The Papua New Guinean Constitution adopted as a national goal the principle that development should be achieved primarily through the use of Papua New Guinean forms of social political and economic organization It holds that villages and communities should remain as viable units of society and includes, inter alia, a guideline that :

“… [L]and policy should be an evolution from a customary base and not on a sweeping agrarian revolution or total transformation of society” (James 1985; 50).

Transformation Policy of the 1960s

However, before independence Papua New Guinea was following a very different path under the Australian colonial administration. The so-called ‘transformation policy’ that was adopted by the Australian Administration in the 1960s involved the substitution of individual registered titles (freeholds) for the existing traditional forms of land-holding, and the replacement of customary law by English real property law (James 1984:45). The more specific commitments included: the introduction of a single system of land-holding which was regulated by the central government and administered by the Department of Lands, providing for secured, individual, registered titles, following the pattern of the Australian system. This meant retention of land rights, as subject to native custom, but only until taken out of custom, either by acquisition by the Administration, or by a process of conversion of title to an individual, registered title. Acquisition or conversion of title would involve compensation in respect of the extinction of rights held under native custom.

Believing that the traditional system prevented the acquisition and utilization of land by potential enterprising farmers, the colonial Administration sought to facilitate the adoption of commercial agriculture by Papua New Guineans through the implementation of the Anglo-Australian system of land holding. It needs to be noted that by custom no direct dealings in customary land could occur. Conversion to freehold would overcome this restriction. In addition to providing greater access to land for entrepreneurial activities, the system was intended to open the possibilities for financial support in so far as secure title to land would allow for easier access to loans, because owners would be able to offer land as security.

Implementation of the transformation policy saw the passage of the *Land Titles Commission Act 1962,* to adjudicate land rights, and under the *Land (Tenure Conversion) Act 1963,* the conversion of the adjudicated title from traditional tenure to freehold estates became possible. The *Real Property Act* in Papua, the *Lands Registration Act* in New Guinea, and finally the unified and consolidated *Lands Registration Act* in 1982, provided for registration and secured title for the converted freehold estates. However, legislation that was intended to implement the plan more efficiently was defeated in the House of Assembly in 1971 (James 1984, 46) Although there has been no official statement rejecting the transformation model in Papua New Guinea, subsequent legislation and the National Constitution have redirected the thinking of policy makers (James 1984:49)

This redirection in thinking resulted in the *Land Groups Incorporation Act* of 1974 which provided for the legal recognition of traditional groups and their incorporation for purposes of acquiring, holding, disposing of, and managing land (*Land groups Incorporation Act* 1974, Ch. 147, s.1 (e)). Given that individuals could not deal in customary land, the legislation sought to empower the group with rights over customary land. This legislation gave legal substance to the view that, in Papua New Guinea, the primary owners of land are groups of one form or other. James (1984) held that the land group corporation represents an emphasis on lineage, as the basic landowning entity, but that lineage is clothed with legal personality in the nature of a land group corporation. The philosophy intended to ground the ILG legislation is one that attempts to align itself with Melanesian customary traditions. As James (1984, 50) explains:

“In this way, many of the elements of the traditional system were sought to be retained, for example, collective ownership, mass participation in the decision-making processes, traditional dispute settlement philosophy, and a distribution system based on one’s interest in land.”

However, more recently, prohibitions against dealing in customary land that continue under current laws, may be overcome when the government may act as an intermediary between groups of customary landowners and alternative owners of the usufruct of their land. According to this so called "lease-lease back" device, the owner (the incorporated land group) must lease the land to the government, who leases it back to the tenant.

The Bougainville Crisis

Despite coming into force in 1974 the formation of land owning groups under the Incorporated Land Group Act remained virtually unknown until the 1990s. The Bougainville crisis of the late 1980s, the most significant dispute involving land and use of land by a major developer, did not involve incorporated land groups. The Bougainville crisis, however, does offer a perspective on the dangerous dynamic that can develop when large scale development attempts transactions over relatively unformalized customary land rights.

The Bougainville crisis began as an inter-generational struggle over the compensation and other payments made to residents in the locality of the giant Panguna copper mine on the island of Bougainville (also known as North Solomons) constructed and operated by the Anglo-Australian mining company CRA from 1969 to 1989. Conflict with the indigenous occupants of the proposed mining areas began as early as 1969. After an apparent settlement, the Panguna landowners formed the Bougainville Revolutionary Army (BRA) to lead renewed opposition to the mine around 1987 and this resulted in the closing of the mine in 1989 and a movement for secession of Bougainville from Papua New Guinea. During the 1990s Bougainville remained isolated and under embargo from Papua New Guinea, while much of the island remained under the control of the BRA. One can trace the initial etiology of the crisis to an absence of defined income and property rights.

A report to CRA by Douglas Oliver in 1968 attempted to explain to the mining company the limited number and type of economic transactions amongst the indigenous inhabitants of Bougainville. He distinguished between just three types of transactions: (1) gifts, with no reciprocity envisaged, limited largely to parents and their children, (2) 'taking' without any intention of repayment (i.e. simple theft), and (3) exchange, comprising mostly reciprocal transfers of gifts, as often as not separated in time and place, with more occasional and limited transactions in the form of bartering. Evidently payments in the form of rents for the use of another's land, for services rendered on a permanent basis as for employment, and for use of capital equipment and tools were largely absent (Denoon 2000, 206).

Oliver advised CRA 'to base any further encroachment on native-owned land upon deep and comprehensive understanding of the specific locale's land tenure principles', and he said that understanding could not be obtained simply by colonial officials merely asking 'who owns this land’ (Denoon 2000, 207). Ironically, Oliver's assessment although taken seriously by CRA and by the Australian colonial administration did little to reconcile the indigenes in the proposed mining area either to the initial exploration or to the eventual construction and operation of the mine. We can never know whether a counterfactual approach might have worked better, perhaps by abandoning de jure the concept derived from English law that minerals underground belonged to the crown. This principle had already been undermined in the process whereby royalties normally payable only to the national government in Port Moresby, as “the crown”, were in the Bougainville Copper Agreement devolved to both the provincial government of North Solomons and the presumed customary landowners of the mining lease. Nevertheless, since the Panguna mine would not involve under-surface mining, being no more than a very large and deep quarry, opportunity existed to approach the indigenes in the mining area and to negotiate the terms under which they would be prepared to allow prospecting and mining to proceed, with such terms to go beyond mere compensation for actual losses (such as from loss of income generating trees and crops, as well as the fish resources of rivers required for disposal of mine tailings). It is certainly arguable that had CRA and the administration treated the residents of the proposed mining area *as if* they were *individual* landowners with title, and therefore entitled not merely to compensation but to actual rental income payable by the mine, perhaps the resentments engendered by construction and operation of the mine could have been avoided.

To some extent the Bougainville Copper Agreement (which was legislated as an Act of the legislative assembly in Port Moresby) did go down this route, but stopped short of identifying appropriate rentals. CRA agreed to pay compensation to groups regarded as traditional landowners for the use and abuse of their territory resulting from its mining operations. But we need to emphasize that its approach to income distribution involved working through designated representatives of defined 'groups' of indigenous residents of the mining lease areas, even though North as CRA's own adviser had nowhere indicated that individuals living in the proposed mining areas could be treated with as if they formed a single entity, as if indeed they had been a company with its own rights in the area. It is ironic indeed that such a supremely capitalist enterprise as CRA preferred to treat with the indigenes as if they were a collective or trade union rather than a loosely organized banding together of individuals with no formal collegial structure of their own.

Instead CRA and the administration themselves organized landowners' associations and trust funds (such as the Road Mine Tailings Lease Trust Fund), which was administered by the twelve titleholders who represented the landowning clans and communities. The trustees were to invest the money received from the mine royalties, occupation fees and compensation payments "...for future generations while spending the income for the benefit of the wider community". As it turned out the trustees violated their fiduciary duties and kept the money for themselves (Denoon, 2000, 91). Filer (1990) explains that customary guidelines were lacking or confused because inheritance is usually matrilineal whereas cash crops have been thought to belong to the male line. Thus, the leaders, rather than operate in conditions of confusion in which the dissemination of benefits would lead to controversy, decided instead simply to keep the benefits for themselves. Thus stated, one can see that conventions regarding income rights were really undeveloped and provided insufficient guides to individual entitlements. Without clear guidelines there were inadequate countervailing forces acting on the titleholders and resulting in a failure to constrain the titleholders from simply pocketing the proceeds.

Hernando De Soto, Capitalism   
and Western Property Rights

However, the question remains whether these developments sufficiently lay to rest concerns over impediments to wealth generation posed by customary land tenure. Hernando De Soto (2000) linked the success of modern capitalism to the institution of ownership that is prevalent in Western capitalist economies.[[1]](#footnote-1) Western property rights possess certain specific characteristics that render it amenable to successful capitalist endeavour. These distinct characteristics include a recorded representation of economically and socially useful aspects of the asset, a single system of integrated information rather than dispersed data, orientation to individual rather than group accountability, a fungible system in which property is capable of being divided, combined and moulded to suit economic potentialities, a network of connections with both the government and the private sector, and record-keeping systems that protect not only the security of ownership but more importantly the security of transactions. Customary land in Papua New Guinea by virtue of its nature is virtually the antithesis of this description. It is unregistered, allegedly collectively owned, unrecorded, lacking in integrated information and lacking in uniform formalized laws that protect the security of title and possible transactions. For example, with respect to the partial alienation of customary land, Filer mentions the transactions between customary owners and squatters in urban areas, but points out that case law governing these tractions has never been realized. Clearly in such instances the law offers neither security of title nor security of one’s transactions. But at the same time alienated land also suffers from the lack of a reliable record-keeping system as mentioned. Thus, many of the necessary aspects of Western property rights that facilitate successful capitalism are absent with respect to both the customary and non-customary forms of land tenure.

Successful capitalism, as de Soto explains, benefits from a wide network of information and relationships that can be utilized when uniform principles of ownership are known, recorded and universally protected. Customary land transactions are merely local arrangements subject to local politics and local protection and thereby cannot reliably function within the wider network of non local relationships. Moreover, the important issue of accountability is blurred because a presumed system of collective ownership often makes it difficult to assign unambiguous forms of individual responsibility. De Soto claims that individual forms of ownership evolved in the West with the integration of a diversity of local property systems under one formal property law. This, he claims, shifted the legitimacy of the rights of owners from the politicized context of local communities to the impersonal context of law. This, he said, created individuals from masses by transforming people with property interests into accountable individuals.

The importance of this relates also to the financing and organizational commitment to economic activities. Despite the individualistic ethic, successful capitalism is an organizational undertaking in which a diversity of interests frequently commit its wealth to a collective enterprise. This is possible if there exists security of title backed by registration and other record and information systems. Since the latter do not exist with respect to customary land, this fact coupled with the prohibition against non-customary transactions, also renders such financing problematic.

In the capitalist world individual financial commitments are coordinated through financial institutions. Financial institutions are generally indispensable for providing the financing that allows entrepreneurial ventures to achieve a form of reality. However, these institutions demand security for such largesse, which usually requires the mortgaging of interests. However, customary land lacks the essential characteristics, such as registered interests and other aspects of security of title whose absence renders it unacceptable as a form of security for loans. One must also recognize that customary land owners usually refuse to recognize the loss, extinction or deprivation of customary rights. Hence as Filer has stated, customary land owners often continue to demand compensation from the developers of land that has been alienated from customary tenure. This partially explains why, as Curtin (2004) has documented, banks in Papua New Guinea have been loath to lend money that could be used to finance significant development. Although they have been awash with liquidity and could have lent much more than the AUD 3.78 billion the country received in foreign aid from 1990 to 2004, they lent out a mere AUD 600 million. Thus, although in certain specific cases, the alleged customary owners have been able to assert adventitious and opportunistic rights to income over land that legally is no longer subject to their interests, the longer term consequences may well be inimical to economic development, as even alienated land may be a questionable form of security. These facts may well confirm de Soto’s remarks concerning alleged owners of unformalized forms of property. “Because they have no property to lose, they are taken seriously as contracting parties only by their immediate family and neighbours. People with nothing to lose are trapped in the grubby basement of the pre-capitalist world.” (de Soto 2000, 48).

However, the concept of “unlocking the capital value of land” which means using it as collateral to borrow money has been criticized in light of recent events in the world’s financial markets. Weiner (2009) states that uninformed borrowers around the world have used this device to their peril by borrowing money not knowing how to use this money wisely and of course this has contributed significantly to the financial crisis of the first decade of the twenty first century. Weiner’s point is that this form of borrowing could create more problems than benefits for Papua New Guineans. Wiener’s somewhat general remarks have more specific reference to the so called subprime mortgage crisis in the USA which signalled the initial unravelling of the global financial system. However, even given these facts, potential Papua New Guinean entrepreneurs should not be denied the opportunity to acquire financing through this device, which at present can only be obtained through the formally recognized property rights described by de Soto. Moreover, with reference to the so called subprime crisis, in which mortgages were granted to individuals with poor credit ratings, meaning there existed significant doubts as to whether they possessed wealth generating skills, or opportunities which would enable them to service these loans successfully, one can say with confidence that the inevitable failure of these borrowers or mortgagors to service their loans has been erroneously regarded as the central cause of this financial meltdown. In fact, those who acquired property or money using real estate through so called sub prime mortgages merely provided the contextual opportunity for speculators to repackage their debts and sell them as sophisticated financial products to unsuspecting investors who were unaware of the risks. In reality it was the trading of these debts, as disguised sound financial assets that became the fundamental causal link to the global financial markets and the essential lynchpin that ensured that when the debtors defaulted the reverberations would be felt throughout the entire global financial system (see also below). Beyond issues such as registration and record keeping, a formal system of property rights consisting of universal principles is extremely beneficial because the generation of wealth is dependent on the ability of capital to move efficiently through a wide range of distanced interlocking relationships to finance economic endeavours that address the material needs of humanity. As Adam Smith explained, the generation of wealth depends on the size of the market which ultimately means extensive communication and transportation links. When these links are tightly circumscribed within a limited local area, specialization and surplus productivity lose their meaning, and subsistence productivity becomes the alternative. Hence a formalized uniform system of property rights makes sense, as opposed to a diversity of local customary arrangements, because distant contracting partners depend on such principles to communicate reliable information concerning security of title and other recorded information that give substance to reliable economic transactions. Papua New Guinea’s land tenure system suffers particularly from a diversity of complex local customs relating to land tenure, together with a patchwork of partially alienated customary land, partially customized alienated land, poor record keeping and heavy transaction costs occasioned by inefficiency of the relevant government agencies, all of which undermine the realization of wider economic market for local goods and services.

De Soto utilizes metaphysical analogies and makes the point that non-western forms of ownership have remained fixated on the material substrate and have been unable to appreciate the economic and transactional aspects of property interests. The latter are said to be the intellectual qualities of property interests associated with commercial potential. According to de Soto (2000), one of the central aspects of the Western ownership system is the ‘fungible’ character of the property interest. De Soto speaks of the uncoupling of the economic factors from the rigid physical state that makes the asset fungible - able to be fashioned to suit almost any transaction. This is accomplished through a system of representations. A representation contains the relevant economic features of assets as found in the records and titles of a formal property system. He states, “Whereas assets such as a factory may be an indivisible unit in the real world, in the conceptual world of formal property representation it can be subdivided into any number of portions” (de Soto 2000, 57). Assets can thus be split into shares, and a single factory can be owned by numerous investors, who can divest themselves of the asset without affecting the physical reality of the asset.

The problem therefore with Papua New Guinea’s system of land tenure is that its failure to focus on economic potential means a failure to create the collective coordination of personal wealth and organization that enhances productivity. In parallel, ambiguous diversity of rights undermines essential linkages that make productivity relevant to lives and needs of those in spatially divided markets. Consequently, the inexorable reality for most Papua New Guineans is one in which coordinated activity does not extend much beyond the family unit and productivity becomes limited to serving the family’s particular subsistence needs, or at best the modest needs of a limited locally based subsistence market.

However, having apparently extolled the virtues of the capitalist system of ownership as explained by de Soto, it is worthwhile to keep in mind the basic truth behind the labour theory of value explained most prominently by Karl Marx. Precisely, one needs to remind oneself that economic value is only produced or increased through human labour that produces products or services that benefit human beings. Economic transactions in themselves do not produce wealth. De Soto sees the Western system of ownership as superior because it facilitates transactions between economic agents in distanced spatial locations, but transactions alone, unaccompanied by any increase in useful productivity do not signify any form of wealth generation.

One can only rationally promote the acceptance of a more Western type system of uniform formal property rights in so far this will facilitate transactions that give meaning to coordinated efforts to achieve greater productivity. Capitalism as understood within this framework can be beneficial to the lives of people who desire to move beyond a subsistence existence. However, Western capitalism has recently made a fatal mistake in believing that transactions alone can be the source of wealth generation. De Soto explains that in the “…conceptual world of formal property representation it (tangible property) can be subdivided into any number of portions”. This is both the great advantage of the capitalist system and also potentially problematic. Interests in the economic potential of a physical asset can be divided and subdivided into shares that gain an independent life as non-tangible assets and sold and resold moving effortlessly through proximate and distant economic markets. The late 2007-2008 subprime crisis that is believed to have precipitated a global credit crisis offers incontrovertible evidence concerning the inherent risks this can pose. One may erroneously believe that transactions in themselves that occur in parallel financial markets are a source of wealth independent of the assets created for the tangible market of goods and services. This alone can be problematic but becomes even more so when the parallel financial market becomes overly responsive to rumour and belief systems that blend both real and unreal expectations and thereby become susceptible to fraud and illusion in the attribution of “value” that is often only tenuously connected to any current production of actual tangible goods and services directly useful to human beings. Like other economies, Papua New Guinea needs to ensure this parallel market is regulated enough to obviate the potential for gross inflation of the value of non-tangible assets (financial interests). Without proper regulation, as has happened in Western financial markets, over-valued financial instruments may ultimately fail to reach their expected economic potential, and in failing, may create massive debts that choke the supply of credit and financial assistance to the productive activities they are intended to serve, thus negatively impacting the flow of basic necessities and improvements to the human condition.

The possibility of facilitating numerous economic transactions is obviously an advantage offered by the capitalist system and its financial markets, and is an important component of the freedoms associated with Western ownership and the success of modern capitalism. The London share market was created in 1690 to allow for the uninterrupted flow of capital necessary for the continuous operation of the joint stock ventures. However, there exists no particular real productive advantage when the virtually unlimited possibilities of dividing and combining of various interests serve merely as vehicles for speculative ventures without reference to ongoing production or productive initiatives. One can specifically refer to the “sub-prime mortgage” crisis that originated in the United States and which should be prevented by prohibiting transactions that package a mortgagee’s interest as a financial instrument allowing it to be subdivided, blended with other interests, and sold and resold throughout the vast global financial market. The mortgage arrangement or transaction should not be a vehicle for further financial transactions but needs to remain as intended, which is that of a relationship between property owner and the lending institution which exists for the benefit of both parties, a relationship that should not be disturbed through the sale of specific interests to third parties not participant in the original undertaking. The numerous transactions which followed the packaging of sub prime mortgages did not add to or increase human wealth but were merely the pastime of speculators who sought to inflate the value of these interests, many of which were in actuality worthless non-performing debts, moving them through the system to other investors and speculators. The huge fraud created massive debts that could not be met and certainly contributed to if not precipitated the ensuing financial crisis.

It is worthwhile to refer to Dembinski (2009) in adding further support for our view. He makes an insightful distinction between bank-based systems and financial-market systems. He argues that Western economies over the last 20 years have moved away from the former towards the latter. He argues that the “relative positions of financial relationships and financial transactions have been inverted, profoundly altering the role of finance in the economy and society” (Dembinski 2009, 84).This has happened because the instruments of financial transactions have become tradeable objects as these instruments have become transferable. This conversion of financial relationships into transferable objects is said to be the basis of the process referred to as financialization. In the bank-based system that no longer predominates in these centres, financial relationships are carefully managed and while there exists the possibility of renegotiation there is no scope for the substitution of financial parties. In the financial market economy financial instruments can be traded and financial partners substituted, and increasingly the production and exchange of such instruments becomes the principal economic activity. This has led to more complex financial activities including the production of derivatives, such as credit default swaps, collateralized debt obligations as well as the notorious activity of reckless short selling. These activities have occurred in an expanded global financial market with numerous partners and consequential increased risk. Dembinski (2009) affirms that the inability of the financial market to control these risks inevitably led to the current global financial crisis.

The bank based system that Dembinski (2009) advocates would maintain the originate to-hold mortgages in which the bank retains the mortgages they issue (as we recommend above) rather than originate-to-distribute model in which mortgages are bundled together in collaterized debt obligations (CDOs). Although some dispute that CDOs or derivative securities alone precipitated the current crisis (see Boatright 2009), it is certainly arguable that those least affected by the crisis were economies that did not indulge in these forms of financial activity. For example economies where Islamic banking predominates (Tutton 2009) and small European counties such as Moldovia, which did not over extend credit have suffered least from the global financial meltdown. Thus by way of answer to Weiner, we would argue that recent events in the global economy do not really counter de Soto’s argument that formal property rights are necessary for the expansion of credit and enhanced economic activity. Expanded access to credit becomes problematic when the creation of financial relationships becomes an end in itself without sufficient reference to inherent risk or the potential for enhanced productivity. Consequently, we would recommend that as Papua New Guinea develops it should maintain a bank based system rather than promote financial-market systems.

Finally we should mention a further view with respect to the issue of land tenure that holds that appropriate development in rural Papua New Guinea cannot be attributed to the particular form of land holding per se. Weiner (2009) holds that it has much more to do with what anthropologists call the social relations of production and that such relations are not determined by a particular form of land holding, although he accepts that registration of interests in land would facilitate the necessary organizational interaction that creates successful economic enterprise. Wiener finds that productive life among such groups as the Chimbu, Foi and Tolai have been mostly carried out at the level of individual families and small groups of closely related families and the customary nature of holdings has not been inimical to this form of individualism. There is certainly value in this point of view, but one needs still to address issues such as the distribution of income from large scale development projects and the use of custom to resolve complex land issues. In the following pages and in the subsequent chapters we will take a closer look at these issues.

Conclusion

In this chapter we considered the distinction between **c**ustomary and alienated land, the latter referring to land that has been removed from custom. We discussed Professor Colin Filer’s observation in which he sees the distinction becoming blurred with what he labels as “*the partial alienation of customary land* and the *partial customisation of alienated land”*. With respect to so called customary land ,mobilization and forms of economic development are being realized despite the impediments which are associated with customary land tenure. With respect to the *partial customisation of alienated land,* we are essentially seeing the growth of reclaimed control rights over under developed alienated land and the assertion of income rights over alienated land which has been subject to ongoing significant economic development. But following the insights of the Peruvian economist Hernando de Soto, we argue that in so far as land in Papua New Guinea is unregistered, allegedly collectively owned, unrecorded, lacking in integrated information and lacking in uniform formalized laws that protect the security of title and possible transactions, land cannot be mobilized for successful economic wealth generation. Ultimately the partial alienation of customary land, the predominant form of land tenure, cannot protect customary land from the predations of an informal system of land tenure.

1. See also Bethel 1998. [↑](#footnote-ref-1)