorded. See generally, James, 43 – 44.

indigenes providing manual labour. However, after the Second World War, the administration determined to introduce and extend commercial farming amongst Papua New Guineans. Partly inspired by the EARC report,³⁹ the administrators were convinced, as were the administrators of Britain's East African territories, that traditional land tenure was a constraint to economic development and 'could not accommodate changes which were taking place and which were caused from planting crops on the land.'⁴⁰ They in particular singled out lack of secure individual titles under customary tenure as a main constraint on promoting commercial farming and investment in the land. In 1960, Paul Hasluck, the Australian Minister responsible for Papua New Guinea, issued a major policy statement in this regard to the effect that, as a long term objective, the administration was committed to the introduction throughout the country of a single system of landholding regulated by the central government and 'providing for secured individual registered titles, after the pattern of the Australian [Torrens] system.'⁴¹ The statement went on to provide that customary land law would cease to apply to any such land. Interestingly, the committee established by the Minister to advise the administration on the reform proposals found no evidence to support the argument that customary land tenure was impeding the development of commercial farming in Papua New Guinea. Nevertheless, it advised that based on experience in other countries it would do so in the future.⁴²

A package of legislation was enacted (1962-3) to implement the policy: the *Land Titles Commission Ordinance 1962*; the *Land Registration (Communally Owned Land) Ordinance 1962*; and the *Land (Tenure Conversion) Ordinance 1963*. The respective legislation made provision for the systematic adjudication and registration of ownership of customary land; settlement of customary land disputes; conversion of customary title into individual freehold titles and registration of such titles under the PNG Torrens system.⁴³ The implementation process, however, proved to be very slow, expensive and contentious in some parts of the country.⁴⁴ In a period of almost ten years, less than 600 parcels were adjudicated. It was then that the government turned to Kenya for assistance. A powerful administration delegation was despatched to Kenya to study how its system functioned. The administration engaged the services of British consultants, led by Simpson, a renowned surveyor who was the architect of the Kenyan system, to advise the PNG government on how to make the system of land title adjudication and registration more efficient.⁴⁵ In their report, the consultants strongly criticised the 1963 legislation

³⁹ Simpson (above n 34, 5) wrote that the recommendation of the EARC, apparently, was 'the thesis which set Papua New Guinea so resolutely on the course it adopted in 1962, as a major policy decision.' See also James, above n 38, 44.

⁴⁰ James, above n 38, 43.

⁴¹ James, above n 38, 44-45. See also T Bredmeyer, 'The Registration of Customary Land in Papua New Guinea' (1975) 3 *Melanesian Law Journal* 267, 270.

⁴² Bredmeyer, *ibid* 271.

⁴³ Then there were two separate but identical pieces of Torrens legislation for Papua and for New Guinea: the *Real Property Ordinance 1913 (Papua)* and the *Land Registration Act 1924 (New Guinea)*. Both pieces of legislation were repealed and replaced by the *Land Registration Act* [Cap 191].

⁴⁴ For a discussion of the legislation and implementation process, see Bredmeyer, above n 41, 271-279.

⁴⁵ It seems Simpson already had an influence in the formulation of PNG's land tenure reform proposals. Way back in 1957 he met and discussed with Hasluck, the Australian Minister responsible for Papua New Guinea, Kenya's customary land tenure reform; see Bredmeyer, above n 41, 297.

and they proposed substantial changes to the process based on the Kenyan model. The consultants drafted the appropriate bills based on the Kenyan model, which they submitted to the administration.⁴⁶

However, political events intervened. Papua New Guinea was on the brink of becoming an independent nation. When the administration introduced the bills in the House of Assembly, the Papua New Guinean members of the House strongly objected to the proposed reforms. Like the Ugandans' reaction to the recommendations of the East African Commission report, they and other nationalist politicians were suspicious of the colonial administration's motives. They feared that the proposals could lead to disturbance and loss of land. Others complained that the administration had no comprehension of land issues facing the soon to be independent State of Papua New Guinea and sought to impose legislation upon the people without proper consultation.⁴⁷ Key expatriate academics at the University of Papua New Guinea added their voices to the criticism of the land tenure reforms and the proposed system of registration.⁴⁸

Commission of Inquiry into Land Matters

Because of the uproar, the Australian administration withdrew the bills. On 16th February 1973, the Administrator appointed a Commission of Inquiry Into Land Matters (CILM) to seek the views of the people with regard to major land matters facing Papua New Guinea. Its extensive terms of reference included examining and making recommendations to the administration with respect to ways customary land tenure affected land utilisation.⁴⁹ All members of the CILM were indigenous Papua New Guineans. The CILM toured the whole country and consulted extensively. In its report, published in the same year, the CILM was critical of the policy of individualisation of customary land. It argued against the conversion of communal customary land tenure to individual tenure as a goal of the reform program. Instead, it recommended a system of registration of group titles with individuals having "occupancy" or other subsidiary rights.⁵⁰ In its opinion, registration of individual titles had to be the exception rather than the norm. The CILM claimed that it had received countless requests from the people for recognition of their group land and their desire for secure boundaries to their lands. It reasoned that such group titles were akin to the Papua New Guinean way of land organisation. In addition, it anticipated that formal recognition of ownership of group land would eliminate inter-group land disputes. The CILM was optimistic that the groups would be able to use their registered title as security for loans. Group titles were also preferred to individual titles because it

⁴⁶ Ibid 280 – 283.

⁴⁷ P Larmour, 'Policy Transfer and Reversal: Customary Land Registration from Africa to Melanesia' (2002) 22(2) *Policy Administration and Development* 151.

⁴⁸ See *ibid.* The most vocal critics were A. D. Ward, author of 'Agriculture Revolution Handle With Care' (1972) 6 *New Guinea Quarterly* 32, and Professor James, the author of *Land Law and Policy in PNG*, above n 38. (The two academics probably had a great influence on some of the nationalist politicians who were their former students). Both academics were appointed as consultants to the all indigenous Papua New Guineans Commission of Inquiry into Land Matters Commission, see n 49, below.

⁴⁹ *Report of Commission of Inquiry into Land Matters* (1973), 3, [3].

⁵⁰ *Ibid* 17, [3.2 – 4]. See also James, above n 38, 195.

gave protection to the majority of the people and there was less likelihood of causing landlessness.⁵¹

The CILM report was well received. One of the main outcomes of the CILM recommendations was the enactment (by the newly independent government of PNG) of the *Land Groups Incorporation Act* [Cap 147], which made provision for the incorporation of customary land groups. Its preamble declared that the object of the Act was:

- (a) to recognise the corporate nature of customary groups; and
- (b) to allow them to hold, manage and deal with the land in their customary names, and for related purposes.

The Act was one of the several Acts enacted at around the same time to facilitate greater participation by Papua New Guineans in the economic development of their nation by using their customary land. The Act is still in force. Before a group is incorporated under the Act, the Registrar must be satisfied that the members regard themselves, and are regarded by others, as bound by a common custom. Once incorporated, the land group acquires all the main attributes of a body corporate, including power to be registered as owner of the group's land and to dispose of the land.⁵² However, incorporation of a group in respect of a particular area of land is not conclusive evidence of ownership of the subject land; it is possible for other customary groups or clans to contest ownership of an incorporated group's land.⁵³ The reason for this is that group land is not a registrable title under the PNG Torrens system legislation; hence, it is not protected by the principle of indefeasibility of title.

Attempts were made in the late 1970s to enact legislation for the registration of customary land. A draft *Customary Land Registration Bill* was presented to the government; but due to delays and change of government in 1980, the Bill was never enacted and no equivalent legislation has ever been enacted by the National Parliament.⁵⁴ Hence, whilst customary landowners can incorporate themselves as a land owning group, there is no legal mechanism for registration of customary land as recommended by the CILM. Professor James comments that the absence of legislative provision for the registration of customary land rendered the incorporation of landowning groups meaningless with regard to reform of customary land tenure.⁵⁵

Registration of Customary Land – Phase Two

⁵¹ James, above n 38, 54.

⁵² Section 11.

⁵³ J. T Mugambwa, H A Amankwah, and C E P Haynes, *Commercial and Business Organisations Law in Papua New Guinea* (2007) 188.

⁵⁴ In 1983, the Provincial Government of Morobe enacted its own legislation for registration of customary land, but the national scheme within which it was supposed to operate did not materialise.

⁵⁵ James, above n 38, 194. Professor James suggests at 195 that the national government was more concerned to use the incorporated land groups to facilitate the plantation redistribution scheme under which alienated land was to be restored to the original landowners rather than a reform measure of customary landholding. More recently, clans and landowning groups have been incorporated under the Act in oil-rich areas in the Southern province to facilitate payment of royalties (Mugambwa et al, above n 53, 190).

In the 1980s and 90s the arguments continued as to whether customary land tenure was a constraint on development, and as to whether individualisation of title and/or title registration was the way forward for PNG. The government received conflicting advice from various experts about how to deal with the land matter. In the mid-80s, the World Bank became more involved in planning PNG's economy. The country was facing serious financial difficulties when it turned to the Bank for assistance. As usual with the World Bank, its loans were subject to stringent conditions in line with its policy. The Bank identified customary land tenure reform as a prerequisite for getting PNG out of its economic difficulties. Accordingly, in 1995, the Bank demanded, as a condition for financial assistance, that the PNG government develop national framework legislation on customary land, which *inter alia* facilitated the lease of customary land to investors. The government was agreeable (probably in the circumstances it did not have much choice) to the condition. However, once the condition became public knowledge, it prompted violent protests led by NGOs and university students. Reportedly, the protesters believed that the legislation was a ploy to appropriate the land and give it to foreign investors, which would cause landlessness.⁵⁶ The government was forced to reconsider its decision and the World Bank withdrew the condition. There were further riots in 2001, when it was rumoured that in spite of its undertaking not to do so, the government was secretly drafting a bill for the registration of customary land.⁵⁷

The Customary Land Bill⁵⁸

Notwithstanding the protests, it seems the PNG government is determined to pass legislation for the registration of customary land. The bill provides for the amendment of the *Land Registration Act* [Cap 191], to enable voluntary registration of "group" customary land under the Act. Only land owning groups that have incorporated themselves under the *Land Groups Incorporation Act* will be eligible to register their land. Registration is conclusive evidence of the particulars specified in the register and the group's title to the land is indefeasible except as specified in the section.⁵⁹ The incorporated land group will be able lease the land to any person (as long as its custom

⁵⁶ Tim Curtin, Hartmut Holzknicht, and Peter Lamour, 'Land Registration in Papua New Guinea: Competing Perspectives' (Discussion Paper 2003/1, State Society and Governance in Melanesia Project, ANU Research School of Pacific and Asian Studies, 2003).

⁵⁷ *Ibid.*

⁵⁸ The discussion is partly based on the draft bill, dated 1995, which partly sparked the riots (I was told by one of my sources that the bill has not been amended since) and partly on a paper by Romilly L Kila Pat, (Deputy Secretary – Corporate & Regulatory, PNG Department of Lands & Physical Planning) 'Customary Land Tenure in a Changing Context,' (Paper presented at the Second Regional Pacific Meeting, Brisbane, Australia, September 2003). Because of the author's status in the PNG government, it is assumed that it reflects the government's thinking over this matter.

⁵⁹ Title will be indefeasible for a period of twenty years, after which it can be changed on certain prescribed grounds: 'evolutionary changes occurring naturally under custom, demographic changes or geological or other natural changes' (Kila Pat, *ibid.*). The 1995 draft does not limit the period of indefeasibility (see clause 12 of the bill). Other exceptions include: prior registered interests under this Act; interests granted by the Government under any law; and rectification of the register by the Registrar (clause 13(2) and 15 of the Bill).

allows)⁶⁰ and provision will be made for the registration of leases of customary land. The government states that the main objective of this bill is ‘to mobilize customary land for development and, in particular, to make land available as security for finance’.⁶¹

In a paper presented at the Second Regional Pacific Meeting in Brisbane, 2003, Romilly Kila Pat, PNG Deputy Secretary, Corporate & Regulatory, said that his government’s economic policy was geared towards an export driven economy with emphasis on poverty reduction. Access to land was critical for the success of this policy. He said that, while alienated state land was being fully utilised, the question was how to access the 97% of the land held under customary tenure. He conceded that the government had to walk a tight-rope between the need for development and the need to retain PNG’s way of life as portrayed by customary land tenure. The bill is supposed to be a compromise solution in this regard. Under the bill, registration of customary land is voluntary so that only those groups that are ready will have their titles registered. The government hopes that gradually other groups will follow suit once they realise the benefits of registration. The expected benefits include secure title, easier land transactions (which may promote better land use), and a better chance of obtaining loans using land as security. The Deputy Secretary’s paper stressed that only leases of customary land would be allowed so that the landowners would retain ownership of the land. In addition, customary law will continue to apply in determining the group members’ ownership or user rights, and other dealings amongst themselves. In other words, registration of the group’s land will give legal protection to the group’s title against adverse claims by others, but members’ rights will continue to be regulated by their custom. Although the proposed legislation does not expressly say so, it is presumed that once the customary owners lease or mortgage any part of their land, the general law of leases and mortgages as the case may be, will apply to the land.⁶²

The draft bill’s proposals are remarkably similar to the CILM recommendations over thirty years ago! What has changed? Was the CILM ahead of its time? Before we draw any conclusion, we should briefly compare these proposals with the customary land law reform, which the Ugandan government enacted in the late 1990s.

UGANDA

⁶⁰ Successive Papua New Guinean law, enacted by the colonial administration and re-enacted by the independent government, prohibited private persons from directly acquiring or leasing land from customary landowners. Only the government had the power (subject to certain prerequisites) to acquire or lease customary land, which it could then lease to private persons as ‘state leases’. See sections 10-11; and 134, of the *Land Act 1996*. For discussion see Amankwah, Mugambwa and Muroa, *Land Law in Papua New Guinea* (2001) 74-77. It is not clear whether under the proposal customary landowners would have a right to lease their land directly to private persons. Presumably this is the intention because if the government wanted to retain the current policy the amendment would be unnecessary. As will be discussed presently, under the current Ugandan *Land Act*, customary landowners are free to lease or sell their land to anybody.

⁶¹ Kila Pat, above n 58.

⁶² Under the *Land Act 1996*, upon lease of customary land to the government all customary rights, unless specifically reserved in the lease, are suspended for the duration of the lease (see s 11(3)).

In Uganda, as we have seen, the drastic land law reform measures introduced by the military regime in the mid-70s were never implemented. Effectively, customary land tenure was left to develop on its own. This was not necessarily by design; rather it had to do with the political turmoil that engulfed the country in the 1970s to mid-80s. Once political stability was established, the government, with the encouragement of the World Bank, made land tenure reform its priority agenda. There were two areas of major concern for the government. First, the government needed to develop a land policy that would promote agricultural and economic development as well as poverty eradication in the country. Second, there was the issue of land rights. The government was aware that the latter was of primary concern for most ordinary Ugandans. With the assistance of the World Bank and several donor countries, the government commissioned various national and international consultants to assist with formulating the most appropriate land tenure policy. The debate as to which land tenure system was best for Uganda raged on for more than ten years. Like in Papua New Guinea, the government received conflicting advice and feedback from consultants, civic leaders, stakeholders and the general public. In fact, the debate became so controversial that the government feared that it could drive the country into civil war. Fortunately, it never came to that.

In the end, it was agreed to change the system of land holding in Uganda. The new Uganda *Constitution* of 1995 vests land in Uganda in the citizens of Uganda owned in freehold, *mailo* (quasi-freehold), leasehold and customary tenure.⁶³ With the exception of Buganda (central region) and urban areas, most land in Uganda is held under customary tenure. As may be recalled, hitherto customary landowners were legally ‘tenants at will’ on government land. Under the *Land Act 1998*) customary tenure, like freehold tenure, entails ownership of land in perpetuity.⁶⁴ Article 237(4) of the *Constitution* empowers all Ugandan citizens owning land under customary tenure to acquire certificates of customary ownership in respect of their land in a manner prescribed by legislation. The *Land Act 1998*, reiterates the constitutional right of individuals, families or communities owning land under customary tenure to apply for a certificate of customary ownership in respect of their land.⁶⁵ The certificate of customary ownership is deemed by the Act to be conclusive evidence of the customary rights and interests endorsed thereon.⁶⁶ Subject to any restrictions endorsed on the certificate, generally, a certificate holder – individual or group – has a right to deal with the land just like any other landowner. Thus, he or she may mortgage, lease or sell the land, except where such right is precluded or restricted by the certificate.⁶⁷

Interestingly, the legal recognition of customary land tenure did not necessarily translate into a pro-customary land tenure policy. Indeed, the position it is quite the contrary. The *Constitution* gives customary landowners a right to convert their title to freehold in accordance with any law enacted by Parliament. That law is the *Land Act 1998*. Section 10(1) of the Act provides that any person, family, community, communal land

⁶³ Article 237(1) & (3).

⁶⁴ Section 4(1)(h) and 4(2).

⁶⁵ Section 5(1).

⁶⁶ Section 8(3).

⁶⁷ Section 9(2) (c), (d) and (f).

association, holding land under customary land tenure may convert their tenure to freehold by following the prescribed procedure. The normal practice is for customary owners to apply for a certificate of customary ownership and later, if they wish, apply to the relevant authority to convert their customary title to freehold. However, it would seem from the Act that possession of a customary certificate of ownership is not a prerequisite for conversion to freehold; applicants may fast-track the process by directly applying to the authority to convert their customary tenure to freehold.⁶⁸ Although the provision for conversion is mainly aimed at individuals, landowning groups or communities could also apply to convert their customary title to freehold.⁶⁹

The *Land Act* does not give the relevant authority discretion to decide whether or not to allow an applicant to convert their title to freehold. It seems that permission to change should be granted as long as the customary law of the community concerned recognises or provides for individual ownership.⁷⁰ Upon conversion to freehold, the land is registered under the Torrens system legislation and it ceases to be subject to customary land law.⁷¹

The foregoing reforms were mainly based on the recommendations of the Uganda Constitutional Commission.⁷² According to its findings, customary land tenure was on the wane: 'in practice, many individuals and families holding land under customary tenure have something akin to freehold tenure'.⁷³ Evidently, the underlying policy of the legislation is to facilitate the demise of customary land tenure. It is noteworthy that there is no provision in the *Land Act* to reconvert freehold to customary land tenure. The Constitutional Commission was convinced that the conversion of customary tenure to freehold tenure was the way forward for the country's greater economic development. It asserted:⁷⁴

The great disadvantage of the customary tenure is that it tends to emphasise cultural values more than the economic and financial gains from the land. This retards development. Land users are not encouraged to make long-term investments in the land; nor can they take good care of the land as they would have done if they had clear titles to it. Land held under customary land tenure especially for communal use tends to suffer from neglect and consequent degradation.

However, the Constitutional Commission urged the government to introduce the changes gradually 'to avoid economic, social and cultural hardships and shocks.' Like its

⁶⁸ This is implied in s 12(4) and 13(2) of the *Land Act 1998*.

⁶⁹ Section 23, *Land Act 1998*.

⁷⁰ See s 12(2) of the *Land Act 1998*. Most customary tenure systems recognise individual or family ownership of particular land within the umbrella of clan or community land, see Obol-Ochola, above n 16.

⁷¹ Section 15, *Land Act 1998*.

⁷² Justice Benjamin Odoki (Chairperson), *The Report of the Uganda Constitutional Commission: Analysis and Recommendations*, (1992). The commission was set up to review the constitution and make proposals for a new constitution (which was the 1995 Constitution).

⁷³ *Ibid* [25.61].

⁷⁴ *Ibid* [25.62 -63].

counterpart, the EARC, four decades earlier, the Constitutional Commission was mindful of the dangers of tenure conversion and the need to exert caution.

CONCLUSION

Almost forty years ago, the late Obol-Ochola, a Ugandan legal academic, wrote that customary land tenure had been in the dock for so long that it had won the sympathy of a few observers.⁷⁵ His comment rings true both in Uganda and Papua New Guinea. However, in Uganda, notwithstanding the support customary land tenure has received from several eminent scholars, it is unlikely to be acquitted of the charge that it is a constraint on development. The government seems to have made up its mind that reform of customary land tenure is the way forward. As we have seen, the right to convert customary tenure to freehold is enacted in the 1998 *Land Act*. Because the debate leading to the enactment of this legislation was very controversial, it is unlikely that the government will revisit the issue even in the face of overwhelming evidence that economic development was possible under customary tenure. Moreover, in central Uganda (Buganda), which is economically more developed than other regions of the country, and in urban areas, land is held in freehold (or quasi-freehold) or leasehold. The perception is that one of the main reasons for the economic development in these areas is that land is held in freehold; hence, other areas of the country should follow suit. There is also a perception that conversion to freehold makes the land more marketable.

It is thought that the way forward for Uganda is not to dismantle customary land tenure in those parts of the country where customary land tenure is still very widely practiced; rather it should be encouraged. The provision for registration of customary titles under the *Land Act* is a step forward in this regard. Further steps may need to be taken to change the perception that freehold is superior to customary title. Conversion of customary title to freehold should be actively discouraged. This may entail amending the *Land Act*, if necessary, to ensure that a certificate of customary land title is treated on a par with a registered freehold title. More importantly, the people, especially outside the relevant region (including financial institutions), should be made aware of this.

With respect to Papua New Guinea, there the debate is not about conversion of customary land to freehold; rather registration of individual or group customary land titles. The need to register group land had, as we have seen, been foreshadowed by the CILM four decades ago. In my view, the time is ripe to implement its recommendations. I also agree with the proposal to register individual customary titles, in areas where there was demand, as explained by Romilly Kila Pat, the Papua New Guinea's Deputy Secretary, Corporate & Regulatory.⁷⁶ Obviously, the whole nation needs to be sensitised of the policy underpinning the proposed legislation.

A final word about customary land tenure, whether in Papua New Guinea or Uganda. There is no doubt that some customary land tenure rules may be a constraint on economic

⁷⁵ Obol-Ochola, above n 16.

⁷⁶ Kila Pat, above n 58.

development. The same, of course, maybe said of freehold and other systems of tenure. Although customary land tenure is dynamic, legislative measures may be necessary to guide, and in some cases to expedite, the reform towards the desired direction.