LAWS OF SUCCESSION IN PAPUA NEW GUINEA: SOME REFLECTIONS

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The legal system of Papua New Guinea[1] is pluralistic in that there are two systems of law, the imported general law and the customary law. Having two systems of law creates conflict problems, since the relationship between the general and customary law remains ill-defined and uncertain. There are also inter-customary conflicts, where the choice in a given situation is between the different customary laws of two or more groups.

The general law was introduced essentially to govern matters such as crime, modern business or persons in the modernised sector (mainly expatriates). For the majority of Niuginians the most important type of law is the customary law of their community[2] especially in the fields of family, succession and land matters. The group of most significance to an individual is the kinship unit within that community - the clan, patrilineage, matrilineage, etc. Kinship determines the jural and personal relations of individuals including right to land, questions of marriage, succession, etc.[3] One can be a member of the kin group by birth (consanguineal member), by adoption, or by marriage (affinal member).[4] Hogbin talks about associational membership, which arises

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1 Hereinafter, the people of Papua New Guinea are referred to as Niuginians.

2 The expression "community" here is used to connote a group of people who have a similar culture and a common language.

3 See *Encyclopaedia of Papua New Guinea*, 1972 (General Editor Peter Ryan), Vol.2, 1075. See also Hogbin and Wedgwood, "Local Grouping in Melanesia", 24 *OCEANIA* 58 (1953-54).

4 *Ibid.*

where cultivators, who share personal rights in areas of land with other members of the kin group or village, develop a relationship akin to kinship ties based on common economic interest and co-operation.[5]

The purpose of this paper is threefold: (1) to state the laws relating to succession; (2) to discuss some conflict problems arising from the dual systems of law; and (3) to suggest reforms.

General Law

The law relating to succession comprise the *Wills Probate and Administration Ordinance* 1966 (hereinafter referred to as *WPAO*) and the *Wills Probate and Administration (Amendment) Ordinance* 1970 (hereinafter referred to as *WPAAO*, otherwise *WPAO* 1966-70). The principles and rules of common law and equity are also applicable insofar as local circumstances permit. The *WPAAO* was enacted partly to bring back into force parts II and VI of the repealed *Probate and Administration Ordinance* 1951-1960, which dealt with the office of Public Curator and his functions. The aforementioned ordinances reflect essentially the English law of testate and intestate succession, with some modifications. In this respect the general law of succession is patrilineal and has a bias towards the members of the immediate (or nuclear) family of the deceased.

Rules of Intestacy

Section 91 of the *WPAO* provides *inter alia* for the distribution of the estate.[6]

Where the intestate:

(a) is survived by a spouse and children the spouse takes one-third and the children share two-thirds.

(b) is survived by a spouse, and a father and/or mother but no children the spouse takes one-half of the estate and the father (or either of them) the other half.

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5 See Hogbin, I. and Lawrence, P., *Studies in New Guinea Land Tenure* (1967) 31.

6 The word "estate" is used here to mean both real and personal property.

(c) leaves only a father and a mother (no surviving spouse and issue), the estate is to be distributed equally between the father and the mother.

(d) leaves a spouse but no father, mother and issue, then the surviving spouse is entitled to the entire estate.

(e) is survived by the father or mother but no spouse and issue the father or the mother is entitled to the entire estate.

(f) is survived by the children leaving no spouse, father and mother, the children are entitled to the entire estate in equal shares. If the deceased dies leaving two wives, then the wives will share equally the entitlement (section 88(2) *WPAO*).

Testate Succession

In order for a will to be valid the following three conditions have to be satisfied:

(1) Testamentary capacity. The law requires a person to be of full age (21 years)[7] and of sound mind. "It is essential that no disorder of mind shall poison his affections, that no insane delusions shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."[8] However, a soldier being in actual military service, or a mariner or seaman being at sea can make privileged wills.[9]

(2) Object of the gift. The law requires that there be a donee under the will. Where there is no donee or object, the will is ineffective. Thus gifts to non-existing persons or corporations by name or description are held to be void.[10]

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7 See section 17 of the *WPAO*.

8 *Banks* v. *Goodfellow* (1870) L.R. 5 Q.B. 549,565.

9 They will be exempted from the requirement of age and other formal requirements. See s. 21 of the *WPAO*.

10 *Brown* v. *Burdett* (1882) 21 Ch.D. 667.

(3) The signature, witness and execution. The *WPAO* requires

> 18. (1) Subject to this Division, a will is not valid unless it is in writing and executed in the following manner:-
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> (a) it is signed at the foot or end thereof by the testator or by some other person in his presence and by his direction;
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> (b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
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> (c) the witnesses attest and subscribe the will in the presence of the testator, but a form of attestation is not necessary.
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> (2) Notwithstanding the provisions of paragraphs (a) and (b), of the last preceding subsection, a will may be signed or acknowledged in the presence of, and may be attested and subscribed by, an authorised witness.[11]

Section 6(1) of the *Ordinances Interpretation Ordinance* 1949-1963 provides that writing "and expressions referring to writing include printing, painting, engraving, typewriting, lithography, photography, and all other modes of representing or reproducing words in a visible form."

The word "will" is defined under section 5 of the *WPAO* to include "testament, codicil, appointment by will or by writing in the nature of a will in exercise of a power, disposition by will and testament or devise of the custody and tuition of a child and any other testamentary disposition."[12]

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11 An "authorised witness" means a judge, magistrate of a District or a Local Court or "some other person authorised . . . by notice in the *Gazette*." Section 14 of the *WPAO*.

12 The word "will" does not preclude an oral disposition. See *Halsbury's Laws of England* (3rd ed.) Vol. 39, 1842.

Section 43 of the *WPAO* provides that failure to comply with formal requirements does not render a will invalid "if it is proved that the testator intended the will to be his last will and testament and the intention is clear."

Recently, commentators have suggested that this legislation calls urgently for reform.[13] Griffin argues that the purpose of section 43 is to validate customary wills and that section 43 allows oral wills to be declared valid where the intention of the testator is clear. Thus, he concludes, this section allows a "wide scope for argument and uncertainty as to whether a man has left a will, and if so, what its provisions are."[14]

Under the *WPAO* the testator's freedom of testation is restricted in that some measure of protection is afforded to the spouse and children where no adequate provision for their maintenance is made.[15]

Customary Law of Succession

I intend neither to discuss the problems of ascertaining customary law nor to examine the rules of customary law on matters of succession. Such a task is beyond the realm of this paper.

Considerable differences exist among the customary laws of different communities in Niugini and some customary laws may conflict. Customary laws of succession vary depending upon whether the group is patrilineal, matrilineal, etc.[16] In a patrilineal system the successor family is the group traced from the male ancestor in a direct line. Under such a system a wife is of little significance in ascertaining lineage. The father's property on his decease devolves on his son.

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13 See Griffin, "Conflict of Inheritance Law and Custom in Nuigini" 1 *M.L.J.* 29, 37 (1970).

14 See Griffin, p. 9, n. 13 *supra* p. 37. However, there are no express words in section 43 restricting its operation to "customary wills". See also *infra* p. 39, n.113/114.

15 See section 134 of the *WPAO* 1966.

16 Customary laws of succession are much more complex than the statement suggests.

Where there is more than one son, some communities divide the property evenly among them; others require the eldest son to make a suitable distribution which may involve equal shares or may permit him to give himself a greater share than the other sons.[17] In a matrilineal system the son inherits from his mother's brother and takes nothing from his father. For the purpose of inheritance the family is a man, his sister and his sister's children.

Intestate Succession

The *Native Regulations*[18] of Papua and the *Native Administration Regulations* of New Guinea provide for the application of the customary law of succession to Niuginians. Regulations 144 and 70 of Papua and New Guinea respectively provide that in the absence of a will the property of a "native" shall descend to those persons "who in accordance with native customs are entitled to it."

Section 5 of the *WPAAO* provides, "After section 6 of the *WPAO* the following section is inserted.

> 6A. (1) Subject to sub-section 2 of this section, nothing in this ordinance repeals, alters, or affects
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> (a) Part V[19] of the Native Regulations 1924 of the Territory of New Guinea, or
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> (b) Part IV[20] of the Native Regulations of the Territory of Papua as in force immediately before the commencement of this ordinance and in so far as those Parts relate to intestate estates of deceased

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17 See Griffin, *op. cit.*p. 4, n.13. See also Hogbin, I. and Lawrence, P., *Studies in New Guinea Land Tenure* (1967).

18 See Parts IV and V respectively, of the *Native Regulations* 1939, Vol. IV of the *Laws of the Territory of Papua* 1888-1945, and *Native Administration Regulations* 1924, Vol. IV of the *Laws of the Territory of New Guinea* 1921-1945.

19 It generally provides that the customary law of testate and intestate succession shall apply to a "native".

20 It generally provides that the customary law of intestate succession shall apply to a "native" and that a "native" cannot dispose of any interest in land by a will.

natives.

(2) Regulation 143 of the Native Regulations 1939 of the Territory of Papua is repealed."[21]

Testate Succession - New Guinea

The *Native Regulations*[22] of New Guinea enable the disposition of property by will provided that the will is made in accordance with "native custom". However, Regulation 77 provides that a "native" shall not dispose of "any land or interest in land, or things attached to or growing on land . . ." The Regulations allow a "native" to make a will, where the customary law so provides.

Alternatively, a New Guinean can tell either a patrol officer or a district officer the disposition he wishes to make. In such a case the officer must put will in writing and sign it. The district officer is required to keep a Register of wills so made in his district. Under these regulations a New Guinean may make a will in a "native form or custom".[23] Where there is no such "native form or custom" he has to observe the formalities prescribed in the Regulations.[24]

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21 Regulation 143 provides that "The general Laws of the Territory relating to the devolution and administration of the Intestate Estates of deceased persons shall not apply to the Intestate Estates of the deceased natives".

22 Regulation 76 provides "In cases where in accordance with native custom a native may make a will, such will, if made in a form that is in accordance with native custom, and so far as it disposes of his property in accordance with native custom shall be effective to dispose of such property provided always that before the property is distributed the debts of the testator are paid." Regulation 77 reads "Provided his disposition of the property is not forbidden by native custom or by any ordinance or law in force in the Territory and provided he does not dispose of any land or interest in land, or things attached to or growing on land, and provided there is no native form or custom regulating the same a native can make a will . . ."

23 For example, if death bed requests are held binding under customary law, then these oral wills may be effective.

24 It seems that Regulation 77 allowed a "native" to make a will only where there was no "native form or custom regulating will making."

Testate Succession - Papua

Regulation 142 of Papua provides, "A native cannot dispose by will of any interest possessed by him in land when such interest is possessed by him simply because he is a native." Although regulation 142 of Papua does not expressly allow a "native" to make a will, it is arguable that the regulation allows him to make a will disposing of his property other than "land". Unlike the New Guinean Regulations, Regulations of Papua do not provide a method for making wills.

The Native Customs Recognition Ordinance 1963 (hereinafter NCRO)

In addition to the Native Regulations the *NCRO* provides for the application of customary law in Papua New Guinea. Section 8(d) of the *NCRO* provides, "Subject to this ordinance native custom shall not be taken into account in a case other than a criminal case except in relation to . . .

> (d) the devolution of native land or of rights in, over or in connection with native land, whether on the death or on the birth of a person, or on the happening of a certain event;
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> (g) a transaction which the parties intended should be, or which justice requires should be, regulated wholly or partly by native custom and not by law;
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> (h) the reasonableness or otherwise of an act, default or omission by a person; or
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> (i) the existence of a state of mind of a person, or where the court considers that by not taking the custom into account injustice will or may be done to a person."

The *NCRO* directs the courts to apply customary law; sections 7 and 8 of the *NCRO* provide the extent of the application of "native custom" in criminal law and civil matters respectively. Furthermore, section 13(1)(c) of the *Local Court Ordinance* 1963-66 gives Local Courts jurisdiction over all matters arising out of and regulated by native custom, other than those matters within the exclusive jurisdiction of the Land Titles Commission. This provision may enable a Local Court to apply customary law on matters not expressly covered

in section 8 of the *NCRO*.[25] In a recent case, the court observed that section 8 of the *NCRO* restricts the scope both of recognition and of enforcement of customary law in civil matters.[26] However, Minogue C.J. held that customary law may nevertheless apply to matters not expressly stated in section 8 if the court considers that injustice will otherwise result. If one accepts the position that section 8 of the *NCRO* is exhaustive in relation to the subject matter expressly dealt with, then the general law would apply to all subjects not included in section 8.[27] Where section 8 does permit the application of customary law, that application is subject to section 6 of the *NCRO*:

> "6. (1) Subject to this Ordinance, native custom shall be recognised and enforced by, and may be pleaded in, all courts, except insofar as in a particular case or in a particular context -
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> (a) it is repungnant to the general principles of humanity;
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> (b) it is inconsistent with an Act, Ordinance or subordinate enactment in force in the Territory or a part of the Territory;
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> (c) its recognition or enforcement would result, in the opinion of the court,

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25 See *Michael Madaku* v. *Patrick Wau*, Supreme Court Judgment No. 723 (1973), p. 8.

26 *Ibid.* This case went on appeal to the Supreme Court from the decision of the Local Court. The respondent was the father of a girl named Gula. He had made a complaint that the appellant "did have sexual intercourse with Gula thereby breaching an extremely strict traditional custom". The Local Court Magistrate had awarded the father the sum of $100 as damages. On appeal the matter was referred back to the Local Court for rehearing, for lack of clear and cogent evidence on the facts alleged by the respondent.

27 In this respect, the wording of section 8 can be taken to have impliedly repealed the circumstantial applicability provisions relating to "received law". However, the Native Regulations in force will not be affected; but see section 13(1)(c) of the *Local Courts Ordinance* 1963-1966.

in injustice or would not be in the public interest; or

(d) in a case affecting the welfare of a child under the age of sixteen years, its recognition or enforcement would not, in the opinion of the court, be in the best interests of the child."[28]

However, the question whether customary law is inconsistent with "an Act, ordinance . . ." should be strictly construed. The two systems of law in Papua New Guinea cater to different groups of people with different needs and interests and, therefore, are of necessity inconsistent. A broad use of the inconsistency provision may minimise the application of customary law to the prejudice of many Niuginians.

Section 4 of the *NCRO* defines "native custom" or any associated or analogous expression "as a reference to the custom and usage of the aboriginal inhabitants of the Territory obtaining in relation to the matter in question at the time when and the place in relation to which that question arises, regardless of whether or not that custom or usage has obtained from time immemorial". Under this definition custom, in order to be applicable, must be established by usage as having the force of law.[29] A rule of customary law need not have existed from "time immemorial" in order to be recognised and enforced by the courts. This provides the court with some flexibility in the application of customary law, since the rules of customary law are not static and changes are continually taking place to meet new problems and influences.[30]

One of the difficult problems in administering customary law is the question of ascertaining the appropriate customary

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28 See also section 9(2) of the *Human Rights Ordinance* which provides: "All customs, practices and procedures . . . which interfere with or take away the rights and freedoms referred to in sub-section (1) of this section are prohibited."

29 It is conceded however, that at times it may be difficult to ascertain which customs are legal and which are merely social.

30 In *Re Bimai-Noimbano, Deceased* [1967-68] P. & N.G.L.R. 256, it was held that the customary law of succession of the deceased was capable of applying to modern property like a quantity of harvested coffee and an insurance policy.

law to be applied in any particular case.[31] Sub-sections (3) (a) and (b) of the *NCRO* provide that a court "may refer to books, treatises, reports or other works of reference or statements by Native Local Government Councils or Committees thereof . . ." and may accept "any matter or thing stated therein" as evidence on the question; and "may of its own motion call such evidence or require the opinions of such persons as it thinks fit."

The Effect of the WPAO Upon the Customary Law of Succession

The *WPAO*, brought into force in 1970, repealed a number of ordinances including the *Probate and Administration Ordinance* 1951-1960. Section 4(7) of the *Probate and Administration Ordinance* 1951-1960 provided that "Nothing in this ordinance shall repeal alter or affect any of the provisions of the *Native Regulations Ordinance* 1908-1951 of the Territory of Papua or the *Native Administration Ordinance* 1921-1951 of the Territory of New Guinea or the Regulations made under those ordinances." The repeal of the *Probate and Administration Ordinance* 1951-1960 may have had the effect of repealing those Regulations relating to succession.[32] For example, Griffin, commenting on the *WPAO* said that the ordinance ". . . . created a major change in the law of succession in Papua New Guinea. It aimed to apply English principles of succession to native estates."[33] Support for this position can also be obtained from Watkins, then Secretary for Law, who said at the second reading of the Bill, ". . . with the growth of commercial and economic enterprise in the Territory the law relating to probate and administration in the Territory requires revision. Difficulties have also been encountered with the lack of provision for administering small estates and for indigenous persons to bequeath their personal belongings to the beneficiaries of their choice."[34] He commented on

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31 For further discussion on the problems of administering customary law, see Kassam "Family Law in Papua and New Guinea" (Stencil No. 1984, Law Faculty, U.P.N.G. to be published).

32 Furthermore the wording of some of the provisions of the *WPAO* may lead one to take this position.

33 See the article by Griffin, cited p.9, n.13, *supra* p. 29.

34 See *House of Assembly Debates*, the Meeting of the 1st Session, 1st March to 9th March 1966, Vol.1, No. 8, 1311.

clauses 88 to 91,[35] ". . . where a man does not make a will or does not make a will which deals with all his property, the property not dealt with by will will go on his death to the same classes of relatives as it would if he were an Australian dying in Australia. These beneficiaries as they are technically called, may perhaps be different from the people who would take the property, if it were *regulated by custom alone*" (emphasis supplied).[36]

Section 5 of the *WPAAO* cured this defect in the ordinance; it provides that regulations relating to customary intestate succession will continue to apply. However, the question whether a particular ordinance repeals the customary law on a topic is a matter requiring discussion. As a matter of principle, the doctrine of implied repeal should apply only within each of the two legal systems operating in Papua New Guinea and not between them. Where an ordinance has been passed under the general law system on a topic to which the customary law also applies, the ordinance should not be construed to repeal the customary law unless that intention is expressly stated.[37] For example, section 18(1) of the *Local Courts Ordinance* 1963-1966 provides that

> "The jurisdiction conferred by the *Deserted Wives and Children Ordinance* 1951-1961 or by Part IX of the *Child Welfare Ordinance* 1961-1962 may be exercised by a Local Court in the case of a marriage by native custom or of an ex-nuptial native child."

This provision permits the wife of a customary law marriage to apply under the *Deserted Wives and Children's Ordinance* 1951-1961 notwithstanding the customary law position in the matter.[38]

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35 These clauses deal with intestacy.

36 See *supra* n. 34, pp. 1352-1353.

37 Whether applying such an ordinance is socially desirable is another question altogether.

38 See *Darusila Kuang* v. *Eliab Tovivil* [1969-70] P. & N.G.L.R. 24. For comments on the case see Kassam "When is Customary Law Marriage not Customary in Papua New Guinea", 1 *M.L.J.* 92 (1972).

Where the ordinance under the general law system expressly excludes application to customary law the problem does not arise. For example section 8 of the *Matrimonial Causes Ordinance* 1963 provides that "nothing in this ordinance applies to or in relation to a native customary marriage."

If the doctrine of implied repeal were abandoned, section 5 of the *WPAAO* would be redundant. The *WPAO* did not expressly repeal the customary law of succession as applicable through the *Native Regulations*. Further, the *Native Regulations* derive their strength independent of the *Probate and Administration Ordinance* 1951-1960: the *Native Regulations* of New Guinea derive their force from the *Native Administration Regulations* 1924, and the *Native Regulations* of Papua from the *Native Regulations* 1939.

The scheme of legislation supports the position that the two legal systems are distinct. Niuginians in their relations with each other, especially in civil matters, will ordinarily be subject to customary law.[39] The circumstantial applicability test in the reception clauses and the general effect of the *NCRO*[40] assumes that the general law will apply to Niuginians in some circumstances.

Customary Law - Its Application

Section 4 of the *NCRO* defines "native custom" as "the custom or usage of the aboriginal inhabitants of the Territory." This section might imply that "native custom" applies only to persons who are "aboriginal inhabitants of the Territory". However, a better reading would accept section 4 as limiting "native custom" to that practised by groups in Papua New Guinea. Thus, a party could not successfully maintain that the native custom of Australian Aborigines or of other Pacific Ocean countries is applicable in Papua New Guinea. The definition of the word 'native' in section 5 of the *Ordinances Interpretation Ordinance* supports this position:

> "an aboriginal inhabitant of the Territory and includes a person who follows, adheres to, or

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39 Unless customary law is not applicable; see sections 6 and 8 of the *NCRO*; but see also section 13(1)(c) of the *Local Courts Ordinance* 1963-66.

40 See also the *Native Regulations*.

> adopts the customs, or who lives after the manner of the aboriginal inhabitants of the Territory."[41]

On the basis of this definition a person other than an aboriginal inhabitant of the Territory can become a "native" if he "follows, adheres to, or adopts the customs . . ." of the aboriginal inhabitants of the Territory. But, must the adoption of customs or manner of life be total? I would maintain that the phrase ". . . adopts the customs" allows the application of customary law in circumstances where a person is following a customary practice, even though he may not live completely within a customary framework. For example, if a mixed race person living in Port Moresby[42] marries a Papuan girl from Kerema under the customary law of that community,[43] the mutual acceptance of that custom by the persons involved ought to be sufficient to make the stranger a member of the girl's community for the purpose of applying the customary law of marriage.[44]

The definition of native thus definitely extends to mixed race people and others partly descended from any "aboriginal inhabitants". However, can a European[45] become a "native" for the purpose of the definition? The definition can be looked at from two viewpoints. In the case of *Otu-Koloi* v. *The Queen*[46]

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41 See also the definition of the word "native" for the Territory of Papua in section 49(2), and for New Guinea in section 55(2) of the *Ordinances Interpretation Ordinance* 1949-1963.

42 This would also apply to an Australian aborigine.

43 Different considerations may apply where the parties go through the customary rituals of both the local communities to which they belong. In such a case where there is a conflict between the customary laws of the parties on a given matter, a court might be guided by section 10 of the *NCRO* 1963.

44 Section 55(1) of the *Marriage Ordinance* 1963 allows the recognition of such a marriage as a valid customary marriage.

45 Including Asians.

46 [1967-68] P. & N.G.L.R. 194.

the High Court of Australia considered the definition of the word "European" in section 5(2) of the *White Women's Protection Ordinance* 1926-1934, then in force.[47] It was held that the word "European" as used has racial connotations and ". . . refers to the racial stock or stocks associated with the continent of Europe; and people derived from European stocks without known admixture of African, Asian or other stocks are to be regarded as Europeans". Similarly, the words "'native', 'part-native'. . . . are not used in a technical sense but in the vernacular sense as they would be understood by people living in Papua and New Guinea". If one accepts this connotation as the basis for the word "native" then a "European" cannot become a "native". Historically, in Papua and New Guinea the term has had racial implications. Section 49(2) of the *Ordinances Interpretation Ordinance* 1949-1963 provides that

> "(2) In an Ordinance of the Territory of Papua, unless the contrary intention appears, "native" means any aboriginal native of New Guinea or of any island adjacent thereto or of any part of the Territory of Papua and also every aboriginal native of Australia or any island adjacent thereto and also every aboriginal native of any island in the Pacific Ocean or of any of the West Indian Islands or of Malaysia that shall whilst he is in the Territory of Papua live after the manner in which aboriginal natives of New Guinea or the islands adjacent thereto live; and also every person that is wholly or partly descended from any aboriginal natives or native aforesaid and that shall whilst he is in the Territory of Papua live after the manner in which aboriginal natives of New Guinea or the islands adjacent thereto live."

There is no room for argument that the word "native" includes a European in this section of the ordinance.[48] This appears to be the position in relation to those ordinances that apply to either Papua or New Guinea.

However, the definition in section 5 of the *Ordinances Interpretation Ordinance* does not draw a distinction on the

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47 The ordinance has since been repealed.

48 See sections 49(2) and 55(2) of the *Ordinances Interpretation Ordinance* 1949-1963.

basis of racial origin. If one reads that definition liberally then a European (including Asians, etc.) can become a "native". Alternatively, one can draw a racial distinction between a European and a non-European on the basis of the decision in the case of *Otu-Koloi* v. *The Queen*,[49] thus including Asians and Africans as potential natives.

The law is at present unclear. If Europeans and Asians are excluded from the customary law system, then the law has failed to recognise and to provide for the realities of a multi-racial society where, for certain purposes, members of any race may choose to adopt the customs of another ethnic group. The *NCRO* lays down the general policy of the legislature that a "native", especially in civil matters, will be governed by the customary law[50] while the general law system applies primarily to "non natives". While this principle reflects the usual state of affairs, it does not adapt to all circumstances. Therefore, the two systems should not be regarded as water-tight, and exceptions should be made in appropriate cases.

Some African countries have solved the problem by enacting comprehensive rules for choice of law.[51] An interim solution would involve a transactional test in determining when a party is a "native". The test for the application of customary law should no longer depend on a person's race, but on his membership in a customary community. By becoming a member of a customary community, a European or Asian may become subject to customary law. A person can become a member of a customary community either by adoption of the way of life of the community or by the acceptance by the community of a person as one of themselves. Such membership may operate generally or partially. Likewise one can cease to be a member of his community by adoption of the way of life, or acceptance by, another community. However, mere absence should not cause a person to lose his membership of a community. The test

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49 [1967-68] P. & N.G.L.R. 194

50 See especially sections 4, 6 and 8 of the ordinance. See also section 13(1)(c) of the *Local Courts Ordinance* 1963-66.

51 Tanzania, Uganda, Kenya and Ghana. Particularly see section 9 of the *Judicature and Application of Laws Ordinance* as amended by the *Magistrates Courts Act* 1963 of Tanzania, and *Interpretation Act*, 1960 (C.A.U.) Ghana.

suggested will cover both Niuginians and non-Niuginians.[52] Where a stranger has adopted the way of life of another community and lives as one of them he could be considered to have become a member of that community with all the legal consequences of membership. Alternatively, a stranger can become a member for particular purposes. For example, if a non-Niuginian marries a Niuginian in accordance with customary law, the stranger may properly be considered a member of that community for any legal actions relating to the marriage.[53]

Apart from membership of a community customary law either wholly or partly should be applicable to a transaction between a Niuginian and a non-Niuginian, where it is considered fitting and just that the transaction should be so regulated.[54] This sort of provision will cater to situations where by reason of connection of any issue to customary rights or obligations it is considered proper to apply customary law either wholly or partly.

Customary Law of Succession and the Wills Probate and Administration Ordinance 1966-1970

There are two provisions in the *WPAO* 1966-70 that expressly refer to "native land" and "native custom".[55] Section 6 of the ordinance enacts: "Nothing in this ordinance contained applies to or in relation to native land."[56] Section 5 of the *Ordinances Interpretation Ordinance* defines "native land" as "land which is owned or possessed by a native or native community by virtue of rights of a proprietary or possessory kind which belongs to that native or native community and

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52 See *Hevago-Koto* v. *Sui Sibi* [1965-66] P. & N.G.L.R. 59; *The Queen* v. *John Kaupa*, Supreme Court Judgment 624, 1971.

53 For some discussion on the question of when customary law will not apply to a "native" see *supra* pp.12-14 and *infra* pp. 36-38.

54 It is arguable that this is the position under section 8(g) of the proviso to that section of the *NCRO*. The *NCRO* needs to be looked into with a view to changing the status of customary law.

55 Apart from section 6A of the *WPAAO*.

56 The marginal notes against the section read thus: "Non-application of Ordinance to native land".

arise from and are regulated by native custom."[57] By implication, then, any land not "native land" is subject to the provisions of the ordinance in respect of both testate and intestate succession. Thus, the status of the deceased is not the criteron for determining the succession law applicable; it is rather the nature of the property he held that matters.

A Niuginian can acquire interests in land other than "native land" by purchasing freehold or leasehold property, by obtaining a grant of leasehold land from the Administration, or by converting "native land" to "registered land" under the *Land Tenure Conversion Ordinance* 1964 (hereinafter *LTCO*.) If a Niuginian acquires interests in land in any one of the aforementioned ways, then the generally held view[58] is that his interests fall within the provisions of the *WPAO* 1966-70 for succession purposes. In other words, in such a case customary law is not applicable.[59]

However, it is possible, though admittedly with some stretching of the words, to construe section 6 as excluding only "native land" from the provisions of the *WPAO*. Such a construction would impliedly repeal some *Native Regulations*, a position I do not accept,[60] but section 5 of the *WPAAO* has brought back into force the *Native Regulations* of Papua and New Guinea dealing with intestate estates of deceased natives.[61]

Section 13 of the *WPAO* 1966-70 provides:

> "The application of this Division extends to and in relation to any property the right to or in which are regulated by native custom insofar only

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57 This definition applies only to the Ordinances of Niugini.

58 The writer takes the same position on this matter.

59 However, the decision in a recent case of *In the Land and Goods of Doa Minch* (Supreme Court Judgment No.718 (1973)) has been that the land held by the "native" deceased under the *LTCO* ceased in his lifetime to be "native land" but it is the land of a "native" for succession purposes. For further discussion of the case see *infra* pp.25-31.

60 For the reasons see *supra* pp. 15-17.

61 This ordinance was passed on the assumption that the *WPAO* had the effect of altering/repealing the *Native Regulations*.

as any such right may by that custom devolve or pass by will or in a manner analogous thereto."

The division deals with the validity of wills, the manner in which they must be attested, and when they will be deemed revoked, a revived or invalid. This section does not appear to give a Niuginian the right to make a will unless that right exists under his customary law,[62] but if the customary law allows him to make a will, then questions concerning the validity of the will would be governed by the *WPAO* 1966-70. Thus, section 13 does not repeal the *Native Regulations* dealing with testate succession, and a will made under the *Native Regulations* will be recognised. However, Regulation 77 of New Guinea prohibits the disposition of "any land or interest in land, or things attached to or growing on land", and section 13 should be read subject to Regulation 77. A "native" governed by the *Native Regulations* of New Guinea can make a will in "native form" or "custom"; where no such "custom" exists, he can make a will in a form provided under the Regulations; or he may choose to make a will under section 13 of the *WPAO* 1966-70. In all cases he cannot dispose of "native land" by will.

A "native" under Regulation 142 of Papua cannot dispose by will of any interest in land which he possesses ". . . simply because he is a native". Unlike the Regulations of New Guinea, the Regulations of Papua do not provide a form for making a will; however, I would argue that a Papuan can still make a will under the regulations where a customary form exists, and, where not, he can make a will under section 13 of the *WPAO* 1966-70. It has been argued that section 13 enables a Niuginian to make a will like an expatriate once his customary law allows some kind of will-making,[63] a position reinforced by section 5 of the *WPAAO*. Section 5 provides that nothing in the ordinance repeals, alters, or affects Parts IV and V of the *Native Regulations* of New Guinea and Papua respectively ". . . in so far as those Parts relate

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62 It is arguable that section 13 by implication allows a Niuginian to make a will under the provisions of the *WPAO* 1966-70 in relation to new forms of property including "registered land". But see *Bimai Naimbano, Deceased* [1967-68] P. & N.G.L.R. 256.

63 If this is the position then a Niuginian can will out all his property except "native land". However, I see s. 13 as a procedural provision solely; what property can be willed and to whom under s.13 would still depend on customary rules and *Native Regulations*.

to intestate estates of deceased natives". The saving provisions in the *WPAAO* in relation to intestate estates of deceased natives do not have the effect of impliedly repealing *Native Regulations* dealing with testate succession, because the *Native Regulations* derive their force independent of the ordinances.[64]

Case Law Relating to Intestate Estate of a Niuginian

There have been two important cases concerning the estate of intestate Niuginians. *Bimai-Noimbano, Deceased*[65] (hereinafter *BN*) was decided before the *WPAO* 1966-70 came into force. The deceased was a member of and lived according to the customs of the Siani people at Iamei Village, Wataubung, in the Eastern Highlands District of New Guinea. He died in that district at Goroka. The deceased left property, including an insurance policy and a quantity of harvested coffee. The Public Curator petitioned the Supreme Court for an Order under section 90 of the *Probate and Administration Ordinance* 1951-1960 (hereinafter referred to as *PA Ordinance*) authorising him to administer the estate of *BN*. The Public Curator was not granted an Order under section 90 of the *PA Ordinance*. It was held, *inter alia*, "Where native custom provides for the property in certain assets held by a deceased to pass on his death to another who has administrative powers and obligations then, subject to the powers and obligations conferring on district officers under regs. 70 to 75 inclusive of the *Native Administration Regulations*, the property in those assets passes to the customary law representative who administers them in accordance with native custom."[65a]

The decision in *BN* left open the possibility that an administration order could be made under section 90 in the following situations: where the deceased died intestate, leaving property and no debts, and where customary law provides that the assets could be dealt with and distributed by a representative named by the deceased before his death and for some reason no such nomination has been made; or, where it is necessary to assist the preservation or recovery of property. But, even where an order to administer under

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64 For further discussion see *supra* pp.15-17.

65 [1967-68] P. & N.G.L.R. 256.

65a *Ibid.* at p. 256.

section 90 were made, the property of the deceased should be distributed according to customary law.

The decision of *BN* was correct. First, the *Native Administration Regulations*, 70-75, of the Territory of New Guinea provide for the application of the customary law of succession to the estate of a native dying intestate. These regulations were preserved by section 4(7) of the *PA Ordinance* then in force. Second, there was nothing in the customary law of the deceased that was objectionable under section 6 of the *NCRO*. And, finally, the customary law of the deceased provided that the assets of the deceased should pass to a customary representative to administer the estate according to customary law.

In the Lands & Goods of Doa Minch[66] was decided after the *WPAO* 1966-70 came into force. *Doa Minch* (hereinafter *DM*) of Mount Hagen, Western Highlands District, ordinarily subject to customary law, died intestate on 20th March 1972. He died possessed of land held under the *LTCO*. The Public Curator of Papua New Guinea applied to the Supreme Court for an order authorising him to administer the estate of *DM*. The application appears to have been made under section 90(1)(c) of the *PA Ordinance* 1951-1960, repealed by s.3 of the *WPAO*, and partially brought back into force by s.4 of the *WPAAO*. The ground for the application, as stated in the petition, was that more than three months had elapsed since the death of *DM* and no application had been made for probate or administration of the estate of the said *DM*. Section 90(1) is as follows:

> The Supreme Court of a judge may, on the application of the Curator, grant to the Curator an order to administer the estate of any deceased person leaving real or personal estate within the jurisdiction in any of the following cases:. . .
>
> (c). Where probate or administration is not applied for within three months after the death of the deceased.

Doa Minch died possessed of a real and personal estate in New Guinea valued at amounting to $50,000.[67] He left no executor

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66 Supreme Court Judgment No. 758 (1973).

67 At the time of his death the estate appeared to have a gross value of $60,834.38. It *inter alia* comprised land known as "Panga" held under the *LTCO*.

resident in the jurisdiction, but left a widow resident at Panga village who requested the Public Curator of Papua New Guinea to administer the estate.

The facts raised numerous issues of importance to the land and succession laws of Papua New Guinea. Can the Public Curator be granted an order authorising him to administer the estate of a Niuginian dying intestate? If so, under what system of law should the estate be distributed, customary law or general law or both? Is the choice of law of succession dependent on the status of the person or the nature of the property he holds or both?

Robson A.J. observed, ". . . the customary rights of beneficial succession preserved by Regulation 70 prevail over the provisions of the Succession Act[68] by virtue of s. 6A of the *Wills, Probate and Administration Ordinance* 1966, as amended, and the persons thereby entitled to succeed to the deceased's property as beneficiaries are so entitled whether any formal order to administer the estate is made or not *(Re Bimai-Noimbano, Deceased)*".[69] Regulation 70 of the *Native Administration Regulations* 1924 of New Guinea not only provides that customary law shall determine the ultimate beneficiaries, ". . . but also that where native custom provides in addition for the property in certain assets held by the deceased to pass on his death to another who has administrative powers and obligations then the property in these assets shall so pass subject to and by virtue of the Regulations. (*Bimai's case*) . . ."[70] An order was made authorising the Public Curator to administer the real and personal estate of

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68 The reference to the "Succession Act" probably was a reference to *WPAO*, since there is nothing like a "Succession Act" now in Papua New Guinea.

69 [1967-68] P. & N.G.L.R. 256, 262.

70 *Ibid.* Robson A.J. further stated that the Regulations conferred power on a District Officer to administer certain types of estates informally.

the deceased intestate according to the customary law.[71]

The Acting Judge took the view that Part V of the *Native Administration Regulations* includes not only "native land" as defined in the *Ordinance Interpretation Ordinance* 1949-1963, but also land held under the *LTCO*. After stating the conditions and restrictions upon the owner in relation to such land, he ruled that section 16 of the *LTCO* does not determine the system of law of succession applicable. Section 16 provides, *inter alia*, that converted land ". . . ceases to be native land, and the land and any right to the ownership and any other right, title, estate or interest in or in relation to the land, cease in all respects to be subject to or regulated by native custom. . ."

The judge reasoned thus: the *LTCO* was designed to give guaranteed individual titles to land; it was concerned he said, with matters of land tenure and not of succession. Secondly, s. 27(1) of the *LTCO* provides:

> "If, under any law in force in the Territory or a part of the Territory relating to succession to property upon death, any land registered in pursuance of this Ordinance devolves upon more than six persons, the Registrar of Titles shall so inform the commission."

This reference to "any law relating to succession" he said, must include not only the "Succession Act", but also Part V of the *Native Administration Regulations* read in conjunction with section 6A of *WPAO* 1966-70 and section 159C of the 20th Schedule of the *Land Registration Ordinance* 1924, as amended. The judge went on, "The method in s.27 of avoiding fragmentation by devolution can only be sensible in the entire legislative complex relating to the registration of land and trans-

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71 The order made was subject to the condition that it shall cease ". . . to operate as to the whole or any part of the estate in the event of this court being satisfied that as to such whole or part there exists or exist some person or persons designated and required or permitted by the customs of the Palge clan group of the Western Highlands District to administer the same who is or are ready, willing and able to perform such administration or that a District Officer within the meaning of the *Native Regulations* elects to exercise such powers as to the administration of this estate as are given to him by such Regulations."

mission to beneficiaries if succession by native custom is relevant."

I would agree with the judge that section 16 does not determine the applicable succession law,[72] particularly since there is already in existence specific legislation covering the situation.[73] However, I disagree with the judge's other arguments. The reference to "any law relating to succession" in section 27(1) of the *LTCO* may not include *Native Regulations* since ordinances in Papua New Guinea always refer to *Native Regulations* as such and not as law. The reference in section 16 is to the received and enacted laws of Papua New Guinea, under which it was possible at the time section 16 was drafted for more than six people to inherit land.[74] Even if section 27(1) could be read as referring to Part V of the *Native Administration Regulations* the reference would be to those Regulations still in force. Section 6 of the *WPAO* 1966-70 has repealed those regulations that enabled land other than "native land" to devolve according to customary law. This important section was not considered by the judge. Further, whatever the effect of section 6 of the *WPAO* 1966-70 on the *Native Regulations*, the *Native Regulations* do not include land other than "native land". Both sets of *Native Regulations* were drafted to regulate "native" affairs and the "courts" which enforced these regulations then had jurisdiction only over "natives". Tenure converted land is a totally new problem not foreseen by the *Native Regulations*. Section 8 of the *NCRO* expressly provides that "native custom" shall not be taken into account in civil matters except, *inter alia*, in relation to devolution of "native land". If one accepts section 8 as restricting the recognition and enforcement of

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72 Alternatively, one can accept section 16 as providing the system of law of succession applicable.

73 Section 6 of the *WPAO* 1966-70.

74 The intestacy rules were those provided by the Statute of Distribution. See section 29 of the *Succession Act* of 1867 (Queensland adopted) Vol. IV, *Laws of the Territory of Papua*, 1888-1945, 4336. See also section 29 of the *Succession Act* of 1867 (Queensland, adopted) Vol. IV *Laws of the Territory of New Guinea* 1921-1945, 4618. These Acts have been repealed by the *WPAO* 1966-70. (First Schedule).

customary law,[75] then one must accept that customary law of succession applies only to "native land". If the *Native Regulations* did allow "registered land" to be regulated by customary law, then section 8 repealed the regulations in that respect.

The judge in *DM* introduced a concept new to Papua New Guinea when he distinguished between "native land" and land of a "native". He said "the real estate belonging to *Doa Minch* ceased in his lifetime to be 'native land' but it continued to be the land of a native for succession purposes."[76] This ingenuity however, does not take cognisance of the entrenched distinction between "native land" and "registered land" in the laws of Papua New Guinea. The distinction determines which system of law is applicable to a given block of land. If it is "registered land" then the general law applies; if it is "native land", the customary law applies unless there are express provisions to the contrary. The test of the applicable law of succession therefore is not dependent upon the status of the person but upon the nature of the land he holds.[77]

The argument that the method of avoiding fragmentation by devolution in section 27 of the *LTCO* can only be sensible if succession by native custom is relevant depicts only one side of the coin. For example, it is possible under the provisions of the *WPAO* 1966-70 for more than six people to succeed to the "registered land" of a Niuginian.[78] Sections 88(2) and (3) of the *WPAO* 1966-70 support this position:

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75 See *supra* pp.12-15. The provision in section 8 that the customary law may apply if injustice results otherwise cannot be invoked, if the effect will be to undermine the provisions of the *WPAO* 1966-70. See section 6 of the ordinance in particular.

76 Supreme Court Judgment No. 758 (1973).

77 The judge, on the reasoning advanced, applied the wrong test, namely, "status" test to determine the system of law of succession applicable.

78 Where a Niuginian dies survived by three wives and four children, under the intestacy rules the estate will be held in trust for sale and conversion. See section 88(1) of the *WPAO* 1966-70.

(2) In the application of this Division[79] to the estate of a person who dies leaving him surviving more wives than one under valid native customary marriages, any residuary estate or share in an estate to which a single wife would, under this Division, be entitled shall be divided between those wives.

(3) Where, by virtue of the operation of the last preceding subsection, the residuary estate of an intestate would be divisible between the wives of the intestate and some other person in such a way that the share of that other person would be greater than the share of a wife, then, notwithstanding anything in this Division contained, the share of that other person shall be reduced, and the share of the wife shall be increased, so that the shares shall be equal."[80]

Section 6 of the *WPAO* 1966-70 read together with sections 88(2) and (3) against the background of the *NCRO* and the *Native Regulations* can make sense only if all "registered land" is governed by the provisions of the *WPAO* 1966-70.[81]

The decision in *DM*'s case therefore, was wrong in law. Yet it must be followed until it is over-ruled or changed by new legislation. However, one can restrict the decision to land held under the *LTCO*. There are at least two good reasons why one should confine it to converted land. First,

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79 The division deals with intestacy. Section 5 of the *WPAAO* clearly indicated a change of mind by the legislature (namely, allowing the *Native Regulations* to apply to intestate estates of deceased natives) without clearing up the provisions in section 88 of the *WPAO*.

80 In view of these provisions the court should have given a wide meaning to section 16.

81 The principles enunciated in *BM*'s case should have been applied to *DM*'s case in so far as the personal estate of the deceased was concerned for two reasons:

(1) *BM*'s case was not concerned with registered land.
(2) The *WPAO* 1966-70 came into force after the decision in *BM*'s case and clarified the position, namely that customary law of succession was not applicable to "registered land".

"converted land" is usually situated near other "native land" and settlements; hence, the owner and his relatives are under immediate pressure to submit to the "native custom" in that area. Second, the land might have been converted without payment of compensation, and/or without any understanding of the legal consequences of such a conversion. The same considerations would not be likely to apply where a Niuginian purchased freehold or leasehold land, or where he obtained a grant of leasehold land from the Administration. The arguments advanced in connection with "registered land" and the system of law applicable are not clear cut due to the uncertainty in the language of the law. On the whole, the present position is very unsatisfactory.

Was the Decision Socially Desirable?

The question of social desirability is a difficult matter, but the decision does challenge some of the expressed policies behind the enactment of the *LTCO*. However, the decision does allow wider distribution of the estate of the deceased than would otherwise have been the case. The decision applies customary law and hence the chances of it being accepted may be higher than might otherwise have been the case.[82] In this respect the decision may have minimised trouble in the community. The continuing problem for a country with a dualistic legal system remains the choice of which system is relevant for purposes of national development. In intestate succession, the general law system provides for a narrower distribution while customary law generally favours wider distribution.[83] The two different systems thus reflect the different socio-economic systems of the people concerned.[84] I do not suggest that law is the best way to bring about economic and political change, but sporadic decisions unrelated to the over-all goals of the country, such as the decision in *DM* are, to say the least, not a satisfactory way of changing the

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82 The case of *Bimai-Noimbano* [1967-68] P. & N.G.L.R. 256 applied customary law and yet there seemed to be problems in relation to the estate. See Finney, B.R., *Big Men and Business* (1973) 100-104, esp. 103-104.

83 Some customary laws might be changing in allowing better rights to the person's close family instead of his clan. See *Report of the Commission of Enquiry into Land Matters*, 1973.

84 See *infra* pp.33-38.

laws.[85]

Law Reform

Defects in the Existing Laws

The most important failure in the existing law is the uneasy coexistence of two systems of succession law, applied according to ethnic or racial origin.[86] The general law and a myriad of customary laws[87] provide different rules on matters of succession. This multiplicity creates numerous conflict problems, including problems of administration, problems that will arise more frequently as Niuginians inter-marry and move into different communities.

A second major problem with the general law[88] of succession is its uncertainty resulting from lack of clarity and simplicity of language.[89] Courts ought to take legislative debates into account in interpreting provisions and deciding policy questions underlying the law, lest the aims of the legislature be undermined by bad drafting.

There are two potentially important failings in the customary laws of succession. First, in many customary laws, the right of women, whether wives or daughters, to share the inheritance is confined to meagre subsistence. Such laws work unjustly against women and are contrary to the principle of equality in the Eight Point Improvement Programme.[90] Second,

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85 It may also undermine the expressed policies behind the *Land Tenure Conversion Ordinance*.

86 Even the *Native Regulations* in relation to succession provide for different rules for New Guinea and Papua.

87 In many cases it may be difficult to ascertain customary law in a given case, especially at the Supreme or District Court level.

88 Including *Native Regulations*.

89 For example see sections 6, 13 and 43 of the *WPAO* 1966-70.

90 Not that it matters but such customary practices may well be contrary to Article 2 of the *Universal Declaration of Human Rights*. There is no provision in the *Human Rights Ordinance* of Niugini against discrimination on the basis of sex, but see the preamble.

customary laws of succession are geared essentially towards a subsistence economy and may not be able to cope with a different life style. For example, the danger of fragmentation of land holdings is common under customary inheritance law, and such a state of affairs may not be conducive to economic development.

Alternatives Available

There are at least three possible solutions to the problem of a dual system. First, one could leave Niuginians to be governed by customary law and allow the general law to apply to non-Niuginians. This is basically the existing position. However, this position does not take into account the increased socio-economic intercourse between peoples of different tribal and racial origins and, hence, is inadequate for Papua New Guinea today. Alternatively, one could create a unified law of succession applicable to all the peoples of the nation. What form the unified law should take calls for research into the attitudes of the people on these personal matters that touch their everyday life.[91] Although "one nation one law"[92] would be the ultimate objective, such a step may not now be practicable.

At present there is a great difference between urban and rural residents. It is in the urban areas that the impact of the outside world has been most pronounced. It would be misleading therefore to model reforms of the law solely on the attitudes of urbanised society.[93] Residents of urban areas are changing rapidly, while those in rural areas remain loyal by and large to the customary laws which appear well suited, at least for the present, to the nature of rural society. Any new plans that ignore these facts have little chance of being accepted, unless the benefits accruing to the

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91 In this connection it may be a good idea to appoint a commission to consider the laws of succession in Niugini and make recommendations for a new law. This is a good way to enable the ordinary people to participate in law reform exercises.

92 If the unified law takes the form of the western law then this may run counter to the general idea behind Village Courts.

93 Almost 90% of the peoples of Niugini live in rural areas at subsistence level.

people by the changes are enormous. The experience of other developing countries has shown the difficulties of attempts to eradicate customary law,[94] and it will be difficult to convince people that progress to a better life requires change of the laws that regulate their most personal concerns.

On the other hand, if a unified code ought not to be modelled after the general law, it is equally unlikely that it could take the form of customary law, since little legal research has been done in the customary field. Time and money are not on our side; we cannot spend years of patient field investigations by means of informants, court records and observations of legal behaviour among the people. If research has to be done then the method used by the Restatement of African Law Project[95] is one way of attempting to restate the customary laws of the peoples. The recording of the customary laws of marriage and divorce of Kenya was done in this fashion. The investigation was carried out through special Law Panels consisting of persons having special knowledge of customary law.[96] The restatements containing rules of customary law of each ethnic group were derived by a detailed examination of trouble cases and the processes by which these

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94 For a further discussion on these matters see Kassam, "Report of the Kenya Commission on Marriage and Divorce: A Critique", 2 *E.A.L. Rev.* 179, 208 (1969); Kassam, "Comments on the White Paper", 2 *E.A.L. Rev.* 329 (1969); but see Read, "A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania" 16 *J.A.L.* 19 (1972).

95 The Project was led by the London School of Oriental and African Studies in 1959. The object of the Project was to facilitate and where feasible undertake or assist, the recording of customary laws in Commonwealth African Countries.

96 The Law Panels were drawn on ethnic basis and consisted mainly of African Courts President, chiefs and tribal elders including young people. See Cotran, "The Place and Future of Customary Law in East Africa" in *East African Law Today* (*I.C.L.Q.* Supplement No. 12, 1966), 72, 88.

cases were settled.[97] The restatements have been used as guides to customary law by the courts, administrators, lawyers and the like.

The Tanzanian customary project differed from that of Kenya. The project was carried out with the assistance of Law Panels. However, the aim was not to restate the customary law of each individual group, but to produce a unified version of customary law for the whole country.[98] The unified customary law thus produced contained a number of policy innovations. This unified customary law was then given statutory force. At first applied as law in certain areas, it was gradually extended to cover more regions.[99]

These two projects represent pioneering efforts to grapple with the problems of customary law confronting many African countries today. The governments of Tanzania and Kenya have made sincere attempts to record and codify the customary laws of their peoples, a project others have regarded as impossible. These countries seem to have decided that, as a matter of policy, it is a good thing for people to use courts, and similarly, good for governments to use law and the courts for purposes of effecting changes. The government of Papua New Guinea has yet to decide future of customary law

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97 *Ibid.* For a critique of The Restatement of African Law, see Twinning, W.L., *The Place of Customary Law in the National Legal Systems of East Africa*, lectures delivered at the Chicago Law School in April/May 1963, 45-50. See also Twinning "The Restatement of African Customary Law: A Comment" J.M.A. Studies 1963, Vol. 1, 226.

98 Cory's work on the Sukuma (one of the tribes of Tanzania) formed the basis of the project. The project at first covered marriage and divorce and later succession and land matters.

99 Tanzania has now enacted a unified law of marriage and divorce reflecting some customary/religious practices and beliefs. For a discussion of this Act see, Read, "A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania" 16 *J.A.L.* 19 (1972). For a contrasting view see Kassam cited p.34, n.94, *supra* pp. 209, 210.

and of the courts in the national legal system.[100]

A third possible solution to the problems created by the dual system requires compromise, allowing the general law and the customary law systems to continue while making changes in both systems. The general policy would normally subject Niuginians to customary law[100a] but would apply the general law wherever life style demands. For example, a Niuginian who lives in an urban area, who has little connection with his customary community and who owns self-acquired property, may fall within the ambit of the general law provisions. However, any property that the Niuginian had acquired by virtue of his membership in a customary community would devolve according to customary law. This distinction between modern and traditional property would not be artificial because it follows the mixed life style of the person concerned. Although not an entirely satisfactory basis for determining the applicable system of law, it would be an improvement on the existing position in that it would reflect the realities of the mixed life styles of Papua New Guinea.[101]

In cases where other members of his community have assisted the person concerned in running a business and other like transactions then their services should be remunerated by the court[102] from the estate of that deceased person.[103] In cases where the general law is applicable it should still

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100 The idea of Village Courts is some indication of the government's concern in this direction.

100a However, in some cases customary law should be changed if it is not in keeping with the *Eight Point Improvement Programme*, e.g. rights of women, whether wives or daughters, should be upgraded.

101 *The Wills and Inheritance Act* 1970 of Malawi distinguishes generally between modern and customary property. In Kenya and Tanzania the nature of property one holds is an important factor in determining the system of law of succession applicable. In Lagos, Nigeria, it is the type of marriage that determines the system of law of succession applicable. In Ghana any African can will out his self-acquired property as he wishes.

102 The court here may be a Local or a District Court if their jurisdiction is extended.

103 If those who rendered services qualify as "dependants" then they will be provided for. See *infra* pp. 37-38.

be possible for a Niuginian to will that his property be distributed according to the customary law.[104] This would recognise that many Niuginians maintain their affection for the customary community in spite of a different life style.[105] In connection with a married Niuginian this direction should be subject to his providing for the surviving spouse or spouses and children.[106] In addition, the general law of succession (*WPAO* 1966-70) should in some respects recognise the social obligations and values of Niuginian society. For example, either in testacy or in intestacy, in addition to providing fixed shares[107] for spouses, children and other lineal descendants, the law should allow the intestate's dependants (whether relatives or not) to apply for reasonable maintenance.[108] At present the law allows only the spouse and children to apply for maintenance.[109] A wider definition of dependants is not novel in the legislative scheme of Papua New Guinea. Section 10(2) of the *Law Reform (Miscellaneous Provisions) Ordinance* 1962 provides:

> "In the case of the death of a native, an action referred to in the last preceding section may be for the benefit of the persons who by native custom were dependent upon the deceased immediately before his death . . ."

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104 In cases of intestacy where the general law heirs agree to allow customary heirs to share the inheritance then that should also be permissible.

105 The other alternative may be to provide that a certain percentage of the property should devolve according to customary law and a certain percentage according to the general law, notwithstanding the life style of the persons concerned.

106 The same principle should apply where a man and a woman live in a *de facto* relationship.

107 It is possible not to provide for fixed shares, but rather allow those entitled according to their needs.

108 Where the estate of a Niuginian is to be governed by the general law, then the people of his district/area should be so informed to enable them to lodge any claims that they may have.

109 See section 134 of the *WPAO*, 1966-70.

other than the wife, husband, parent and child of the deceased person, and also the issue of, a brother, sister, uncle or aunt of the deceased person.[110]

Any discussion on reform of the law must take into account the dual nature of Niuginian society, where a western economic system and life style and a customary subsistence economy both exist. The compromise proposal takes into account the socio-economic divisions underlying society. Furthermore, the suggestion would permit, in the modern sector, a modernized but non-western general law. These suggestions are based on three principles: that a new law should make fair and equitable provision for the immediate family and other dependants of the deceased person; that the law should reflect the Niuginian way of life; and that the law should be flexible and generally encourage the peaceful settlement of disputes.[110a]

Wills - Formalities

Since many Niuginians are illiterate, any reform in the laws must provide for oral dispositions. To insure the fulfillment of the testator's intent, the law could retain a requirement like the necessity to make the will before two or more witnesses[111] or in the presence of a District Officer.

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110 The *Workers Compensation Ordinance* 1918-1971 uses the word "dependants", and section 5(1) defines a "dependant" to cover a wider group than the immediate members of the family of the worker. It has been submitted that the better approach for determining dependency in a mixed economy (cash/subsistence) is to consider not only the financial assistance but also supply of goods and services. See Peter Bayne, Workers' Compensation Research Project (Mimeographed materials).

110a For the discussion of the machinery see *infra* pp.39-41.

111 The existing law about invalidating gifts to persons who witness the will should be modified by providing that gifts to witnesses will not be invalidated if there are at least two witnesses to the will who do not receive gifts under the will. Furthermore, gifts to the spouses of a witness should be valid - since in Niugini husband and wife are independent persons. In any case, the legal fiction of husband and wife being one has no merit today.

The officer could be empowered to write and sign the will, after having explained its contents to the testator.[112] Alternatively a new law could require strict formality in will making, as provided in the *WPAO* 1966-70.[113/114]

People should be encouraged to make wills wherever the customary law allows. Oral wills and "telling a District Officer" could be made standard procedures for making wills under customary law.[115] For intestate deaths under customary law, a commission of enquiry should provide sets of model rules, allowing each district to adopt one, with or without variation.[116]

Administration of the Law

The machinery necessary to administer estates, both testate and intestate, should be as simple as possible. The basic purpose of such machinery is to transfer property from the dead to the living with a minimum of delay, expense and waste, and to pay debts, taxes and other claims. The system of official administration presently in force under the general law system[117] should be extended. Family Tribunals are

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112 This is generally the position on the making of a will under the Regulations in New Guinea.

113/114 See *supra*, p. 8. An oral will under the general law should be revocable either by a written will or by another oral will but a written will should only be allowed to be revoked by a written will. One interpretation of section 43(1) is that it allows oral wills to be admitted where the intention of the testator is clear. The other view is that section 43(1) relaxes only formalities other than writing.

115 It may be possible to print standard form wills in different languages, Pidgin, Motu, etc.

116 In this section the recommendations made by the *Commission of Inquiry into Land Matters* appear reasonable.

117 See Parts II and VI of the *Probate and Administration Ordinance* 1951-1960, brought back into force by section 4(b) of the *WPAAO* 1970. See also the *Public Trustees and Executors Ordinance*, 27 1961 as amended, and section 51 of the *WPAO* 1966.

familiar in relation to marriage and divorce. In succession (which can be as personal as marriage and divorce), it may be equally possible to create an informal tribunal, consisting of a Director on Matters of Succession,[118] or his nominee (preferably a lawyer) who should be the Chairman, the District Commissioner or a Councillor from the area where the deceased died, and either the surviving spouse, the *de facto* spouse or another relative of the deceased. An executor should be made an *ex officio* member of such a tribunal where such an appointment is made under a will.

The Tribunal would decide all questions pertaining to testate and intestate succession under the general law, including the question of the system of law applicable. The tribunal would control and supervise the administration of estates, and could function with speed and minimum cost.[119] It would also distribute the estate property after paying debts and other claims.[119a] In performing this administrative task the members of the tribunal should have the same protection that is accorded to a trustee or executor: they should be indemnified for any losses incurred, provided that the members acted reasonably and honestly.[120] In discharging other duties, the tribunal should have all the powers and immunities of a court of law.[121] The decisions should be by majority vote and

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118 The office of the Public Curator should be renamed as mentioned for two reasons: the role as suggested will no longer fit the traditional role of the Public Curator; to simplify the term in order to give ordinary people some idea as to the function of such an office.

119 The members of the tribunal should be reimbursed only for the expenses incurred in connection with their duties as the members of this tribunal. It is assumed here that the Director and the District Commissioner or Councillor will be holding other substantive positions. The idea of a tribunal will help to decentralise decision making, and should provide an accessible forum. These tribunals should be established at the district level, if possible.

119a In appropriate cases the tribunal may allow the heirs to carry on the business.

120 See section 56 of the *Trustees and Executors Ordinance*, 27 of 1961, as amended.

121 In matters of procedure and evidence, the tribunal should not be bound by any rules.

the Chairman should have a casting vote. There should be an appeal from the decision of the tribunal to the other courts. Where the value of the estate is $10,000 or less the appeal could lie to the District Court; anything above that could go to the Supreme Court. A second appeal should be allowed only when the first appellate tribunal certifies that a matter of great public importance is involved. Legal representation before the tribunal should not be allowed, but relatives of the contesting parties could appear.

In cases where customary law applies, the tribunal could be used by a village court as a consultative body. Alternatively, it may be possible to have a single law of succession for administrative purposes but to provide different choice of law rules. If so, the tribunal could be used both for general and for customary law cases, adding a village court magistrate to the tribunal when customary law is at issue.

The structure of the dispute settlement machinery is as important as the substantive provisions of the law. A good succession law can be frustrated by lack of appropriate machinery to administer it. We are presently operating an adversary system, in which, all too frequently, one side or the other is not represented. The adversary system, thus is not appropriate to the circumstances of Papua New Guinea. An informal tribunal, on the other hand, would reflect customary practices and contemporary conditions. It would be inexpensive and readily accessible, and would also play important conciliatory, inquisitorial and educational roles. Much the same considerations gave impetus to the village courts.

Report of the Commission of Inquiry into Land Matters[122]

I propose merely to make some general comments on the recommendations of the commission on matters of succession. For this purpose, I am broadly paraphrasing the different recommendations on land interests.

General - Wills

The commission favoured recognising both written and oral wills. For a written will, the formalities recommended are those provided in the *WPAO* 1966-70, in relation to signature and execution etc.[123] An oral will is to be made either

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122 *Commission of Inquiry into Land Matters* - Report - 1973.

123 See *supra* p. 8.

before an "authorised witness"[124] or before two witnesses. If it is the latter then ". . . the degree of proof required should be greater than where the will is made before an authorised witness".[125] The Commission suggested that will forms be provided in English, Pidgin and Hiri Motu, and people be informed of their rights to make a will and the required procedures.

Model Rules[126]

Under customary law, the succession question is often difficult to resolve, and people's thinking on matters of succession is changing. In some areas there has been a change of emphasis from the rights of a person's clan to those of his close family. In view of this and the great variety of customs applying to different areas, the Commision recommended drafting model rules, allowing each local area to adopt one of the model rules with or without variation. This would permit both the recognition of customary law where appropriate and allow the introduction of changes where possible.

Different Interests in Land

The Commission proposed that customary land be of two kinds - unregistered and registered. The Commission recommended that registration[127] be used only where there is a clear demand and need for it. Furthermore, customary land should not be registered as full freeholds.

Registered customary land would be further sub-divided into group titles and conditional freeholds. Under group titles would be registered the titles of traditional right-holding groups. The group could grant use rights in the form of registered occupation rights, leases and other subsidiary rights to individuals and others. On the question of defining membership, including rules governing relationships

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124 Including Lands Officers, Village Court Magistrates, Medical Officers and other senior persons of recognised status.

125 Recommendation 57(A).

126 Model rules will apply in cases of intestacy. See *infra* pp. 44-45.

127 The Commission may have over-emphasised the significance of registration as a means of preventing disputes.

among group members, the Commission favoured relying on custom or informal arrangements. The Commission shied away from the task of considering in detail the complex and flexible customary rules with a view to recommending in a written form the most appropriate rules. However, it did propose that an agreement between a group and others be signed by a majority of group members.[128]

In cases where the traditional rightholding group is very small (for example, a family or an individual) a conditional freehold could be registered, but this kind of tenure should not be used to divide large groups. The holder of a conditional freehold would be able to grant registered rights to individuals and others, as would group title holders.

Government Leasehold Interests

The Commission recommended that all freehold and leasehold interests be converted into government leaseholds. The purpose behind such a move is to bring urban land under public ownership, and thus gain more control over the dealings in such land.

Government leases to citizens would be for a maximum of sixty years with a right of renewal. Leases to non-citizens would be for a maximum of forty years.[129] Government leases would be the only form of title a non-citizen could acquire in Papua New Guinea. Freeholds currently held by Niuginians could be converted either into group titles, conditional freeholds or government leaseholds.

National Land

National land would comprise all registered land held by the central government, and should be used for the benefit of Niuginians. The government should have power to acquire more land to meet public needs. The national land would include

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128 See recommendation 12D, p. 31 and paras 3.29, p.29 and 3.34, p. 33 of the Report.

129 Sixty-year leases can however be granted to non-citizens if the latter involved citizens in substantial ownership and management of the business on the land.

wishes. The recommended conditions may have changed the problem from intestacy to whether the will meets the conditions. In some cases the conditions themselves are unclear and will cause uncertainty, thus involving people in litigation.

The interests created under group title and conditional (freehold) title may lead to sub-division and fragmentation of land, as it will be possible for two, three or even more persons to succeed to the interests of the deceased. In such a case the successors may be unable to use the land economically.

Finally, although the Commission recommended a single law of succession for Papua New Guinea, it is questionable whether the effect of the Commission's recommendations will provide one law for all.[134]

Conclusion

Papua New Guinea, like many African countries, faces the problems inherent in legal pluralism. Recognition of the customary laws of different groups may tend to reinforce the autonomy and exclusiveness of these groups, and this may in turn prevent or hinder the emergence of a national ethic and values.[135] However, one should not underestimate the strength of history. The different bodies of customary laws developed before the coming of foreign powers and have by and large continued their hold over people to the present day. Thus we cannot count too much on the educative function of a unified code. A code can successfully supplant earlier laws only where there are some common features among the different systems of law that are the subject of unification. The customary law and the general law system are basically different. The latter is rule oriented, while the former is process oriented. The two systems serve two different societies whose socio-economic lives are fundamentally opposed.

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134 On the discussion of one law of succession see *supra* p.33-36.

135 See Ghai, "The New Marriage Laws in Tanzania" (1971) *African Quarterly* 101-109. For a contrasting view see Kassam, cited p. 34, n. 94, *supra* pp. 209-210. The National Coalition Government's philosophy appears to be that of cementing national unity among the peoples of Niugini. See also the *Eight Point Improvement Programme*.

Any code unifying personal laws that does not take into consideration the basic differences in the two societies in Papua New Guinea risks creating an impassibly wide gulf between the law in the books and the actual behaviour of the people.[136] Unification of the laws raises problems both of implementation and of substance. It has been pointed out that the "problem for legislators today in many African states with mixed populations is to judge when, and how far, social change has reached the point at which some integration of personal laws is feasible."[137] There are those who argue that even if the unified code changes some customary practices, "the code certainly presents a more desirable scheme of law towards which society may move in practice as well as in theory."[138]

But, as this quotation implies, ultimately the questions of law reform and the extent to which law and the courts should be used to effect change are related to the ideology and the concept of law held in a given society.[139] Thus, meaningful answers to these questions must come from the people and their elected government.

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136 In such a case the unified code may not help cement national unity but rather promote communal exclusiveness.

137 See the article by Read, cited p. 34, n. 94, *supra* p. 20. The comments made apply with equal force to Niugini.

138 *Ibid.* p.38.

139 See the article by Ghai, cited p. 46 no. 135 *supra* p.109.

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