SUCCESSION TO LAND IN PAPUA NEW GUINEA

CHOICE OF LAW

BY

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"Land is the only thing worth living for.
Land is the only thing worth working for.
Land is the only thing worth fighting for.
Land is the only thing worth dying for.
For land is the only thing that lasts
forever and ever."[1]

The importance of land to Papua New Guineans cannot be overestimated. It is the source of life and in the end it is the resting place of the ancestors. Between life and death it assumes magico-religious significance[2]. One of the important aspects of law to Papua New Guineans is therefore the rules which provide for the succession to this valuable asset. This paper attempts to define when customary law applies to determine issues of succession to land in Papua New Guinea. No consideration will be paid to substantive customary law. I shall deal with choice of law questions for both inter-customary as well as customary-general law conflict situations.

PART I: CLASSIFICATION OF LAND IN PAPUA NEW GUINEA

Land in Papua New Guinea is broadly classified into unalienated or customary land and alienated land. Customary land is usually owned by groups and the rights of use and possession thereof are defined by unwritten norms which the owning group has evolved. Customary

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1 Report of Emergency Committee Relating to the Declaration of a State of Emergency on Monday 23rd July 1979 for the Five Highlands Provinces. (1979, J. Guise, Chairman).

2 See "The Psychological Dimension" by B. G. Burton-Bradley in Problem of Choice: Land in Papua New Guinea's Future ed. P.G. Sack. p. 32.

land accounts for approximately 97% of the land surface of Papua New Guinea. The other 3% constitutes alienated land which is strategically located; it acounts for prime urban land as well as valuable agricultural plantations. Most of this land is beneficially owned by the Government. Some of it consists of freehold estates. Some of the land is private leasehold and government leasehold. Most alienated land is registered under a Torrens title registration system.

PART II: THE LAW OF SUCCESSION: GENERAL OVERVIEW

In the law relating to succession, the legal system of Papua New Guinea displays a duality[3]. On the one hand there are customary laws of succession which have been evolved by the different Papua New Guinean societies over centuries. On the other there is an imported succession regime with concretised rules which evolved in an alien social system. This regime has often been referred to as the general law relating to succession.

The general law is modelled on Australian and English statute law and was orginally intended to govern the distribution of the estates of deceased "Europeans". The customary rules of succession were applied by virtue of the Native Regulations which attempted to set out a system of succession law applicable to Papua New Guineans only.

In 1966 the Australian Administration in Papua New Guinea attempted to do the impossible: to provide a uniform law of succession governing all persons who died domiciled in Papua New Guinea, irrespective of whether they were indigenous Papua New Guineans or not. "Western" rules of succession were meant to replace traditional rules of succession. Great emphasis was placed on the rights of the nuclear/simple family. The theoretical changes effected by the legislation were many and far reaching. No doubt in practice very little would have changed. However after the legislation was enacted but before it was brought into force[4] wiser counsels prevailed and the

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3 Because of several distinct customary legal regimes which obtain in Papua New Guinea, plurality is a more accurate term. For our present purposes the twofold distinction is adequate.

4 The Act was to come into operation on a date to be fixed by the Administrator by notice in the Gazette.

Administration had some doubts as to the wisdom of its proposals. For over three years so the matter remained until by an administrative oversight, the Administrator brought the Wills Probate and Administration Act 1966 (hereinafter W.P.A. 1966) into force instead of another Succession Statute which had been recently passed in Parliament.[5] This was on 14th May 1970. The solution to the dilemma was the enactment of an amending Act entitled the Wills Probate and Administration (Amendment) Act 1970.[6]

This situation has continued up to the present except that changes to the succession laws have been proposed by two Commissions. The Commission of Inquiry into Land Matters (C.I.L.M.) which reported in 1973 made specific recommendations with regard to succession to land; and in 1978 the Law Reform Commission prepared a draft Working Paper on the Law of Succession. It had some specific proposals in respect of land. However many aspects concerning succession to land must be gleaned from its general statements and provisions in relation to succession to property.

PART III: SUCCESSION TO CUSTOMARY LAND

The choice of law rules regarding succession to customary land are found almost exclusively in the Native Regulations. When one looks at the Native Regulations for guidance on the matter, one is confronted with either silence or inextricable confusion. The Native Regulations dealing with succession in Papua and New Guinea are similar. They are not the same. The Papuan Native Regulations are more badly drafted.

The New Guinea Native Administration Regulations expressly permit the testamentary disposition of customary land. Regulation 76 provides that an automatic citizen[7] can dispose of his property by a

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5 The recently passed Act was the Wills (Amendment) Act 1969. Act No. 14 of 1970. This Act was never brought into force.

6 Act No. 52 of 1970. This Act exempted the intestate estates of Papua New Guineans from being governed by the provisions of the Wills, Probate and Administration Act 1966.

7 Section 98 of the Interpretation (Interim Provisions) Act 1975 provides that where the word "native" occurs in any adopted law, read it as "automatic citizen".

customary law will[8]. The Native Regulations of Papua provide[9] that "An automatic citizen cannot dispose by will of any interest possessed by him in land when such interest is possessed by him simply because he is an automatic citizen". This land referred to is no doubt customary land.

The question arises whether Regulation 142 of Papua prohibits the disposition of customary land by will even if customary law allows for such disposition, or whether the Regulation has some other more limited meaning. It is difficult to discover the intention of the draftsman of Regulation 142. Either (i) he did not appreciate that natives in some Papua communities could make valid (oral) wills of customary land; (ii) he realised this will making possibility but for some unknown reason decided to put an end to it; or (iii) the draftsman meant by the word "will" a document executed in compliance with the Succession Act of 1867 of the State of Queensland, in its application to the Territory of Papua.

At the time when the Native Regulations of Papua were enacted, the relevant law governing the making of statutory wills was the Succession Act of 1867 of the State of Queensland (Adopted). Section 36 of that Act provided: "It shall be lawful for every person .... to dispose of by will .... all real estate and all personal estate ....". It is possible that the draftsman of the Papuan Native Regulations considered that this provision, unless excluded, would allow a Papuan native ("every person") to dispose of his customary land ("real estate ... personal estate") in breach of customary law. This possibility is reinforced by two later enactments.

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8 Part V of the Native Administration Regulations 1924 (New Guinea) deals with the law of succession. 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 provided a method of making wills before District Officers. This Regulation however does not apply to "any land or interest in land, or things attached to or growing on land".

9 Regulation 142. Part IV of the Native Regulations, 1939 (Papua) deals with the law of succession.

Section 36, amongst other sections of the Succession Act of 1867 of the State of Queensland (Adopted), was repealed by the Wills Act 1956[10]. This Act laid down new (although in many cases, similar) provisions governing statutory will making. Section 4 of this Act provided: "Nothing in this Act contained applies to an automatic citizen or to a will made by an automatic citizen". Section 4 stated in clear and explicit terms what is implicit in Regulation 142 of the Papuan Native Regulations. It was not possible for a Papua automatic citizen to make a valid statutory will, whether of customary land or of other assets.

There was an attempt to reform the law in this area when the Wills (Amendment) Act 1969 was passed. This Act provided for the repeal of Section 4 of the Wills Act 1956 and provisions to be substituted therefor which allowed automatic citizens of Papua New Guinea to make valid statutory wills. Section 4(1) recognised that customary wills disposing of customary land were possible and went on to impliedly provide that where such wills were possible, the testator could achieve the same purpose by executing a statutory will. Capacity of automatic citizens was not affected. The new section 4(1) was merely a procedural provision.

It is submitted that the draftsman of Regulation 142 of Papua meant to prevent the Succession Act of Queensland from conferring capacity on automatic citizens to dispose of their customary land contrary to customary law. This limitation continues to operate in Papua New Guinea today. Succession to customary land is not affected by the W.P.A. 1966[11]. Customary land cannot be disposed of by wills which merely comply with W.P.A. 1966. It is therefore submitted that a Papua New Guinean can dispose of customary land by will wherever the land is situated, provided the relevant customary law permits such disposition, and the will complies with the customary requirements.[12]

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10 Sectoin 3(1) and Schedule of the Wills Act 1956.

11 Section 6 of the W.P.A. 1966 provides: "Nothing in this Act contained applies to or in relation to customary land".

12 Section 8(d) of the Native (Customs Recognition) Act 1963 provides that "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".

The Wills Probate and Administration (Amendment) Act 1970 states that those parts of the Native Regulations dealing with intestate estates of deceased automatic citizens are not repealed or affected by the provisions of the W.P.A. 1966. It has therefore been argued that this express reference to intestate succession only means that the Native Regulations dealing with testate succession have been impliedly repealed. Whatever the force of this argument in relation to testate succession in general, it is submitted that the argument has no application to customary wills of customary land. Section 6 of the W.P.A. 1966 expressly provides that nothing in that Act applies to or in relation to customary land. This would include testate succession to customary land.

Having determined that customary wills of customary land are possible [13], the other issue for determination is 'by which customary law is the issue to be tested?"[14] No difficulties will arise where the land in question belongs to the clan which normally resides in the area, and of which the testator is a member. The customary law of the clan is the only possible choice. However, there are certain cases, the frequency of which seems to be increasing, where customary land belonging to one clan or a member thereof, is sold or leased [15] to

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13 It is possible (but unlikely) that a customary group could evolve a rule requiring customary wills to be in writing and to be signed by the testator and two witnesses. Despite Section 6 of the W.P.A. 1966 such a will would be valid; it would not derive its validity from the W.P.A. 1966.

14 The Native Regulations do not state whether the custom which has to be applied is always the personal customary law or some other customary law; the provisions merely say "in accordance with native custom(s)'; Section 4 of the Natives (Customs Recognition) Act 1963 does not offer any assistance in this regard.

15 For some examples of this See Alan Ward: Customary Land, Land Registration and Social Equality in Papua New Guinea. History of Agriculture Discussion Paper No. 20. There are cases of sales of "matrilineal land" in East New Britain Province where fathers have sought to gain succession rights for their children rather than allowing the land to descend to the wife's brother's son. Automatic citizens (which includes customary groups) can transfer customary land to other automatic citizens; Sections 80 and 81 of the Lnad Act 1962.

"outsiders" i.e., non-members of the clan. It may be that the personal customary law of the purchaser or lessee allows for customary wills whereas the customary law of the group from which the land is alienated does not permit wills of the customary land. Or it may be that only limited wills are possible by the customary law of the area and the outsider testator has exceeded or not complied with the terms of the limitation.

It is submitted that testamentary capacity to transfer customary land by a customary will is to be determined by the personal law of the individual rather than the *lex situs* i.e. the customary rules of succession which generally apply in the area where the land is situated.[16] Such a test may cause resentment when sons, or others to whom the personal law of the testator allows testate distribution, inherit the land to the exclusion of nephews. However if the land was truly purchased or leased, the then existing customary rights of succession are abrogated or suspended. If nephews did not receive some of the purchase moneys, their claim should be against the recipients of the purchase money or rent payment, rather than against the purchaser, and customary law or the general law should allow for the pursuance of such claims.

There are no specific statutory provisions which state that capacity to will land is determined by the personal customary law of the deceased. However, it is submitted that this is the fairest rule to adopt and Section 10(1) of the Native Customs (Recognition) Act 1963 does allow for the existence of some unspecified rule, failing which "the court shall consider all the circumstances and may adopt that system which it is satisfied the justice of the case requires'.

If in any individual case it is felt that the application of the proposed choice of law rule will work injustice,[17] Section 10(1) of the Natives Customs (Recognition) Act 1963 is flexible enough (or should be so interpreted) to allow the land to be returned to the matrilineage for succession purposes. However, the matrilineage, in particular the successor, should be under an obligation to make

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16 cf. Section 5(6)(a) of the Law Reform Commission's Draft Bill on Succession, *infra* p. 25.

17 Regulation 143 states: "The general laws of the Territory relating to the Devolution and Administration of Intestate Estates of Deceased Persons shall not apply to the intestate estates of deceased natives".

restitution for the improvements which have been carried out on the land.

PART IV: INTESTATE SUCCESSION TO CUSTOMARY LAND

It is submitted that the customary law of succession, which applies to determine who are the beneficiaries where a deceased has died intestate, depends on whether the land is owned by the group of which the deceased is a member or by some other group. It is irrelevant that other neighbouring groups have different customary laws.[16]

PART V: TESTATE SUCCESSION TO ALIENATED LAND AND THE NATIVE REGULATIONS

Papua New Guineans are today acquiring alienated land on a more regular basis and the succession implications of such acquisitions are vital questions. Can alienated land be left by will? If so must the will comply with customary law or can it also/must it comply with the W.P.A. 1966 in order to be valid? If customary law wills of such land are possible, which customary law is to determine the validity of the will?

In this area as well the New Guinea Native Administration Regulations are better drafted than their counterpart provisions in Papua. Regulation 76 is clear on the point that an automatic citizen of Papua New Guinea, succession to whose property is governed by the New Guinea Regulations, can only make a will, in particular a will to alienated land, "so far as it disposes of his property in accordance with customary law". If customary law places a total or partial restriction on the deceased's testamentary capacity, then that restriction operates.

The position in relation to automatic citizens governed by the Papuan regulations is more uncertain. The power of such persons to will alienated land is inferentially referred to in Regulation 144 which provides: "In the absence of a will the property of a deceased automatic citizen shall descend to those persons who in accordance with customary law are entitled to it". It is implicit in Regulation 144 that at least in some cases, some form of will making was recognised by the draftsman. It is submitted that the will referred to is a customary will and such wills are only possible if the personal customary law of the deceased allowed him to make such a will in

relation to the particular type of property in question.

We have already argued that "will" in Regulation 142 of the Papuan Regulations should be interpreted to mean "statutory will". The question then arises whether "will" has a similar meaning in Regulation 144 which occurs in the same Regulations, in the same Part of the same Regulations (in fact two Regulations further on), and this following Regulation 143 which expressly adverted to the general law. The argument is that, the general law of testate succession not having been expressly excluded is necessarily impliedly allowed for.

It may not be a useful exercise to pursue these questions because it would appear (there has been no case law on the subject) that the Native Regulations dealing with testate succession are no longer in force. The W.P.A. 1966 did not *expressly* repeal the Native Regulations; however there are indications in the W.P.A. 1966 that they were *impliedly* repealed. In addition the passage in Parliament of the Wills, Probate and Administration (Amendment) Act 1970 is based on the assumption that the W.P.A. 1966 repealed the Native Regulations. The Amendment Act of 1970 then sought to limit the repealing effect of the W.P.A. 1966. It stated that nothing in the W.P.A. 1966 was to be taken to repeal alter or affect the succession Parts of the Native Regulations "in so far as those parts relate to the *intestate* estates of deceased natives". The inference is that the W.P.A. 1966 did have some effect on the testate provisions of the Native Regulations.

PART VI: THE W.P.A. 1966 AND TESTATE SUCCESSION TO ALIENATED LAND

Division 2 of Part II of the W.P.A. 1966 lays down certain requirements which have to be fulfilled before a valid will comes into existence. Some of the conditions are set out in Section 18. Usually a valid will must be in writing, signed at the end by the testator, and witnessed by at least two witnesses.[18]

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18 The effect of Section 18 is rendered almost meaningless because of the meaning of Section 43 which says defects of formalities may be disregarded if the testamentory intention of the testator is clear; see the cases of *Public Curator of Papua New Guinea* v *Rei Reinou* (1978) P.N.G.L.R. 253 and *Public Curator of P. N. G.* v *Public Trustee of New Zealand* (1976) P.N.G.L.R. 427.

Section 16(1) of the W.P.A. 1966 provides:

> "A person may devise, bequeath or dispose of by his will executed in accordance with this Division (2) all real estate and all personal estate to which he is entitled either at law or in equity at the time of his death, and which if not devised, bequeathed or disposed of, would devolve upon his executor or administrator".

Section 13 of the W.P.A. 1966 provides:

> "The application of this Division (2) extends to and in relation to any property the rights to or in which are regulated by custom insofar only as such rights may, by that custom, devolve or pass by will or in a manner analogous thereto".

It is important to understand the relationship between these two provisions in order to determine whether an automatic citizen of Papua New Guinea has unrestricted power to dispose of alienated land by statutory or customary will. The essential question therefore, in relation to a particular type of property (in particular alienated land) is "Are the rights to or in this property regulated by customary law?" There is an apparent ambiguity which first has to be resolved. Are the types of rights to which the section refers rights of user, possession, enjoyment and ownership when the deceased was alive? Or are the rights referred to rights of succession? If the former is the correct formulation for the purposes of Section 13, then customary law does not apply, and the owner of the land (whether an automatic citizen or not) can freely dispose of his land in accordance with the provisions of the W.P.A. 1966. Customary law does not regulate rights of user, possession and ownership of alienated land when the testator is alive. The general law applies in such a case to alienated land.

If the rights referred to in Section 13 are interpreted to mean succession rights, then if by his personal customary law, an automatic citizen cannot make a will in relation to his alienated land, then he cannot make a valid "statutory" will even if he complies with all the procedural requirements laid down in Division II of the W.P.A. 1966. If the customary law does allow for wills of alienated land the further question has to be asked: "Does the customary law in question permit the testator to pass the right in question to the person in question?" For Section 13 permits "statutory wills" "*insofar only* as such rights may, by that custom, devolve or pass by will or in a manner analogous thereto'. A statutory will is only

valid to the extent that a customary will of the land would have been valid.

The Law Reform Commission is of opinion that "under the law as it stands, a Papua New Guinean ... may (not) ... dispose of any ... property by will if custom prohibits such disposition[19]. Given such an interpretation of Section 13, it would appear that the answer to whether succession rights to alienated land are regulated by customary law depends on whether customary law regulates (generally or in an individual case) intestate succession to alienated land. If the land would have passed under the provisions of the W.P.A. 1966 if the deceased died intestate, then the deceased has the capacity ot dispose of it during his lifetime, freed from any restrictions, customary or otherwise. If however the land would have descended to customary successors, then the land is "regulated by customary law" and any will of that land would then be valid, if and only in so far as, it is permitted by the customary law of the deceased.

A natural reading of Section 13 however, seems to lead to the conclusion that it deals with the regulation of rights of use, possession and owenrship during the lifetime of the deceased. If this is the case, these rights are regulated by the general law and therefore Section 13 of the W.P.A. 1966 does not prevent alienated land from being left by statutory will. Despite this however, it may still be possible for the courts to place some limitation on the wide words of Section 16(1) and allow customary norms to operate.

It is submitted that there are restrictions on the will-making power of Papua New Guineans which are implied in the W.P.A. 1966 as amended. It is argued that Section 16(1) of the W.P.A. 1966 as amended should read "A person who has capacity according to his/her personal law may devise bequeath or dispose of by his will...". It is submitted that there are several persuasive reasons why a Judge should read this implied limitation into Section 16(1) of the 1966 Act.

It is submitted that Section 16(1) is subject to an implied private international law rule that testamentary capacity of a testator is governed by the law of the domicile of the testator at the time when

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19 See Law Reform Commission Working Paper No. 12, Law of Succession, pp. 3, 6. 8.

he made the will in question[20]. It is submitted that in the same way that Section 16(1) is to be read subject to a private international law rule (a rule of the underlying law of Papua New Guinea) governing capacity of foreign domiciliaries, Section 16(1) is also subject to an internal conflict of law rule (a rule of the underlying law) that a Papua New Guinean only has capacity of making a statutory will if so permitted by his personal customary law.

There are several policy and other reasons why Section 16(1) of the W.P.A. 1966 as amended should be given a restricted interpretation as that advanced above. The W.P.A. 1966 which is currently in force was devised by the Australian colonial administration to implement the then emerging policy of civilizing and modernising Papua New Guineans by imposing western traditions on the peoples. The main form this modernisation was to take was in increasing individualisation, especially in the ownership of property. One clear example in the area of ownership of land occurs in the Land (Tenure Conversion) Act 1963. To what extent this trend reflected Papua New Guinean aspirations is uncertain. One can however guess that the majority of Papua New Guineans then, as now, would be against this trend towards greater individualisation of the use and ownership of property.

There were several aspects of the W.P.A. 1966 over which even the then Australian Administration had doubts. After some concern expressed by Papua New Guineans and other persons vitally interested in the welfare of the peoples of Papua New Guinea and the question of what road to development the country was taking, the Australian Administration decided not to bring the W.P.A. 1966 into force, at least not before much greater thought and consideration on the matter. The W.P.A. 1966 was not deliberately brought into force. It was brought into force by an administrative blunder.

Following the bringing into operation of the W.P.A. 1966, there was great uncertainty as to what course of action should be pursued. There was certainly a need to do something quickly as Papua New Guineans were dying every day. Such need for haste does not allow for proper deliberations and perhaps the seemingly limited provisions of the Wills, Probate and Administration (Amendment) Act 1970 can be explained on this account. There was a recognition that long term measures would have to be considered in due course. During the second reading of the 1970 Bill, the Secretary of Law stated: "I have

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20 See Re Lewal's Settlement (1918) 2 Ch. 391.

spoken of this Bill as being of a temporary measure only. It is generally agreed that some further legislation will be required... what changes, if any, ought to be made will have to be the subject of careful study and consideration. It is proposed to embark on that study immediately". The fact that Parliament to date has been remiss in putting the law of succession of Papua New Guinea on a firm and clear footing should not deter the courts from taking up the challenge of creating a suitable underlying law.

The self-governing and then independent State of Papua New Guinea has subsequently set for itself development goals which reflect more the beliefs and aspirations of the Papua New Guinean peoples. These aspirations are not coincidental in many respects with the views and policies of the Australian Administration in the mid 1960's. The main national policy guidelines are to be found in the Eight Point Improvement Programme and the National Goals and Directive Principles of the Constitution of Papua New Guinea. It is submitted that to allow a Papua New Guinean automatic citizen complete freedom of testation would in many cases be contrary to the Eight Point Improvement Programme and the National Goals and Directive Principles of the National Constitution.

One of the Eight Aims of government planning announced in 1972 called for more equal distribution of economic benefits. The National Constitution assert that national wealth should be equitably shared by all, and National Goal and Directive Principle Number 2(3) calls for every effort to be made to achieve an equitable distribution of incomes and other benefits of development among individuals and throughout the various parts of Papua New Guinea. It is submitted that to allow Papua New Guineans complete freedom of testation would indirectly violate these goals or principles in that a testator is able by will to concentrate wealth in the hands of a few persons. On the other hand customary law or a suitably developed underlying law would ensure that benefits (including alienated land) are equitably distributed on the death of deceased automatic citizens.

If the courts of Papua New Guinea are unwilling to hold that the personal customary law of *all* deceased Papua New Guineans determines capacity to make valid statutory wills, then they should evolve an alternative rule to supplement the provisions of the W.P.A. 1966. The suggested internal conflict of law rule should be to the effect that some Papua New Guinean automatic citizens have capacity to make statutory wills. The test should be the mode of life of the deceased. The courts should consider whether the mode of life of the deceased was so non-traditional that customary law should not apply to determine

his testamentary capacity. Section 13 of the W.P.A. 1966 would then be merely one aspect of a wider series of rules. Not only will the type of property owned by the deceased determine whether it can be willed, but also the status of the individual will also so determine. Courts, executors, administrators and others would have to enquire into the mode of life of a deceased and make a determination.

If the court decides that a mode of life test should be preliminary consideration in determining the capacity of a Papua New Guinean automatic citizen to make a statutory will, there would appear to be a need to introduce an element of certainty by providing that there is a presumption that the capacity of automatic citizens to make statutory wills is governed by their personal customary law. The burden of proving that the personal customary law does not determine the capacity of the deceased should be upon the person alleging this fact.

PART VII: INTESTATE SUCCESSION TO ALIENATED LAND

There was at one time serious doubts whether customary law of succession would or could apply to modern forms of property including leases and freehold estates. In other jurisdictions with a plural legal system, there have been arguments that the identity of the property is of paramount importance, so that once it has been determined that the land is alienated land, it automatically descends in accordance with English-derived rules of succession rather than in accordance with customary law. The status of the deceased is of no importance.[21]

Today there can be no doubt that customary laws of succession can apply to new types of property including alienated land.[22] Customary law is flexible enough to accommodate these developments. It is submitted that there is nothing inherent in alienated land which places it beyond the scope of customary norms of succession. In fact, the legislation governing registration of alienated land transmissions expresssly recognises (at least in some cases) customary successors as the persons entitled to be registered as the proprietors

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21 See for example A.M. Susman; State Land and Customary Law (1957) 5 Zambia L. J. 127.

22 See Re Bimai-Noimbano Deceased (1967-68) P.N.G.L.R. 256 and In the Land and Goods of Doa Minch (1973) P.N.G.L.R. 558.

of the land.[23]

It is generally considered that the present position in regard to intestate succession to the estates of deceased automatic citizens is that customary law automatically applies.[22] Section 5 of the Wills Probate and Administration (Amendment) Act 1970 inserted a new section (S. 6A(1)) into the W.P.A. 1966 which provided that nothing in the W.P.A. 1966 "repeals alters or affects" the Native Regulations in so far as they relate to the intestate estates of deceased automatic citizens. It is generally considered that the Native Regulations dealing with succession continued in force up to 1970 when they were impliedly repealed, and that the implied repeal was shortlived.

It is submitted that in the same way that the legislative draftsman considered that the Native Regulations had been impliedly repealed by the W.P.A. 1966, they had in fact been impliedly repealed on a previous occasion. It is submitted that at the time when the W.P.A. 1966 was enacted and came into force the Native Regulations had already been repealed. They were not impliedly repealed by the W.P.A. 1966. The Wills Probate and Administration (Amendment) Act 1970 in stating that nothing in the W.P.A. 1966 "repeals alters or affects" the succession Parts of the Native Regulations, states the obvious, because these Regulations were not in force for the W.P.A. 1966 to 'repeal alter or affect' them.

It is submitted that the Native Regulations dealing with succession were impliedly repealed by the Native Customs (Recognition) Act 1963. Section 8 of this Act provides that customary law can be taken into account in some instances and provides that "subject to this Act"

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23 See section 125 of the Land Registration Act 1981 (Act No. 2 of 1981), which replaces earlier Torrens legislation. Section 125 is entitled Transmission to Person Entitled by Custom and states: "Notwithstanding Section 118 or 119 where - (a) a registered proprietor of an estate, interest or security dies intestate; and (b) the estate, interest or security is transmitted to a person entitled to it by custom, the Registrar shall, on production of a certificate in the prescribed form signed by the Custodian, register the person so entitled as proprietor of the estate, interest or security".

customary law *shall not* be taken into account.[24] It does not say "subject to the Native Regulations or other law dealing with succession". However, the Native Regulations or other law dealing with customary succession are nowhere in the Act expressly repealed. It is further submitted that the provisions of the W.P.A. 1966 dealing with intestate succession do not affect the operation of Section 8 of the Native Customs (Recognition) Act 1963.

The effect of Section 8 of the Native Customs (Recognition) Act 1963 is that with the exception of customary land, in order to prove that customary law of succession governs, it has to be proved to the satisfaction of the court that by not taking the custom into account, injustice will or may be done to a person.

If the courts were to accept the above argument, then the question arises "when is injustice done to a person who would have succeeded to alienated land if customary law was applied?" It is submitted that this is where a mode of life test comes into the picture.

It can be argued that rather than applying a rigid test of status or identity of the property to determine who should be entitled to succeed to the alienated land which the deceased possessed, a more flexible and just test should be applied. It is suggested that the "mode of life" test is such a test. This should also accord more with the expectations of the parties concerned including the deceased. In the application of this test, the court (or perhaps the customary administrator, the custodian or Public Curator)[25] will have to consider all the circumstances surrounding the deceased. Did the deceased's extended family help in his education? Did the deceased live most of his life away from the village? Did his

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24 Section 8 states: "Subject to this Act, native custom shall not be taken into account in a case other than a criminal case, except in relation to- (then follow 9 paragraphs outlining the types of cases), or where the court considers that by not taking the custom into account injustice will or may be done to a person".

25 Because of the flexibility (which brings with it uncertainty) there may be many disputes as to the destination of the property. The court should develop suitable principles to guide us in the choice of the appropriate law.

extended family help him in setting up his business? Did he make substantial gifts to them during his lifetime? Did the deceased have a wife or wives? Did he consider that his obligation to his nuclear/simple family came above those to his extended family etc?

It is important to note that section 125 of the Land Registration Act 1981 does *not* state that in all cases of an automatic citizen dying possessed of alienated land customary successors are entitled thereto Section 125 merely provides an administrative machinery to allow the Registrar to register. Where there is a successor under the W.P.A. 1966 then the personal representative (executor or administrator) is the person who has the duty to inform the Registrar of Titles. Otherwise the custodian appointed under the Land Registration Act 1981 will act.

If the Native Regulations were not repealed by the Native Customs (Recognition) Act 1963, as seems to be the accepted position, then what do these Regulations provide in relation to intestate succession to alienated land? Both Regulations provide that persons entitled in accordance with customary law should succeed to the property of the deceased. There are no express limitations or qualifications which except alienated land from these provisions. If anything a court would have to read these limitations into the Regulations. The propriety of doing so is questionable. Nor can the courts develop an underlying law to cover the situation, for in the normative order, subsidiary legislation takes precedence over underlying law to the contrary. If an automatic citizen dies owning alienated land, that land descends (unless customary law allows him to otherwise dispose of it) to the customary successor(s), the personal customary law of the deceased determining who his or her successors are.

PART VIII: EFFECT OF THE WILLS, PROBATE AND ADMINISTRATION (AMENDMENT) ACT 1970 ON CUSTOMARY RULES OF INTESTACY

We have already noted that the Wills, Probate and Administration Act 1970 provided that nothing in the W.P.A, 1966 was to repeal alter or affect the Native Regulations in so far as the Regulations relate to the estates of deceased automatic citizens,

However the bringing back into force of the Native Regulations was subject to one "exception": "Regulation 143 of the Native Regulation

1939, of the Territory of Papua is repealed".[26]

Regulation 143 provided: "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 deceased natives". This Regulation was quite clear. On no occasion was non-customary law to apply to determine who was entitled to the property of a deceased automatic citizen, and how the property was to be administered.

The question the specific repeal of Regulation 143 raises is whether, in *some* cases (involving the estates of Papuan automatic citizens?) the general law relating to intestacy can apply? Does the repeal of Regulation 143 allow the courts to apply a mode of life test and in some cases apply the W.P.A. 1966 to the estates of deceased automatic citizen? Or was the Regulation 143 tautologous and did the draftsman considered that if he had "brought the Regulations back into existence" he would have compounded the tautology; Regulation 144 already provided that "the property of a deceased native *shall* descend to those persons who in accordance with custom are entitled to it". On the other hand the draftsman could have interpreted "The general laws of the Territory relating to the Devolution and Administration of the Intestate Estates of Deceased Persons..." to consist of statutes which were in force at the time the Regulations were enacted.[27] However seeing that these statutes were repealed by the W.P.A. 1966[28] there was no need to continue to provide for their non-application. The repeal of Regulation 143 does not appear to be helpful to the Court in evolving a mode of life test to determine questions of the devolution and administration of the estates of deceased automatic citizens.

PART IX: SUCCESSION TO TENURE CONVERTED LAND

The Land (Tenure Conversion) Act 1963[29] was enacted at a time when

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26 Section 6A(2) W.P.A. 1966 inserted by Act No. 52 of 1970.

27 The Succession Act 1867, the Intestacy Act 1877, the Succession Act Declaratory Act 1884, all Queensland Adopted Acts.

28 Section 3(1) and First Schedule.

29 Act No. 15 of 1964.

it was considered that "a most efficacious method of promoting the agricultural development of a country and the economic well-being of its people and especially of its agricultural population" lay in the conversion of "the tenure of customary land into individualized tenure". To date about 1000 parcels of land have been converted under this Act, and despite the uniform criticisms which the process came in for in the Commission of Inquiry into Land Matters (CILM 1973) tenure conversions, after a period of rest beginning in 1972, have once again restarted.

The only decided case concerning the effect of conversion orders on succession rules is Re Doa Minch[30]. The deceased Doa Minch was a "big-man" of the Palge clan and was the first person in the Western Highlands Province to apply for a tenure conversion order. This was done and he was registered as the freehold owner of the land. He died intestate in respect of this land and other property. One question the court had to decide was what law of succession governed the devolution of the tenure converted land. The learned Judge, ROBSON A. J. held that the customary law of succession of the Palge clan applied. He came to this conclusion for "at least three reasons":

1. The Land (Tenure Conversion) Act 1963 "is concerned with matters of land tenure and not of succession"[31]

2. The reference in S.27(1) of the Land (Tenure Conversion) Act to "any law relating to succession" must include not only the Succession Act, but also Part V of the

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30 (1973) P.N.G.L.R. 558.

31 Section 16 of the 1963 Act provides: "Upon the making of a conversion order ... (a) the land ... ceases to be customary land, and the land and any right to the ownership or possession of the land, 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 customary law: (b) all rights, titles, estates and interests, whether legal or equitable and whether arising from or regulated by customary law or otherwise, and whether in rem or in personam, subsisting before the date of the order, are abolished, other than such rights, titles, estates and interests as are specified in the order".

Native Administration Regulations.[32]

3. "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 transmission to beneficiaries if succession by customary law is relevant".[33]

It is submitted that however justified the result reached in *Re Doa Minch* may have been as a matter of the then "current" land policy, it is based on faulty reasoning and therefore technically incorrect, as well as out of keeping with the aim of the Land (Tenure Conversion) Act 1963 (the 1963 Act).

As regards the learned judge's first reason that the Act "is concerned with matters of land tenure and not of succession": granted that the word "succession" is not used in Section 16 of the 1963 Act; however the words "ownership and possession of the land" are so wide as to cover cases of disputes of succession to land. A claim to succession is essentially a claim to ownership or at the very least possession. A person claims that by virtue of the death intestate of the deceased, he is now the owner of the land or he has exclusive rights of possession thereto. The words "other right, title, estate etc" are also wide enough to cover rights of succession. There are other rights which are not spelled out specifically by section 16 e.g., right to sue for trespass, and merely because the word "succession" is not used in section 16 should not mean that succession to the tenure converted land should not cease to be subject to or be regulated by customary law.

As regards the second reason, the essential question is whether land can devolve upon more than six persons "under any law in force (in Papua New Guinea) relating to succession". This is possible under the intestacy provisions of the W.P.A. 1966. The wife and children (together amounting to more than six) of a deceased person subject to the Act, may be entitled to his property. If that property is

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32 Section 27(1) of the 1963 Act provides: "If, under any law in force in Papua New Guinea relating to succession to property upon death, any land registered in pursuance of this Act devolves upon more than six persons, the Registrar of Titles shall so inform the Commission".

33 At p. 567 of the reported judgment.

land, they may decide, instead of selling it under the statutory trust for sale, to appropriate the land between themselves as joint tenants or tenants in common, in satisfaction of the money which would have resulted from the sale of the property and to which they would have been entitled. The learned judge's second reason is consistent with devolution under both the W.P.A. 1966 and customary law. In itself, therefore, this reason is not determinant of the issue in question.

The third reason also cannot decide the matter. Having determined in the second "reason" that Section 27(1) of the 1963 Act must include "not only the Succession Act (i.e. W.P.A. 1966) but also customary law", the Judge completely ignores the fact that the W.P.A. 1966 can lead to fragmentation of interests by devolution.

Under Section 9(c) of the 1963 Act, the Land Titles Commission is empowered to make conversion orders after being satisfied that adequate provision had been made, whether by way of cash payment or otherwise, for compensation to all persons whose customary interests in the land would be abolished or reduced by the making of the conversion order. It would be interesting to see whether in the Doa Minch conversion (or whether in cases of tenure conversion generally) the Commission make sure that persons who may have benefitted under customary rules of succession but who did not stand to benefit under the intestacy rules of the W.P.A. 1966 were in fact compensated. If such was the case and we now allow customary succession rules to operate, it will mean that customary successors are benefitting twice over; their customary succession rights having been purchased, the law of succession then says they are still entitled to them.

PART X: CAN TENURE CONVERTED LAND BE LEFT BY WILL

If we accept the reasoning of Robson A. J. and in particular that the 1963 Act "is concerned with matters of land tenure and not of succession" it follows that customary law continues to govern not only intestate succession to tenure converted land but also questions concerning the capacity of the landholder to dispose of his tenure converted land by will. If by the particular customary law the deceased could not make a valid will in relation to his customary land, then he cannot make a will of his tenure converted land. If he could make a customary will limited to a choice between certain relatives, this is the extent of his will making power in relation to the converted land.

If for some reason the landholder has power to will tenure converted land away, but customary intestacy operates, it means that customary rights are not completely, but only partially (albeit significantly) altered. The interest of a customary successor now becomes a *spes successionis*; a right to inherit the land provided the landholder has not willed it away.[34]

If for some reason the landholder can make a valid statutory will of tenure converted land in favour of whomever he wants, an interesting question arises where he makes no will and customary intestacy rules operate. Are all rightholders thereafter disentitled to make statutory wills of the land or their rights therein, similar to the situation in West Africa where individually acquired property becomes family property if the owner does not leave it by testamentary disposition. As family property it cannot be disposed of unless customary law permits.[35]

It is important to note the limited effect of the decision of *Re Doa Minch*. The land was not held to have reverted to being customary land. It continued to be alienated land registered under the Torrens system of title registration. All dealings and transmissions in relation to the land would continue to be governed by the Land Registration Act 1981. The provisions of that Act would have to be complied with. Any customary successors would need to have their names entered on the register in order to acquire legal ownership of the land.[36]

If Robson A. J. is right, and it follows that it is not possible to make a statutory will in relation to tenure converted land, it seems quite anomalous that an "owner" of such land can mortgage it,

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34 The Commission of Inquiry into Land Matters (1973) was of opinion that a deceased person could make a statutory will in relation to tenure converted land. If a customary will could have been made in respect of the land before it was tenure converted, there should be no reason why such a will should not continue to be possible in respect of the tenure converted land.

35 The doctrine is known as reverter; see R. W. James, Modern Land Law of Nigeria, p. 65.

36 See section 17(1) of the Land Registration Act, 1981.

sell it or lease it quite uncontrolled by his customary successors (at least as a matter of law) and yet he cannot make a will in relation to it. However such anomalies are not unknown to the general law.[37]

It is submitted that as a matter of law, *Re Doa Minch* was wrongly decided. It is also submitted that an owner of tenure converted land has a largely unrestricted power to leave his land to whomsoever he desires.[38] The decision of *Re Doa Minch* is out of step with the policy of the Land (Tenure Conversion) Act 1963. However, as we have seen other types of alienated land can be regulated by customary law of succession and there is no essential difference between tenure converted land and other alienated land. The decision is also in keeping with post 1973 national policy, and from this point of view can be regarded as "rightly" decided. The result of *Re Doa Minch* is that there is an equitable sharing by all, in keeping with the Eight Point Plan and the National Goals and Directive Principles. It is time that the legislature acted and repealed the Land (Tenure Conversion) Act 1963 and implemented the recommendations of the Commission of Inquiry into Land Matters.[39]

PART XI: PROPOSALS OF THE COMMISSION OF INQUIRY INTO LAND MATTERS

On the attainment of self-government in 1973, a Commission was appointed to enquire into the major land questions with which Papua New Guinea was faced. The Commission was to seek the views of Papua New Guineans in the first instance. The Commission reported in the year of its appointment.

There were several basic principles which guided the Commission in making its recommendations. It was concerned not only with the important question of how to increase primary production but also with the kind of society Papua New Guinea should become. The Commission was in favour of building on a customary base. It was not

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37 Estates held upon a joint tenancy can be affected by *inter vivos* transactions but not by wills.

38 Section 75 of the Land Act 1962 and Section 56(1)(b) of the National Constitution are limitations.

39 The C.I.L.M. recommended that fee simple estates should be abolished.

in favour of a sweeping agrarian revolution and a total transformation of Papua New Guinea Society. Both collective and individualistic extremes were to be avoided. The approach of the Commission was to encourage evolution of certain existing features of Papua New Guinea society in order to strengthen opportunities for commercial farming and permit free transfer of rights to those who most needed land. Policies leading to great inequality were to be avoided.[40]

The Commission of Inquiry recommended the abolition of freeholds. The main types of interest in land were to be heritable occupational rights in registered customary land, conditional freeholds, leases of registered customary land and leases of national land. It was also recognised that some customary land would remain unregistered.

The proposals dealing with succession to land appear to be hurried and in certain instances contradictory. However, certain principles appear to be reasonably clear. Despite lip service paid to the advantages of freedom of testation customary laws or model rules based upon customary law are to be the controlling law or rules. It is also made clear that dependants should be adequately provided for and land should go to the user.

The recommendations of the Commission generally allow a deceased the power to make a will passing on rights in land only if (a) the will is in writing and signed by two witnesses or is a valid customary will according to the customary law of "the people of that place",[41] and (b) the will disposes of the right to a person or persons to whom the testator was entitled to pass the right during his lifetime.

The beneficiary under the will, if he is not living on or near the land and using it, must either return to it and begin to use it, or make arrangements for its use within 12 months of the will-maker's death. If this is not done the right is to pass as if the rightholder

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40 See Ch. 2 of the CILM Report, 1973.

41 See paragraph 7.12 of the CILM Report, 1973. The Commission referred to "spoken wills" but made no specific mention of when these wills would be made use of: see p. 101 of the 1973 Report.

had died intestate.[42]

Where the land is unregistered customary land, intestate succession thereto is to be decided according to the customs of th- area where the land is situated.[43] In other cases of intestacy, model rules would determine who the beneficiaries are. These model rules are to be enacted by the National Government and the Provincial Government is to then adopt one or more of these model rules to be applied to the Province or to different parts of the Province. The Provincial Government is to be given the power to alter the model rules to suit local circumstances. The model rules are meant to be applied to geographical areas.

The Commission considered that dependants of the deceased should be allowed to apply to the Local Land Court to change the will or applicable model rules to make adequate provision for them (e.g. by asking the Court to allow them to make subsistence gardens on the deceased's land). The Commission also considered that there should be a limit to the area of land any individual can own. [44]

To date many of the proposals of the Commission of Inquiry into Land Matters have remained what they were in 1973 - proposals. Some of them have been implemented and some of those implemented have been discontinued. The proposals relating to succession to land have almost been forgotten.

PART XII: LAW REFORM COMMISSION PROPOSALS

In 1975 the Law Reform Commission was asked to review the law relating to wills and succession and to recommend laws which would
(a) fit the requirements of our society as it develops and changes;
(b) as far as is consistent with (a), reflect the customs and usages

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42 This limitation is not to apply to unregistered customary land. It appears as though this is a general principle and the model intestacy rules are to make provision for it: see para. 7.20 of the 1973 Report.

43 Recommendation 56 (b).

44 See Recommendation 64 (C).

of our people". The Commission produced a Working Paper in April 1978 to which a draft Succession Bill was appended.[45]

The Law Reform Commission proposals place several limits on a person's freedom to dispose of his property after his death as he wishes. In doing so, the Commission stated that it was "giving effect to customary concepts on the movement of property on death, as well as the Constitutional Goals". It argued that "Without some restrictions on the power of will making, there can be no equitable distribution of the benefits of development. The scheme of distribution proposed relies heavily on custom to do this..."[46]. "The scheme proposed makes custom the most important factor in the distribution process. A will shall only have effect insofar as it is a true statement of intention and it is not inconsistent with custom"[47].

Section 5(3) of the Draft Succession Bill provides that where a deceased person who is subject to customary law[48] leaves a will recognised as valid under the Act[49] which disposes of the estate, or

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45 Law Reform Commission, Working Paper No. 12, April 1978, Law of Succession.

46 Working Paper No. 12, p. 4.

47 *Ibid*. p. 8.

48 The onus of proving that a person is not subject to customary law lies on the party alleging this fact: see section 5(5) of the Bill. No guidelines are given as to when a person is not subject to customary law. Nor does the Bill state that a Papua New Guinean cannot be "not subject to customary law". If a person is not subject to customary law then Schedule 1 provides statutory rules of intestacy similar to the Anglo-Australian derived rules: the nuclear family benefit. Perhaps a Papua New Guinean's estate is to devolve in accordance with Schedule 1 where he or she "had no substantial attachment to a group or clan"; cf. sect. 5(7) of the Succession Bill which provides; "For the purpose of ascertaining whether the deceased had a substantial attachment to a group or clan under (Sect. 5(6)(b)), all the relevant circumstances of the case shall be considered".

49 Sect. 7 of the Succession Bill provides: "A person may make a will in any form he chooses, orally, in writing or by other means".

part of the estate, so that such disposition complies with the customary law applicable to the distribution of the particular property, the residuary estate or part of the residuary estate shall descend according to the terms of the will. There is a presumption that any will made by the deceased is in compliance with the customary law applicable to the distribution of his property.

The rules which provide for the ascertainment of the customary law applicable to the distribution of the deceased's residuary estate are: (1) in the case of customary land, the customary rules of distribution which apply where the land is situated; (2) in the case of all other property, the customary rules of distribution recognised by the group or clan to which the deceased has the most substantial attachment on his death.[50]

A novel feature of the Succession Bill is the provision of a right of residence in the family house in favour of dependants. Dependants consist of a husband and wife of the deceased and children of the deceased under 18 years of age. A right of residence arises immediately on the death of the deceased and applies to family houses on alienated land and on customary land. A right of residence exists regardless of whether or not such a right is contrary to customary law. There are several conditions which automatically terminate the right of residence where the family house is sited on alienated land e.g., remarriage or death of the spouse.[51] Where the house is built on customary land the Bill does not set out the incidents of the right of residence but merely state that a court may "make such orders and impose such conditions in relation to the right of residence ... as it thinks necessary to do justice".

Despite the fact that the Law Reform Commission proposals represent a major shift towards bringing the official law into line with the beliefs and aspirations of Papua New Guineans, to date Parliament has taken no action. Reform of this type of law is not considered to be important for the "development" of the country. There are more important rice and tin fish matters to consider.

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50 Section 5(6) of the Succession Bill.

51 Section 19 *Ibid.*

PART XIII: CONCLUSION

The present law relating to succession to land in Papua New Guinea is vague and uncertain. The confusion is compounded by the fact that laws relating to land have evolved with different policy considerations in view, and despite the fact that these policies are no longer adhered to (at least as a matter of official policy) the laws still continue in force. In many instances too much allowance is made for the doctrine of implied repeal.

It seems clear that the choice is not between customary law and provisions similar to those found in the Wills, Probate and Administration Act 1966. If customary law of succession applied whenever a Papua New Guinean died there are many cases where injustice would result. Especially at risk would be the rights of wives who are unfairly treated under customary succession regimes. On the other hand provisions similar to the W.P.A. 1966 allow too much freedom of testation and the statutory intestacy rules do not cater for members of the extended family.

It is submitted that succession to the property of Papua New Guineans (and in particular land) should be governed by the personal law of the deceased; that personal law may either be a customary law or the general law. The choice would depend on the mode of life test. It is further argued that the uncertainty of the test is a price worth paying for the justice which will result in individual situations.

Despite the fact that the judges of the National Court (because of the open-ended nature of the choice of law rules) can mould the succession laws to accommodate a mode of life test, it is submitted that it is preferable for Parliament to start doing its job of enacting law reform measures.