

THE OWNERSHIP OF MINERALS AND PETROLEUM IN PAPUA NEW GUINEA: A COMMENT

by

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Introduction

In a valuable article in the last issue of this Journal, Kibuta Ongwamuhana and Anthony Regan discussed, but left open, the question whether mineral and petroleum resources in Papua New Guinea belong to the State or to the customary landowners on whose land those resources are located.¹ They also pointed out that the Courts in that country have not yet given an authoritative answer or indeed any hint of an answer to the question.² However, at a time when a number of vast mining enterprises have been established or projected it is important to examine the matter further. All of these operations are or will be unlawful if the present statutory regime which governs them and which asserts State ownership of minerals and petroleum is itself held to be unlawful. It will be submitted in this article that the legality of State ownership is beyond question and that, if it is proposed to give customary landowners proprietary interests in these resources as distinct from rights to royalties, then the present laws will have to be repealed and replaced by others framed in terms apt to accomplish this result.

The Present Statutory Regime

The formal position with respect to both minerals and petroleum is quite clear. Section 7 of the *Mining Act* (Chapter No.195) (PNG) provides that "all gold and minerals in or on any land in the country are the property of the State". Section 5(1) of the *Petroleum Act* (Chapter No.198) (PNG) is in similar but more thorough. It provides as follows:

Subject to this Act ... all petroleum and helium at or below the surface of any land is, and shall be deemed at all times to have been, the property of the State.

Both Acts then proceed to set out elaborate schemes governing the acquisition of rights concerning the relevant resources by grant from the State including miners' rights, prospecting authorities and mining leases and regulating the exercise of such rights. The validity of all of these rights depends upon the title of the State as grantor.

The Constitutional Challenge to the Present Statutory Regime

The suggested basis for a challenge to State ownership of resources is that the abovementioned provisions which assert such ownership are invalid because they infringe s.53 of the Constitution of the Independent State of Papua New Guinea (the Constitution). Section 53 refers to one of many qualified rights protected by the Constitution. It protects citizens from deprivation of property in certain specified circumstances. For the purpose of the present discussion it is necessary only to set out part of the section as follows:

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1 "Ownership of Minerals and Petroleum in Papua New Guinea: The Genesis and Nature of the Legal Controversy" (1991) 7 QUTLJ 109.

2 The question arises for decision in *Wapula Akiye and Others v. Paterson Lowa and Others* WS No.1067 of 1990 (unreported), an action concerning the Mt Kare Gold Mine. At an interlocutory stage Salika J of the National Court referred the question to the Supreme Court for determination but that Court held that the reference was premature as necessary findings of fact had not been made. See SC Appeals Nos.19, 32, 36 and 60 of 1991 (unreported). The action has not yet proceeded to trial and to a stage when the point could properly be referred again to the Supreme Court.

- (1) ... except as permitted by this section, possession may not be compulsorily taken of any property, and no interest in or right over property may be compulsorily acquired, except in accordance with an Organic Law or an Act of the Parliament, and unless:
- (a) the property is required for:
 - (i) a public purpose; or
 - (ii) a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind,
 that is so declared or so described, for the purposes of this section, in an Organic Law or an Act of Parliament; or
 - (b) the necessity for the taking of possession or acquisition for the attainment of that purpose or for that reason is such as to afford reasonable justification for the causing of any resultant hardship to any person affected.
- (2) Subject to this section, just compensation must be made on just terms by the expropriating authority, giving full weight to the National Goals and Directive Principles and having due regard to the national interest and to the expression of that interest by the Parliament, as well as to the person affected.

The argument based on this provision is that prior to the enactment of the *Mining Act* and the *Petroleum Act* the resources were according to customary law owned by those who owned the land on which they were located and that the effect of the vesting provisions in those Acts was to work a compulsory acquisition of their rights to those resources without payment of just compensation and therefore contrary to the Constitution. Of course, proof of customary ownership of petroleum or of minerals such as gold, silver or copper which were not extracted or mined in times before European contact in Papua New Guinea poses formidable evidentiary difficulties. However, for the purpose of the present discussion, it will be assumed that such proof would be possible.

The History of State Ownership of Minerals and Petroleum

Those who seek to invoke s.53 of the Constitution face another problem which is more fundamental and, indeed, insuperable. The Constitution came into effect on Independence Day, 16th September 1975, and according to its terms, s.53 speaks only prospectively. It does not purport to apply to compulsory acquisitions which occurred prior to that date. In other words, in order to establish the invalidity under s.53 of a provision of an Act of Parliament it is necessary to show that the provision did indeed operate to deprive a citizen of property and did so after 16th September 1975. Section 7 of the *Mining Act* and s.5(1) of the *Petroleum Act* are provisions which appear to, but do not in fact, belong to that category.

In order to sustain this proposition it is necessary to examine the pre-Independence laws which applied in the two Territories which now constitute Papua New Guinea. Although administered together since 1942, Papua and New Guinea had quite different constitutional histories and, in some respects, quite different laws. However, in relation to mining laws it suffices to note that in Papua, then the colony of British New Guinea, the common law of England was received in 1889 and in New Guinea, then a Mandated Territory of the league of Nations administered by Australia, the common law of England was received in 1921. There are differences in the precise terms of the relevant Ordinances but they are alike in stipulating that the common law was to be received so far as applicable to local circumstances and so far as not inconsistent with local legislation then in force or made at a later time.³

At common law gold and silver wherever situated belonged to the Crown by prerogative and

³ The constitutional histories of the two Territories and the terms of the reception Ordinances are discussed in detail in the writer's *The Common Law in Papua and New Guinea*, Law Book Co, Sydney (1971) Chapters 1, 2 and 3.

other minerals belonged to the owner of the land where they were situated.⁴ Now, at the time of reception of the common law in Papua in 1889 and in New Guinea in 1921 there was no local legislation inconsistent with this prerogative of the Crown, and it is certainly arguable that it was applicable to local circumstances. It had been held applicable in various British colonies or former colonies where the common law had been received.⁵

In any event the common law in both Territories was later superseded by local legislation. In Papua legislative intervention began with *The Gold Fields Ordinance* 1888 and continued with the *Mining Act* of 1898, a Queensland enactment which was adopted in part in the colony. However, neither contained a provision vesting minerals in the Crown. This kind of provision first appeared as s.167 of the *Mining Ordinance* 1937 and it covered base as well as precious minerals. The section, so far as material, provided as follows:

All minerals ... on or under native lands shall after the passing of this Ordinance be the property of His Majesty.

"Native land" was defined in the Ordinance as including "all lands which have never been vested in His Majesty".

In New Guinea the history of mining legislation was much the same. There was a series of Ordinances beginning with the *Mining Ordinance* 1922 and ending with the *Mining Ordinance* 1928, s.191 of which provided as follows:

All gold, silver, copper, tin, antimony and metals of every description ... in or under all lands ... are and shall be deemed always to have been the property of the Administration.

"Land" was defined to include "native lands" and that term was defined as "all lands which have never been vested in the Administrator".

There were similar vesting provisions for petroleum in both Papua and New Guinea. Initially they were in Ordinances enacted in each Territory in 1938.⁶ They were later repealed by the *Petroleum (Prospecting and Mining) Ordinance* 1951 which applied in both Territories. Section 7 of that Ordinance provided as follows:

Subject to this Ordinance, but notwithstanding anything contained in any other law of the Territory or in any grant, instrument of title ... all petroleum and helium at or below the surface of any land in the Territory shall be, and shall be deemed at all times to have been, the property of the Administration.

The *Mining Ordinance* 1937 (Papua), the *Mining Ordinance* 1928 (New Guinea) and the *Petroleum (Prospecting and Mining) Ordinance* 1951 were repealed upon Independence by the *Laws Repeal Act* 1975 and immediately adopted as Acts of the Parliament of Papua New Guinea by force of subs.20(2) and (3) of the Constitution and Schedule 2.6 thereto. Furthermore, all property that immediately before Independence was vested in "the Government of Papua New Guinea" was by s.248 of the Constitution vested in Papua New Guinea and by the same provision all rights of the firstmentioned entity became rights of Papua New Guinea. The term "the Government of Papua New Guinea" was not there defined, but the term "the Administration" had been defined elsewhere, in the *Ordinances Interpretation Ordinance* 1949, as being "the Administration or Government of the Territory" and "the Territory" was defined in the same enactment as "the Territory of Papua and New Guinea".

The formal position, therefore, was that upon Independence minerals and petroleum belonged to the State. With respect to minerals this was confirmed a few years later by s.198 of the *Mining*

4 *Case of Mines* (1567) 1 Plowd 310 at 336 and *Halsbury's Laws of England* 4th ed vol 31 "Mines, Minerals and Quarries" para 16.

5 See, for example, *Woolley v. Attorney-General of Victoria* [1877] 2 App Cas 163; *Attorney-General of British Columbia v. Attorney-General of Canada* (1889) 14 App Cas 295, and generally CW O'Hare, "A History of Mining Law in Australia" (1971) 45 ALJ 281.

6 The vesting provision in each Territory was s.10 of each Ordinance and each was cited as the *Petroleum (Prospecting and Mining) Ordinance* 1938.

Act (Amalgamated) 1978 which provided that “all gold and minerals in or upon any land in the country are the property of the State”. This Act was in its turn repealed in the *Mining Act* now in force, but s.7 of the present Act is in virtually the same terms as s.198. With respect to petroleum the confirmation was contained in s.5 of the *Petroleum Act* 1977 which continues in force as Chapter No.198.

Although s.7 and s.5 are in post-Independence statutes and therefore potentially subject to s.53 of the Constitution if they unjustly deprive citizens of property rights, it will be apparent from the above analysis that the sections have no such effect. Although they purport to vest mineral and petroleum rights in the State they do not do so. That had been done long ago before Independence in both Papua and New Guinea. The sections merely declare what has been the law for many years.

The Validity of Pre-Independence Vesting Provisions

Accordingly, an attack upon State ownership of minerals and petroleum based upon the argument that the post-Independence vesting provisions infringe s.53 of the Constitution is unlikely to succeed. It would be necessary to go much further and to impugn the validity of the pre-Independence vesting provisions which, as argued above, created the rights which have devolved to the State.

There are two possible arguments. One is that rights accorded by customary law prevail over those derived from legislation. However, that argument is plainly untenable. In the Territory of New Guinea limited recognition was given to custom by s.10 of the *Laws Repeal and Adopting Ordinance* 1921-1923 but only “subject to the provisions of the Ordinances of the Territory from time to time in force”. Obviously, customary ownership of resources was inconsistent with State ownership asserted in s.191 of the *Mining Ordinance* 1928 and in s.7 of the *Petroleum (Prospecting and Mining) Ordinance* 1951. In the Territory of Papua there was no explicit recognition of custom as a source of law and nothing to deny the vesting of resources in the Crown by s.167 of the *Mining Ordinance* 1937 and by s.7 of the *Petroleum (Prospecting and Mining) Ordinance* 1951. These pre-Independence statutes were inconsistent with any recognition of private ownership under customary law. Indeed, they made customary ownership of these resources impossible.

The second argument is that the pre-Independence statutes which vested minerals and petroleum in the Administration and which were adopted by Schedule 2.6 of the Constitution in 1975 were invalid thereafter to the extent that they defeated the right of customary landowners to protection from deprivation of property without compensation, ie, the protection afforded by s.53 of the Constitution. By virtue of s.38(2) of the Constitution, a law which regulates or restricts a right such as that protected by s.53 must be expressed to be made for the purpose of giving effect to the public interest in a specified subject matter, specify the right it restricts and be made, and certified by the Speaker to have been made, by an absolute majority of Parliament.

Clearly pre-Independence laws were, when enacted, incapable of complying with this regime because there was then no National Parliament and, of course, no Speaker of such Parliament. It is submitted, however, that s.38 operates only prospectively to laws made by the National Parliament after Independence in exercise of the legislative power granted to the Parliament by s.109 of the Constitution.⁷ It does not apply to laws such as the pre-Independence resources enactments which were continued in force not by that exercise of legislative power but by the Constitution itself, that is, by s.20 and Schedule 2.6. Although Schedule 2.6(2) adopts pre-Independence laws “subject to any Constitutional law”, it is submitted that the purpose of this

⁷ As, for example, in *Re NTN Pty Ltd and NBN Ltd*, SC Appeal No.1 of 1986 (unreported) where the Supreme Court held that the *Television (Prohibition and Control) Act* 1986 was invalid by reason of non-compliance with s.38(2)(a) of the Constitution.

qualification is not to apply constitutional provisions such as s.38 to the body of laws thus adopted but merely to indicate that Constitutional Laws, including the provisions of the Constitution itself, apply to them only to the extent that they are capable of application.⁸ Any other construction would have the ludicrous consequence of rendering invalid by reason of non-compliance with the formalities of s.38(2) the very pre-Independence laws which the Constitution has decreed should continue to apply. Of course, if any pre-Independence statutes were to be repealed and re-enacted by the National Parliament, s.38(2) would apply to it. That, however, is not what happened to the pre-Independence mining and petroleum legislation.

Conclusion

For the above reasons it is the writer's opinion that the State's title to minerals and petroleum in Papua New Guinea is very likely to survive any challenge in the Courts. A change in the present legal regime could only be brought about by legislation and any such enactment divesting the State in favour of customary landowners would be valid only so far as it complied with the Constitution, and especially the provisions discussed in this article.

⁸ There is no authority in Papua New Guinea which decides that s.38 of the Constitution applies to pre-Independence laws adopted by s.20 and schedule 2.6. However, the point has been mentioned incidentally in a number of cases. These are collected and discussed in the article referred to in n.1. As the learned authors point out there are tentative expressions of opinion either way. See *supra*, n.1 at 122 and 123.

